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PERMANENT EDITION

CONTAINING ALL THE DECISIONS OF THE

SUPREME COURTS OF OHIO, ILLINOIS, INDIANA
MASSACHUSETTS, APPELLATE COURT OF
INDIANA, AND THE COURT OF
APPEALS OF NEW YORK

JUNE 13—OCTOBER 31, 1911

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¹ Became Chief Justice June, 1911.

² Became Justice June, 1911.

³ Beginning May 22, 1911.

⁴ Resigned, to take effect September 7, 1911.

⁵ Appointed Chief Justice to succeed Marcus P. Knowlton.

⁶ Appointed to succeed Arthur P. Rugg.

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AMENDMENT TO RULES

SUPREME AND APPELLATE COURTS OF INDIANA

No. 21½.¹

It is ordered that the following be and is hereby adopted as rule 21½ of this court and that the same shall take effect May 22, 1911:

Petitions for extensions of time to file briefs will not hereafter be granted, unless facts are stated therein showing that the court in which said case is pending has jurisdiction thereof, and it is shown that such

brief will be on the merits of the cause and that all motions to dismiss and all dilatory motions in said cause on behalf of the petitioner have been filed. The application must also show the date of submission of the cause, the date upon which the time of the applicant for filing the briefs will expire, and the order of the court will fix the date on or before which the brief shall be filed. This rule to take effect May 22, 1911.

¹ For rule as originally adopted, see 92 N. E. v.

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MONYPENY et al. v. MONYPENY et al.
(Court of Appeals of New York. May 2, 1911.)

1. WILLS (§§ 246, 432*)—JURISDICTION OF ACTION.

Under the express terms of Code Civ. Proc. § 1866, suit lies to determine the validity or effect of a will made in another state, so far as concerns real estate within this state; and the decision is conclusive.

[Ed. Note.—For other cases, see Wills, Dec. Dig. §§ 246, 432.*]

2. ACTION (§ 8*)—FRIVOLOUS ACTION—SUIT TO CONSTRUER FOREIGN WILL.

A suit to construe a foreign will affecting real estate within the state *held* to present practical questions, giving jurisdiction to determine them.

[Ed. Note.—For other cases, see Action, Cent. Dig. § 41; Dec. Dig. § 8.*]

Chase, Gray, and Hiscock, JJ., dissenting.

Appeal from Supreme Court, Appellate Division, Second Department.

Action by Brunson B. Monypeny and others against William Monypeny and others. From a judgment of the Appellate Division (136 App. Div. 677, 121 N. Y. Supp. 590) affirming a judgment for defendants, plaintiffs appeal. Reversed and remanded.

See, also, 137 App. Div. 902, 122 N. Y. Supp. 1137.

Alpheus H. Favour, for appellants. W. C. Prime, for respondents.

CULLEN, C. J. The fate of this litigation has been a peculiar one. When the case reached the Appellate Division on the appeal from the first complaint in the action, one half the court sustained the demurrer practically on the ground that the courts of this state had no jurisdiction of the matter in controversy, while the other half sustained it on the ground that the validity of the provisions of the will was too clear for discussion and the questions sought to be raised were frivolous. 131 App. Div. 269, 115 N. Y. Supp. 804. On the second appeal to the Appellate Division the demurrer seems to have been upheld on the ground first stated, the court being of opinion that any decision of the courts of this state would be

without effect. The judgment there entered is now sought to be sustained on the ground that there is no practical question before us. Let us see.

[1] The will is drawn with a prolixity of language and confusion in thought and in expression approximating to genius, and the complaint in the action is entitled to the same high commendation. Nevertheless, it states sufficient to require the judgment of this court, to wit, a will of real estate within this state and a demand for its interpretation as to validity and effect, unless the construction of the will, as is claimed, presents no practical question. The Code of Civil Procedure, § 1866, expressly authorizes an action to determine the validity and construction, or effect, under the laws of this state, of a testamentary disposition of real property situated within it. There can be no question that, though the will was made in Ohio, its interpretation and effect, so far as it relates to the real property within this state, is to be determined by the courts of this state, and that their decision is conclusive. *Peck v. Cary*, 27 N. Y. 9, 84 Am. Dec. 220. The rule justifying the maintenance of such an action is well stated in *Horton v. Cantwell*, 108 N. Y. 255, 15 N. E. 546, by Judge Peckham: "There must be some color of a question for construction before the court can be called upon to construe the devise." In that case the court refused to act on the ground that under no construction of the will could the plaintiff be entitled to the possession of a remainder in the property upon her own demise. In determining whether the plaintiffs have in any view a present interest in the real property within this state I shall assume that the will did not create an equitable conversion; for, even if we should think it did, the fact that two judges of the court below not only thought there was no equitable conversion, but that the claim to that effect was frivolous, at least makes the question a debatable one worthy of adjudication by the courts.

We now turn to the trust created for the benefit of the plaintiffs' father, the testa-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep't Indexes

tor's son. What is meant by the expression "to raise a trust?" It is certainly inartificial, and possibly the subject of differing interpretations. I think the intention of the testator was to give one-fifth of his estate, both real and personal, to his trustees in the trust directed by his will; for, on the death of the equitable life tenant, he provides for transferring and conveying, in fee, the corpus of the trust estate to the remainderman, which expression clearly contemplates that the trust estate might contain realty. Now, this conveyance is to be made to the children of the life tenant upon the youngest child attaining his majority, in the meanwhile the income to be paid to him. But there is no provision authorizing the trustees to collect the rents and profits of the real estate, and without such direction, either express or implied, the statute vested the legal estate in the plaintiffs upon the death of their father and entitled them to possession. Real Property Law (Laws 1896, c. 547) § 73; Consol. Laws 1909, c. 50, § 93; *Denison v. Denison*, 185 N. Y. 438, 78 N. E. 162. Surely the question whether there is an implied direction to collect the rents is fairly debatable.

But there is a still more serious objection to the validity of the continuing of the trust. The statute forbids a suspension of the power of alienation, except during the continuance of two lives in being at the death of the testator, and the validity of the provisions of the will is to be determined, not by what has happened, but what might have happened under them. Plainly the children of his son might be born after the testator's death. This renders the trust void, and the plaintiffs may be now entitled to the possession of the property. It is true there is one exception to this absolute rule prescribed by statute. That is, "a contingent remainder in fee, may be created on a prior remainder in fee, to take effect in the event that the persons to whom the first remainder is limited, shall die under the age of twenty-one years, or upon any other contingency, by which the estate of such persons may be determined before they attain their full age." 1 R. S. pt. 2, c. 1, art. 1, § 16. This exception, however would not save this case, because the remainder which each of the several children would be entitled to is not given over on his failure to arrive at the age of 21, but on the failure of the arrival of the youngest of the children at the age of 21, a provision not within the exception. This objection also disposes of the validity of the attempted bequest over upon the death of the sons and their issue before the termination of the trust. The result is that it may be at least plausibly if not rightfully argued, that, under the will and laws of this state, the plaintiffs, on the death of their father, became seised in fee simple of the real estate within this state. *Radley v. Kuhn*, 97 N. Y. 26; *Livingston v. Greene*, 52 N. Y. 118,

123. It is true that this result would not necessarily destroy a discretionary power of sale in the executors, but the right to share in the proceeds of the sale depends upon the right to the lands sold, and it is the courts of this state, not those of Ohio, that are to determine the rights of the parties.

[2] I think there is more in this case than has been appreciated, and that the questions presented by it are entitled to at least consideration and decision; and that, as some of the members of the court share the views I entertain as to the effect of this will, the questions cannot be said to be frivolous or not practical. If the question whether the plaintiffs are now seised in fee of an undivided interest in the real estate is not a practical one, pray what would be such?

The judgment should be reversed and judgment ordered for plaintiffs on the demurrer, with costs in all courts, with leave to defendants to withdraw demurrer and serve answer within 20 days on payment of costs.

CHASE, J. (dissenting). William Monypeny died a resident of Columbus, Ohio, September 12, 1899, leaving a will dated September 23, 1895, and a codicil thereto dated September 7, 1899, which will and codicil were admitted to probate as the will of said William Monypeny in the county of Franklin, Ohio, October 18, 1899, and a certified copy of said will was filed in the office of the surrogate of the county of Westchester January 19, 1907. The testator left him surviving a widow, Maria Monypeny, and four children, William Monypeny, Jr., George B. Monypeny, Perin B. Monypeny, and Sallie Newsom, now Beckwith, and one grandchild, Mabel Monypeny, now Huntington, the only child of a deceased son, which four children and said grandchild were the only heirs at law and next of kin of the testator.

The testator died possessed of a large estate, consisting principally of real property, all of which was situated in the state of Ohio except a farm of 328.89 acres situated wholly or in part in the city of Yonkers, in this state. The real property of said testator was of the value of about \$900,000, and the value of said farm in this state was about \$300,000. The said George B. Monypeny died September 4, 1903, leaving a wife and the two plaintiffs in this action, who are infants and the only heirs at law and next of kin of said George B. Monypeny. The said George B. Monypeny died a resident of the state of Ohio, and he left a will which has been admitted to probate in that state. In and by his will he gave all of his property, "except what I (he) may be entitled to under the will of my (his) deceased father, William Monypeny," to his wife absolutely. All of the parties to this action are nonresidents of this state.

This action is brought under section 1866 of the Code of Civil Procedure; the alleg-

ed purpose thereof being stated in the prayer for relief in the complaint as follows: "Wherefore, plaintiffs pray judgment that the validity, construction, and effect of the provisions of the said last will and testament of the said William Monypeny, deceased, so far as they relate to the disposition of the said real property situated in the county of Westchester, this state, may be determined, and that the defendants herein may be perpetually enjoined from making any claim in contravention to the determination of this court. And, further, that it may be adjudged and decreed that should the court decide there has been, under the will, an implied equitable conversion of the real property in this state, that then the trustees be instructed to sell and convey the same at their discretion, conveying good title thereto, to the end that the proceeds thereof may be taken by them to the state of Ohio." It is alleged in the complaint that the trustees "are now in possession of all the trust property and estate affected by the terms of said last will and testament, including the property situated in this state." The complaint also recites that a contract to sell part of said farm was entered into by and between said trustees and the city of Yonkers, and that two corporations engaged in the business of insuring titles to real property for a consideration refused to insure the title to the property described in said contract, unless the deed from the trustees was accompanied by a deed from the heirs at law of William Monypeny, deceased, and that the trustees without further controversy obtained for said city in addition to the deed signed by them as trustees a deed from said heirs at law, and such deeds were then accepted by the city and thereby were sold 33.56 acres of said farm.

The complaint further alleges that such facts show that "there is a question as to whether title passed to this property under the will." The reason why the title guaranty companies refused to guarantee the title to the lands sold to the city of Yonkers without a deed from the heirs at law of William Monypeny, deceased, does not appear.

Said will provides that "all the real, residue and remainder of my estate real, personal and mixed I give, bequeath and devise unto my wife Maria Monypeny, and Logan C. Newsom of the city of Columbus, their successors and assigns, and the survivor of them, her or his heirs and assigns, but in trust nevertheless for the performance of this my last will and testament concerning the same." It then provides with considerable detail the terms of the trust, and directs the trustees in regard to their duties under the trust and as to a division, continuance, and investment of the same.

(1) It directs that "two trust funds of Thirty thousand dollars (\$30,000) each shall be raised out of" the estate and invested

for the respective equal benefit of his son Perin B., and his granddaughter Mabel.

(2) It further provides: "I hereby order and direct that a further Trust shall be raised out of my estate and be held and invested by my Executors, who, for the purposes and in carrying out the provisions of This Trust shall act as Trustees as well but without extra or additional compensation thereof thereunder—the two whole, full and equal shares, and all and singular of the property thereof, and in amounts equal, one with the other, of my entire estate, except and after deducting the special bequests and devises made to my wife and to my daughter, in items Second and Third respectively, of this will, for the use, benefit and behoof, after first charging them respectively with all advances theretofore had, of my two sons William Monypeny and George B. Monypeny, their heirs and assigns forever, and the property thereof to be given, transferred and conveyed in fee to their legitimate children at their death by right of representation, on the youngest child of each attaining his or her majority or becoming of age under the Laws of the State of Ohio, except as hereinafter provided. The net income arising therefrom after the payment of all taxes, assessments, proper insurance and repair charges, shall be paid quarterly, or at such convenient times as may in the judgment of said Trustees be proper, to said William Monypeny or George B. Monypeny, or to their heirs. I also order and direct hereunder that the Trustees of the Trusts under this second clause of this fourth item of my Will may make such advance payment or payments from the principal of said Trusts, charging each respective Trust therewith in accordance with the representation thereof, and for that purpose keeping the accounts of each Trust separate and distinct; upon a child as aforesaid of either one of my said sons William and George arriving at age, and needing property or funds, or both, in the judgment and sound discretion of said trustees, with which to engage in business or otherwise improve and advance, properly, his or her condition, said Trustees may make a proper advance to such child aforesaid. Such advancement having been made, the share out of which it shall have come shall then be charged therewith and thereto and the receipt from such son, issue, or representative by right of representation, having received such advancement, shall be a full and complete acquittance, release and relinquishment to and from any further obligation on the part of said Trustees in that behalf in said amount so advanced. In the event that one or both of my sons William and George die without issue of their body, or the issue of one or both dies, or die without issue, said share or shares arising out of said Trust shall be paid to my estate except one equal distributive share thereof

which shall go to and become a part and share of the trust hereof of the son or his issue then living. Should both said sons and their issue all be dead before the execution and termination of this Trust then said fund thereof shall vest in and ascend to my children then living or to their issue by right of representation in equal distributive shares."

(3) It further provides that the remainder shall be conveyed on a day named absolutely in equal shares to his two children, Sallie and Perin B., and his granddaughter Mabel, and that as to them there shall then be a final accounting.

(4) It gives his executors and trustees power to sell real estate by a provision as follows: "I give and confer to and upon said executors and upon the trustees or the trustee acting under this will full power and authority by public sale or private contract and in such way and in such manner and at such price and at such prices as they or he shall deem expedient to make sale of and convey all the real estate of which the trust premises are or shall be composed; and to do all needful acts requisite to convey the title thereof to a purchaser or purchasers and to invest the proceeds arising from such sale or sales in other real estate or any personal property with like power and to dispose of every, any, and all real estate under which the trust premises or any part thereof shall be invested."

The trust provisions of the will are stated in much greater detail, but need not be further quoted for the purposes of this opinion. By the codicil the trust provision above quoted for William Monypeny and George B. Monypeny so far as it relates to William Monypeny was revoked, and, so far as it relates to George B. Monypeny, was reaffirmed. William Monypeny was by the codicil included with his sister Sallie, his brother Perin B., and his niece Mabel in the division of the remainder as in the will stated.

Said section 1866 of the Code of Civil Procedure expressly provides that "the validity, construction, or effect, under the laws of the state of a testamentary disposition of real property situated within the state, or of an interest in such property, which would descend to the heir of an intestate, may be determined, in an action brought for that purpose, in like manner as the validity of a deed, purporting to convey land, may be determined. * * * " Real property in this state when transferred by testamentary disposition must be so transferred in accordance with the laws of this state. Decedent's Estate Law (Consol. Laws 1909, c. 18) § 47.

If the construction of the will, so far as it relates to the real property in this state, is now a practical question for the plaintiffs, the complaint is not demurrable. In other words, the action may be sustained when the plaintiffs are interested in a practical existing question relating to real property in this

state, notwithstanding they are nonresidents and notwithstanding the testamentary provision is a will executed and proven in another state or a foreign country. The action should not be sustained for the purpose of satisfying the curious or of advising persons who are in possible doubt as to what action, if any, they should take in another jurisdiction.

It is not clear what the real purpose of the plaintiffs is in bringing this action in this state. They do not assert a right or interest in the real property in this state as heirs at law of their father. It is assumed in the complaint that the right of their father as an heir at law of their deceased grandfather did not pass to them under their father's will. Their interest in the real property in this state, if any, comes to them under the will of their grandfather. The trustees do not ask for a construction of the will in question, but join with other defendants interested under the will in demurring to the complaint.

Except for what is stated in regard to the title insurance companies requiring a deed from the heirs at law when a part of the real property was sold to the city of Yonkers, it does not appear that the trustees have had any difficulty about selling and conveying real property in this state.

It does not appear that the trustees now desire to sell the real property, or that, if they desired so to do, they would be prevented from so doing by the doubt suggested in regard to the construction of the will, or if such doubt is expressed that they could not obtain a deed from the heirs at law of the testator to be used in connection with the deed from the trustees as was done when a part of such real property was conveyed as stated. The complaint alleges that the trust is valid in Ohio, and that it is valid in this state, and it also alleges that the real property in this state is by the will converted into personal property. The allegations of the complaint are numerous and long, and are principally devoted to statements of the failure of the trustees in Ohio to obey the instructions of the testator. Such questions should be presented to the courts of Ohio. The plaintiffs are not in possession of the real property in this state, and it does not appear that they are now entitled to the possession of said real property or of any part thereof or interest therein. It is not an action to direct the trustees in regard to the trust.

There are, so far as affects the real property in this state and any interest of the plaintiffs therein, several suggested constructions of the will: (1) That the said trust for the plaintiffs is valid in this state, but that the real property is not converted into personal property. (2) That the said trust for them is valid in this state, and that the real property is converted into personal property by

the terms of the will. (3) That the said trust for them is valid, but that the plaintiffs' interest in the corpus thereof is contingent upon one of them living until the termination of the trust. (4) That it is the duty of the trustees to "raise" the share for the benefit of the plaintiffs and that under the terms of the will they can "raise" the same from the property in Ohio. (5) That the said trust for them is void.

In the first suggested construction the trustees may sell the real property in this state before the termination of the trust, and in each of the first four suggested constructions an action should not be sustained under the statute at least before such termination of the trust. In the fifth suggested construction the plaintiffs have no interest in the real property as heirs at law of their grandfather.

I am of the opinion that the plaintiffs' complaint does not present a practical existing question requiring action by the courts of this state in their behalf.

The right to maintain an action under said section of the Code of Civil Procedure has frequently been considered by the courts, and it has always been determined that the right is dependent, not alone upon some claim as to the construction of the will upon which a fair argument can be founded, but also upon one in which the plaintiff is actually interested and which sooner or later will require determination. If we assume that under the laws of this state the trust for the life of George B. Monypeny is valid, and that subject to such trust the corpus of the fund directed to be held for George B. Monypeny and his heirs vested in his children, subject to the power of sale contained in the will, and that the proceeds of real property sold by the trustees in this state will be subject to division in accordance with the laws of this state, it is nevertheless quite unnecessary and gratuitous at this time to consider whether such assumption is the true construction of said will, because it is a question that may never come before the courts of this state for determination. With the crowded condition of our courts we should not unnecessarily assume jurisdiction of the action simply to advise the courts of the state of Ohio what determination should be made by them on the final accounting of the trustees.

In *Horton v. Cantwell*, 108 N. Y. 255, 15 N. E. 546, the plaintiff, the only child of the testatrix, was interested as the life beneficiary of a valid trust under her will. There was a bequest dependent upon the contingency of the plaintiff's death without children, and for the purposes of the discussion in the opinion it was assumed that such bequest was void. The plaintiff sought to construe the will under section 1866 of the Code of Civil Procedure, and claimed to be the

absolute owner of the estate or of certain specified parts thereof. The court say: "If this claim were even questionable, if it were possible to found a fair argument in relation to it, there would be ground for the plaintiff's contention that such an action as this would lie to obtain a construction of the devise. But it is not alone a case where a claim is made in regard to the character of a devise that the court under this section of the Code can take jurisdiction. There must be some color of a question for construction before the court can be called upon to construe the devise. * * * The testamentary disposition of real property, or of an interest therein, the validity, construction, or effect of which may be determined under the above-quoted section, and where its invalidity is sought to be determined, must be a disposition of some interest in real estate which may possibly be enjoyed in actual possession (if the invalidity of such disposition be decreed) during the lifetime of the person who seeks the aid of the court in construing the devise of such real estate or interest therein. In this case the contingency upon which alone the question can arise may never occur, for the plaintiff may marry and have children who (or their issue) may be living at her death, in which case they take the fee and the contingency never happens. It is not a case where any practical benefit can arise to the plaintiff in having this will authoritatively construed as to the devise of the real estate. * * * Upon the whole case we think there is no practical or present controversy to be determined, and the contingency may never arise in which the question can become a practical one, and even then, if it do hereafter arise, there is no certainty there will be any contest whatever in regard to it." 108 N. Y. at page 265, 15 N. E. at page 553. *Matter of Mount*, 185 N. Y. 162, 163, 77 N. E. 999; *Tonnele v. Wetmore*, 195 N. Y. 436, 88 N. E. 1068 and cases cited; *Mellen v. Mellen*, 139 N. Y. 210, 84 N. E. 925.

The judgment should be affirmed, with costs.

HAIGHT, VANN, and WILLARD BARTLETT, JJ., concur with CULLEN, C. J. GRAY and HISCOCK, JJ., concur with CHASE, J.

Judgment reversed, etc.

(209 N. Y. 61)

VANDENBOUT v. ROCHESTER RY. CO.

(Court of Appeals of New York. April 25, 1911.)

1. STREET RAILROADS (§ 117*)—COLLISION OF CAR WITH PEDESTRIAN—NEGLIGENCE—CONTRIBUTORY NEGLIGENCE—EVIDENCE.

Under the evidence in an action for death of one who, running in front of a car, slipped, fell on the track, and was struck by the car,

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

held, the questions of negligence and contributory negligence were for the jury.

[Ed. Note.—For other cases, see *Street Railroads*, Cent. Dig. §§ 239-257; Dec. Dig. § 117.*]

2. STREET RAILROADS (§ 98*)—COLLISION OF CAR WITH PEDESTRIAN—CONTRIBUTORY NEGLIGENCE—RUNNING IN FRONT OF CAR.

One who, when the street was icy and slippery, ran in front of an approaching street car, slipped, and fell, and was struck by the car, was guilty of contributory negligence, if he ran because he saw that the car was so near that he could not otherwise pass in front of it.

[Ed. Note.—For other cases, see *Street Railroads*, Cent. Dig. §§ 204-208; Dec. Dig. § 98.*]

Appeal from Supreme Court, Appellate Division, Fourth Department.

Action by Nellie Vandebout, administratrix, against the Rochester Railway Company. From a judgment of the Appellate Division (136 App. Div. 913, 120 N. Y. Supp. 1149), affirming a judgment entered on a verdict at Trial Term for plaintiff, defendant appeals. Reversed, and new trial granted.

W. A. Matson, for appellant. Charles Van Voorhis, for respondent.

CULLEN, C. J. The action was brought to recover damages for the death of the plaintiff's intestate, who was struck and killed by a trolley car while crossing defendant's railroad on Main street in the city of Rochester. The deceased was in a car proceeding westerly along Main street. As the car approached Circle street, which terminates at, but does not cross, Main street, the deceased alighted on the right-hand or north side of the car. The next that was seen of him by any of the plaintiff's witnesses was as he was getting up on his hands and knees from the south or further rail of the east-bound track, where he had apparently fallen. The witness testified that the defendant's east-bound car was then 15 or 20 feet distant, and that the car struck him before he could get off the track. The accident occurred about noon of the 7th of December. The testimony shows that the street was icy and slippery. It was further shown that, at a point on the railroad quite far distant from the scene of the accident, the motor at the front end of the east-bound car became disabled; that for some distance the car was pushed by one behind it; and that then it proceeded under its own power, by the use of the motor at the rear end, the motorman standing there and controlling the power, while the conductor took his station at the front end of the car. There were Y's or places at which the car could be reversed, and the rule of the company required that under such circumstances it should be reversed. Despite this rule, the car proceeded in the manner stated. The conductor in the front of the car could operate the brake at that end, but the power could be cut off only by signaling to the motorman at the

rear. There was also evidence tending to show an excessive rate of speed of the car. For the defense, the conductor testified that he caught a glimpse of the deceased on the north curb on Main street; that the next he saw was the man crossing behind the west-bound car on a run; that when he got to the east-bound track he slipped and fell; and that the car, which was then only 4 or 5 feet away, struck him. In parts of this statement he was corroborated by the motorman of his own car and the motorman of the car in the rear. There was evidence tending to show that the power was not cut off till immediately before the accident, and that the car could have been stopped within 10 feet.

[1] On this statement we think the case was for the jury. If the deceased was from 15 to 20 feet away from the car when he slipped and fell, the jury might have found that, had the car been propelled in the ordinary manner and at a proper speed, it would have been stopped in time to save the accident. On the other hand, if the deceased ran in front of the approaching car, which plaintiff claims was running at a high rate of speed, at a distance of 4 or 5 feet, plainly he was guilty of contributory negligence.

[2] When the case was submitted to the jury, the counsel for the defendant requested the court to charge that, if the deceased saw that it was necessary for him to run in order to get across ahead of the car, he was guilty of contributory negligence as matter of law. This request was refused, we think erroneously. It contained the meat of the whole case. It may not have been negligence for a young, alert man to run across the street, even if slippery, instead of walking; but if he ran because he saw that the car was so near that, proceeding in the ordinary manner would not save him from being struck, he was taking chances, running into danger and assuming a risk he had no right to incur, and that is exactly what the request called for.

Fenton v. Second Ave. R. R. Co., 126 N. Y. 625, 627, 26 N. E. 967, 968, was a case of a boy who fell while running in front of a street car by which he was struck and killed. It was there said: "There was nothing requiring this boy to run across the track at this particular place and time. If he had walked, he probably would not have fallen; and if he had waited two or three seconds, the car would have passed, and he could then have gone over the street in safety."

Stabenau v. Atlantic Ave. R. R. Co., 155 N. Y. 511, 514, 50 N. E. 277, 278, 63 Am. St. Rep. 693, was a similar case. A girl running in front of a trolley car, fell, was struck and killed. It was there said by this court: "It may be observed in the present case, if the little girl had not run, she probably

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

would not have fallen; and if she chose to run across in front of the car, it was because she believed it was possible to do so. The motorman had the same right to believe so, and it was the fact, as shown by the other little girls having passed over in safety. Nothing required of his little girl that she should run over the crossing in front of the car. She might have waited for the car to pass; but, having preferred to run with her companions, she could have reached the other side of the track, if she had not fallen."

All this is applicable to the case before us. While the deceased could not be said to be guilty of negligence as matter of law in running, still, if he ran because the car was so close to him that he could not pass in front of it otherwise, he necessarily took a risk of falling so close to the car that he could not avoid being struck by it.

The judgment should be reversed, and a new trial granted; costs to abide the event.

GRAY, VANN, WERNER, WILLARD BARTLETT, and CHASE, JJ., concur. HAIGHT, J., absent.

Judgment reversed, etc.

(202 N. Y. 104)

GRIFFIN v. THOMPSON et al.

(Court of Appeals of New York. May 2, 1911.)

1. MUNICIPAL CORPORATIONS (§ 218*)—CIVIL SERVICE EMPLOYEES—INSUBORDINATION.

Protest by a civil service employé against his unwarranted removal and demand for his retention was not insubordination or insulting conduct warranting his removal.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 589-598; Dec. Dig. § 218.*]

2. MUNICIPAL CORPORATIONS (§ 218*)—CIVIL SERVICE EMPLOYEES—REMOVAL—GROUNDS.

A civil service employé's statement to an outsider in an ordinary conversation that he had not signed a certain pay roll, whereas he had signed it, did not authorize his removal; no injury to the city being shown.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 589-598; Dec. Dig. § 218.*]

3. MUNICIPAL CORPORATIONS (§ 218*)—CIVIL SERVICE EMPLOYEES—REMOVAL—GROUNDS.

An assistant city engineer's direction in good faith to his men to do proper work, without express authority from, or notification to, his immediate superior, was not insubordination warranting his removal.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 589-598; Dec. Dig. § 218.*]

4. MUNICIPAL CORPORATIONS (§ 218*)—CIVIL SERVICE — DISMISSAL — "INSUBORDINATION."

"Insubordination" in a civil service employé implies intentional, willful disobedience.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 589-598; Dec. Dig. § 218.*]

Appeal from Supreme Court, Appellate Division, First Department.

Mandamus proceeding by Gerald S. Griffin against Henry S. Thompson and others. From an order of the Appellate Division (140 App. Div. 904, 125 N. Y. Supp. 1123) affirming an order denying the writ, appellant appeals. Reversed and writ granted.

On or about August 3, 1888, as the result of a civil service competitive examination, the petitioner was appointed chairman in the department of docks in said city, at a salary of \$12 a week. Thereafter and prior to September, 1908, by various promotions, he had attained the position of assistant engineer in the department of water supply, gas, and electricity, and he continued to hold this position until his removal in April, 1910. He was at the latter date drawing a salary of \$3,000 a year, in addition to an allowance of \$2.25 a day for the use of a horse and wagon. In April, 1910, charges of insubordination, neglect of duty, and incompetence were preferred against him by one de Varona, who was chief engineer in the department mentioned. The specific charges as they may be condensed were as follows:

First. That "on or about September, 1908, and for a period before or after that date, said assistant engineer * * * ordered the men in the repair gangs, of which he had charge, to do certain work * * * which was in charge of the water registrar, not only without the direction or authority of the chief engineer of the department, but without the knowledge of the latter, who only recently discovered the facts in the case." The following letter addressed by appellant to the water registrar was appended to this charge as "establishing Mr. Griffin's connection with the work referred to": "I submit herewith plan and estimate of the main parts necessary to erect the large meter testing machine at East 24th street. As it is our intention to assemble the various parts ourselves, we now require the parts shown on the accompanying sketch. I have asked several parties to estimate on this work, but up to the present time I have received but one estimate, that from John Turl's Sons."

Second. The chief engineer of the department addressed to appellant the following letter: "You will arrange to turn over at once all the work, records, and force under your charge to Mr. George A. Taber, assistant engineer, who will have immediate charge of all maintenance work in the boroughs of Manhattan and the Bronx." To this the appellant in part replied: "Inasmuch as I am an honorably discharged veteran fireman and have not been lawfully removed from my position, I respectfully protest against your putting Mr. Taber in charge of any of the work which has been placed under my supervision and against any

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

attempt to remove me from my present position; and I demand that I be continued and retained in my present position of assistant engineer," etc. This was held to be insubordinate and insulting conduct.

Third. Among the men employed in the gangs of which the appellant had charge were some "tappers" with their horses and wagons and whose salaries amounted to a considerable sum, and it was charged that "Mr. Griffin was so unacquainted with the details of this work and the duties of these men that he denied that he signed the payrolls for these men and the wagons, or was responsible for them, and had to be confronted with signed pay rolls in order to admit the fact."

The commissioner of the department directed the deputy commissioner to conduct a hearing of the appellant on the foregoing charges, and the latter subsequently made to his superior a report which in effect sustained the charges, and, amongst other things, contained the following statement with relation to the first charge hereinbefore set forth: "Acting under verbal orders, as Mr. Griffin claims, from the then deputy commissioner, Mr. Loughman, which Mr. Loughman confirms in a letter written this week, and through some arrangement with Mr. Padden, Mr. Griffin made plans and ordered a testing plant * * * without informing Mr. de Varona, * * * although at a later time in 1909 Mr. de Varona did know that such a testing plant was being constructed." Thereafter the commissioner refusing to accept as satisfactory the explanations made by the appellant on the hearing, and of which the most important was that whatever work he had done covered by the first charge had been so done by the direction of the deputy commissioner of the department, removed appellant on a statement of reasons which conform to the charges except in the case of the first one, where it is simply stated that appellant "on or about September, 1908, and thereafter, directed men in the repair gangs of which he had charge to do certain work * * * without the authority or knowledge of the chief engineer."

Roger Foster, for appellant. Archibald R. Watson, Corp. Counsel (Clarence L. Barber, of counsel), for respondents.

HISCOCK, J. (after stating the facts as above). The appellant was removed on charges from his position as assistant engineer in the department of water supply, gas, and electricity in the city of New York. He held this position as the result of original appointment under a competitive civil service examination and various subsequent promotions, and thereby was protected against arbitrary removal. He claims that his rights in this respect were violated, and that, having been removed without sufficient cause, he should be reinstated. He also originally claimed that his tenure of position was forti-

fied by service as a member of a volunteer fire department in the borough of Richmond, and that certain rights thereby acquired were violated in his removal. This last claim, however, is without merit, for his alleged membership was one of those sham memberships which have been repeatedly condemned by the courts when urged as a basis for relief in such a proceeding as this. Instead of entitling him to extra consideration, it is the one feature that casts discredit upon him and the defense interposed by his counsel. *People ex rel. Storey v. Butler*, 124 App. Div. 148, 108 N. Y. Supp. 848; *People ex rel. Vineing v. Hayes*, 135 App. Div. 19, 22, 119 N. Y. Supp. 808; *People ex rel. Stewart v. Ahearn*, 131 App. Div. 932, 116 N. Y. Supp. 1144; affirmed, 199 N. Y. 526, 92 N. E. 1098.

I pass, therefore, to the consideration of the question whether his removal was in disregard of those rules which protected him as holding position under the civil service. In determining this it will be best in the first place to state these rules and then by them measure what was done.

Section 1543 of the charter of Greater New York (L. 1901, c. 466) applicable to the present case provides: "No * * * person holding a position in the classified municipal civil service subject to competitive examination, shall be removed until he has been allowed an opportunity of making an explanation; and in every case of a removal, the true grounds thereof shall be forthwith entered upon the records of the department * * * and a copy filed with the municipal civil service. In case of removal, a statement showing the reason therefor shall be filed in the department."

The case of *People ex rel. Mitchel v. La Grange*, 2 App. Div. 444, 445, 37 N. Y. Supp. 991, 992, affirmed on opinion below, 151 N. Y. 664, 46 N. E. 1150, involved a writ of certiorari to review the removal of relator who had been a fire marshal. Section 48 of chapter 410. Laws of 1882 (Consolidation Act), contained practically the same provision for his protection as that now invoked by the appellant. In construing that provision and applying it to the determination of the proceeding then before it, the court said: "It is well settled that the commissioners may exercise their power of removal upon facts within their own knowledge, or upon information which they have received, and that testimony is not required to be taken as to the basis of their action. *People ex rel. Keech v. Thompson*, 94 N. Y. 451. It is equally well settled that the cause assigned must be substantial and not shadowy, and that the explanation must be received and acted upon in good faith and not arbitrarily. To be substantial, the cause assigned must be some dereliction on the part of the subordinate, or neglect of duty, or something affecting his character or fitness for the position. * * * This explanation is not a mere form to precede a predetermined removal. The

minds of the commissioners must be open to the explanation. They must act upon it fairly and reasonably. They cannot arbitrarily disregard it."

People ex rel. Kennedy v. Brady, 166 N. Y. 44, 48, 59 N. E. 701, 703, involved a writ of certiorari to review the removal by a commissioner in the department of buildings of a subordinate holding a position, subject to competitive examination under the civil service law. In that case the court cited with apparent approval People ex rel. Keech v. Thompson, 94 N. Y. 451, as holding that the law was sufficiently complied with "where a statement of charges with a specification of facts furnishing sufficient cause for removal and sufficiently distinct to apprise the subordinate of the grounds upon which the charges are based, with notice of the time and place when an opportunity for an explanation will be given, is served upon him, and where, at the time and place specified, an opportunity for explanation is given." It was said: "The reasons assigned for the removal must appear, upon their face, to justify the action; in other words, they must be substantial, and not frivolous, but, when they appear to be sufficient to justify the determination, the courts have no power to interfere on the ground that the reasons, though good in themselves, had no existence as matter of fact, or that the explanation given by the subordinate should have satisfied the head of the department."

[1] When we scrutinize the charges and reasons on and for which appellant was removed in the light of these statutory provisions and decisions, they seem to be entirely insufficient to sustain the removal. Two of the charges are so fanciful and unsubstantial as to appear somewhat ridiculous when subjected to serious and impartial consideration. The first of them, as has already been stated, is to the effect that, when the chief engineer called on the appellant to turn over his work, records, and force to another man, he was guilty of insubordination because he "respectfully" protested against putting some one else in charge of his work and against any attempt to remove him, and demanded that he be continued and retained in his present position. Assuming, as the appellant did, that the order given to him was the first step towards getting rid of him, I do not see how he could safely do less or otherwise than he did. The right of self-defense against unlawful attack is universally conceded whether exercised in behalf of person or property and it almost savors of unintentional humor, this serious contention that the appellant was guilty of insubordination and insulting conduct because he did not in a spirit of cordial receptivity accept complainant's invitation to assist in preparing for his own official decapitation. It is true that it is now argued that appellant quite misconceived his superior's order, and that it did not contemplate his removal. I am in-

clined to think, however, that subsequent events are the best answer to this argument and indicate that the appellant diagnosed the situation with entire accuracy.

[2] The second charge now being considered is to the effect simply that appellant denied that he had signed the pay rolls for certain employees when in fact he had so signed them. It is not in any way charged that he improperly signed these pay rolls, or that he willfully or for any purposes of fraud or deception denied signing them, or that his denial was made to anybody having official relationship to the facts, or that the city in any way suffered either from his signing the pay rolls or from the denial that he had signed them. The very worst construction to be placed on his conduct under this charge is that at some time in an ordinary conversation with an ordinary person he was a victim of the very ordinary human infirmity of forgetting on a single occasion that he had performed a certain act, which we may assume was one among a great number of official duties. Removal for such a cause would establish a test for continuance in public employment decidedly beyond anything which we have as yet attained.

[3] This leaves for consideration the first charge and ground assigned for removal, and this presents the only debatable question in the case. As already stated, this charge accused the appellant of "insubordination" because he ordered men under his control to do certain work "not only without the direction or authority of the chief engineer of the department but without the knowledge of the latter." Some preliminary insight into the real merits of this accusation is afforded by a comparison of the date of the alleged offense with the date of the charges. This shows that nearly two years had elapsed between the two, and one is forced to conclude at the outset that either for this period the complainant ignored or condoned the alleged offense, or was so derelict in his duty that he did not know what his important subordinates were doing, or, and this is probably the real explanation, did not at the time deem to be offensive and insubordinate the acts now claimed by him to have been such. When we proceed further and analyze with reasonable closeness the language of the charge and assignment of reasons for removal, this last notion is confirmed for we perceive that the facts stated therein as constituting insubordination and misconduct do not amount to any such offense.

[4] Insubordination certainly implies intentional, willful disobedience. But nothing of that kind is alleged and found here. The most that can reasonably be spelled out is that appellant directed certain men under him to do perfectly proper work in the department with which he was connected without having the express and affirmative direction or authorization of his immediate superior, and without notifying him thereof.

This falls far short of stating a case of insubordination and consequent misconduct.

We not only may, but ought to, presume that in a department such as this a person occupying a position so high as that of assistant engineer would be authorized and expected by the general rules and practices of the department to exercise some discretion and to do some things in the absence of express directions, and there is nothing which saves this charge from this presumption.

Again, it appears without dispute that what the appellant did was authorized by the deputy commissioner. Without deciding that we may look at the evidence, and hold as a matter of law that this explanation should have been accepted as satisfactory and sufficient, we may yet utilize it as an illustration of what we can assume might happen in the department. There were both a commissioner and deputy commissioner who were the superiors, not only of appellant, but also of the complainant. Naturally they would have power to give directions to the former which would be controlling without, or even in contradiction of any given by the latter. I see no basis for the presumption that they did not exercise this power and give such orders on this occasion, and the charge and finding are discreetly lacking in any word which would cover this point.

And, lastly, I am not prepared to admit that the performance by an employé on a single occasion of proper work in his general field of employment in the honest belief that it was his duty to perform it—and these features are not challenged here—would make a case of insubordination or misconduct justifying his discharge even though it should turn out that the work was strictly beyond the line of his duty and authority.

Having such considerations as these in mind, it does not seem to me that we should approve as sufficient the reasons assigned for the removal of appellant. Of course, I accept the principle which has been established that the power of removal in such a case as this is very broad, and the right of review very narrow. These rules are doubtless essential to good service and entirely proper. But their liberality in favor of the superior furnishes all the greater reason why such requirements as they do impose should be fairly and honestly observed. If an employé has been guilty of acts which amount to insubordination or any nature of misconduct sufficiently serious to warrant his removal, there ought to be no difficulty in so charging and finding. The acts relied on and set forth as constituting misconduct ought on a fair interpretation to make it out. An employé ought not to be punished as for willful disobedience on a statement of facts so meager and ambiguous that they are just as consistent with fidelity and obedience as with the opposite qualities. That is this case. Everything

which is charged and assigned as a reason on this point for dismissing appellant might be true, and yet he have done nothing which amounted to insubordination or misconduct, and such a situation ought not to receive our approval.

It would not be difficult to believe that this meagerness in charge and statement was not the result of inadvertence or unskillfulness, but rather of discretion in the face of necessity. While it may not be part of the strictly legal aspects which we are required to examine, we can hardly avoid seeing behind this attempt to remove appellant a background of friction between his superiors, the deputy commissioner and chief engineer, in which appellant apparently recognized the higher authority of the former and thereby antagonized the latter. This was doubtless an unfortunate situation, but I hardly see how he could have done otherwise, and certainly it did not furnish a sufficient justification for making him a conspicuous sufferer in the conflict between his superiors which in some measure was being carried on over his unlucky and presumably unwilling shoulders.

The orders of the Special Term and Appellate Division should be reversed and the application for the writ of mandamus granted, with costs in all the courts.

CULLEN, C. J., and VANN, WERNER, WILLARD BARTLETT and CHASE, JJ., concur. HAIGHT, J., absent.

Orders reversed, etc.

(201 N. Y. 479)

SIMPSON v. FOUNDATION CO.

(Court of Appeals of New York. April 25, 1911.)

1. MASTER AND SERVANT (§ 252*)—EMPLOYEE'S LIABILITY ACT—NOTICE OF INJURY.

A notice of injury to an employé, which states that the employé was struck by a bucket and caused to fall into a pit while at work in constructing the foundation of a building, and which alleges a failure to provide proper protection without pointing out the kind of protection needed or indicating the producing trouble in the case, is insufficient for failing to state the cause of the injury as required by the employer's liability act (Consol. Laws 1909, c. 31, § 201).

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 806; Dec. Dig. § 252.*]

2. MASTER AND SERVANT (§ 150*)—INJURY TO SERVANT—LIABILITY UNDER EMPLOYEE'S LIABILITY ACT.

That a master failed to furnish a signalman to warn a servant of danger while at work does not show a cause of action under the employer's liability act (Consol. Laws 1909, c. 31, §§ 200-204).

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 297; Dec. Dig. § 150.*]

3. MASTER AND SERVANT (§ 291*)—INJURY TO SERVANT—EVIDENCE—INSTRUCTIONS.

Where a servant suing for a personal injury pleaded and proved only an action at com-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

mon law, though he alleged and proved the service of notice under the employer's liability act (Consol. Laws 1909, c. 31, § 201), the submission of the case as one within the employer's liability act was reversible error.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1136; Dec. Dig. § 291.*]

4. TRIAL (§ 296*)—INSTRUCTIONS—ERROR IN ONE INSTRUCTION CURED BY ANOTHER INSTRUCTION.

The error in submitting an action as one within the employer's liability act (Consol. Laws 1909, c. 31, §§ 200-204), while the cause of action pleaded and proved was one at common law only, is not cured by an instruction that plaintiff must stand or fall on his complaint.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 708; Dec. Dig. § 296.*]

5. DEATH (§ 69*)—ACTION FOR NEGLIGENT DEATH—EVIDENCE—ADMISSIBILITY.

Under Code Civ. Proc. §§ 1903, 1904, authorizing just compensation for the pecuniary injuries resulting to the wife and next of kin for negligent death, evidence in an action by personal representatives for negligent death that decedent had a wife and children is competent on the measure of damages.

[Ed. Note.—For other cases, see Death, Cent. Dig. §§ 86, 87; Dec. Dig. § 69.*]

6. DAMAGES (§ 170*)—PERSONAL INJURIES—EVIDENCE—ADMISSIBILITY.

One surviving an accident and suing for a personal injury can only recover damages for the loss he has personally sustained, and evidence that he has a wife and children has ordinarily no bearing on the subject of damages, and is incompetent for any purpose.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 496, 497; Dec. Dig. § 170.*]

7. DAMAGES (§ 170*)—PERSONAL INJURIES—EVIDENCE—ADMISSIBILITY.

Where, in an action for personal injuries, plaintiff, 30 years of age, showed that as a result of the accident he had lost all sexual power, evidence that he had a wife was admissible as bearing on the damages.

[Ed. Note.—For other cases, see Damages, Dec. Dig. § 170.*]

8. DAMAGES (§ 170*)—PERSONAL INJURIES—EVIDENCE—ADMISSIBILITY.

Where, in an action for personal injuries, plaintiff, 30 years of age, showed that as a result of the accident he had lost all sexual power, evidence that he had children was incompetent as aggravating the damages that might be awarded.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 496, 497; Dec. Dig. § 170.*]

2. TRIAL (§ 132*)—CONDUCT OF COUNSEL—MOTION IN TRIAL COURT—EVIDENCE.

Where plaintiff's counsel was surprised by the answer of a witness on direct examination disclosing the fact that defendant was protected by accident insurance, he must move to strike out the evidence, and ask the court to instruct the jury to disregard it, or the admission of the evidence will be deemed reversible error.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 315; Dec. Dig. § 132.*]

10. TRIAL (§§ 127, 133*)—EVIDENCE—INSURANCE.

That defendant, in an action for negligence, was insured in a casualty company or that the defense was conducted by such company, is incompetent, and the admission of proof of that fact is reversible error even when the court strikes it from the record and directs the jury to disregard it, unless it clearly ap-

pears that it could not have influenced the verdict.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 275, 316; Dec. Dig. §§ 127, 133.*]

11. EVIDENCE (§ 472*)—OPINION EVIDENCE—COMPETENCY.

The opinion of a nonexpert witness that signalmen were necessary to protect employes working on a platform and in a pit in constructing the foundation of a building is incompetent in an action for injury to an employé while at work based on the negligent failure to employ signalmen to protect him.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2186-2195; Dec. Dig. § 472.*]

12. TRIAL (§ 85*)—EVIDENCE—OBJECTIONS.

Where some of the evidence is competent and the objections are not specifically addressed to the incompetent evidence alone, the admission of all the evidence is not reversible error.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 223-225; Dec. Dig. § 85.*]

Appeal from Supreme Court, Appellate Division, Second Department.

Action by Patrick Simpson against the Foundation Company. From a judgment of the Appellate Division (134 App. Div. 930, 118 N. Y. Supp. 1142), affirming a judgment for plaintiff, defendant appeals. Reversed, and new trial granted.

On the 27th of June, 1906, the defendant was engaged in constructing the foundation for a large building in lower Manhattan, and the plaintiff was in its employ as the foreman of a gang of eight laborers. An excavation, called by the witnesses the "pit," had been made to the depth of 30 feet and a platform erected therein, 15 feet square and 25 feet high, supported by posts. There was a hopper two feet square in the center of the platform, through which sand and crushed stone were fed to a mixer below in order to make concrete for the foundation of the building. These materials were dumped from the street into the bottom of the pit, from whence they were raised to the platform by an iron bucket moved by a derrick. Beside this platform, but six or seven feet higher and parallel thereto, was another called the "engineer's platform," on which stood the derrick and an engine to run it. The position of the engineer was 18 feet back from the mixing platform. Six men, under the orders of the plaintiff, filled the bucket at the bottom of the pit, and, when ready, it was raised by the derrick above and over the lower platform, and, after it was dumped into the hopper by a trap in the bottom, it was swung off the platform and lowered into the pit to be refilled. Two of plaintiff's men, standing on the platform, added water and cement as the sand and stone were thrown into the hopper.

Owing to the difference in the height of the two platforms, the place where the engineer stood, the presence of a pile of pig iron on the edge of the engineer's platform next to the other platform and other obstructions, the engineer who operated the der-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

rick could see only a small part of the lower platform, which will now be spoken of as simply the platform. The light was poor. No bell, whistle, or other signal was provided to give notice when the bucket was to be moved, but prior to the night of the accident two signalmen had been employed to notify the engineer how and when to move the bucket, and to warn persons necessarily on the platform so that they could get out of the way. The work went on constantly night and day; three gangs of men being employed in shifts of eight hours each.

The plaintiff had been working as a laborer from 8 in the morning until 4 in the afternoon, but on the night in question, having been promoted to the position of foreman, he began at midnight. He had charge of the work of mixing the concrete, and it was necessary for him at times to be on the platform in order to direct the men there employed, and from there to shout his orders, through the noise of much machinery in operation near by, to his other men at work in the pit. The engineer was not under him nor subject to his orders. For some reason during the night of June 26th and the morning of June 27th there were no signalmen present as there had been on all other occasions while the plaintiff was at work for the defendant. He reached the place shortly before midnight, went into the pit to place his men and give them directions, and while he was thus employed the night superintendent of the defendant shouted to the engineer from a distance to commence moving the bucket, and the engineer answered that he had no signalmen. The superintendent himself then signaled the bucket for two round trips and a part of the third, or until it was raised from the pit to the platform, when he went away, shouting to the engineer to go ahead. At about this time the plaintiff came on the platform, spoke to one of his men, walked to the edge and stooped over, with his back to the bucket, in order to give orders to the men below. At this instant the heavy bucket was moved swiftly and without warning, and striking the plaintiff knocked him off the platform into the pit, injuring him severely. He did not know that the signalmen had been withdrawn.

While there was a decided conflict in the evidence, the facts could have been found as thus stated. The jury rendered a verdict in favor of the plaintiff for \$25,000, and upon appeal to the Appellate Division the case was argued twice. On the first argument the court decided to reverse by a vote of three to two, but upon a reargument before the court after a change in its membership the judgment was affirmed by a like vote. 132 App. Div. 376, 116 N. Y. Supp. 878; 134 App. Div. 930, 118 N. Y. Supp. 1142. The defendant then appealed to this court.

Frank V. Johnson, for appellant. Jeremiah A. O'Leary, for respondent.

VANN, J. (after stating the facts as above). Through undue zeal on the part of the counsel for the plaintiff this case was overtried, and hazardous chances were taken by inviting rulings, which require a reversal of the judgment. We will call attention to a few of the errors, trusting that upon another trial counsel will realize that the true interest of a client is rarely advanced by a verdict resting on error.

The only specific allegations of negligence set forth in the complaint are that "the defendant operated a derrick and bucket which swung, raised and lowered in and about said premises, and, in utter disregard of its duty to the plaintiff, failed to supply a sufficient number of servants to operate said apparatus; failed to furnish or supply signalmen at various points about said premises to warn plaintiff of the approach of said apparatus or any of its parts; failed to furnish or supply other signalmen or appliances of any kind whatever to warn plaintiff of the approach of said apparatus or any of its parts; failed to supply sufficient electric lights, or any other kind of light in the nighttime to enable plaintiff to see about said premises with reasonable clearness, so that said premises were dark." Although these were simply allegations of negligence at common law, the plaintiff also alleged the service of a notice under the employer's liability act (Consol. Laws 1903, c. 31, § 201), but without setting forth any fact to bring the case within the reach of that statute.

Upon the trial the first evidence offered by the plaintiff was a notice claimed to conform to said act. The defendant objected to it as incompetent and immaterial, as having nothing to do with the case and as wholly insufficient in that it did not properly show the cause of the accident or comply with the requirements of the statute. The objection was overruled, an exception taken, and the notice read in evidence. It stated the time and place of the injury with fullness and accuracy, but the only attempt to state the cause of the injury was as follows: "Said accident was caused by the failure of the said Foundation Company to provide proper protection for the said Simpson in his employment, and as a result thereof said Simpson was struck by a bucket, which was being used for hoisting purposes, causing him to fall into a pit whereby he sustained serious injury."

In submitting the case to the jury, the court read sections 1 and 2 of the statute, and charged that "this action is brought under this act and this law applies to the evidence in this case and you must apply this law to the evidence." The court further instructed the jury to decide whether the defendant provided a safe place and exercised proper care to keep it safe, and refused to charge that there was no evidence to warrant a finding that there was any defect in the ways, works, or machinery furnished by

the defendant which in any way contributed to the accident. Exceptions were duly taken to these rulings.

[1] 1. The notice did not comply with the employer's liability act because it failed to adequately describe the accident, and did not notify the defendant of any cause of injury that came within the provisions of that statute. It is simply a notice of common-law negligence, which was not required, and is not a notice to bring the case within the enlarged liability imposed by the Legislature. There is no notice of any defect in the condition of the ways, works, or machinery, or of the negligence of any person exercising superintendence with the authority or consent of the employer. It alleges a failure to provide "proper protection," but does not point out the kind of protection needed, nor the nature of the work in which the plaintiff was engaged, nor "indicate what the real, producing trouble in this case was as distinguished from many others which might have existed." While it says that he was struck by a bucket and caused to fall into a pit, it does not state what he was doing, why the bucket struck him, where he fell from, or under what circumstances he fell. Upon reading the notice, the employer could not tell whether something broke, or whether the accident was caused by some defect in machinery, or through careless operation, or the failure to give warning, or through any particular act of omission or commission. The allegation of a failure to provide proper protection is too general, for that is simply an allegation of negligence, with "no statement which fairly and completely described the cause of the accident," as we held was necessary in *Finnigan v. New York Contracting Co.*, 194 N. Y. 244, 248, 87 N. E. 424, 21 L. R. A. (N. S.) 233. In a later case we said "that the accident should be so identified that the master's attention is called to the exact occurrence," and that the notice "must reasonably describe the accident." *Logerto v. Central Building Co.*, 198 N. Y. 390, 394, 91 N. E. 782. In that case the notice stated at length all the possible statutory grounds of liability, but the only allusion to the accident or cause of injury was in the statement that "as a result of all which certain earth, stone and material was caused and permitted to fall upon and seriously injure me." We held that this did not reasonably and sufficiently describe the accident or occurrence.

It is not enough to specify the time and place of the accident, although that would guide the employer to some extent in making an investigation, which is one of the objects of requiring notice. The statute says that "the cause of the injury" must also be stated, and this means that the accident should be so described that a person of ordinary intelligence who knew nothing about it could understand how it happened. Notice that the plaintiff was struck by a bucket

and knocked into a pit is good as far as it goes, but it was necessary to further state, however informally, how the bucket came to strike him, or, in other words, in some reasonable way to describe the occurrence as it actually took place.

[2] 2. Even if the notice had been adequate, the evidence did not warrant the submission of the case to the jury as one governed by the employer's liability act. As was well said by Mr. Justice Miller below: "The master was liable, not for a defect in the ways, works, or machinery, nor for the failure to furnish a safe place in which to work, but, if at all, for not furnishing a signalman. The evidence respecting the light, the absence of bell or other signal, and the obstructions of the engineer's view only relate to the defendant's duty to furnish a signalman and to the question of the plaintiff's contributory negligence."

[3] The plaintiff pleaded and proved only an action at common law, and, while he alleged the service of a notice, he did not prove the service of one sufficient to bring the case within the statute. Moreover, he furnished no evidence of statutory liability, even if the complaint and the notice had conformed to the act and hence the case was submitted to the jury upon an erroneous theory. The court refused to charge that there was no evidence upon which negligence could be predicated under the act, and the jury were told to apply the act although only a common-law liability was shown.

[4] This constituted reversible error, which was not cured by the instruction that the plaintiff "must stand or fall on his complaint," for the jury must have understood from the charge as a whole that the complaint set forth a cause of action under the act. The subject was so thoroughly considered below that we regard further discussion as unnecessary. *Simpson v. Foundation Co.*, 132 App. Div. 375, 116 N. Y. Supp. 878.

3. The next evidence received after the notice was introduced was given by the plaintiff himself, who, after testifying that he was 30 years of age at the time of the accident, was asked if he was married, and, under objection and exception, he answered: "I am married. I was married on the 27th day of June, 1896. My wife was living at that time and she is living to-day." He was then asked if he had any children, and, subject to objection and exception he answered that he had four.

[5] When an action is brought by the personal representatives of a decedent to recover damages for causing his death by negligence, evidence that he had a wife and children is competent, because the measure of damages provided by the statute which authorizes the action is "just compensation for the pecuniary injuries resulting" to the wife and next of kin. *Matter of Meekin v. B. H. R. R. Co.*, 164 N. Y. 145, 147, 58 N. E. 50, 51.

L. R. A. 235, 79 Am. St. Rep. 635; Code Civ. Proc. §§ 1903, 1904.

[6] When, however, the injured person survives the accident and brings the action himself, the damages recovered belong to him and are allowed only for the loss which he has personally sustained. In such a case evidence that he had a wife and children ordinarily has no bearing on the subject of damages, and is incompetent for any purpose. We have thus stated the general rule in relation to the admissibility of such evidence.

[7] In this case, however, evidence that the plaintiff was married, although incompetent when received, was subsequently made competent through testimony given by the plaintiff and his physician tending to show that as the result of the accident he had lost all sexual power. It was proper that the jury in estimating the damages should consider the fact that, although married and still a young man, he was rendered incapable of enjoying marital rights. Thus, under the peculiar circumstances of this case, evidence of marriage and that his wife was still living was competent, but it is an exception to the general rule.

I am personally of the opinion that evidence that the plaintiff had begotten children prior to the injury was also competent under the extraordinary facts of this case, because he had the natural right to possess unimpaired the power of procreation during the normal period. The fact that he had children was evidence that he possessed the power before the accident. It must be presumed that his children might be a source of comfort and support in his old age, and hence loss of the power bore on the question of the pecuniary damages he had sustained, independent of the policy of the law and the interest of society in the perpetuation of the species. It is not a complete answer to say that the law presumes the previous existence of the power, for it is not reversible error to prove a fact which the law presumes.

[8] A majority of my associates, however, are of the opinion that the evidence relating to children was incompetent, and that it was brought in to aggravate the damages. They think that the power is presumed without proof, and that the real object of the attorney for the plaintiff is shown by the fact that the evidence was clearly incompetent when offered, and yet he did not state that he intended to prove anything which might make it competent.

4. The plaintiff, apparently for the purpose of showing that the defendant was not misled by the statutory notice, called his brother, who testified that he had an interview with Mr. Brown, the general superintendent of the defendant, in the presence of a man to whom he was introduced by Brown. The witness was asked what Brown said when he introduced this gentleman, and, under objection and exception, he answered:

"I will introduce our representative, Mr. Frank V. Johnson." He was next asked: "Who did he say this gentleman, Frank Johnson, was?" Subject to objection and exception, he answered: "From the insurance company." The defendant's counsel then insisted that it was improper to ask a question which the attorney knew would elicit an improper answer, and asked the court to withdraw a juror and declare a mistrial. The court did not rule upon the motion, but made a distinct ruling that the evidence should stand, and the defendant again excepted.

Subsequently another witness for the plaintiff testified to an interview with Mr. Brown, and stated that two attorneys were present at the time. He was asked: "Where did they tell you they were coming from?" The answer was: "Travelers' Insurance Company, I think they said." There was no objection or exception to this question, and no motion was made by either party to strike out any of the evidence relating to the subject of insurance.

Later on in the trial after one Riley had testified for the defendant, a paper purporting to be a statement made by the witness was offered in evidence to contradict him. The last words of the paper were: "I made a statement to a representative of the insurance company, but I neither read it or signed my name." The defendant objected to the admission of the paper upon the ground, among others, that it was an effort "to introduce in evidence and to give to the jury certain information which is improper, incompetent and immaterial," and in this connection counsel particularly called the court's attention to the last clause in the statement as quoted above. The objection was overruled, and the defendant excepted.

The plaintiff's counsel claims that the answers to the questions objected to were unexpected to him, and that he intended to show simply that the men who were present at the interviews represented the defendant as attorneys. The circumstances indicate, however, that one object of the questions was to suggest to the jury that the defendant was insured in an accident company in order to induce them to give a larger verdict. Disregarding the questions not objected to, the objections to the other questions were not only overruled, but the answers were allowed to stand by an independent ruling made after it was known what the answers were.

[9] If the answers were unexpected, as claimed, it was the duty of the plaintiff's counsel himself to move to strike out the evidence and to ask the court to instruct the jury to disregard it. Although warned by objection and exception, he had brought it into the record, and when he knew that it was not what he expected, but something highly improper, he should have lost no time in getting it out of the record and doing his utmost to correct his mistake. A prompt

withdrawal of the evidence by the counsel for the plaintiff would go farther toward correcting the evil than any motion made by the attorney for the defendant. While there was no proof, in this case that the defendant was insured, by suggestion and indirection the jury were given to understand that such was the fact and the result, apparently, is reflected in the verdict.

[10] Evidence that the defendant in an action for negligence was insured in a casualty company, or that the defense was conducted by an insurance company, is incompetent and so dangerous as to require a reversal even when the court strikes it from the record and directs the jury to disregard it, unless it clearly appears that it could not have influenced the verdict. *Cosselmon v. Dunfee*, 172 N. Y. 507, 65 N. E. 494; *Loughlin v. Brassil*, 187 N. Y. 128, 135, 79 N. E. 854; *Hordern v. Salvation Army*, 124 App. Div. 674, 676, 109 N. Y. Supp. 131; *Haigh v. Edelmeier & M. H. Elevator Co.*, 123 App. Div. 376, 380, 107 N. Y. Supp. 936; *Manigold v. Black River Traction Co.*, 81 App. Div. 381, 384, 80 N. Y. Supp. 861.

In *Hordern v. Salvation Army*, supra, Mr. Justice Ingraham said: "The question as to whether or not under any circumstances evidence of this kind is competent has been so often before the court and so uniformly decided that there can be now no question that under no circumstances is it proper to ask such a question. The only possible ground of asking the question is to suggest to the jury that, as the defendant would sustain no damage by a verdict against it, they should give to the injured plaintiff compensation to which under other circumstances he would not be entitled. * * * As counsel in cases of this kind have been so often admonished as to the impropriety of suggesting either by way of argument or by way of questions to the jury, or in any other way, that the defendant was protected by insurance, it seems to be unnecessary to say more than that such a suggestion in the presence of the jury will render any verdict that has been obtained by the plaintiff valueless, as a violation of the rule will require a reversal of the judgment." 124 App. Div. 676, 109 N. Y. Supp. 133.

5. Statements, both verbal and written, made out of court by certain witnesses for the defendant were received for the purpose of affecting their credibility. These statements involved the opinion of the witness, although not an expert, that signalmen were necessary in order to protect the men working on the platform and in the pit.

[11] The opinion of a witness upon the vital question upon which the case turned and which was for the jury to decide, was clearly incompetent.

[12] As, however, some of the evidence was competent and the objections were not spe-

cifically addressed to the part that was improper, we do not hold that the rulings involved reversible error, but simply call attention to the subject by way of suggestion.

Many other rulings made during the trial are challenged by the appellant, but in an opinion of reasonable length it would be impossible to discuss them all, and we have said enough, as we hope, to secure, upon the new trial which it is our duty to order, greater care in offering and receiving evidence and a closer observance of the principles of law.

The judgment should be reversed and a new trial granted, with costs to abide the event.

CULLEN, C. J., and GRAY, HAIGHT, WERNER, HISCOCK, and COLLIN, JJ. concur.

Judgment reversed, etc.

(202 N. Y. 77)

PEOPLE v. BARNES.

(Court of Appeals of New York. April 25, 1911.)

1. HOMICIDE (§ 22*)—MURDER IN FIRST DEGREE—DELIBERATION—LENGTH OF TIME.

For the deliberation, which is an element of murder in the first degree, no particular length of time, other than that it shall be long enough for the perpetrator to decide between not doing and doing the act, is necessary.

[Ed. Note.—For other cases, see *Homicide*, Cent. Dig. § 38; Dec. Dig. § 22.*]

2. HOMICIDE (§ 282*)—MURDER IN FIRST DEGREE—DELIBERATION—LENGTH OF TIME—JURY QUESTION.

Under the evidence in a homicide case, held, that it was a question for the jury whether the time was sufficient for deliberation, necessary for murder in the first degree.

[Ed. Note.—For other cases, see *Homicide*, Dec. Dig. § 282.*]

3. HOMICIDE (§ 193*)—SELF-DEFENSE—EVIDENCE OF FABRICATION.

In connection with evidence that bullet holes in the building at the scene of the homicide, relied on by defendant on the matter of self-defense, were not there immediately after the homicide, evidence of a noise, which might have been made by the firing of a pistol, being heard there later, was relevant on the question of attempt to fabricate a defense.

[Ed. Note.—For other cases, see *Homicide*, Cent. Dig. § 416; Dec. Dig. § 193.*]

4. CRIMINAL LAW (§ 680*)—TRIAL—ORDER OF INTRODUCING EVIDENCE—DISCRETION.

It is within the discretion of the trial court to allow the prosecution to anticipate any defense which might be based on the finding of certain bullets in walls at the place of the homicide, and to account for their presence as a part of its principal case.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 1609; Dec. Dig. § 680.*]

5. HOMICIDE (§ 339*)—APPEAL—HARMLESS ERROR—EXCLUSION OF EVIDENCE.

Defendant cannot complain of the sustaining of objections to questions asked on cross-examination of a state's witness, intended to show that deceased carried firearms, where, on it appearing that defendant would rely on the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

self-defense, the district attorney recalled the witness, withdrew the objections, and consented to any questions along that line.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 714; Dec. Dig. § 339.*]

6. HOMICIDE (§ 188*) — EVIDENCE — SELF-DEFENSE — CHARACTER OF DECEASED.

Defendant in homicide having proved the fact of deceased's imprisonment, the prosecution could introduce the pardon by which it was terminated.

[Ed. Note.—For other cases, see Homicide, Dec. Dig. § 188.*]

7. CRIMINAL LAW (§ 1169*) — APPEAL — HARMLESS ERROR.

Any error in receiving testimony for the prosecution of facts neither material nor damaging to defendant was cured by the court striking it from the record, and directing the jury to eliminate it entirely from consideration, as though it had not been presented.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3141; Dec. Dig. § 1169.*]

8. HOMICIDE (§ 7*) — MURDER — MOTIVE — NECESSITY OF PROOF.

Satisfactory proof of motive is not necessary for a conviction of murder.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 12; Dec. Dig. § 7.*]

Appeal from Kings County Court.

Thomas Barnes appeals from a judgment on a verdict of guilty of murder in the first degree. Affirmed.

Edward J. Reilly, for appellant. John F. Clarke, Dist. Atty., for the People.

WILLARD BARTLETT, J. At about 2 o'clock on the morning of February 22, 1910, in the basement of the house No. 266 South Fourth street, in the borough of Brooklyn, John T. Leonard was killed by a pistol shot fired from a revolver in the hands of the defendant, Thomas Barnes. Of this fact there is no question. The case is devoid of any doubt, either as to the fact of the killing or the identity of the slayer. The defense was justifiable homicide. The defendant denied premeditation or deliberation, and gave an account of the occurrence which, if true, would have warranted the jury in finding that he was attacked and fired upon by Leonard in the first instance, and only returned the fire, with fatal effect, when it appeared to be necessary, in order to preserve his own life. The jury refused to believe his testimony to this effect, however, and declared him guilty of murder in the first degree. His counsel upon this appeal insist that there is no evidence in the record to sustain a conviction of this grade of felonious homicide, and argue that in any event the charge should have been reduced to manslaughter in the first degree, before the case was submitted to the jury.

This is really the gravest question in the case, as there is no readily discernible motive for the crime, and the defendant denies any acquaintance with the deceased previous to the killing. A careful study of the record, however, has convinced me that there is a

view of the facts which furnishes ample support for the verdict.

Both the defendant and the deceased were men of criminal antecedents. The defendant had served terms of imprisonment in the Albany penitentiary and on Blackwell's Island; and the deceased had been convicted of conspiracy and breaking into a post office in North Carolina, and sentenced to imprisonment in the United States penitentiary at Atlanta, from which he was released by pardon in December, 1909. Leonard then came to Brooklyn, and he and his wife were keeping a lodging house for men at 266 South Fourth street when the homicide was committed.

Mrs. Leonard was the chief witness for the prosecution. She testified that she first saw the defendant two weeks before the shooting in the room of one of her lodgers named Goldie. She went to the room to change the bed, according to her custom. Her husband was in the hall, fixing a lock on the door of the next room, and he told her there was company in there, and he did not think she could go in. She went in, nevertheless, but finding too many persons there told Goldie so, whereupon he said it was all right; he would do the work to-morrow morning himself. At this time the defendant was in Goldie's room, and Goldie himself, and a man named Wilson, and two other men who were strangers to Mrs. Leonard. This testimony is important as bearing upon the defendant's knowledge of Leonard previous to the homicide. If true, it shows that the defendant was where he could have seen him and probably did see him two weeks before. The defendant, on the other hand, denies ever having made any such visit to Goldie's room at all.

The next time that Mrs. Leonard saw the defendant was on the evening of the 21st of January, 1910, between 7:30 and 8 o'clock, when he called at the house and asked for Mrs. Leonard. She heard him, and stepping forward in the hall said she was Mrs. Leonard, whereupon he asked her whether Mr. Leonard was at home. She said, "No," but she expected him at 8 o'clock. The defendant then inquired whether "any of the boys" were at home. Mrs. Leonard said: "Which of them?" He responded: "Is Goldie in?" and just then a lodger named Anderson called out, "Hello, friend!" from upstairs, and the defendant went up to one of the floors above. Mrs. Leonard asked, "Who will I say wants to see him?" when Mr. Leonard came home, and the defendant answered, "Tell him Arthur. He will know who it is." She did not actually see the defendant come down and leave the house, but she knew that three or four of the men went out between 9 and 10 o'clock.

Leonard and his wife roomed in the basement; their bedroom being in the front of

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

the house and their kitchen in the rear. According to Mrs. Leonard's testimony, her husband came home at 11 o'clock, went up to Anderson's room to find out who had been there to see him, and then came downstairs, and they both retired at about 15 minutes after midnight. She was awakened shortly before 2 o'clock by somebody knocking at the front basement door, the door of the room in which they slept. This was followed by knocking at the kitchen door in the rear, whereupon Mrs. Leonard called out, asking who was there. There was no response to her inquiry, but further knocking followed at the front door again. Meantime Mrs. Leonard had aroused her sleeping husband, who in turn asked who was there, when the voice of Anderson was heard in the hall, saying, "Never mind, Jack, I will see you in the morning." Leonard responded, "It is all right; I want to see you any way,"—and putting on some of his clothes went into the kitchen. lit the gas there, unbolted the kitchen door leading out into the hall, and had just about entered the hall when his wife heard four shots fired in rapid succession. Her husband jumped back into the kitchen, and exclaimed: "Oh Mary, I'm struck; I'm done for"—and fell to the floor mortally wounded and unconscious. Mrs. Leonard was about to seek help, but was prevented from going out into the hall by the noise of breaking glass in the front basement door, which subsequently proved to be due to the efforts of the defendant to escape in that way. She got out of the house by the basement window, and called for help to a man whom she saw on the sidewalk a short distance from the gate. She then saw the defendant on the front stoop, coming down the steps, and pointed him out as the man who had shot her husband. In company with this man whom she thus addressed and some other bystanders, she followed the defendant out to the Williamsburg Bridge plaza, where he was arrested by an officer, who brought him back to the place where Leonard lay dying. The deceased was about breathing his last; but the defendant when taken into his presence said nothing. Mrs. Leonard testified that, although her husband had carried a revolver prior to his imprisonment at Atlanta, he was not armed after that, and did not have a pistol on the night of the homicide. The defendant resisted arrest by striking the officer on the cheek with the butt end of his revolver so severely as to draw blood. His person was searched, and there were found upon him 18 cartridges in a bag, a flashlight dark lantern, a coil of fuse, and a quantity of percussion caps, such as are used for setting off a blast. When questioned at the station house concerning the homicide, he said to the sergeant in charge, "What are you trying to do, kid me?" The cartridges found upon him were of the same caliber as his pistol (38), and five empty

shells of the same caliber were picked up in the hallway on the parlor floor of the Leonard house, where the defendant is supposed to have opened his revolver and ejected them immediately after the shooting.

The defense of justifiable homicide rests wholly upon the testimony of the defendant himself. He denied that he had ever visited the premises No. 286 South Fourth street before the evening preceding the shooting. He said he came to go there at the suggestion of Goldie, whom he had met a short time previously, when they were both inmates of the same ward in a hospital in New York. "I could get a room there for a reasonable price," he said, "a couple of dollars or two and a half; and if I wanted a girl I might get a girl there. It was a neighborhood of that kind." His testimony agreed with that of Mrs. Leonard as to his calling at the house on the evening of the 21st of February and asking for Mr. Leonard; but he said that he inquired for Goldie after being told that Mr. Leonard was not in. Thereupon Anderson, whom the defendant swore he had never seen before, looked over the head of the stairs and called out, "Hello," and the defendant went up to the first floor, where he was standing. He told Anderson that he had been in the hospital and was "all in"; that Goldie told him he could get a room there; that there were a couple of women downstairs, one of whom said she was Mrs. Leonard, but he did not care about giving her his money until he saw the proprietor who ran the house (Leonard), and he would give him the money to get his room. Anderson told him that he expected Goldie right back, whereupon the defendant went to Goldie's room and waited there an hour or so, talking with Anderson, who mentioned a mutual acquaintance—a woman who kept a saloon in Montreal. He then proposed to Anderson to go out and have a drink, and they went together to a liquor saloon in the same block, where they met Goldie and another man, Wilson, to whom the defendant was introduced. They stayed there until it was time to close the place, and they were put out. In the street Goldie and Wilson went off with two girls; Goldie saying that he would make a night of it, and telling the defendant to go down and sleep in his room. The defendant then returned to the Leonard house with Anderson. According to his testimony, they were all "pretty drunk." He told Anderson that if he went up and slept in Goldie's room Goldie might come back in the night and sleep on the floor, and said he would go down and see "this fellow," meaning Leonard. Going down into the basement, he tripped and fell, and "woke up at the bottom," to quote his language. As he was picking himself up, Anderson called out: "You are waking the whole God damned house up. Get back and go to bed." The defendant heard Leonard's voice, and Anderson said: "Never mind, Jack; it is all right. I will see you to-morrow,"—and started upstairs. Leon-

ard came out into the hall, which was either dark or very dimly lighted. The defendant started to explain to him about getting the room, mentioning Goldie. I quote his testimony from this point: "He says, 'Goldie sent you over here?' He says, 'You bum, get out of here,' and he made a pass at me and struck me here in the side of the head. I came back with another pass, and he kicked me in the private, and I went down. I fell to the floor, and I says, 'You rotten son of a bitch,' and he faced back towards the door, and he says, 'I will give you one second to get out of here,' and I was in the condition on that floor that I couldn't get out of there, and being strapped up and I got a large rupture, and I couldn't get up off that floor, and the next thing I heard, bang, and I reached around my back pocket, and I pulled my gun, and I let go. Why did I shoot my revolver? Why, it was his life or mine. That is why I shot my revolver, and I would do it now, if I were in the same position. That is why I done it."

The theory of the prosecution was that the defendant and certain criminal associates of his in the borough of Manhattan were inspired with animosity toward Leonard, because they feared him as an informer. The district attorney denominated these criminals "yeggmen," which it seems is a term applied to post office and bank robbers. Leonard had recently been pardoned by the president, after conviction of a crime of the character committed by "yeggmen," and his associates might well fear revelations made by him to the officers of the government. This feeling may not have gone so far as to result in a determination to kill him, but it might naturally have created a sentiment of hostility on the part of the defendant. If the testimony of Mrs. Leonard was true—and the jury must have accepted it as true—her husband did nothing on the occasion of the homicide which could possibly have warranted the defendant in supposing that Leonard meant to harm him or could harm him, still less do any act which would endanger his life. Even if the defendant had little previous knowledge or information concerning Leonard, and was not actuated by any fear that he might turn state's evidence, the jury might well have thought that the defendant, enraged by the language which Leonard used, and having him completely within his power in the obscurity of the basement hall, then and there resolved to kill him.

[1] The law does not prescribe any particular length of time as necessary for the deliberation, which is an element of the crime of murder in the first degree. It is only essential that it shall be long enough for the perpetrator to decide between not doing and doing the act. *People v. Boggiano*, 179 N. Y. 267, 72 N. E. 101.

[2] It cannot be held, as matter of law, that the time was insufficient in this case. That question was properly left to the jury.

I cannot say that their conclusion was against the evidence, or against the weight of evidence, or that it was without evidence to support it.

There are 43 exceptions in the record, most of which are obviously so untenable as not to require any discussion. A few of them, however, require notice. To understand these, it is necessary to mention some facts to which reference has not yet been made.

The evidence left no doubt that the defendant had fired five shots, and special pains were taken by the prosecution to prove the location from which these shots must have been fired, as well as the direction of the shots, and to find the five bullets. Five shells fitting the defendant's pistol had been found in the upper hallway near the hat rack, but prior to the 28th of March only four bullets had been discovered. The case originally came on for trial on March 25, 1910, but was adjourned on the application of counsel for the defendant until the 18th of April, 1910, when the trial began. On the 28th of March the district attorney caused further search to be made for another bullet in the hall of the basement of the Leonard house, and the fifth bullet was discovered. The search was made with great care by a surveyor, a police captain, and an expert photographer. At this time there were no traces of any bullet holes in the walls of the basement hall, nor were any other bullets found. A week later counsel for the defense requested the same photographer to visit the premises with him, and he pointed out to the photographer two bullet holes in the wall opposite the kitchen door which the other evidence conclusively shows were not there on the 28th of March. Subsequently, on examining the boards containing these new bullet holes, two 32-caliber bullets were found, one of them in the coal bin. There is no reasonable doubt that these bullets had been fired into the wall subsequent to the homicide. The house had been unoccupied after the 14th of March. The lessee was one John Cavanagh, a New York liquor saloon keeper, under whom Leonard occupied the premises. His partner in business was a man who is denominated Chi-Jack in the record, and Cavanagh testified that he had seen the counsel for the defendant talking to this partner of his in the middle of March or thereabouts. While expressly exonerating the counsel for the defendant from any charge or suggestion of complicity in the scheme, the theory of the district attorney was that some of the friends of the defendant in Manhattan had caused these two shots to be fired from a 32-caliber revolver in the basement of No. 266 South Fourth street subsequent to the murder, for the purpose of lending credibility to the plea of self-defense. It is to be noted that no reference is made to these bullets in the argument of defendant's counsel. It has been necessary to mention this incident in order to show the admissibility of certain evidence which was received.

ed over objection and exception in behalf of the defendant.

[3] Catherine Kane, a girl of 17 who lived with her parents next door to the Leonard house, and Willie Kane, her younger brother, testified, in substance, that after the Leonard house had become vacant, and on the night of the 31st of March, between 10 and 11 o'clock, they heard a report in the house next door, which sounded as if something had fallen over, so that they wondered if the ceiling was falling down in their own home. Their parents were out at the time; but they told them about this crashing noise when they came home, and subsequently reported it to the police captain of the precinct. This evidence was plainly relevant, as the noise might have been made by the firing of a pistol, and the testimony of these witnesses thus tended to show an attempt to fabricate a defense.

[4] It is argued that in any event such testimony was only proper upon rebuttal; but I think that it was within the discretion of the trial judge to allow the prosecution to anticipate any defense which might be based upon the finding of the 32-caliber bullets, and to account for their presence in the premises as a part of the principal case for the people.

[5] The only other exceptions of any consequence may be disposed of briefly. Upon the cross-examination of Mrs. Leonard, objections by the prosecution to a series of questions intended to show that the deceased carried firearms were sustained, and the defendant duly excepted. At that time there had been no suggestion, nor was the district attorney aware, that the defendant would rely upon self-defense as a justification for the shooting. After it became apparent that this was to be the defense, the district attorney recalled Mrs. Leonard to the stand, withdrew the objections that he had previously made, and consented to any questions being asked along that line. This action, I think, deprived the exceptions of any force, as it afforded counsel for the defendant the fullest possible opportunity to ask the questions which had been ruled out.

[6] No error was committed in receiving in evidence the pardon of Leonard. Upon the cross-examination of Mrs. Leonard, the defense had proved the fact of her husband's imprisonment at Atlanta, and under these circumstances it was entirely proper for the prosecution to show how that imprisonment was terminated.

[7] Exception was also taken to the testimony of a post office inspector and a detective in reference to their business relations with Leonard, and his connection with the investigation of post office burglaries. Nothing material or damaging to the defendant was elicited on the examination of either of these witnesses, but in any event, if error

was committed in receiving their testimony, it clearly was cured by the action of the court in striking it from the record, and directing the jury to eliminate it entirely from consideration, "as though it had not been presented at all." It is to be presumed, as a general rule, that an instruction to a jury that testimony is immaterial and of no probative force, and should not be considered by them, will efface all prejudice, if any prejudice has resulted from such testimony. *State v. Fortin*, 106 Me. 382, 76 Atl. 896.

Some of the reasons which may well have led the jury to reject the plea of self-defense readily suggest themselves to the mind. In the first place, the only voice which Mrs. Leonard, and, therefore, presumably Leonard himself, recognized in the hall before Leonard went out was the voice of Anderson, a lodger in the house, with whom Leonard's relations appear to have been entirely friendly. Even if he had a pistol on the premises, there was nothing in the circumstances to arouse any apprehension of danger, or to lead him to arm himself before going out. In the second place, it is to be noted that Leonard was shot in the back. When this fatal shot was fired, it is perfectly certain that the deceased was in the act of flight from his assailant. This is not the usual attitude of a man who is trying to kill another. Finally, the defendant when arrested, instead of saying anything about an assault upon himself as a justification for his act, violently resisted arrest and made an assault upon the officer. These facts taken together, weigh strongly against the story of the defendant.

[8] There is nothing in the law or the facts of this case which would justify us in interfering with the verdict. It is true that no adequate motive for the crime is plainly discernible; but, if satisfactory proof of motive were essential to uphold a conviction of murder, many wicked criminals would escape the punishment which they deserve. I think it is our duty to affirm this judgment.

CULLEN, C. J., and VANN, WERNER, HISCOCK, and CHASE, JJ., concur. HAIGHT, J., absent.

Judgment of conviction affirmed.

(201 N. Y. 436)

PAYNE v. NEW YORK, S. & W. R. CO.
(Court of Appeals of New York. April 7, 1911.)

1. PLEADING (§ 52*)—COMPLAINT—SEPARATE COUNTS—SAME "CAUSE OF ACTION."

Under Code Civ. Proc. § 483, which requires that, when a complaint sets forth two or more causes of action, the statement of facts constituting each cause of action must be separate and numbered, the term "cause of action" is synonymous with the right to bring a suit, and means that where the facts alleged show

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one primary right of the plaintiff, and one wrong done to him by the defendant which involves that right, that the plaintiff has stated only one cause of action, and hence, in an action by a brakeman against his employer for personal injuries, it is proper for the plaintiff to plead in his complaint as one cause of action facts constituting negligence under the common law, facts constituting negligence under the employer's liability act of the state of New Jersey, and facts constituting negligence under the act of Congress known as the federal employer's liability act, on any two of those grounds of liability.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 113; Dec. Dig. § 52.*]

For other definitions, see Words and Phrases, vol. 2, pp. 1015-1019; vol. 8, p. 7598.]

2. ACTION (§ 3*)—STATUTORY RIGHT OF ACTION—NEW CAUSE OF ACTION.

Where a statute creates a new or extended liability not known at common law, it creates a new cause of action, since without the statute none would exist.

[Ed. Note.—For other cases, see Action, Dec. Dig. § 3.*]

Appeal from Supreme Court, Appellate Division, Second Department.

Action by James W. Payne against the New York, Susquehanna & Western Railroad Company. From an order of the Appellate Division of the Second Judicial Department (141 App. Div. 833, 125 N. Y. Supp. 1011), modifying, and, as modified, affirming an order at Special Term, denying defendant's motion to cause the complaint to be made more definite and certain, plaintiff, by permission, appeals. Reversed, and questions certified in 127 N. Y. Supp. 1135, as proposed by plaintiff, answered.

Rosslyn M. Cox and Abram F. Servin, for appellant. Thomas Watts, Elbert N. Oakes, and John Bright, for respondent.

WERNER, J. The learned Appellate Division of the Second Department has certified to us the following questions: (1) "In an action for damages for personal injuries by a servant against a master, is it proper for the plaintiff to plead in his complaint as one cause of action facts constituting negligence under the common law, facts constituting negligence under the employer's liability act of the state of New Jersey, and facts constituting negligence under the act of Congress known as the federal employer's liability act, or any two of said grounds of liability?" (2) "Should a plaintiff be compelled to separate the facts constituting liability under the aforesaid acts, and plead them as separate causes of action?" (3) "Under the complaint in this case was it proper to direct the plaintiff, in case he desired to rely upon any except the common-law liability of defendant, to separately state the facts constituting the statutory liability and plead them as separate causes of action?"

The complaint upon which these questions arise is simple and precise. It alleges that the defendant is a railroad corporation, oper-

ating a line of railroad within certain parts of this state and within parts of the state of New Jersey; that on April 13, 1910, the plaintiff was a brakeman employed by the defendant on a freight train which was being operated in the vicinity of Little Ferry Junction, in the state of New Jersey; that while the plaintiff in the exercise of his duties, and of due care, was standing upon one of the cars of said train, he was thrown therefrom by the sudden and violent movement thereof and sustained serious bodily injuries; that said injuries were caused by the improper movement of the train upon which the plaintiff was employed by the person in charge of the locomotive engine attached thereto, by the negligent direction of the conductor or other person in control of signals directing the movement thereof, and of some person who at the time had charge or direction of the movement of said train and was acting as superintendent with the authority and consent of the defendant; that there were defects in the brakes or coupling apparatus upon said train which could have been discovered by the use of ordinary care; that the caboose or car upon which plaintiff was stationed had no platform or guard rail, and that the grabirons thereon were defective and improperly and inadequately secured, which was due to the neglect of some person in the employ of the defendant intrusted with the duty of seeing that the cars and appurtenances were in proper and safe condition, which defects are also referred to as causes of the accident. Continuing, the complaint proceeds to allege that the train was being used by defendant as a common carrier between the states of New York, New Jersey, and elsewhere, and that the plaintiff was engaged in such commerce when he was injured, and this is followed by a recital of the provisions of the employer's liability act of the state of New Jersey, and an averment of the service of a notice in accordance with its provisions. These several allegations are set forth in the order in which we have stated them, without being specified or numbered as separate causes of action.

The defendant moved at Special Term that the complaint be made more definite and certain in the following particulars: (1) "So that it will set forth the physical cause of the accident by a plain statement of the facts by which the accident was caused or out of which it arose, and which is not accomplished by the mere allegation that 'he was thrown therefrom by a sudden and violent action of the train,' nor by the similar allegation of the complaint that 'said injuries were caused by the improper movement of the train upon which the plaintiff was at work.'" (2) "So that it will set forth plainly either a cause of action based on defendant's common-law liability, upon

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the New Jersey employer's liability act, or one upon the employer's liability act passed by the Congress of the United States in 1908." (3) "Or, if plaintiff desires to set forth three causes of action, that plaintiff separately state and number such causes of action."

The court at Special Term denied the defendant's motion. An appeal was taken to the Appellate Division, where an order was made which purports to modify, but in fact reverses, the order of the Special Term. The order of the Appellate Division directs the plaintiff to separate and number the causes of action, if he intends to set forth a cause of action other than under the common law; and, since the order of the Special Term flatly denied the defendant's motion, it is apparent that there was in fact a reversal, although it was called a modification. The distinction is of no importance except to determine the form of the order which we are to make in disposing of this appeal. There are times when nothing is more troublesome than the simplicity of our Code pleading, although in the main it works out for good.

[1] The question in this case is whether the plaintiff has pleaded a single cause of action, or several distinct and separate causes of action. The Code of Civil Procedure (section 481) directs that a complaint shall contain a plain and concise statement of the facts constituting each cause of action without unnecessary repetition; and that, when a complaint sets forth two or more causes of action, the statement of facts constituting each cause of action must be separate and numbered. Section 483. The Code contains no definition of what constitutes a single or separate cause of action, and we must, therefore, draw upon other sources of inspiration for the solution of the question. The term "cause of action" is one which has a technical and primary definition, although in practice it has also acquired a much wider secondary and colloquial meaning. In its simplest analysis the term "cause of action" is synonymous with "the right to bring a suit," and that right is based upon the ground or grounds on which an action may be maintained. There is a more technical and scientific definition which is well stated by Pomeroy, in his standard work on Code Pleading, as follows: "If the facts alleged show one primary right of the plaintiff, and one wrong done by the defendant which involves that right, the plaintiff has stated but a single cause of action. * * * On the other hand, if the facts alleged in the pleading show that the plaintiff is possessed of two or more distinct and separate primary rights, each of which has been invaded, or that the defendant has committed two or more distinct and separate wrongs, it follows inevitably, from the foregoing principle, that the plaintiff has united two or more causes of action." Every lawyer knows that for

practical and colloquial uses these terms are frequently given a much broader significance. One has only to scan the judicial opinions in cases arising out of personal injuries to employes to appreciate that they are frequently used interchangeably with the expressions "remedies" or "liabilities." In cases like the one at bar, this is doubtless due to the fact that there are many instances in which the employer may be liable under the common law, and also under one or more statutes which have extended his liability for reasons not cognizable at common law. In such cases the different grounds of liability have sometimes been referred to as "causes of action" when in fact there has been but a single "cause of action" which could be established by evidence appropriate to each of the grounds upon which the employer's liability is predicated, either under the common law or under the statutes.

[2] There are other instances in which the statutes have created a new or extended liability not known at common law. In such cases it is quite accurate to say that the statute which establishes a new liability also creates a new "cause of action," for without the statute none would exist. In one case the right, the wrong, and the "cause of action" may all depend upon the language of the statute, and in another there may be separate and distinct grounds of liability under the common law, and under one or more statutes, which may be so pleaded as to entitle a plaintiff to recover under one or all. Thus, although there may be various grounds of liability, there can be but one cause of action and one recovery. The complaint before us fairly illustrates the difference between a case wholly dependent upon one or more provisions of specified statutes, and one where the defendant's liability may be predicated either upon the common law, the statutes, or both. It sets forth facts which render the defendant liable at common law. It contains other allegations which tend to support a claim under the employer's liability act which is pleaded; and it pleads still other averments which bring the case within the rule of the federal statute. Suppose the plaintiff proves them all. Does that establish three distinct rights in the plaintiff, or three independent wrongs against the defendant, or support three separate recoveries? Obviously there is but one primary right, one primary wrong, and one liability. The single wrong has given rise to a single right, which may be established by as many different facts as the nature of the case may justify or demand. This is the rule which was clearly stated in the early case of *Dickens v. New York Central R. Co.*, 18 How. Prac. 228, and which this court has endeavored to consistently follow. That was a case in which the plaintiff sought to recover damages for personal injuries. The

complaint contained three separate counts. The second count stated all of the acts of negligence contained in the first count, and one in addition. The third count set forth many acts of negligence not mentioned in the first and second counts. It was held that this was not proper pleading, that the plaintiff had the right to allege in a single count all the different acts of negligence; and that upon the trial the plaintiff could rely on any or all of the acts of negligence sustained by the evidence. To the same effect is *Whittier v. Bates*, 2 Abb. Prac. 477. The rule was again very clearly stated by Mr. Justice Woodward in *Acardo v. New York Contracting & T. Co.*, 118 App. Div. 793, 794, 102 N. Y. Supp. 7, 8. That was a case in which the complaint contained some allegations designed to cover a case at common law, and other averments to support a claim under the employer's liability act. In reversing an order requiring the plaintiff to serve an amended complaint separately stating facts constituting liability under the common law and under the statute the learned justice said: "The plaintiff clearly has but one cause of action, and that is for the damages he has sustained through the actionable negligence of the defendants, if such negligence exists. Whether the facts bring his case within the employer's liability act, or whether he must rely upon his common-law rights, must depend upon the evidence which he is able to produce upon the trial, and we can see no good reason for a refinement of the pleadings such as is directed by the order appealed from. If the plaintiff establishes his cause of action under the employer's liability act, the common-law allegations are mere surplage, just as a portion of them would be if various common-law grounds were asserted and only one of them proved." In the later case of *Welch v. Waterbury & Co.*, 138 App. Div. 315, 120 N. Y. Supp. 1059, there was an appeal from a judgment based upon a common-law complaint, but submitted to the jury under the employer's liability act. The judgment was reversed upon the ground that the plaintiff had sued upon one theory and had been permitted to recover upon another. The same learned justice who wrote for his court in the *Acardo* Case wrote the opinion in the *Welch* Case, and in the latter he made use of some expressions which seem to indicate that he and his associates had changed their views, but when we look to the two opinions for what was decided, rather than for what was said, we find no inconsistency between them. In the *Acardo* Case the question was one of pleading. In the *Welch* Case the question was whether a judgment could be sustained upon a theory not set forth in the complaint. In the more recent case of *Uss v. Crane Co.*, 138 App. Div. 256, 258, 123 N. Y. Supp. 94, 95, the question of pleading was also directly involved, and there the learned Appellate Di-

vision of the First Department held that the defendant was entitled to compel the plaintiff to separately state and number as distinct causes of action grounds of liability under the common law and under the employer's liability act, "so that the defendant could demur to the statutory action if barred." In that case Mr. Justice Clarke stated that the evident purpose of the 'employer's liability act' "is to give the servant a right of compensation entitling him to a cause of action which he did not formerly possess." In support of this statement he cites the language of Judge Gray in *Harris v. Baltimore Machine & Elevator Works*, 188 N. Y. 141, 80 N. E. 1028, which, in turn, refers to *Gmaehle v. Rosenberg*, 178 N. Y. 147, 151, 70 N. E. 411, 412, where Judge Cullen, in speaking of the employer's liability act, says: "It is clear that it has given an additional cause of action where it prescribes that the master shall be liable for the negligence of the superintendent or any person acting as such." When we turn to these cases to see what was decided, it becomes apparent that the expressions quoted from them have been too broadly construed. In the *Gmaehle* Case the sufficiency of the complaint was questioned by demurrer. There the defendant argued that the action was brought under the employer's liability act, and that the complaint was defective because it failed to allege the service of a proper notice under the statute. This court held that the complaint did not purport to state a cause of action under the statute, but was a good pleading under the common law, and therefore it was not necessary to plead service of notice. In the *Harris* Case the appeal was from the judgment upon the verdict. At the close of the evidence the trial justice suggested that no common-law right of action had been established. The plaintiff elected to treat the action as one brought under the employer's liability act. Upon appeal to this court, the complaint was held sufficient. In neither of the opinions in these two cases do we find any expression or intimation to the effect that when an injured employé, who sues his employer for damages for negligence, so frames his complaint as to entitle him to give evidence either under the common law or under the statutes or under both, he pleads separate and distinct causes of action which must be set forth in separate and numbered paragraphs. Quite a contrary conclusion must follow when the whole context of these opinions is considered. We think such a complaint pleads but a single cause of action, although it may specify different acts of negligence, some of which create a liability only under the common law and others of which create a liability only under the statute. This view of the subject is entirely consistent with the statement that the statute may have given an additional or new cause of action, for that is literally true in all cases where the common law affords no

relief, and where the only right to recovery is created by the statute. In the *Uss Case* Mr. Justice Clarke argued, with much force, that the combination of several grounds of liability in a single count of a complaint may prevent a defendant from demurring to such parts thereof as would be plainly open to attack if separately numbered. That may be the result in some cases, but we think it can do little practical harm, since a defendant always has the power to limit the issues and to ascertain what he must meet by demanding a bill of particulars. We are convinced, moreover, that the occasional inconvenience in such instances will be more than offset by a general and consistent adherence to the simpler forms of pleading.

The order of the Appellate Division should be reversed and that of the Special Term affirmed, with costs to the appellant in both courts. The first question certified to us is answered in the affirmative; the second and third in the negative.

CULLEN, C. J., and VANN, WILLARD BARTLETT, HISCOCK, and CHASE, JJ., concur. HAIGHT, J., absent.

Order reversed, etc.

(202 N. Y. 34.)

FULTS v. MUNRO.

(Court of Appeals of New York. April 25, 1911.)

1. FORCIBLE ENTRY AND DETAINER (§ 4*)—ENTRY DISTINGUISHED FROM DETAINER.

Forcible entry and forcible detainer are separate and distinct wrongs.

[Ed. Note.—For other cases, see *Forcible Entry and Detainer*, Cent. Dig. §§ 5-22; Dec. Dig. § 4.*]

2. ACTION (§ 65*)—MATTERS ARISING AFTER COMMENCEMENT OF ACTION.

In an action at law, the right to judgment depends on the facts as they stood when it was commenced, instead of, according to the rule in equity, as they stood at the time of the trial.

[Ed. Note.—For other cases, see *Action*, Cent. Dig. §§ 735, 736; Dec. Dig. § 65.*]

3. APPEAL AND ERROR (§ 1180*)—DISPOSSESSION OF TENANT—WARRANT—EFFECT OF REVERSAL.

A warrant to dispossess tenants which is valid on its face, and has been issued pursuant to a judgment also valid on its face, is to be regarded as valid when it was executed, although subsequently the judgment was reversed for errors at the trial, but not for want of jurisdiction.

[Ed. Note.—For other cases, see *Appeal and Error*, Dec. Dig. § 1180.*]

4. LANDLORD AND TENANT (§ 318*)—TRESPASS TO REAL PROPERTY—LIABILITY.

Where a tenant has assigned his lease to his wife, with the knowledge and consent of the lessor, and thereafter proceedings to remove the tenants were instituted against the husband without making the wife a party, and under a judgment of dispossession the wife is removed from the premises, she has an action of trespass against the lessor.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. §§ 1345-1348; Dec. Dig. § 318.*]

5. FORCIBLE ENTRY AND DETAINER (§ 3*)—FORCE TO REGAIN POSSESSION.

At common law and prior to the statutes against forcible entry and detainer a person dispossessed of lands, who was entitled to possession, was justified by law in regaining possession by force.

[Ed. Note.—For other cases, see *Forcible Entry and Detainer*, Dec. Dig. § 3.*]

6. FORCIBLE ENTRY AND DETAINER (§ 4*)—CIVIL LIABILITY—STATUTORY PROVISIONS—"IN A FORCIBLE MANNER."

Under Code Civ. Proc. § 1669, which provides that a person put out of real property "in a forcible manner" may recover treble damages of the wrongdoer, the term "in a forcible manner" means force of an unusual kind which tends to bring about a breach of the peace, such as an injury with a strong hand, or a multitude of people, or in a riotous manner, or with personal violence, or with threat and menace to life and limb, or under circumstances which would naturally inspire fear and lead one to apprehend danger of personal injury if he stood up in defense of his possession, and hence an entry upon premises held by a lessee under a warrant valid only against the lessee is free from the imputation of willful and reckless conduct, and, where made after the officer's statement that he had come to put them out, is not an entry in a forcible manner.

[Ed. Note.—For other cases, see *Forcible Entry and Detainer*, Dec. Dig. § 4.*]

7. FORCIBLE ENTRY AND DETAINER (§ 21*)—CIVIL LIABILITY—PROCEEDINGS TO TAKE POSSESSION—WARRANT.

A warrant following the language of the statute, and commanding an officer "to remove all persons from the said property and to put the said purchaser in the full possession thereof," does not mean all persons, but only those in actual possession who have been made parties to the proceeding.

[Ed. Note.—For other cases, see *Forcible Entry and Detainer*, Cent. Dig. §§ 93-104; Dec. Dig. § 21.*]

8. FORCIBLE ENTRY AND DETAINER (§ 5*)—DISPOSSESSION OF TENANT—RE-ENTRY BY TENANT.

Where a tenant, after dispossession from premises, has still the right to possession, he may re-enter if he can do so peaceably, and whoever prevents a re-entry by menace or intimidation is guilty of forcible detainer.

[Ed. Note.—For other cases, see *Forcible Entry and Detainer*, Cent. Dig. §§ 23-28; Dec. Dig. § 5.*]

9. FORCIBLE ENTRY AND DETAINER (§ 5*)—CIVIL LIABILITY—DEFENDANT'S LIABILITY FOR ACTS OF AGENTS.

Where defendant in an action of forcible entry and detainer had stationed an officer's assistant on the premises with instructions to guard them, whatever the officer did within the line of this estate the defendant did.

[Ed. Note.—For other cases, see *Forcible Entry and Detainer*, Cent. Dig. §§ 23-28; Dec. Dig. § 5.*]

10. FORCIBLE ENTRY AND DETAINER (§ 34*)—ACTION—QUESTION FOR JURY—FORCIBLE ENTRY.

In an action for forcible entry and detainer, the question whether plaintiff had been forcibly detained *held* for the jury.

[Ed. Note.—For other cases, see *Forcible Entry and Detainer*, Cent. Dig. § 157; Dec. Dig. § 34.*]

Appeal from Supreme Court, Appellate Division, Fourth Department.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep't Indexes

Action by Kittle Fufts against John C. Munro. From a judgment of the Appellate Division (137 App. Div. 881, 118 N. Y. Supp. 1107), affirming a judgment entered upon a nonsuit, plaintiff appeals. Reversed, and new trial granted.

The material allegations of the complaint are that on the 10th of March, 1908, the defendant leased to one William Fufts, the husband of the plaintiff, a farm of 240 acres, situate in the town of Camillus, county of Onondaga. The lease was in writing, and provided for a term of one year from the 1st of April, 1908. The lessee agreed to market the crops and pay to the lessor as rent for the use of the premises one-half of all the proceeds of the farm. On the same day that the lease was made William Fufts assigned it to his wife, the plaintiff herein, with the knowledge and consent of the defendant, and thereupon with like knowledge and consent she entered into possession of the premises. She further alleged that on the 16th of July, 1908, "said defendant made forcible entry into the lands and premises," fully describing them, and "made forcible entry to the whole of said premises and has forcibly put the plaintiff out of the possession thereof and has continued to forcibly and unlawfully hold plaintiff out of possession thereof, and by reason thereof said plaintiff has been damaged by the aforesaid acts of the defendant, his servants and agents, in the sum of \$2,000 for treble which amount the plaintiff claims judgment against the defendant." The plaintiff also described the crops growing upon the premises at the time of the entry, and alleged that she "was receiving profits from seven milch cows amounting to \$30" per month. The defendant by his answer admitted the execution of the lease, denied all the other allegations of the complaint, and alleged that he was in possession under the judgment and warrant of a justice of the peace duly made and issued in a proceeding in which the defendant was the petitioner and William Fufts, the lessee of the premises, was the defendant.

It appeared upon the trial that in July, 1908, the defendant began a proceeding before a justice of the peace to remove his tenant, William Fufts, from the premises for the nonpayment of rent, but he did not make Mrs. Fufts, the assignee of the lease, a party, although he knew of the assignment and had recognized her as in possession. After issue joined and a trial had in said proceeding, in which the plaintiff was sworn as a witness, judgment of dispossession was rendered in due form of law, and a warrant regular upon its face issued to a constable for execution. The officer went to the premises, and without using force or threats entered the dwelling house where Mrs. Fufts resided and inquired for her husband. She said he was down in the lot, and asked the officer what he wanted. He answered: "I

have come to put you out. If you don't take your \$100 and put on your things and leave, I am going to put you out." She said: "Well, I guess you won't put me out." The defendant was not present when this took place. Mr. Wood sat down in a chair, and Mrs. Fufts after saying, "These things are mine, don't you touch a thing in any way, shape, or manner in this house," went out, harnessed a horse, and drove to Syracuse. When she came back with a lawyer, the officer was removing the furniture, and placing it on the opposite side of the road in front of the house. After nearly everything was out, she went in to get some puppies, which she swore belonged to her, and the officer told her she could not have them, and, to use her own words, "He took me by the arm and put me right off," taking her to the road, but using no violence to speak of. After this the defendant came to the premises and she heard him identify certain articles, saying: "That is mine, don't take that out. This is theirs, take that out." Household furniture, horses, cows, wagons, farming implements, and tools all belonging to the plaintiff were thus removed from the premises and put on the opposite side of the road; the horses being tied to the fence. That night she slept on the roadside with her things. One Lockwood, an assistant of the officer, walked up and down the road with a shotgun during the entire night. Twice after dark and once in the middle of the night he fired the gun. He told her to keep off of Mr. Munro's land; that he was in possession; that Mr. Munro had left him to keep guard; and that she should keep off.

An appeal was taken by William Fufts from the judgment of dispossession to the County Court, and on the 15th of October, 1908, the judgment was modified as to the amount of rent due, and, as thus modified, affirmed, without costs. The next day this action was commenced. On the 13th of November following a further appeal was taken to the Appellate Division, and on the 2d of March, 1909, the judgment of dispossession was reversed by that court on the ground that the rent and costs were tendered before the warrant was issued, and that no proper demand had been made. The present action was tried in May, 1909, and, when the plaintiff rested, the defendant moved for a nonsuit. The plaintiff asked to go to the jury upon the question whether she was forcibly ejected and detained from the premises, upon the question of the damages sustained by her, and upon all the evidence in the case. The application of the plaintiff was denied, the motion of the defendant granted, and the plaintiff excepted to each ruling. Upon appeal to the Appellate Division, the judgment entered upon the verdict was unanimously affirmed.

Walter Welch, for appellant. Thomas Woods, for respondent.

VANN, J. (after stating the facts as above). Statutes relating to forcible entry and to forcible detainer, which are separate and distinct wrongs, have existed for centuries. The earliest, passed in 1381, provided that: "None from henceforth make any entry into lands and tenements but in cases where entry is given by the law, and in such case not with strong hand nor multitude of people but only in peaceable and easy manner; and if any man from henceforth do to the contrary, and thereof be duly convicted, he shall be punished by imprisonment of his body, and thereof ransomed at the King's will." 5 Ric. II, c. 7; Pollock on Torts (6th Ed.) 368.

[1] Later the provisions of the statute were extended to forcible detainer (8 Henry VI, c. 9) and since then legislation upon the subject in England and in this country has usually been addressed to both forcible entry and forcible detainer and except in one or two states, the offenses are still distinct. As time passed, many changes were made, and various remedies, both civil and criminal, provided, including the recovery of treble damages. The Revised Statutes contained the provision that: "If any person be disseized, ejected or put out of any lands or tenements, in a forcible manner, or being put out, be afterwards holden and kept out by force, or with strong hand, he shall be entitled to maintain an action of trespass, and shall recover therein treble the damages assessed by the jury or by a justice of the peace, in cases provided by law." 2 Rev. St. (1st Ed.) pt. 3, c. 5, tit. 6, § 4. The Code of Civil Procedure provides that "if a person is disseized, ejected, or put out of real property, in a forcible manner; or after he has been put out, is held and kept out, by force, or by putting him in fear of personal violence, he is entitled to recover treble damages, in an action therefor against the wrongdoer." Code Civ. Proc. § 1669.

Under the head of summary proceedings to recover the possession of real property the Code further provides that: "An entry shall not be made into real property, but in a case where entry is given by law; and, in such a case, only in a peaceable manner, not with strong hand, nor with multitude of people. A person who makes a forcible entry forbidden by this section, or who, having peaceably entered upon real property, holds the possession thereof by force, and his assigns, under tenants, and legal representatives, may be removed therefrom, as prescribed in this title." Id. § 2233. It is provided by the Penal Code that "a person guilty of using, or of procuring, encouraging or assisting another to use, any force or violence in entering upon or detaining any lands or other possessions of another, except in the cases and the manner allowed by law, is guilty of a misdemeanor." Pen. Code, § 465.

[2] As this is an action at law, the right to judgment depends on the facts as they stood when it was commenced, instead of, ac-

cording to the rule in equity, as they stood at the date of the trial. *Sherman v. Foster*, 158 N. Y. 587, 593, 53 N. E. 504, and cases cited.

[3] Hence the warrant to dispossess, being valid upon its face and having been issued pursuant to a judgment also valid upon its face, is to be regarded as valid when it was executed, although subsequently the judgment was reversed, not for want of jurisdiction, but for errors committed during the trial before the magistrate.

[4] Mrs. Fults, however, was not a party to the proceeding in which the judgment was rendered, so that she was not bound thereby, and the warrant was not good as against her. She was in possession as assignee of the lease, and there was evidence tending to show that the defendant had recognized her as lawfully in possession. She should have been joined as a party to the proceeding, and it was a trespass to dispossess her without giving her an opportunity to make her defense. As was said by Judge Van Heusen in *Croft v. King*, 8 Daly, 265, 268: "She might have paid the rent to protect her possession, or she might have taken a valid objection to some of the landlord's proceedings. At any rate, the statute gave her a right to a hearing and the landlord ought to answer in damages for the wrong." The following cases cited by the learned judge amply sustain his position: *Sims v. Humphrey*, 4 Denio, 185; *Hill v. Stocking*, 6 Hill, 314; *Starkweather v. Seeley*, 45 Barb. 164; *Savacool v. Boughton*, 5 Wend. 170, 21 Am. Dec. 181. See, also, *Colt v. Eves*, 12 Conn. 243, 259; *Kendall v. Doctor*, 4 How. Prac. 447. While the warrant would be no protection as against an action for simple trespass brought by her, it has an important bearing upon the question of forcible entry.

[5] At common law and prior to the statutes to prevent forcible entry and detainer, if a lawful right of entry existed, the person entitled to possession was justified by law in regaining possession by force. *Hyatt v. Wood*, 4 Johns. 150, 157, 4 Am. Dec. 258; 2 Hawk. P. C. 64. The present statutes upon the subject are the re-enactment of a long series of laws for the primary purpose of preventing landlords from taking the law into their own hands and ejecting tenants by violence, although they also apply to some other cases. The civil action to recover treble damages is penal in nature, and its object is to redress the forcible and wanton violation of the right to the possession of real estate.

[6] The expression "in a forcible manner," as used in the statute, does not mean any kind of force, such as is involved in a mere trespass. Thus, as was held in a leading case after a careful review of the authorities: "The entry or detainer must be riotous, or personal violence must be used, or there must be threats or menaces of violence, or other circumstances must exist inducing

alarm or terror in the occupant of the premises." *Willard v. Warren*, 17 Wend. 257. As was said in another case which has frequently been cited: "It has always been held that, to make an entry forcible, it ought to be accompanied with some circumstances of actual violence or terror; and therefore an entry which hath no other force than such as is implied by the law in every trespass whatsoever is not within these statutes." *People ex rel. Niles v. Smith*, 24 Barb. 16, 18.

The force used must be unusual and tend to bring about a breach of the peace, such as an entry with a strong hand, or a multitude of people, or in a riotous manner, or with personal violence, or with threat and menace to life or limb, or under circumstances which would naturally inspire fear and lead one to apprehend danger of personal injury if he stood up in defense of his possession. *Pharis v. Gere*, 110 N. Y. 336, 345, 18 N. E. 135, 1 L. R. A. 270; *People ex rel. Kline v. Rickert*, 8 Cow. 226; *Waterbury v. Deckelmann*, 50 App. Div. 434, 64 N. Y. Supp. 60; *Bach v. New*, 23 App. Div. 548, 48 N. Y. Supp. 777; *Labro v. Campbell*, 56 N. Y. Super. Ct. 70, 2 N. Y. Supp. 129; *Milner v. McClean*, 2 Car. & P. 17; 1 Hawkins, Pleas of the Crown, c. 28, §§ 26, 27; *Wharton, Criminal Law*, §§ 2033, 2034; 1 Bishop, Cr. Law, § 397; 3 *McAdam's Landlord & Tenant* (3d Ed.) 187. As was said by Judge Folger in *Wood v. Phillips*, 43 N. Y. 152, 157: "The main object still is to preserve the public peace and prevent parties from asserting their rights by force or violence, though by gradual additions the remedy has become in effect a private as well as a public one."

The entry itself in this case, leaving out of view for the present the detainer, was not made in a forcible manner within the meaning of the statute as read in the light of the authorities. Actual entry was made without force or the display or threat of force of any kind. After such entry the plaintiff of her own accord left the premises, and went off to get legal advice. The mere statement of the officer, made with the warrant in his hands, that he had come to put her out, and that if she did not put on her things and leave he was going to put her out, with no threat to injure, or any overt act, did not make the entry forcible. While she did put on her things and leave, it was not through fear, but to procure a lawyer. She apprehended no danger, but held her own well in the conversation with the officer. Nothing occurred to suggest a breach of the peace. Moreover, the officer did not go there wantonly and with no semblance of right, but was armed with process valid against William Fults, the lessee named in the lease, the husband of the plaintiff, and an actual occupant of the premises, although as the hired man of his wife, but invalid as to herself.

[7] The warrant commanded him "to remove all persons from the said property and to put the said petitioner into full possession

thereof." It followed the language of the statute, which, however, does not mean literally persons, but only those in actual possession who are made parties to the proceeding and their guests, agents, servants, and the like. *Croft v. King*, supra. While the warrant under the facts recited therein did not upon its face authorize the officer to remove Mrs. Fults, the form of the command gave him color of authority to do so, and saved him from the imputation of willful and reckless conduct such as is necessary to support an action of this character. The primary question in such cases is not who had title to the land, but who had the right to possession; and the next, not whether the entry was made without right, but whether it was made with such force or threats as to disturb the public peace. While the defendant had no right to possession when he entered, as the entry was not made by force or through fear, it was not an entry in a "forcible manner" within the meaning of the statute. Although the entry was peaceable, still, if the plaintiff was kept out through fear of personal violence, she was entitled to recover treble damages for a forcible detainer.

[8] After the dispossession was complete, she had the right to re-enter if she could do so peaceably, for she had been deprived of possession without right. *Bliss v. Johnson*, 73 N. Y. 529. Neither the officer nor the defendant had any authority to prevent her if she attempted to, or to keep her out by threats or a display of force. As she was put out wrongfully, she had the right to get in again if she could, and whoever prevented her by menace or intimidation was guilty of forcible detainer. Referring to that subject, Chief Justice Savage said in *People ex rel. Kline v. Rickert*, at page 232 of 8 Cow., supra: "The law is that the same circumstances of violence or terror which will make an entry forcible will make a detainer forcible also; and whoever keeps in the house an unusual number of people, or unusual weapons, or threatens to do some bodily hurt to the former possessor if he dare return, shall be adjudged guilty of a forcible detainer though no attempt be made to re-enter."

[9] Threats may be made by acts as well as words. There was some evidence tending to show that Lockwood, the officer's assistant, had been stationed on the premises by the defendant with instructions to guard them and keep the plaintiff off, and whatever Lockwood did within the line of this authority the defendant did. *Welsh v. Cochran*, 63 N. Y. 181, 20 Am. Rep. 519; *Newberry v. Lee*, 3 Hill, 523, 525; *Brown v. Feeter*, 7 Wend. 301.

[10] Mrs. Fults testified that she saw Lockwood "there with Wood carrying the stuff out," and that she saw him there while the defendant was on the premises. When asked what Lockwood was doing there that night, she answered, "Why, he kept walking back and forth in front of our things, and ordering us and threatening and pointing a gun and

such things." Later, on being recalled by the plaintiff, in answer to a similar question she said that Lockwood "kept walking up and down, walking up and down, and during the night he fired that gun three times, while I was living on the opposite side of the road," twice shortly after dark and once in the middle of the night. During the night he told her "to keep off of that side of the road. * * * He said to keep off of Mr. Munro's land. That he was in possession. That Mr. Munro had left him to keep guard and for me to keep off."

The officer's aide, with a loaded gun on his shoulder, marching through the night up and down on one side of the road in front of the plaintiff sitting with her effects on the other side, and at intervals firing the gun, was such a personification of force as naturally to inspire fear. His actions spoke louder than words, with the meaning, as the jury could have found, that, if she attempted to regain possession or enter the house, she would sustain bodily harm. Moreover, threatening words were used, although what they were does not appear and the gun was pointed, but at whom and under what circumstances was not disclosed. There was at least such a show of force as to strongly tend to bring about a breach of the peace and to prevent the plaintiff from attempting to re-enter.

All the evidence taken together, if believed by the jury, would have authorized them to find the defendant guilty of forcible detainer, not committed by himself in person, but by an agent for whose acts in the line of guarding the premises and keeping the plaintiff off he was responsible. A case was made for the jury, and as there was some evidence, although slight, on the question of damages, the motion to nonsuit was improperly granted. After hearing the defendant and his witnesses, whose version of the facts has not yet appeared, it will be for the jury to say whether the plaintiff was kept out of possession through fear of personal violence, and, if so, to assess the damages sustained by her.

The judgment of nonsuit should be reversed and a new trial granted, with costs to abide event.

CULLEN, C. J., and GRAY, HAIGHT, WILLARD BARTLETT, and COLLIN, JJ., concur. CHASE, J., not voting.

Judgment reversed, etc.

(201 N. Y. 427)

WITHERBEE et al. v. BOWLES et al.

(Court of Appeals of New York. April 7, 1911.)

1. ACTION (§ 38*)—SINGLE CAUSE OF ACTION.

A complaint to set aside a sale of corporate stock as illegal, and as the result of a conspiracy of defendants to deprive plaintiffs thereof, and to set aside acts of the directors of the corporation increasing the capital stock and

purchasing property in furtherance of the plan to exclude plaintiffs, states a cause of action for injury to the rights of plaintiffs individually as between them and the corporation, and the complaint does not improperly join causes of action on the theory that the setting aside of a sale of the stock is a cause of action in plaintiffs' individual right, while the demand to set aside the acts of the directors is a cause of action solely in behalf of the corporation.

[Ed. Note.—For other cases, see Action, Cent. Dig. § 649; Dec. Dig. § 38.*]

2. PLEADING (§ 193*)—DEMURRER—IMPROPER JOINER OF CAUSES OF ACTION.

A demurrer to a complaint on the ground that causes of action have been improperly united must be sustained where the pleader has attempted to set forth causes of action and has partially succeeded, and it is not necessary that the complaint should have completely and sufficiently stated causes of action which cannot be united.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 428-443; Dec. Dig. § 193.*]

3. CORPORATIONS (§ 320*)—FRAUD AS AGAINST STOCKHOLDERS—COMPLAINT—SUFFICIENCY.

A complaint in an action by stockholders, which alleges that they were holders of a majority of the stock; that they made a contract for the purchase of the balance of the stock; that, in accordance with the plan, both blocks of stock were deposited with a trust company as security for the purchase price of the minority stock; that wrongfully and in pursuance of a conspiracy defendants procured all of the stock prematurely, and without notice sold the same and bought it in behalf of defendants; that the stock was subsequently distributed among defendants; that, in furtherance of the plan to exclude plaintiffs from the corporation, the directors fraudulently issued new stock in purported payment of property of little value, and distributed the new stock among defendants; and which demands that plaintiffs shall be restored to their original position as holders of the controlling stock by setting aside the sale of their stock and by canceling the issuance of the new stock—states a cause of action as against a demurrer for want of facts.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 320.*]

4. CORPORATIONS (§ 320*)—RELIEF AGAINST FRAUDULENT ACTS—ACTION BY STOCKHOLDERS—PARTIES.

A stockholder suing to set aside a sale of stock as illegal and the result of a conspiracy to deprive him of his stock, and to set aside the issuance of new stock in furtherance of the conspiracy, need not join as defendant one who at the time of the illegal increase of stock was a director and the holder of a comparatively small amount of stock, and who had not joined defendants in their illegal operations, and he need not join stockholders simply as such when not involved in the controversy.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 320.*]

Appeal from Supreme Court, Appellate Division, First Department.

Action by Alfred S. Witherbee and another against Thomas H. Bowles and others. From a judgment of the Appellate Division (142 App. Div. 407, 126 N. Y. Supp. 954) reversing an interlocutory judgment overruling the demurrer of defendant Lawrence Dilworth to plaintiffs' complaint and sustaining the demurrer, plaintiffs appeal by permission on certified questions (127 N. Y. Supp. 1150).

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.

Order of Appellate Division reversed, and judgment of Special Term affirmed, and questions answered.

See, also, 129 N. Y. Supp. 1151.

Samuel Untermyer, for appellants. Martin Conboy, for respondent.

HISCOCK, J. Plaintiffs are seeking to maintain the character and sufficiency of their complaint, which only contains one count, in the face of a demurrer which assails it on the grounds that there is a defect of parties defendant, that it does not state facts sufficient to constitute a cause of action, and that causes of action have been improperly united. The specification under this last and most important charge is that there have been joined one cause accruing to plaintiffs in their individual right and another derived from and asserted in behalf of a corporation controlled by hostile and unfaithful directors. It will promote convenience in the discussion of the entire subject to consider these grounds of demurrer in the inverse order from that stated, and the first inquiry, therefore, is, Have causes of action been improperly joined?

[1] The substance of plaintiffs' alleged grievances, without regard for the moment to the precise form of statement, may be briefly summarized. They claim that they were holders of a majority of the capital stock of the San Toy Mining Company, and had made a contract for the purchase of substantially all of the minority interest from some of the defendants; that in accordance with the plan adopted both blocks of stock were deposited with a trust company as security for the payment of the purchase price of the latter block in installments; that wrongfully and in pursuance of a conspiracy some of the defendants with the aid or acquiescence of the others procured all of this stock prematurely and without proper notice to be sold and that it was bought in in behalf of and subsequently distributed amongst the various defendants; that still later in furtherance of the plan to exclude plaintiffs from the corporation and fasten their own control thereon, even though plaintiffs should set aside said sale, the defendants, being in power, fraudulently caused the corporation to issue to one of their number in purported payment for some properties of little value a large amount of new stock sufficient to control the corporation, and that this stock was subsequently distributed amongst all of the defendants or amongst some of them with the acquiescence of the rest. The plaintiffs seek to be restored to their original position as holders of the controlling stock interest in the corporation by procuring the sale of their stock to be set aside and the issue of new stock to be delivered up and canceled.

The first group of facts involved in the alleged unlawful sale of stock owned and purchased by plaintiffs obviously constitute

or belong to a cause of action in their individual right. But by way of indirect support for the demurrer, it is urged that the second group of facts involved in the alleged unlawful increase of stock make a cause of action solely in behalf of the corporation, and cannot, even if attempted, be utilized in an action in behalf of the plaintiffs individually. I do not think this is so. It is not questioned that these acts might be made the basis of an action by or in behalf of the corporation to remedy the injury inflicted upon it and through it upon all of the stockholders in common. But these same acts performed for the purpose and with the effect stated worked an injury to rights belonging to the plaintiffs individually as between them and the corporation and its other stockholders, and not common to the latter.

In *Stokes v. Continental Trust Co.*, 186 N. Y. 285, 296, 78 N. E. 1090, 1093, 12 L. R. A. (N. S.) 969, simply affirming principles which had been long recognized, we referred to the rights belonging to a person by virtue of his ownership of stock in a corporation, especially mentioning the one to exercise a relative voice in the control and management of the corporation. We held that "the power of the individual stockholder to vote in proportion to the number of his shares is vital and cannot be cut off or curtailed by the action of all the other stockholders even with the co-operation of the directors and officers," and determined that the right of a holder to maintain an existing proportion and relation between his stock and the entire capital stock was a property right of which he could not be deprived on an increase of stock under ordinary circumstances. In that case we gave relief to a stockholder complaining of the method employed in increasing the capital stock of a corporation which while not claimed to be with fraudulent purpose did impair his right to take his proportion thereof. Holding this in such a case, it seems very clear that a stockholder would have a right to attack and avoid a fraudulent increase of stock made for the express purpose and with the clear result of depriving him of his relative position as a stockholder.

Therefore this preliminary argument fails, and we come to the precise question whether plaintiffs by their complaint have, as they might, molded the offensive acts involved in the increase of stock into the statement of an individual cause of action, or have, as claimed, shaped them into one in behalf of the corporation.

In determining this question, I do not deem it necessary to recapitulate or even summarize to any extent the allegations of the somewhat lengthy complaint. I think there are certain predominant features of the action and the complaint which warrant us in believing that the pleader intended to and on the whole did set out an individual cause of

action and not a derivative and incongruous one in connection with an individual one.

There is only one count. The first part of it concededly states facts only pertaining to an individual right of action, and it does not seem too violent to credit the pleader with the design at least not to begin this single count with the statement of a cause of action of one character and finish it with the statement of one of another.

In the next place, the question fairly may be raised whether plaintiffs, deprived of and without the legal title to any stock, might maintain a stockholder's action in behalf of the corporation. Without deciding the question, it is not too much to say that it at least may be debated, and again perhaps not too much to credit the pleader with perception of its existence and discretion enough to desire to avoid its difficulties. The complaint does not purport to be made and framed in behalf of the plaintiffs and all other stockholders as is usually and properly done in a derivative action.

And, lastly, the great proportion of the allegations and prayers for relief are appropriate to the statement of an individual cause of action. In fact, the only basis found for the proposition that the complaint at this point is of a derivative character is found in two or three scattered allegations and clauses. For instance, it is alleged that the board of directors of the defendant company is constituted of the defendants in the suit and "it would be useless to ask them to institute any action, suit or proceeding for the recognition or enforcement of any of plaintiffs' rights." Also, in connection with a demand that the defendants account for such stock as may have come into their hands as the result of the alleged fraudulent sale, and that they deliver up to the defendant company for cancellation such shares as may have come into their possession as the result of the alleged illegal increase of stock, it is prayed: "If any defendant cannot surrender up to the defendant company all of the shares of said increased stock so received by him, that, then, such defendant may be decreed to pay to the defendant company the par value of any such shares, delivery whereof he may be unable to make." These clauses are, of course, entirely inappropriate to an action brought by plaintiffs for the purpose of restoring themselves to their appropriate relative position as stockholders in the company. I do not, however, think that they are of sufficient extent or gravity to overturn the other features to which I have referred in determining the character of the action. I think, rather, that they are to be attributed to the ignorance or carelessness of the pleader who did not exercise wisdom enough to stop when he had framed appropriate and necessary allegations for the cause of action which he was really trying to enforce, but from a confused desire to fortify the sufficiency of his

complaint incorporated these allegations which were inappropriate and imperiled its correctness. If I am right in this conclusion, they are to be deemed mere surplusage and disregarded.

[2] The next question is whether the complaint does sufficiently set forth a cause of action against the respondent, for he is right that in passing on the last ground of demurrer it was not necessary to his success that the complaint should have completely and sufficiently stated causes of action. It was enough if the pleader had attempted to set forth such causes of action and had partially succeeded in his purpose.

[3] I think the complaint does set forth a cause of action. There is no doubt that it is inartificially framed and subject to many criticisms for alternative allegations and indefiniteness. These criticisms, however, while possibly they may be made the basis for some relief by motion, do not in my opinion present defects of sufficient seriousness to sustain the demurrer. Viewing the allegations as a whole and giving them the benefit of that rule of liberal construction which prevails in favor of a pleader whose pleading is assailed by a demurrer, they do state actionable misconduct on the part of the defendants. They allege a conspiracy antedating and resulting in the unlawful sale of plaintiffs' stock and in the subsequent unlawful increase of the capital stock of the corporation whereby plaintiffs were deprived of their stock and doubly ousted from their position as controlling stockholders, and to which continuous conspiracy at some point or other all of the defendants including this respondent were parties. The object of the action is not to recover for the loss of plaintiffs' stock, but to regain their stock and their position as controlling stockholders in the corporation and for that purpose to be relieved from the acts in a continuous conspiracy whereby they have been deprived of these rights. I think they had a right to maintain such an action, and I believe that the allegations of their complaint sufficiently set forth their injury and the connection of the defendant therewith to make out a cause of action. It was proper for them in one cause of action to attack all the acts and join all the parties who took part in the acts which have impaired their rights and which are barriers between them and the relief which they seek. *Brinkerhoff v. Brown*, 6 Johns. Ch. 139; *Loos v. Wilkinson*, 110 N. Y. 195, 18 N. E. 99, 1 L. R. A. 250.

[4] Lastly, it is urged as a defect of parties that plaintiffs have failed to join as defendants one or two who now are or at the time of the alleged illegal increase of stock were directors and also the holders of a comparatively small amount of stock who were not united with the defendants in their alleged operations. I do not think that it was necessary to join either set of people.

I can see no reason whatever for joining

as a defendant a party otherwise unnecessary because a director now or at the time the increase of stock was made. This is not an action to punish directors for a breach of faith towards the corporation or to hold them liable in damages for illegal conduct. It is one, so far as that aspect of the case is concerned, to have an increase of stock adjudged illegal and to compel certain parties holding such increase to deliver up the certificates for cancellation. This relief in no wise renders it necessary to join a party simply because he happened to be a director when the increase was made.

Neither do I think it necessary to join stockholders simply as such when not involved in the controversy. Presumably any outside stockholder would be benefited if plaintiffs should succeed in having the increase of stock canceled because thereby such stockholder's proportionate holding of stock would be increased. The only theory which suggests itself for joining such stockholder would be that he might be interested in maintaining the increase of stock for property said to have been acquired thereby, or might have a theoretical interest even in maintaining the control of the corporation where it is now rather than with the plaintiffs as would be the case if they should succeed. While these reasons possibly might be sufficient for allowing a stockholder to come in as a party on his own application, which we do not decide, they are not adequate to make him a necessary party. The corporation is a defendant and presumably in behalf of all of the stockholders will give such defense to the transaction complained of as is appropriate. So far as I am aware, it has never been held that in an action by a corporation or in a derivative action in its behalf to set aside a purchase or sale of the property it is necessary to join all of the stockholders as defendants. Neither can it be the rule that stockholders have such a legal interest in the location of the control of a corporation that they are entitled to be parties to any suit which may change it. If this were so, it would seem to be necessary to impose some restrictions on the rights of a stockholder to make such transfer of his holdings as might change the control of the corporation without the consent of the other stockholders.

For these reasons, I think that the order of the Appellate Division should be reversed and the judgment of the Special Term affirmed, with costs in both courts, and the questions certified to us answered, the first one in the affirmative and the last two in the negative.

CULLEN, C. J., and VANN, WERNER, WILLARD BARTLETT, and CHASE, JJ., concur. HAIGHT, J., absent.

Order reversed, etc.

(202 N. Y. 65)

TAYLOR et al. v. HIGGS et al.

(Court of Appeals of New York. April 25, 1911.)

1. WILLS (§ 710*)—VALIDITY.

The invalidity of a divorce procured by a wife who subsequently marries another man aware of the fatal defects in the divorce proceedings does not affect the validity of his testamentary gift of a part of his estate to her.

[Ed. Note.—For other cases, see Wills, Dec. Dig. § 710.*]

2. WILLS (§ 58*)—CONTRACTS TO DEVISE AND BEQUEATH—EVIDENCE—SUFFICIENCY.

A contract binding one to devise his property must be established by an instrument in writing, or, if based on parol, the contract must be established by the clearest and most convincing evidence.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 164, 165; Dec. Dig. § 58.*]

3. WILLS (§ 58*)—CONTRACTS TO DEVISE—EVIDENCE.

Where, in an action by heirs to enforce a parol contract by their stepmother to devise to them all the property she had acquired from their father, a witness who was a beneficiary under the will testified to the contract by the stepmother, and to her own promise to will to the heirs the estate acquired by her under the will, evidence that she herself had executed such will was inadmissible because the witness could not corroborate her testimony by her own acts, and because her declaration that she had made a will could not prove that the stepmother had made the agreement relied on.

[Ed. Note.—For other cases, see Wills, Dec. Dig. § 58.*]

4. WITNESSES (§ 414*)—IMPEACHMENT—CORROBORATION.

The rule that a witness who has been impeached may be sustained by proof of previous declarations in accord with his testimony applies only to declarations made by the witness before any dispute or litigation had arisen.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1287, 1288; Dec. Dig. § 414.*]

5. APPEAL AND ERROR (§ 1094*)—QUESTIONS REVIEWABLE—UNANIMOUS AFFIRMANCE OF APPELLATE DIVISION.

That certain justices of the Appellate Division dissented on a question of law from an order affirming a judgment of the trial court does not show that they concurred on questions of fact, so as to make the Appellate Division unanimous on the facts, and preclude the Court of Appeals from examining the evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4322-4352; Dec. Dig. § 1094.*]

Appeal from Supreme Court, Appellate Division, Fourth Department.

Action by Lillian B. Taylor and another against John B. Higgs, as administrator of Alma M. Taylor, deceased, and others. From a judgment of the Appellate Division (136 App. Div. 906, 119 N. Y. Supp. 1146) awarding a judgment for plaintiffs, defendants appeal. Reversed, and new trial granted.

Eugene M. Ashley, for appellants. William F. Canough, for respondents.

CULLEN, C. J. The action was brought against the heirs at law, administrators, and

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

next of kin of Alma M. Taylor to specifically enforce a contract alleged to have been made by the deceased whereby she promised upon her death to devise and bequeath to the plaintiffs all the property that she had received under the will of her late husband, Dr. Judson J. Taylor, the father of the plaintiffs. The Special Term decided in favor of the plaintiffs, and that decision has been affirmed at the Appellate Division by a divided court.

The circumstances of the case and the relations of the parties are as follows: In June, 1895, Dr. Judson J. Taylor, the father of the plaintiffs, married the defendants' intestate, Alma M. Robinson, at the city of Syracuse, where both the parties resided, and lived with her until his death on July 23, 1897. A short time prior to the marriage Alma M. Robinson obtained in the territory of Oklahoma a decree of divorce from her husband, William Robinson, on service of process by publication. So far as appears by the record, this decree was clearly void; the parties being residents of New York state, neither living in Oklahoma, and the defendant not appearing in the suit. Dr. Taylor, however, was aware of the defect in the divorce proceedings, and so the trial court has found. At the time of the marriage referred to, Dr. Taylor transferred and conveyed to the plaintiffs property to the value of at least \$15,000. The estate possessed by him at his death seems to have been less than \$20,000, of which by his will he gave to his wife, Alma, property worth between \$10,000 and \$11,000, about \$2,500 to each of his daughters, and some legacies or devises to other relatives and connections.

The claim of the plaintiffs is that, they being dissatisfied with the terms of the will and threatening to contest its probate, the widow, Alma, promised in consideration of their allowing the will to go to probate to leave to them on her decease all the property she had received from her husband. The evidence to establish this agreement is of a most unsatisfactory character. No objections had been filed to the probate of the will, nor does there seem any ground on which even a plausible contest might have been made. There is no claim that Dr. Taylor was in any way incompetent to make a will, and the trial court has found not only that he was of sound and disposing mind and memory, but that the execution of the will was not procured by reason of any undue influence.

[1] That the invalidity of Alma's divorce would not affect the validity of Dr. Taylor's testamentary dispositions seems clear. *Gelston v. Shields*, 78 N. Y. 275. It does not appear that the plaintiffs ever consulted counsel, but confined themselves to expressions of dissatisfaction with the provisions of their father's will. It is probably true that plaintiffs as heirs at law of their deceased father could have objected to the probate of the will, and the withdrawal of opposition

would afford some consideration for the support of a promise on behalf of their step-mother, still it is evident that in this case the consideration was of the most unsubstantial character. The testimony to establish the agreement contended for was that of Mrs. Beckham, a sister of Dr. Taylor, and Mrs. Treat, a sister of the plaintiffs' mother. Mrs. Beckham was a beneficiary under the doctor's will to the extent of some \$900, and Mrs. Treat's husband was also a beneficiary, but to what amount does not appear in the evidence. It would not be practicable to quote in detail the testimony of these witnesses. Mrs. Beckham seems to have carried on most of the negotiations on behalf of the plaintiffs. She testified that she commenced the conversation with Mrs. Taylor, at which the daughters were present, by saying: "Girls, I wish to know your decision in the matter before I return home. I shall remain true to my promise that I will will you all the property left by my brother to me upon my death." Then Mrs. Taylor said: "Now, girls, if you will drop this matter, give it no further thought and take no proceedings, be perfectly safe in the statement I made at the beginning, that at my death your father's property which was willed to me will be willed to you. That was a promise I made with your father"; and to this the girls assented. This is the most direct testimony of an agreement between the parties. Mrs. Treat's testimony is of the same general character. Much of the testimony consists of admissions by Mrs. Taylor. Other witnesses were produced to prove various statements by Mrs. Taylor of her intention to dispose of the property to the plaintiffs, but the unreliability of such testimony is made apparent by the evidence of one witness for the plaintiffs who states that Mrs. Taylor told her that she intended to remodel the homestead, and that it was to be so arranged that upon her death it should go to the plaintiff Lillian, but, if Lillian died first then it should go to herself—an agreement or plan entirely inconsistent with the alleged agreement that all the property obtained from her husband should go on her death to the two plaintiffs.

[2] In *Hamlin v. Stevens*, 177 N. Y. 39, 47, 69 N. E. 118, 120, Judge Vann, speaking for the court and referring to agreements of the character here sought to be enforced, said: "Contracts of the character in question have become so frequent of recent years as to cause alarm, and the courts have grown conservative as to the nature of the evidence required to establish them, and enforcing them when established, by specific performance. Such contracts are easily fabricated and hard to disprove, because the sole contracting party on one side is always dead when the question arises. * * * Such contracts should be in writing, and the writing should be produced, or, if ever based upon parol evidence, it should be given or corroborated in all substantial particulars by disin-

terested witnesses." In *Roseau v. Rouss*, 180 N. Y. 116, 120, 72 N. E. 916, 918, the same judge, again speaking for this court, said: "Thus the evidence relied upon to establish the contract is, first, the testimony of the mother, who tried to swear \$100,000 into the pocket of her own child; and, second, the testimony of witnesses who swear to the admissions of a dead man. The former is dangerous, the latter is weak, and neither should be acted upon without great caution. We have repeatedly held that such a contract must not only be certain and definite and founded upon an adequate consideration, but also that it must be established by the clearest and most convincing evidence." Tested by these rules it seems to me the plaintiffs did not establish their case.

[3] But, if I should err in this view, there is one plain error in the admission of evidence for which the judgment should be reversed, as it is apparent that the evidence so admitted influenced the decision of the trial court. After Mrs. Beckham had narrated her story of the transactions and conversations between the parties, the trial judge asked her, over the objection and exception of the defendants' counsel, whether she had made her will leaving to the plaintiffs the \$900 which she had received from her brother's estate. She answered in the affirmative. The incompetency of this testimony is clear. The witness could not corroborate her evidence by her own acts. There are certain cases in which, when a witness has been impeached, he may be sustained by showing previous declarations to the same effect as his testimony on the stand.

[4] The evidence admitted does not fall within any such rule, and the rule itself applies only to declarations made by the witness before any dispute or litigation has arisen. It does not appear when the witness made her will and at any time she was at liberty to change it. But chiefly no declaration of the witness that she intended to leave property to her nieces, nor any act of hers in conformity with such declaration, would tend to prove that the deceased had made a similar promise or agreement as to her property.

[5] The learned counsel for the respondents contends that this is a case of unanimous affirmance, and therefore we are precluded from examining the evidence. This view is erroneous. The order recites that two of the justices dissented upon the authority of *Hamlin v. Stevens*, supra. It is urged that this dissent was on a question of law. Assuming that the dissent was on a question of law, that would not at all aid the plaintiffs in their contention. That a judge dissents on a question of law does not show that he affirms the disposition on the questions of fact. But beyond this, the reference of the dissenting justices to *Hamlin*

v. Stevens clearly shows that their dissent was upon questions of fact.

The judgment should be reversed and a new trial granted, with costs to abide the event.

GRAY, HAIGHT, VANN, WERNER, and COLLIN, JJ., concur. HISCOCK, J., not voting.

Judgment reversed, etc.

(203 N. Y. 24.)

McKINLEY v. HESSEN.

(Court of Appeals of New York. April 25, 1911.)

1. APPEAL AND ERROR (§ 1091*)—REVIEW—INTERMEDIATE COURT DECISION—PRESUMPTIONS.

Where it does not appear from the order of reversal by the Appellate Division that the reversal was on the facts or law, it will be presumed on a further appeal to the Court of Appeals that the judgment was reversed on a question of law, limiting the inquiry on the subsequent appeal to the correctness of the conclusions of law from the facts found, as provided by Code Civ. Proc. § 1338.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4302-4311; Dec. Dig. § 1091.*]

2. SPECIFIC PERFORMANCE (§ 41*)—PAROL CONTRACT TO CONVEY LANDS—PART PERFORMANCE.

Plaintiff, desiring to purchase land for speculative purposes, and not desiring to have the title in his own name, defendant, his sister, orally agreed to take the property in her name, and to hold the same for plaintiff and dispose of it as he directed, and would execute deeds at plaintiff's direction, and pay him the proceeds. Plaintiff procured the land to be transferred to defendant, paid all the taxes, interest on a mortgage, insurance, and repairs to a house on the property. At no time did defendant make any claim of ownership prior to a disagreement, and on at least one occasion defendant executed a deed to a portion of the property to a purchaser, and turned the proceeds over to plaintiff. Held sufficient to show part performance, so as to take the contract out of the statute of frauds, and entitle plaintiff to specifically enforce the contract.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 120-123; Dec. Dig. § 41.*]

3. FRAUDS, STATUTE OF (§ 119*)—ORAL CONTRACTS—ENGINE OF FRAUD.

Equity will not permit the statute of frauds to be made an engine of fraud.

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. § 270; Dec. Dig. § 119.*]

Appeal from Supreme Court, Appellate Division, Second Department.

Action by James A. McKinley against Susan Hessen. Judgment (135 App. Div. 832, 120 N. Y. Supp. 257) for defendant, and plaintiff appeals. Reversed and remanded.

See, also, 137 App. Div. 902, 122 N. Y. Supp. 1135.

Alton B. Parker, for appellant. Almeth W. Hoff, for respondent.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes

GRAY, J. The action is to compel the specific performance of a parol agreement, whereby the defendant agreed to hold the title to certain real estate in trust for the plaintiff, and to convey the same to any person, or to him, as he should request. The answer set up the defenses of a denial of the agreement, of a claim that the plaintiff had purchased the premises and had caused the same to be conveyed to the defendant as a gift, and of the allegation that the agreement was void under the statute of frauds. The case was tried at a Special Term of the Supreme Court, and the plaintiff, upon findings made by the trial court, recovered a judgment, which directed the defendant to specifically perform the agreement by conveying to him the premises described and in question. Upon appeal to the Appellate Division, that court reversed the judgment, and from the order of reversal the plaintiff has appealed to this court.

[1] As it does not appear in the order that the reversal was upon the facts, it must be presumed that the judgment was not reversed upon a question of fact, but upon the law only. Code Civ. Proc. § 1338. This limits the inquiry to a consideration of whether, upon the decision upon the facts, the legal conclusion followed that the plaintiff was entitled to the equitable relief awarded, whether any material finding of fact was without evidence to support it, and whether any material error was committed, in the admission, or exclusion, of evidence.

[2] I think that the findings have support in the evidence, and I find no material error in the rulings upon the trial. There is left, therefore, but the one important question as to the correctness of the legal conclusion reached by the trial court. The findings establish the following facts: The plaintiff was unmarried, and with him had lived for some years the defendant, his sister, with her family. He was employed as the manager of a business, which closely confined him from early in the morning until late at night and disabled him from attending to outside matters. His health began to fail, and he feared the loss of his eyesight. His sister advised him to withdraw from business; but he told her that he was not in a position to do so. At the time, he was considering a speculative investment in real estate on Long Island, upon the advice of a friend in the real estate business. He informed the defendant of this, and that he did not wish to go on record as the owner of the property. Whereupon, on June 23, 1906, as the finding reads, "the plaintiff and the defendant entered into an oral agreement, to the effect that the plaintiff, in case he should purchase certain real estate at Bell Harbor, Queens county, New York, would pay the consideration therefor out of his own property and take title to the same in the name of the defendant, and that she would allow her

name to be so used, and that she would hold the legal title to such property as the plaintiff might so purchase, for the benefit of the plaintiff, and would dispose of it as and when he should direct, and that, in case he should at any time make a sale of any such property, she would execute a deed or deeds therefor at the plaintiff's direction, and would turn over to him all the moneys received by her on such conveyances." Three parcels of real estate were purchased between June 23 and August 11, 1906, in pursuance of the aforesaid agreement, at prices aggregating the sum of \$16,450, of which sum \$4,920 remained upon mortgage. The deeds were received and retained by the plaintiff. In December, 1907, the plaintiff sold one of the parcels for \$5,000, and, at his direction, the defendant executed a deed of conveyance to the purchaser. Upon receipt of the purchase price, she turned it over to him, and he applied it to his own use. He paid all of the taxes upon the properties, the interest upon the mortgage, and the insurance upon, and repairs to, a house upon one of the parcels, which they resided in, at times of the year. At no time did the defendant make any claim to the ownership of the real estate, or to the moneys realized upon the sale of the one parcel, prior to a disagreement, which was followed by this action; but, throughout the period mentioned, she referred to the plaintiff as the owner and acted as his representative. The trial court expressly refused to find, at the request of the defendant, that "the moneys so, as aforesaid, advanced by the plaintiff for the purchase of said property, were free and voluntary gifts to the defendant, his only sister, in consideration of natural love and affection for defendant and her children and of many years of faithful service and acts of kindness by her bestowed on him." He was in solvent circumstances, and he had personal reasons for not appearing of record as owner. A disagreement arose between the parties in August, 1908, not concerning the real estate, which resulted in the defendant declaring that "she did not have to make deeds of the property for the plaintiff," and in her refusing, upon his demand, to execute conveyances of the remaining parcels. The trial court, then, finding that the plaintiff had wholly performed the agreement on his part, and that the defendant had partly performed it on her part, reached the legal conclusion that the former was entitled to have judgment against the latter that she convey to him the real estate remaining unsold.

Upon the facts which I have now stated, and which, as the case comes to us, must be accepted as true, the question of law to be determined is whether they established such part performance of the parol agreement as to take the case out of the statute of frauds, and to justify a decree for its specific performance by the defendant. It was considered by the Appellate Division that the acts

relled upon did not show part performance, inasmuch as they were not, under the rule of the cases, "necessarily, referable to the alleged agreement and done in execution of it." It was thought that the facts were entirely consistent with a gift of the premises to the defendant for the purpose of a family abode. The opinion of the court is elaborate in its review of the facts, and, had the reversal been placed upon a question of fact by the order, the case would not be here. But that was not done, and, with the facts as they are found, I am brought to the conclusion that the judgment of the trial court was right. I am compelled to differ with the Appellate Division, not in the statement of the rule of law which governs; but in the view that the facts established do not come up to the requirement of the rule, which authorizes specific performance of an oral agreement for the conveyance of land. What the plaintiff claims is, not that the defendant practiced some fraud upon him in the inception of these transactions, but that, relying upon her promise, he entered into the agreement with her, and has so performed it on his part that to permit this defense now of the statute of frauds would be to enable her to perpetrate a fraud. The intervention of equity is asked to prevent the commission of fraud, and to relieve a situation which is irremediable at law.

[3] The policy of the law, which requires a contract relating to real estate to be reduced to writing and to be subscribed, for reasons founded on the fallibility of human memory, is not contravened by such intervention, in a case where the contract has not been made in conformity with the statute, if the parties have waived its protection, and the contract has been performed in part. It would be quite antagonistic to the spirit of a statute designed to prevent fraud, if it might be availed of to cover fraud. Therefore, it has been long the settled rule, in England, as here, that when a parol agreement for the conveyance of real estate, void by the statute of frauds, has been proved and part performance has been shown by acts of the party seeking relief, which could have been done with no other design than that of performance, if an action at law is not an adequate remedy, the agreement will be specifically enforced. In such a case, a court of equity acts upon the principle that, not to allow effect to the part performance, would be to allow the party permitting the acts to treat them as if the agreement had not been made. Where, by a refusal to execute the parol agreement, the other party, who has in part performed, cannot be placed in the same situation in which he was before such performance, then an irreparable injury is threatened and equity will intervene, upon the ground that it would be a fraud if the transaction were not completed. Phillips v. Thompson, 1 Johns. Ch. 131; Lowry v. Tew, 3 Barb. Ch. 407, 413; Malins v. Brown, 4

N. Y. 403; Wheeler v. Reynolds, 66 N. Y. 227. The difficulty has been in the application of the rule. Generally, the rule is that, not only the part performance should be of the agreement proved, but the acts claimed to constitute such must be unequivocal in their character, and must have reference only to the carrying out of the agreement. In Wheeler v. Reynolds, at page 231, supra, Judge Earl, following the authorities, laid down the rule as follows: "The acts should be so clear, certain, and definite in their object and design as to refer exclusively to a complete and perfect agreement, of which they are a part execution." In defining what facts will constitute such part performance as would justify a judgment for specific performance, the rule, as at present settled, is not, ordinarily, satisfied by mere proof of the payment of the purchase price of the land. Duncel v. Duncel, 141 N. Y. 427, 36 N. E. 405; Cooley v. Lobdell, 153 N. Y. 596, 601, 47 N. E. 783, 784. The reason for this is stated by Judge Vann in Cooley v. Lobdell, supra, as follows: "That as the purchase money can be recovered back in an action at law and the parties thus restored to their original position, the party paying is not injured, no fraud is perpetrated upon him by refusal to convey, and there is no occasion for a resort to equity." In that case the question of how far the making of improvements constituted part performance was considered, and it was held that, when they are made in reliance upon the oral agreement and are of a substantial nature, they become so connected with the subject-matter of the contract as to make refusal to perform unjust, and to estop a party from setting up the statute.

In this case there was much more done by the plaintiff than the payment of the purchase price of the land. Had that, however, been his principal, or sole, act, the case would still have been distinguished from those in which it was deemed insufficient. The plaintiff could not recover back the purchase moneys, which he had paid to the vendors of the land. They were third persons, as to whom no cause of action had survived the transaction of sale. Had this been a transaction where the defendant could be made liable, in an action at law, for the repayment of the moneys paid by the plaintiff, the limitation of the rule of part performance might possibly be applicable. But the plaintiff, in addition to paying for the land, paid its carrying charges, in taxes and insurance, and he paid for the repairs and for improvements. The facts exhibit a situation where such acts should, by every fair and reasonable intentment, be deemed to have been done with a view to the performance of the agreement. That is to say, the defendant, acting only for the plaintiff in taking and in holding the title for his benefit, the latter discharged the liability of the true owner by paying the price of the land and the cost of carrying

and improving it. There was a reason shown for the making of the agreement between the parties, in that the plaintiff, though desiring to enter into a land speculation, felt himself disabled by the exactions of the business of his employment and by falling health and vision. He had personal reasons for not wishing to appear of record as owner, in the apprehension of becoming liable to perform jury duty, and, upon advising with his sister, the agreement in question results. He was to buy certain real estate and to take title in her name. She agreed to hold the title for his benefit and to make conveyances, as he might sell the land, or might direct her. After the purchases were made, upon a sale of a parcel, she recognized his right to sell it and to receive the price; for she executed the deed at his direction and turned over the moneys to him. When he paid the carrying charges of the property and for the repairs upon it, were not the payments referable, unequivocally, to the agreement, and in recognition of his obligation towards the property as its real owner? Were not his acts and her acts in accord with the existence of their agreements? I think that it would be a reproach to equity, if its arm could not be effectively stretched out to redress the wrong, by compelling the defendant to complete the transaction by conveying the property to the plaintiff.

In *Jeremiah v. Pitcher*, 163 N. Y. 574, 57 N. E. 1113, we affirmed a judgment, though without opinion, in a case whose facts closely enough parallel those of the present case. There the plaintiff, a real estate dealer, whose wife had become insane, entered into an agreement with the defendant, his daughter, to take title to the property in dispute and to transfer the same to him, or to others, as he might direct. He purchased the property and had the conveyance made to her, and thereafter, he paid the taxes and made improvements. On his demand that she convey the property she refused to comply; whereupon he brought the action to establish a trust in his favor. In defense she pleaded the statute of frauds, and that the conveyance to her was a gift. The Appellate Division reversed a judgment of the trial court, adverse to the plaintiff, and ordered judgment in his favor, holding, in substance, that the case did not come within the statute of frauds, as it was "a parol agreement, fully performed on the part of the plaintiff." 26 App. Div. 407, 49 N. Y. Supp. 792. While the facts differed in the feature of the insane wife, whose condition embarrassed the plaintiff's dealings in real estate, yet the principle of the decision applies. As there was a reason in that case for putting the title to the property in the daughter's name, so in the present case there was a reason for putting it in the sister's name. Whether one reason be deemed stronger than the other is imma-

terial. The discretion of the court might competently be exercised for either, if satisfied of the fact. In *Canda v. Totten*, 157 N. Y. 281, 51 N. E. 989, land had been purchased by the defendant in his own name, under an oral agreement with the plaintiff to purchase it for, and to convey it to, her on receipt of the amount of the price paid. The action was brought to compel the defendant to convey to the plaintiff, and we held that she was entitled to recover on the theory of part performance of the agreement. That the plaintiff had performed on her part, in paying the amount of the purchase price, in making repairs and paying taxes, insurance, and mortgage interest meanwhile, were deemed to be facts which justified a court of equity in decreeing specific performance on the part of the defendant.

I think that this is a case, upon its facts, where to suffer the defense of the statute of frauds to prevail against the demand of the plaintiff would be to cover fraud, not to prevent it, and, for the reasons given, I advise that the order of the Appellate Division be reversed, and that the judgment of the Special Term be affirmed, with costs in both courts to the appellant.

CULLEN, C. J., and WERNER, WILLARD BARTLETT, HISCOCK, CHASE, and COLLIN, JJ., concur.

Order reversed, etc.

(202 N. Y. 72)

RAMSAY v. MILLER et al.

(Court of Appeals of New York. April 25, 1911.)

1. PRINCIPAL AND AGENT (§ 163*)—MUTUAL RIGHTS OF PARTIES—RATIFICATION.

One may ratify the acts of another purporting to be made on his behalf, whether that other is an agent exceeding his authority or no agent at all.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 618-621; Dec. Dig. § 163.*]

2. TRIAL (§§ 163, 174*)—DIRECTION OF VERDICT.

A motion for a nonsuit cannot be sustained on account of a defect in a formal proof which might have been obviated unless the motion points out specifically the defect; and this rule applies to a motion for the direction of a verdict.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 371, 398; Dec. Dig. §§ 163, 174.*]

3. PRINCIPAL AND AGENT (§ 174*)—RATIFICATION—QUESTIONS FOR JURY.

Whether a customer of stockbrokers had ratified unauthorized orders for the purchase and sale of stocks by their office manager held, under the evidence, to be a question for the jury.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. § 725; Dec. Dig. § 174.*]

Werner and Collin, JJ., dissenting.

Appeal from Supreme Court, Appellate Division, First Department.

Action by Arthur T. Ramsay against Abraham P. Miller and others. From a judgment of the Appellate Division, First Department (135 App. Div. 503, 120 N. Y. Supp. 523), affirming a judgment entered on a directed verdict for plaintiff, defendants appeal. Reversed.

Benjamin N. Cardozo, for appellants. William W. Mumford, for respondent.

CULLEN, C. J. [1] The defendants were stockbrokers in the city of New York, having a branch office in Washington, of which one Ludwig was the manager. In January, 1907, the plaintiff commenced to speculate in stocks through the Washington branch, depositing the sum of \$1,000 to which were subsequently added the further sums of \$3,000 and \$2,000. On July 6th the plaintiff ordered the sale of all the stocks the defendants were carrying for him, and that his account be closed. On the 8th he received a message from Ludwig's wife stating that Ludwig was at home ill, and the plaintiff went to see him. Ludwig then told the plaintiff that his money was all gone, that he, Ludwig, had not given the defendants orders for the purchase of the stock the plaintiff had ordered, but for other stocks not directed by the plaintiff, and then said to the plaintiff: "If you will just be quiet and will not do anything about it, I will readjust this matter, and pay you your money." Ludwig's wife said to the plaintiff: "Mr. Ramsay, this house belongs to me, and you know that it is worth \$4,000 or \$5,000, and I will deed it to you to pay back the money that has been wrongfully used of yours." She also said that her brother had money, and she would send for him and they would adjust this matter. Finally, the plaintiff told Ludwig that he would wait for an adjustment to be made. On cross-examination he testified that Ludwig and his wife stated to him that, if he would be quiet and would not do anything about it, Ludwig would adjust the matter and save the plaintiff his money, and that the plaintiff told Ludwig that he would keep quiet if he would adjust the matter, as he promised. Ludwig subsequently gave to the plaintiff as security a policy of life insurance and also some shares of mining stock. These were returned to Ludwig in the winter of 1907, or in the early part of 1908. After this conversation, the plaintiff did not tell the defendants anything about the transaction until November 8, 1907, when he first communicated with the defendants about the wrong that Ludwig had done, and this action was commenced on February 5, 1908. The answer of the defendants was to the effect that the plaintiff's deposit had been exhausted except a balance of \$11.02 by losses on purchases and sales made for his account, and by payments made to him of money. The defendants rendered the plaintiff a statement of his accounts

showing the various transactions which they claimed to have been effected on his behalf. This account the plaintiff repudiated. On the trial it was proved by the plaintiff's testimony, which was not contradicted, that nearly all the purchases and sales assumed to be made by the defendants on his account were not authorized by him, but ordered by Ludwig without the plaintiff's authority. Excluding the unauthorized transactions, the balance due the plaintiff was the sum of \$5,860 and interest. Of the items charged against the plaintiff in defendants' account \$1,950 was drawn by Ludwig, by his checks as manager, on the defendants' bank account in Washington and appropriated to his own use. The defendants, after having requested the direction of a verdict against them for the balance of \$11.02, which was denied, asked the court to submit the case to the jury on the question of ratification. This request was also denied, to which the defendants excepted, and the court directed a verdict in the plaintiff's favor for the full amount claimed and interest.

The question in this case is, Was the evidence sufficient to require the submission to the jury of the question whether the plaintiff had not ratified Ludwig's unauthorized orders for the purchase and sale of stocks? As to the \$1,950 drawn by Ludwig from defendants' bank account and appropriated by him, we see no theory on which the charge of that sum against the plaintiff can be sustained. But the remainder of the account rendered by the defendants presents a very different question. It is true that Ludwig was the defendants' agent, not that of the plaintiff. But this fact did not necessarily preclude the plaintiff from ratifying his acts. One may ratify the acts of another purporting to be made on his behalf whether that other is an agent exceeding his authority or no agent at all. *Huffcut on Agency*, § 30. This principle is recognized by this court in *Hamlin v. Sears*, 82 N. Y. 327, where Judge Earl said: "The general doctrine that one may, by affirmative acts, and even by silence, ratify the acts of another who has assumed to act as his agent, is not disputed. It is illustrated by many cases to be found in the books, and set forth by all the text-writers upon the law of agency [citing authorities]. But the doctrine properly applies only to cases where one has assumed to act as agent for another, and then a subsequent ratification is equivalent to an original authority." 82 N. Y. 330. It is urged on this appeal that there was no proof that the sales and purchases of stocks charged against the plaintiff were directed by Ludwig ostensibly on plaintiff's account. No such point, however, was made on the trial, which seems to have proceeded on the assumption that the transactions were so directed. Proof of the sales and purchases made in the account was rendered unnecessary by the stipulation of the

parties that the transactions had actually been made, reserving, however, the plaintiff's repudiation of the defendants' authority to make them on his account. Had the point now raised been suggested on the trial, the defendants could have made further proof.

[2] It is settled practice that a motion for a nonsuit cannot be sustained on account of a defect in formal proof which might have been obviated, unless the motion points out specifically the defect (*Binsse v. Wood*, 37 N. Y. 526; *Gerdling v. Haskin*, 141 N. Y. 514, 36 N. E. 601), and the rule must be the same on a motion for the direction of a verdict.

[3] The final question in the case is, therefore, whether the evidence of ratification was such as to require its submission to the jury. We think it was. Ratification is based on assent, which may be either express or implied. If the principal adopts the acts of the agent, it is the same as if he had originally conferred authority upon the agent. While silence alone in many cases may be insufficient to constitute ratification, still it is competent evidence for the purpose. In this case there was proof that the plaintiff not only remained silent for some months, but that he agreed to remain silent, and that he received from Ludwig certain securities. If, in consideration of the agreement of Ludwig and his wife and of the securities turned over to him, he agreed to accept the purchases and sales ordered by Ludwig as authorized and to look to him for the payment of the losses thereon, then there was a ratification of Ludwig's acts. Whether this was the fair import of the negotiations and transactions between the plaintiff and Ludwig was a question of fact to be determined by the jury.

The judgment should be reversed, and a new trial granted, costs to abide the event.

GRAY, VANN, and HISCOCK, JJ., concur.
WERNER and COLLIN, JJ., dissent.

Judgment reversed, etc.

(250 Ill. 27.)

FINKELSTEIN v. LYONS.

(Supreme Court of Illinois. April 19, 1911.)

APPEAL AND ERROR (§ 439*)—EFFECT OF APPEAL—POWERS OF TRIAL COURT—ORDER APPROVING APPEAL BOND—VACATION.

Since judgments and orders are under the court's control during the term in which they are entered, and may be set aside, the court has power to set aside an order approving an appeal bond at the term at which the judgment was rendered.

[Ed. Note.—For other cases, see *Appeal and Error*, Dec. Dig. § 439.*]

Appeal from Appellate Court, First District, on Appeal from Superior Court, Cook County; Ben M. Smith, Judge.

Action by Sadie Finkelstein, by Samuel

Finkelstein, against Samuel Lyons. From an order of the Appellate Court, denying a motion to reconsider its order striking the transcript, and from a judgment against plaintiff for costs, plaintiff appeals. Judgment affirmed.

McGillvray, Eames & Maclean and Warren Pease, for appellant. David K. Tone and Bernard J. Brown, for appellee.

FARMER, J. Appellant sued appellee in the superior court of Cook county for damages for criminal assault. A verdict was returned in her favor June 15, 1910, and on July 15, 1910, after overruling a motion by appellee for a new trial, the court rendered judgment on the verdict. Appellee prayed an appeal to the Appellate Court for the First District, which was granted upon condition that he file an appeal bond within 30 days in the sum of \$17,500, bill of exceptions to be filed within 60 days. On July 16th appellee presented his appeal bond, which was approved by the court and filed. On July 28th, which was during the term at which the judgment was rendered, appellee filed motions in the superior court to set aside the approval of the appeal bond, to set aside the order denying the motion for a new trial, and to set aside the judgment and grant a new trial on the ground of newly discovered evidence. These motions were continued to the August term, during which term they were allowed, the order approving the appeal bond vacated, the judgment set aside, and a new trial awarded. Appellant objected to the court considering or allowing these motions, and on the 20th day of October, 1910, she filed in the Appellate Court for the First District a transcript of the record of the superior court and moved to dismiss the appeal, with statutory damages, on the ground that the superior court had no jurisdiction to make any order in the case after the appeal bond was approved and filed. The Appellate Court struck the transcript from the files, and appellant thereupon entered her motion for a reconsideration by the Appellate Court of the order striking the transcript from the files and refusing to dismiss the appeal, with damages. This motion was also denied by the Appellate Court, and a judgment for costs entered against appellant. The Appellate Court granted a certificate of importance, and she has prosecuted this appeal from the order and judgment of the Appellate Court.

The question raised by this appeal is whether the superior court had jurisdiction and authority to entertain a motion to set aside the order approving the appeal bond and grant a new trial at the term at which the judgment was entered. While the orders setting aside the approval of the appeal bond and granting a new trial were not

made at the term at which the judgment was entered, the motions were filed at that term and continued to a subsequent term. No question is raised as to the authority of the court to continue the motions and act upon them at a subsequent term, if it had authority to entertain the motions at the term at which the judgment was entered. Appellant's only contention is that, when the appeal was perfected by the filing and approval of the bond, the case was thereafter beyond the jurisdiction of the superior court and was pending in the Appellate Court, and the superior court had no authority or jurisdiction to make any order whatever in the case.

Appellant relies upon decisions of this court, in which it was said that after the approval of an appeal bond the case would be considered as pending in the court to which the appeal was taken, and under those conditions it would be beyond the power and jurisdiction of the trial court to enter any order in the case affecting the rights of the parties. This rule was announced in view of the fact that the appeal had been perfected and was still in force, and, of course, under such circumstances it would not be within the jurisdiction of the trial court to make any further order or take further steps in the case. The decisions of this court relied on by appellant are *Owens v. McKethe*, 5 Gilman, 79, *Reynolds v. Perry*, 11 Ill. 534, *Smith v. Chytraus*, 152 Ill. 664, 38 N. E. 911, *Cowan v. Curran*, 216 Ill. 593, 75 N. E. 322, and *Merrifield v. Cottage Piano & Organ Co.*, 238 Ill. 526, 87 N. E. 379, 128 Am. St. Rep. 148. An examination of those cases will show that the question here raised was not involved in any of them.

In *Briggs v. Dunne*, 163 Ill. 36, 46 N. E. 628, the precise question before us was involved, and determined contrary to the contention of appellant. In that case a final decree was entered, an appeal prayed and allowed, and an appeal bond filed and approved. Afterwards, and during the same term of the court, appellee entered a motion to vacate the order approving the appeal bond on the ground that the sureties were insolvent and the bond worthless. The appellants resisted the motion, but it was allowed and an order entered vacating the approval of the bond, and a further order was entered requiring a good and sufficient appeal bond to be filed within five days. This latter order was not complied with. All this appeared from the transcript of the record filed by appellants in the Supreme Court, and it was contended by the appellants there, as it is by the appellant here, that when the appeal bond was filed and approved the case was thereafter to be considered as pending in the Supreme Court, and the circuit court had no jurisdiction to make the order vacating the approval of the appeal bond

and requiring another bond to be filed. *Owens v. McKethe*, supra, and *Reynolds v. Perry*, supra, were relied on by appellants there in support of their contention; but this court held that the circuit court had authority to entertain the motion to vacate the order approving the appeal bond at the term at which the decree was entered and the bond approved. The court said (163 Ill. 38, 46 N. E. 628): "It is a familiar rule, and one well understood, that a circuit court may, upon a proper showing, during the term at which a judgment or decree is rendered, modify or set aside such judgment or decree. In other words, during the term of court the court has free power and control over its orders and judgments, and they may be modified or set aside upon a proper showing, as justice may require. If the court has the power to vacate a judgment or decree during the term, it is plain that the order vacating the judgment approving the bond was one within the jurisdiction of the court, and after that order was entered appellants' appeal was at an end, unless a new bond should be filed within the time limited by the court. As that was not done, the appeal is not properly here, and the motion to dismiss the appeal will be allowed."

The *Briggs* Case is decisive of the one before us. Appellant admits that it is in point, but insists it is not in harmony with previous and subsequent decisions, and should not control the decision of this case. We find no inconsistency between the *Briggs* Case and the cases relied upon by appellant, nor do we see any ground for questioning the soundness of the rule announced in the *Briggs* Case. It has always been held in this state that the orders and judgments of a court are under its control during the term at which they are entered, and may be set aside during the term. If the court may set aside a judgment during the term at which it was rendered, we see no reason why it may not set aside an order approving an appeal bond also. It would, of course, be necessary to vacate the order approving the bond before the judgment could be set aside; for until that was done the case would, as said in the cases relied upon by appellant, be considered as removed from the jurisdiction of the trial court to the court to which the appeal was taken. Here the court proceeded properly by first vacating the order approving the appeal bond. That the court had authority to make the order that it did make is settled by the *Briggs* Case. Whether it erred in the exercise of that authority and jurisdiction can only be determined after the case is disposed of and final judgment rendered in the superior court.

The judgment of the Appellate Court is affirmed.

Judgment affirmed.

(250 Ill. 32)

HAMMOND v. GLOS et al.

(Supreme Court of Illinois. April 19, 1911.)

1. RECORDS (§ 9*)—REGISTRATION OF LAND TITLES—EVIDENCE—ABSTRACT OF TITLE.

Under Hurd's Rev. St. 1909, c. 30, § 61, on the subject of registration of land titles, providing that the examiner may receive in evidence any abstract of title or certified copy made in the ordinary course of business by makers of abstracts, an uncertified copy of the copy of an abstract is not admissible before an examiner, even though the first copy was properly certified.

[Ed. Note.—For other cases, see Records, Dec. Dig. § 9.*]

2. RECORDS (§ 9*)—REGISTRATION OF LAND TITLES—EVIDENCE—ABSTRACT OF TITLE.

Under the direct provisions of Hurd's Rev. St. 1909, c. 30, § 61, abstracts of title made by an abstract company and those made by the recorder in the regular course of business are admissible in a proceeding to register the title of land.

[Ed. Note.—For other cases, see Records, Dec. Dig. § 9.*]

3. RECORDS (§ 9*)—REGISTRATION OF LAND TITLES—PROCEEDINGS—DECREE.

In a proceeding to register the title of land upon which there had been a tax deed, a decree that the tax deed should be set aside as a cloud upon title, on condition that the owner pay to the holder of the tax deed the amount found due for interest and principal within 30 days from the entry of the decree, and that the title be listed forthwith, is improper; for under it the owner could transfer the property during the days, to the prejudice of the holder of the tax title, leaving him without security.

[Ed. Note.—For other cases, see Records, Dec. Dig. § 9.*]

4. COSTS (§ 256*)—ON APPEAL—EXPENSES IN MAKING THE RECORD.

Where defendants in a proceeding to register the title of land filed three separate answers and three sets of exceptions to the master's report, and took three separate appeals, and united them all in the appellate court, unnecessary costs were incurred, for which they are liable.

[Ed. Note.—For other cases, see Costs, Cent. Dig. §§ 968-971; Dec. Dig. § 256.*]

Appeal from Circuit Court, Cook County; John Gibbons, Judge.

Application by Harold E. Hammond to register his title to certain land. Jacob Glos and others answered, and denied the applicant's title. From a decree for the applicant, defendants appeal. Reversed and remanded.

John R. O'Connor, for appellants. Victor M. Harding, for appellee.

HAND, J. This was an application filed by the appellee in the circuit court of Cook county to register his title under the act concerning land titles, commonly known as the "Torrens Law," to the S. ½ of the S. W. ¼ of the S. W. ¼ of section 30, township 37 N., range 15 E. of the third principal meridian (excepting railroad right of way), being 18.214 acres, more or less, in Cook county, Ill. It was averred that the appellants held a tax deed to said premises. The appellants filed answers, in which they de-

nied title in the appellee, and urged that the act under which the title was sought to be registered was unconstitutional. The case was referred to an examiner of titles, who filed a report finding that the title in fee to said premises was in the appellee, that the premises were vacant and unoccupied, that the tax deed held thereon by the appellants, or through which they claimed title, was void, and recommended that such tax deed be canceled, upon the payment to the appellants of the sum of \$416, and that the appellee have his title registered. Thereupon the court entered a decree that the tax deed held by the appellants, or through which they claimed title, be set aside, that within 30 days the appellee pay to the appellants the sum of \$416, and that in default of such payment the application should stand dismissed, at the cost of the appellee, and that the title of the appellee be registered forthwith; and this appeal has been prosecuted to reverse said decree.

The appellants concede that this court has held the Torrens law, as amended, constitutional, and make no contention on that branch of the case. *Waugh v. Glos*, 246 Ill. 604, 92 N. E. 974; *Culver v. Waters*, 248 Ill. 163, 93 N. E. 747. Two questions, only, are argued in the briefs filed in this court.

It is first contended that no proper foundation was laid for the introduction in evidence of the abstract of title upon which the appellee relied to show title in himself. The section of the statute authorizing the introduction of abstracts of title in evidence in this class of cases reads, in part, as follows: "The examiner may receive in evidence any abstract of title or certified copy thereof, made in the ordinary course of business by makers of abstracts; but the same shall not be held as more than prima facie evidence of title, and any part or parts thereof may be controverted by other competent proofs." Hurd's Stat. 1909, § 18, p. 549.

[1] The abstract of title admitted in evidence by the examiner consisted of three parts: (1) An abstract showing chain of title from the United States in 1847 to November 28, 1881, designated "a true copy," and signed, "Handy & Co.," and "Haddock, Vallette & Rickcords"; (2) a continuation from November 28, 1881, to January 16, 1902, signed, "Chicago Title & Trust Company, by Chas. R. Dalrymple, Ass't Sec'y"; (3) a continuation from January 16, 1902, to May 26, 1909, signed, "Abel Davis, Recorder." Charles R. Dalrymple testified his company furnished the parts of the abstract signed by Handy & Co., Haddock, Vallette & Rickcords, and the Chicago Title & Trust Company, by Charles R. Dalrymple, assistant secretary; that the part signed by Handy & Co. and Haddock, Vallette & Rickcords was made by Handy & Co., and thereafter copied, including the signature of Handy &

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Co., by Haddock, Vallette & Rickcords, and then signed by Haddock, Vallette & Rickcords, and that the copy introduced in evidence was prepared by his company, although not certified, from the copy signed by Handy & Co. and Haddock, Vallette & Rickcords. This part of the abstract was, therefore, at most, only a copy of a copy; the last copy not being certified. The statute provides for the admission of a "certified copy," but clearly not for the admission of an uncertified copy of a copy, even though the first copy was properly certified. We think, therefore, the part of the abstract signed by Handy & Co. and Haddock, Vallette & Rickcords, which was admitted in evidence, was not an original abstract, nor was it so certified as to entitle it to admission in evidence as a certified copy.

[2] Mr. Dalrymple further testified he had been actively engaged in making abstracts in the city of Chicago for 15 years, and that the Chicago Title & Trust Company was engaged in making abstracts of title, and his testimony shows that the first continuation of the abstract was made in the ordinary course of business by the Chicago Title & Trust Company under his supervision and direction, and was duly signed by the Chicago Title & Trust Company, by himself, as assistant secretary. J. G. Norris testified he was an employé in the recorder's office of Cook county, and his testimony shows that the second continuation of the abstract was made in the recorder's office of Cook county under his supervision and direction, in the ordinary course of business, and was signed by the recorder. We think both continuations were properly admitted in evidence. *Waugh v. Glos*, supra; *Culver v. Waters*, supra.

[3] The decree entered in this case provides that the tax deed held by the appellants, or under which they claim title, be set aside as a cloud upon the title of the appellee, upon condition that appellee pay to the holder of the tax deed the amount found to be due for principal and interest and costs within 30 days from the entry of the decree, and that in default thereof the application be dismissed, at the cost of the appellee, and that the title of the appellee be registered forthwith. A decree similar to this in *Mihalik v. Glos*, 247 Ill. 597, 93 N. E. 372, was reversed on the ground that the rights of the defendants were not properly protected by the decree, in this: That, during the 30 days provided for the payment of the amount decreed to be paid defendants, complainants might transfer the property to the injury of the defendants. To the same effect is *Cregar v. Spitzer*, 244 Ill. 208, 91 N. E. 418. We are unable to distinguish the decree entered in this case from the decrees in those cases.

[4] The appellants have padded this record by filing three separate answers and three sets of exceptions to the examiner's report, and have prayed separate appeals, filed separate appeal bonds, and separately assigned error, and then in this court treated the proceeding as one appeal. We think by this method of procedure unnecessary costs were made in preparing the record for removing the case to this court, which costs should be paid by the appellants.

The decree of the circuit court will be reversed, and the cause will be remanded to that court for further proceedings in accordance with the views herein expressed; the appellants to pay one-half and the appellee one-half of the costs incurred by this appeal.

Reversed and remanded.

(350 Ill. 36)

BOLLES et al. v. PRINCE et al.

(Supreme Court of Illinois. April 19, 1911.)

1. STATUTES (§ 125*)—TITLE—SUBJECT—MATTER.

The city election act (Hurd's Rev. St. 1909, c. 46, §§ 155-287d), entitled "An act regulating the holding of elections and declaring the result thereof in cities and villages and incorporated towns in this state," in so far as it controls the expenses of town elections, is not objectionable as including a subject not within the title of the act.

[Ed. Note.—For other cases, see Statutes, Dec. Dig. § 125.*]

2. TOWNS (§ 28*)—ELECTIONS—STATUTES—"ELECTION IN A CITY."

The city election act (Hurd's Rev. St. 1909, c. 46, §§ 155-287d), regulating elections in cities, includes town elections, so far as the territory of the town is within the boundaries of the city, since to that extent the joint election is an "election in a city."

[Ed. Note.—For other cases, see Towns, Dec. Dig. § 28.*]

3. TOWNS (§ 43*)—ELECTIONS—EXPENSES—STATUTES.

The city election act (Hurd's Rev. St. 1909, c. 46, §§ 155-287d) is not violative of Const. art. 9, §§ 9, 10, prohibiting the imposition of taxes on a municipal corporation, except by its corporate authorities and for corporate purposes, in that expenses incurred by election commissioners in a township election are imposed on the township; it being a public corporation, existing only for public purposes connected with the state government and its revenues, in the absence of an express constitutional restriction, subject to legislative control.

[Ed. Note.—For other cases, see Towns, Dec. Dig. § 43.*]

4. TOWNS (§ 43*)—TOWNSHIP ELECTIONS—CITY ELECTION ACT—JUDGES AND CLERKS—PAYMENT.

The city election act (Hurd's Rev. St. 1909, c. 46, §§ 155-287d) requires the county to pay the salaries of the election commissioners and chief clerks, and the city to pay all expenses incurred by the board of election commissioners, and declares that the judges and clerks of the election shall be allowed \$5 a day paid in all city elections by the city, and all state and county elections by the county, but no provision is made as to the corporation's liability to pay them in case of a township election. *Held* that, where a township election was

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

held in a township containing a city that had adopted such act, the township was liable for the pay of the judges and clerks, but was not liable for the rent of places to hold the election, or for printing and miscellaneous expenses, such expenses incurred by the commissioners being payable by the city; nor was the township liable for the compensation of judges and clerks when township officers were elected at a city election, the city being required to pay for their services under such circumstances, by section 284.

[Ed. Note.—For other cases, see Towns, Dec. Dig. § 43.*]

Appeal from Circuit Court, Vermillion County; W. B. Scholfield, Judge.

Mandamus on petition of H. H. Bolles and others against William Prince and others. A demurrer to the petition was sustained, and the petition dismissed, and petitioners appeal. Reversed and remanded, with directions.

I. A. Love and J. B. Mann, for appellants. Rearick & Meeks, for appellees.

DUNN, J. The city of Danville adopted the city election act (Hurd's St. 1909, p. 984), and the first election held under its provisions was the township election on April 5, 1910. The city of Danville includes a part of the territory of the town of Danville. After the election the board of election commissioners presented to the board of town auditors of the town of Danville a bill for the expenses of conducting the registration and election in that part of the city within the town of Danville. The bill included the compensation of the judges and clerks of election, \$2,040; rent of places for registration and election, \$252; printing and miscellaneous items, \$429.51. The board of town auditors refused to audit or allow the bill, for the reason stated that "an uncertainty exists as to the legal liability of the township therefor." Thereupon a petition for a mandamus against the board of town auditors to meet, audit and allow the bill and the claims of the petitioners was filed in the circuit court. A demurrer was sustained, the petition was dismissed, and the petitioners appeal.

There were four petitioners, one a judge of election, one a clerk of election, one who furnished a place for the election, and one who furnished printing and stationery. The demurrer raised several constitutional objections to the city election act, most of which are not insisted upon here, and would, in any event, be unavailing, in view of the decisions in *People v. Hoffman*, 116 Ill. 587, 5 N. E. 596, 8 N. E. 788, 56 Am. Rep. 793, *Wetherell v. Devine*, 116 Ill. 681, 6 N. E. 24, and *People v. Wanek*, 241 Ill. 529, 89 N. E. 708. [1] It is, however, insisted that, if the act controls the expenses of town elections, it includes a subject-matter not mentioned in the title, which is, "An act regulating the holding of elections and declaring the result thereof in

cities, villages and incorporated towns in this state." The expense of holding an election in the city and declaring the result thereof, even though it should be an election of town officers, is within the title. [2] The town election, so far as that part of the territory of the town within the boundaries of the city is concerned, is an election in a city.

[3] It is insisted that if the expenses incurred by the election commissioners in the township election, and the registration therefor, are imposed upon the township, the act violates sections 9 and 10 of article 9 of the Constitution, which prohibit the imposition of taxes upon a municipal corporation, except by its corporate authorities and for its corporate purposes. It was stated in *Wetherell v. Devine*, supra, that those sections have no reference to counties, but relate to and regulate the taxes for cities, towns, and villages. The reasoning of that case applies with equal force to a township as to a county, and the power of the Legislature over the revenues of a township is equally as extensive as over the revenues of a county. A township, like a county, is a public corporation, which exists only for public purposes connected with the administration of the state government, and it and its revenues are alike, when no express constitutional restriction is found to the contrary, subject to legislative control, so that its property is not diverted from the uses and objects for which it was given or obtained. *Marion County v. Lear*, 108 Ill. 843; *Wilson v. Board of Trustees*, 138 Ill. 443, 27 N. E. 203; *People v. Bowman*, 247 Ill. 276, 93 N. E. 244. The Legislature, having control of the funds of the township, was authorized to require the payment of the expenses of the township election by the township. The cost of the election is greater because of the larger and denser population of the city. The city received the benefit of the registration in the city election, and the county also will be benefited by it. The Legislature had the authority to make an apportionment of the cost among the county, the city, and the township, and require each to bear its portion. Article 7 of the act is devoted to this purpose. The county is required to pay the salaries of the election commissioners and chief clerks. The city is required to pay all expenses incurred by the board of election commissioners. The judges and clerks of election are directed to be allowed and paid \$5 a day—in all city elections by the city, in state and county elections by the county. From what source the judges and clerks of a township election are to receive their pay is not expressly declared. It was not expressly declared, either before or after the enactment of the city election act. Before that act the judges and clerks of state and county elections were directed to be paid out of the county treasury. Rev. St. 1874, c. 46, § 75.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

[4] Though it was not expressly so provided, the judges and clerks of township elections have uniformly received their pay, at the rate provided by the general election law, from the township—the municipality to which they rendered service. The city election act has declared that the judges and clerks of election shall be paid. It has fixed the amount of their compensation. They are essential to the conduct of a township election. In the absence of any other provision of law, the township is under obligation to pay them. The township is not, however, liable for the rent of the places of holding the election, or the printing and miscellaneous expenses. These were expenses incurred by the commissioners required to be paid by the city. Nor is the township liable for the compensation of the judges and clerks of election when township officers are elected at a city election; for it is expressly provided by section 4 of article 7 of the act that the city shall pay their compensation in such case.

The judgment will be reversed, and the cause remanded to the circuit court, with directions to overrule the demurrer.

Reversed and remanded, with directions.

(250 Ill. 40.)

BECKER v. ILLINOIS CENT. R. CO.

(Supreme Court of Illinois. April 19, 1911.)
GARNISHMENT (§ 237*)—FOREIGN JUDGMENT—CONCLUSIVENESS.

In Missouri, where his wages were not exempt, action was commenced against one, and his wages garnished. In Illinois, his residence, where his wages were exempt, he thereafter commenced action therefor against his employer in a justice court, and obtained judgment before that in Missouri against the employer as garnishee. *Held*, the status of the debt for wages as exempt was thereby fixed, as against the subsequent judgment in Missouri for the same debt, and was not changed by the employer's voluntary act of appealing to the circuit court from the justice, so that its payment of the Missouri judgment was not a good defense in the circuit court.

[Ed. Note.—For other cases, see Garnishment, Cent. Dig. § 439; Dec. Dig. § 237.*]

Appeal from Appellate Court, Fourth District, on Appeal from Circuit Court, Marion County; J. C. McBride, Judge.

Action by C. H. Becker against the Illinois Central Railroad Company. Judgment for plaintiff was affirmed by the Appellate Court (158 Ill. App. 520), and defendant appeals on a certificate of importance. Affirmed.

W. W. Barr and Charles E. Feirich (W. S. Horton, of counsel), for appellant. C. F. Dew and A. D. Rodenberg, for appellee.

CARTWRIGHT, J. The appellee, George H. Becker, the head of a family residing with the same in this state, was employed by appellant, the Illinois Central Railroad Company, as a brakeman on its line between

Centralia and Mounds, and earned wages which were exempt from garnishment by virtue of section 14 of the garnishment act (Hurd's Rev. St. 1908, c. 62). De Bower, Chaplin & Co., of Chicago, claiming to be a creditor of appellee to the amount of \$32, assigned the account to N. B. Miller, of Kansas City, Mo., and on July 9, 1909, Miller commenced a suit in attachment against appellee before a justice of the peace in Kansas City. The writ of attachment was returnable on July 20, 1909, and was returned on that day "Not found" as to appellee, but served on July 10, 1909, on the appellant, as garnishee. On July 17, 1909, appellee demanded payment of his wages, which demand was refused on the ground the garnishment proceeding had been begun in Missouri. On the same day appellee made and delivered to appellant an affidavit in compliance with the provisions of the said section of the garnishment act, which requires an employer, upon the making and delivery of the same, to pay the wage earner exempt wages, notwithstanding the service of any writ of garnishment upon the employer. The demand was ignored by appellant, and appellee brought this suit on July 30, 1909, against appellant for his exempt wages before a justice of the peace of Marion county. On July 20, 1909, the justice of the peace in Kansas City continued the attachment suit to July 30, 1909. On July 23, 1909, before the justice had obtained jurisdiction of appellee or appellant was required by law to make any answer, it filed its answer as garnishee, stating that it was indebted to appellee in the sum of \$56.72 on account of wages, which were exempt under the law of this state; that the sum demanded by Miller was less than \$200; that no judgment had been recovered against the appellee; and that under the laws of the state of Missouri the writ of attachment and garnishment notice were null and void; and appellant moved to dismiss the action against it. On July 30, 1909, the date to which the attachment suit had been continued, an order was made for publication to appellee, and the cause was again continued until August 20th. The summons issued by the justice of the peace in this state was returnable on August 6, 1909, and was served on the day it was issued. On the return day the parties appeared, and judgment was rendered in favor of appellee, against appellant, for \$56.68 and costs, including an attorney's fee of \$5. Afterward, on August 30, 1909, proof of publication of notice to appellee was made in the justice's court in Missouri, and the justice overruled the motion of appellant to dismiss as to it, and also the claim of exemption, and rendered judgment against appellant for \$32 and costs. Appellant paid that judgment, and appealed from the judgment

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

of the justice of the peace in this state to the circuit court of Marion county, where the cause was tried by the court without a jury. The sole defense offered was the proceeding before the justice of the peace in Missouri, and the court received evidence of that proceeding, but refused to hold propositions that it was a good defense to the claim of appellee for the amount paid, and rendered judgment for \$56.68 and costs. The Appellate Court for the Fourth District affirmed the judgment, and granted a certificate of importance and an appeal to this court.

In the case of *Lancashire Ins. Co. v. Corbetts*, 165 Ill. 592, 46 N. E. 631, 36 L. R. A. 640, 56 Am. St. Rep. 275, a suit in attachment was brought by Wilson Bros. & Co. in the circuit court of Cook county against Corbetts, a resident of Wisconsin, and the insurance company was summoned as garnishee. Afterward Dowling, another creditor of Corbetts, instituted garnishment proceedings in Wisconsin against the insurance company on the same debt owing to Corbetts. Although the suit in this state was instituted first, a judgment was first rendered by the Wisconsin court, and that judgment was paid by the insurance company. A judgment was afterward rendered by the circuit court of Cook county against the insurance company, and was affirmed by the Appellate Court for the First District; but it was reversed by this court. There was a very full consideration of the law and review of the decisions, and the law of this state was settled on the questions involved. We disagreed with the doctrine maintained by the Supreme Court of Wisconsin that the jurisdiction in garnishment proceedings is dependent upon the situs of the debt, which, so far as so intangible a thing as a debt can be said to have a situs, is at the domicile of the creditor, and held that the question of jurisdiction depends upon the place of residence of the garnishee, where his creditor could maintain an action against him for the debt. Although it was considered obvious that the grounds upon which the Wisconsin court based its judgment were untenable, that court had jurisdiction under our view of the law, and we held that the payment of the judgment barred further prosecution of the suit in this state. This conclusion was reached upon the grounds that the two courts had concurrent jurisdiction, and the rule in such cases, that the one first acquiring jurisdiction will retain it until the matter is disposed of, applies only to courts of the same state, and does not apply to courts of different states; that where two courts of different states have concurrent jurisdiction of the same matter, a suit pending in one state cannot be pleaded in abatement or in bar of the suit in the other state; that both suits may proceed until judgment is rendered in one of the suits, when it may be set up in bar of the further maintenance

of the other; that it makes no difference which suit was first commenced; and that the recovery and payment of one judgment after a full disclosure of the pendency of the other suit and without collusion by the garnishee will bar a recovery in the other state.

The application of that doctrine to the garnishment suits was based on the settled rule in ordinary actions, which had been previously declared in *McJilton v. Love*, 13 Ill. 486, 54 Am. Dec. 449, and other cases, and it is equally applicable where there is a pending garnishment proceeding in one state and an action against the garnishee by the principal defendant in another state. In any case, the courts will see that the debtor who is without fault is not compelled to pay his debt twice; but that is the only right he has. The pendency of the garnishment proceeding in Missouri was no bar to the suit of appellee in this state; but in the case of an ordinary debt a compulsory payment of the judgment first rendered would protect appellant against another judgment for the same debt. When judgment was rendered against the appellant in this state for wages exempt from garnishment, payment of the judgment would have been a good defense to the further prosecution of the suit in Missouri. The appeal to the circuit court was a voluntary act of the appellant, with the effect of letting in a foreign judgment which had been rendered against the appellant in Missouri and paid before the trial in the circuit court. Such a voluntary act in a case where the appellant had no defense to the claim could not, without injustice, be permitted to affect the rights of the appellee. By the service of the garnishee summons in Missouri Miller acquired a contingent or inchoate lien upon the debt, and appellant could not thereafter make a voluntary payment to the appellee; but the right which Miller acquired was dependent upon subsequently obtaining judgment, and that was not accomplished until a judgment had been recovered in this state, where the debt was free from any right or claim that he had. The law of this state for the protection of the wage-earner who has a family and resides with the same exempts his wages from garnishment to a certain amount, and it is the duty of the state to enforce within its own borders the laws made for the benefit of its citizens. We give full faith and credit to the judgment of the justice of the peace of Missouri; but the payment of it will not suffice to protect the appellant from the payment of the judgment of our own court. Before that judgment was rendered the judgment for the same debt was rendered in this state, and the status of the debt as exempt from garnishment had been fixed.

A penal statute of this state prohibits the sending out of this state of any claim for debt to be collected by proceedings in attachment, garnishment, or other mesne process,

with intent to deprive any resident of this state of his rights under the exemption laws. While the law of Missouri only provides for exemptions to a resident of that state, it prohibits the issue of garnishment process in any cause where the sum demanded is \$200 or less, and where the property sought to be reached is wages due the defendant by any railroad corporation, until after judgment shall have been recovered by the plaintiff against the defendant in the action, and no railroad corporation is required to make answer to any interrogatories propounded to it in any action against any person to whom it may be indebted on account of wages, where the writ was issued or served in advance of the recovery by the plaintiff against the defendant in any action for \$200 or less. Questions arising under these statutes are argued by counsel, but have been ignored, as not necessary to the decision of the case.

The judgment of the Appellate Court is affirmed.

Judgment affirmed.

(250 Ill. 47.)

BUTLER v. AURORA, EL. & C. R. CO.

(Supreme Court of Illinois. April 19, 1911.)

1. RAILROADS (§ 411*)—FENCING TRACK—STATUTES.

Under Hurd's Rev. St. 1909, c. 114, § 62, requiring every railroad company to maintain fences on both sides of its road, or so much thereof as is not open for use, a railroad company, maintaining a platform used for passengers and reached from a highway by a cinder walk, need not fence its tracks where the cinder walk approaches the platform.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1409-1450; Dec. Dig. § 411.*]

2. APPEAL AND ERROR (§ 1094*)—QUESTIONS REVIEWABLE—FINDINGS OF APPELLATE COURT.

The question whether a railway company was guilty of negligence at common law in killing an animal on its track is one of fact; and the finding of the Appellate Court thereon, affirming a judgment of the trial court, is not reviewable by the Supreme Court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4322-4352; Dec. Dig. § 1094.*]

Appeal from Appellate Court, First District, on Error to Municipal Court of Chicago; Edward A. Dicker, Judge.

Action by Frank O. Butler against the Aurora, Elgin & Chicago Railroad Company. There was a judgment of the Appellate Court (158 Ill. App. 386), affirming a judgment for defendant, and plaintiff appeals, on a certificate of importance granted by the Appellate Court. Affirmed.

Asa Q. Reynolds, for appellant. Hopkins, Peffers & Hopkins, for appellee.

FARMER, J. This is an action of tort, brought by appellant against appellee in the

municipal court of Chicago, to recover damages for the loss of a cow which was killed by coming in contact with the third rail of appellee's electric railroad, where it is crossed by a public highway about a mile south of the village of Elmhurst, Du Page county. A trial was had before the court without a jury, and defendant found not guilty, and judgment entered for costs. A writ of error was sued out of the Appellate Court for the First District, and that court affirmed the judgment of the municipal court. The case comes to this court upon a certificate of importance granted by the Appellate Court.

Appellee owns and operates a double-track electric railroad running east and west and crossing Spring Road, a public highway, at right angles. The right of way is about 100 feet wide, and except at the highway crossing is fenced on both sides. On the west side of the crossing a fence extends from the south line of the right of way to the south track, where it connects with the cattle guards extending across the tracks. On the north side of the track is a platform, which is used by passengers taking the west-bound trains. This platform is about 16 inches higher than the roadbed, and is reached from the highway by a cinder walk, which is practically on a level with it. A fence extends north from the platform and connects it with the fence on the north line of the right of way. Appellant, on the day the accident occurred, was driving a number of cattle on the public highway, and when the crossing was reached the cow which was killed turned west on the right of way, and by passing over the cattle guards or by getting on the station platform and jumping off came in contact with the electrically charged third rail of appellee's road and was killed.

[1] Appellant contends that the killing of the cow resulted from a failure of appellee to fence its right of way, as required by section 62 of chapter 114 of the Revised Statutes of 1909. The platform was used as a public station or depot for receiving and discharging passengers by appellee, and appellee contends that the provision requiring the right of way to be fenced does not apply.

Section 62 is as follows: "That every railroad corporation, shall, * * * erect and thereafter maintain fences on both sides of its road or so much thereof as is open for use, suitable and sufficient to prevent cattle * * * from getting on such railroad, except at the crossings of public roads and highways, and within such portion of cities and incorporated towns and villages as are or may be hereafter laid out and platted into lots and blocks, * * * and shall also construct * * * cattle guards suitable and sufficient to prevent cattle * * * from getting on such railroad; and when such fences or cattle guards are not made as aforesaid, or when such fences or cattle

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

guards are not kept in good repair, such railroad corporations shall be liable for all damages which may be done by the agents, engines or cars of such corporation, to such cattle, * * * and reasonable attorney's fees in any court wherein suit is brought for such damages, or to which the same may be appealed; but where such fences and guards have been duly made and kept in good repair, such railroad corporation shall not be liable for any such damages, unless negligently or willfully done."

The only point on the right of way which was not fenced was where the cinder walk approached the platform. The record does not disclose to what extent the platform is used by the public; but it is evident that to require it to be fenced at this place would inconvenience those desiring to board and alight from the trains, and would interfere with its use by the public. In *Chicago, Burlington & Quincy Railroad Co. v. Hans*, 111 Ill. 114, it was said: "It is the duty of a railway company to establish depots, etc., and so operate its road as to afford the public reasonable safety and dispatch in the transaction of business. To effect this, and to accommodate those traveling its road or transacting business with the company, it is necessary that it should at all reasonable times provide a ready and convenient means of access to its stations and depots. To require those places to be fenced would cause delay and inconvenience to the public and detract from the public character of railways." Under the decision in that case, and in view of the use of the station platform by the public, we do not think appellee was required to fence that portion of its right of way, and its failure to do so does not render it liable for the loss of appellant's cow.

[2] Appellant contends that, if appellee is not liable under the statute, the use by it of the third rail, charged, as it was, with electricity, was such negligence at common law as renders it liable. The question whether or not appellee was guilty of negligence at common law is a question of fact, and the finding of the Appellate Court upon this question is not reviewable by this court.

The judgment of the Appellate Court is affirmed.

Judgment affirmed.

(250 Ill. 50)

SMITH et al. v. TUCKER et al.

(Supreme Court of Illinois. April 19, 1911.)

1. DEEDS (§ 128*)—ESTATE GRANTED—LIFE ESTATE—"RULE IN SHELLEY'S CASE."

A deed to one, his heir and assigns, of certain land, with a provision in the granting clause, "This deed is only to remain in full force and effect during the lifetime of [the grantor], and at her death it goes back to her heirs," does not convey a fee-simple title to the grantee, under the rule in *Shelley's Case*, but

conveys only an estate for the life of the grantor.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 413-415; Dec. Dig. § 128.*]

For other definitions, see Words and Phrases, vol. 7, pp. 6272, 6273.]

2. TENANCY IN COMMON (§ 15*)—ADVERSE POSSESSION—OUSTER.

Testimony of tenants in common that after they went into possession of the land their possession was exclusive and peaceable, that they exercised acts of ownership and claimed to own all the land, that they paid the taxes thereon regularly, and that no other person claimed the premises adversely, does not show an ouster of the other tenants in common, necessary for their acquiring title by limitation against such others.

[Ed. Note.—For other cases, see Tenancy in Common, Cent. Dig. §§ 42-62; Dec. Dig. § 15.*]

3. ADVERSE POSSESSION (§ 72*)—COLOR OF TITLE.

A bond for a deed is not color of title, as regards the defense of possession and payment of taxes for seven years under color of title.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 430-434; Dec. Dig. § 72.*]

Error to Circuit Court, Pope County; W. W. Duncan, Judge.

Suit by Sarah A. Smith and another against William Tucker and others. Bill dismissed, and complainants bring error. Reversed and remanded.

Morris & Hayes, for plaintiffs in error.
Charles Durfee, for defendants in error.

VICKERS, C. J. The plaintiffs in error, Sarah A. Smith and Nannie Jeffers, filed their bill in chancery in the circuit court of Pope county alleging that they are the owners in fee simple, as tenants in common, of a tract of land described therein and containing 120 acres, and are entitled to the possession thereof; that defendants in error, William Tucker and Daniel Tucker, are in the possession of said land, but have never had any interest in the same, except an estate for the life of Sarah J. Keel, the mother of plaintiffs in error, in an undivided one-half thereof, which was acquired by mesne conveyances from Lewis W. Chrishman; that Sarah J. Keel died October 13, 1908, and the estate of the defendants in error was thereby terminated, and plaintiffs in error thereupon became entitled to the immediate possession of all of the land; that a certain deed from said Sarah A. Smith and Alexander Blair and Maggie Sim, a brother and sister of plaintiffs in error, to one D. G. Thompson to said land, was procured by fraud and was without consideration; that the defendants in error have cut, sold, and destroyed valuable timber grown on the premises while tenants for the life of Sarah J. Keel, which timber would now be worth more than \$1,500, and that Alexander Blair and the husband of Maggie Sim, deceased, have conveyed their interest in the land to

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

said Sarah A. Smith. The bill prays for an accounting of rents, profits, waste, and sale of timber, that certain deeds which are clouds upon their title be canceled, that the defendants in error may be enjoined from committing further waste, and for general relief. The answer of the defendants in error denies all the material allegations of the bill, and alleges that they have been in the peaceable, adverse, and exclusive possession of the premises for more than 20 years prior to the filing of the bill, and have paid all the taxes thereon during that time, and that they have been in peaceable, adverse, and exclusive possession of all of said premises under color of title for more than 7 years prior to the filing of the bill, and have paid all the taxes thereon during that time. The cause was heard before the chancellor, and resulted in a decree dismissing the bill for want of equity. Plaintiffs in error have sued out this writ, seeking to reverse the decree of the circuit court.

The facts developed on the hearing were as follows: On September 3, 1870, John M. Crank and wife conveyed the 120 acres in question to Robert R. Blair and Sarah J. Blair, his wife. On November 17th of that year Robert R. Blair died intestate, leaving surviving him the said Sarah J. Blair, his widow, and certain children, all of whom, except the plaintiffs in error and Alexander Blair and Mary Murphy, have since died. Mary Murphy has not been heard of for more than 25 years and is presumed to be dead. Sarah J. Blair remarried, and on February 28, 1878, together with her husband, John W. Keel, in consideration of \$100, executed and delivered to Lewis W. Chrishman a warranty deed to said 120 acres of land; the granting clause of said deed being, in part, as follows, Keel and wife being the parties of the first part: "That the said party of the first part, for and in consideration of the sum of one hundred (\$100) dollars in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, have granted, bargained, and sold, and by these presents does grant, bargain, and sell, unto the said party of the second part, his heirs and assigns, all the following described lot, piece, or parcel of land situated in Grandpier precinct, in the county of Pope, and state of Illinois, to wit: The southeast fourth of section 16, township eleven (11), range seven (7) east, containing one hundred and twenty acres (120 a.). This deed is only to remain in full force and effect during the lifetime of the above-named Sarah J. Keel, and at her death it goes back to her heirs. Together with all and singular the hereditaments and appurtenances hereunto belonging," etc. By sundry conveyances George J. Carter, on June 27, 1882, derived this title from Chrishman; one of the deeds in the chain of conveyances containing the same language as that above quoted in the deed from Mrs. Keel to Chrish-

man, and the other deeds in the chain being in the regular form and making no attempt at restriction. At the October term, 1883, of the circuit court of Pope county, and while the title conveyed to Chrishman was held by George J. Carter, the children of Robert R. Blair obtained a judgment in ejectment against Carter for the recovery of an undivided one-half of said land in fee, and for the possession of the same. On December 10, 1887, Carter conveyed the said land to John Tucker by warranty deed. This deed was never recorded, and its existence was evidently unknown to the plaintiffs in error until the time of the hearing on the bill herein. On June 20, 1885, Alexander Blair, Maggie Sim (now deceased), and said Sarah A. Smith, all children of Robert R. Blair, for the expressed consideration of \$15, conveyed to D. G. Thompson all their interest in the undivided one-half of said 120 acres, and all their reversionary interest in the other undivided one-half. Thompson conveyed to one William King, who on December 24, 1888, conveyed to said John Tucker. This deed from King to John Tucker has never been recorded. On November 16, 1891, John Tucker contracted with his brother, William A. Tucker, to sell to him the 120-acre tract, together with the remaining 40 acres of that quarter section, for the sum of \$200, and executed and delivered to him a bond for deed, binding himself to convey the land to William A. Tucker upon the payment of four notes then given to the obligor, aggregating \$200. This bond for deed has never been recorded. Upon the execution and delivery of the bond for deed on November 16, 1891, William A. Tucker took possession of the premises, and he and Daniel Tucker, another brother, have been in possession of the same from that time to the time of the filing of this bill, in 1908.

The evidence does not disclose whether William A. Tucker has complied with the terms of the contract of sale made between him and John Tucker, or has paid any of the promissory notes mentioned in the bond for deed, or any interest thereon. It does appear, however, that William A. Tucker has never received a deed to the premises, and his only right to possession has been under the bond for deed. John Tucker was not made a party defendant to the bill, and no attempt was made to bring him in by amendment when his interest was disclosed upon the hearing. The bill was evidently drawn upon the theory that William A. Tucker, and Daniel Tucker, instead of John Tucker, had been the purchasers from Carter and King, respectively. Carter and the Tuckers were brothers-in-law, and William A. Tucker and Daniel Tucker both knew of the ejectment suit brought by the children of Robert R. Blair against Carter in 1883, and knew that the children of Robert R. Blair claimed to have an interest in this land. The bill was also drawn upon the theory that the deed from Sarah J. Keel to Chrishman conveyed only

an estate for the life of Sarah J. Keel, and that upon the death of said Sarah J. Keel the estate of her grantees was extinguished, and that plaintiffs in error, being the owners of the fee, were entitled to the possession of the entire tract. The proof was made and the case tried upon this theory.

Plaintiffs in error insist that by the deed from Sarah J. Keel and her husband Lewis W. Chrishman acquired only an estate for the life of Sarah J. Keel in the premises. Defendants in error, on the other hand, contend that this deed in apt language conveyed all of the title of Sarah J. Keel to Chrishman, his heirs and assigns, thereby creating in him an estate in fee simple in the undivided one-half of the premises. Plaintiffs in error rely, to support their contention, upon the words inserted in the deed after the description of the land, "This deed is only to remain in full force and effect during the lifetime of the above-named Sarah J. Keel, and at her death it goes back to her heirs."

[1] Defendants in error contend, and their contention seems to have been sustained by the trial court, that this deed is controlled by the rule in Shelley's Case, and that under said rule the deed conveyed a fee-simple title to the grantees. This is a misapprehension. The rule in Shelley's Case applies to wills or deeds conveying to the ancestor an estate of freehold, and in the same instrument an estate is limited, either mediately or immediately to his heirs in fee. It will be noted that the estate conveyed to Lewis W. Chrishman is an estate per autre vie. There is no language in this deed purporting to convey a fee-simple title to the heirs of the grantees, which affords satisfactory reason for taking it out of the operation of the rule in Shelley's Case. The limitation of the estate of the grantees in this deed is found in the granting clause, and not in the habendum. The extent of the estate intended to be conveyed is not mentioned in the deed, except in the clause which limits its duration to the life of Sarah J. Keel. While the limitation in the habendum clause cannot restrict an estate to one for life, where the language is repugnant to the granting clause, that rule has no effect where the extent of the estate, as here, is stated in the granting clause of the deed. Section 13 of our conveyance act expressly excepts from its operation conveyances where an estate less than a fee is limited by the express words of the deed. *Riggin v. Love*, 72 Ill. 553; *Welch v. Welch*, 183 Ill. 237, 55 N. E. 694.

Under this construction of the deed it is clear that the court below erred in dismissing the bill. It is also clear, from the proofs, that Nannie Jeffers owned some other interest in the land, the exact extent of which

cannot be certainly determined from the proofs in this record; but upon another hearing the evidence may disclose the extent of such interest. The evidence fails to show any fraud in procuring the deed from Sarah A. Smith, Alexander Blair, and Maggie Sim by D. G. Thompson. That deed was a valid conveyance.

[2] Defendants in error asserted title in themselves and relied upon the statute of limitations. Prior to the time that William A. Tucker came into possession of the premises under his bond for deed John Tucker had been in possession, and the possession of John and William together extended over a period of more than 20 years. Whether or not John knew of the interest of the children of Robert R. Blair in this land does not appear; but it is shown that William and Daniel Tucker knew of their interest, and also knew of the ejectment suit brought by them against Carter and its result. While William and Daniel Tucker have been in the possession of all of the lands in controversy since the date of the bond for deed, and during that time have received all the benefits of said land, their possession was not so adverse as to amount to an ouster of their tenants in common and start the running of the statute of limitations. The testimony of both William and Daniel Tucker was to the effect that since they went into possession of this land their possession had been exclusive and peaceable, that they exercised acts of ownership and claimed to own all of the land, that they paid the taxes thereon regularly every year, and that no other person claimed the premises adversely. This does not show an ouster of the other tenants in common and is not sufficient to show title by limitation. *Nicoll v. Scott*, 99 Ill. 529.

[3] Defendants in error are not entitled to avail themselves of the defense of possession and payment of taxes for seven years under color of title. The bond for a deed is not color of title. *Rigor v. Frye*, 62 Ill. 507; *Davis v. Howard*, 172 Ill. 340, 50 N. E. 258; *Converse v. Calumet River Railway Co.*, 195 Ill. 204, 62 N. E. 887.

For the error in dismissing the bill for want of equity, the decree of the circuit court of Pope county is reversed, and the cause remanded.

Reversed and remanded.

(260 Ill. 57)

TOWN OF HARMONY v. CLARK.

(Supreme Court of Illinois. April 19, 1911.)

1. HIGHWAYS (§ 14*)—ESTABLISHMENT—PRESCRIPTION—DEDICATION—RIGHTS ACQUIRED.

The width of a highway acquired by prescription or dedication must be determined by the fences built by the abutting owners.

[Ed. Note.—For other cases, see *Highways*, Cent. Dig. § 21; Dec. Dig. § 14.*]

2. DEDICATION (§ 45*) — HIGHWAYS — EVIDENCE.

Whether an owner of land abutting on a highway dedicated a strip to form a part of the highway *held*, under the evidence, for the jury.

[Ed. Note.—For other cases, see Dedication, Cent. Dig. § 88; Dec. Dig. § 45.*]

3. HIGHWAYS (§ 161*)—ESTABLISHMENT—PRESCRIPTION.

In an action to recover a penalty for obstructing a highway, whether a strip of land abutting on the highway was acquired as a part of the highway by prescription *held*, under the evidence, for the jury.

[Ed. Note.—For other cases, see Highways, Cent. Dig. § 440; Dec. Dig. § 161.*]

4. HIGHWAYS (§ 161*) — OBSTRUCTION — EVIDENCE.

In an action to recover a penalty for obstructing a highway, whether a fence encroached on the highway which was acquired by dedication or prescription, thereby obstructing the highway, or whether it was built on the line of the highway, *held*, under the evidence, for the jury.

[Ed. Note.—For other cases, see Highways, Cent. Dig. § 440; Dec. Dig. § 161.*]

5. HIGHWAYS (§ 161*) — OBSTRUCTION — EVIDENCE—ADMISSIBILITY.

Where, in an action for obstructing a highway acquired by prescription or dedication, the issue was whether a fence was constructed within the highway or on the line thereof as fixed by fences built by abutting owners, an order of the commissioners of highways reciting the fact of the existence of the highway, and describing it as four rods wide, and a copy of a petition by abutting owners for the reduction of the width of the highway from 66 feet to 60 feet, were properly excluded.

[Ed. Note.—For other cases, see Highways, Cent. Dig. § 440; Dec. Dig. § 161.*]

Appeal from Circuit Court, Hancock County; Harry M. Waggoner, Judge.

Action by the Town of Harmony against John A. Clark. From a judgment for defendant, plaintiff appeals. Affirmed.

Scofield & Califf and David E. Mack, for appellant. O'Harra, O'Harra, Wood & Walker and Hartzell & McCrory, for appellee.

FARMER, J. Appellant brought an action of debt in the circuit court of Hancock county upon the statute, against appellee, to recover the penalty provided for the obstruction of a public highway. The declaration averred that notice had been given appellee to remove the obstruction, and a recovery was sought for continuing the obstruction after giving the notice. Issue was joined, and the cause tried by a jury, resulting in a verdict and judgment in favor of the appellee. Appellant prosecutes this appeal to reverse that judgment.

The highway appellee is charged with obstructing runs east and west through the middle of sections 31, 32, 33, 34, 35, and 36, in the town of Harmony, Hancock county. It was never laid out by proceedings had under the statute, and exists as a public highway only by prescription or dedication. There is no dispute between the parties as

to there being a highway at the place in question and that it had existed for more than 40 years. In 1861 Thomas G. Lyons became the owner of and removed upon the E. $\frac{1}{2}$ of the N. W. $\frac{1}{4}$ of section 35. The place of the alleged obstruction is the north side of the road at the south end of this 80. Before Lyons became the owner of said 80, there was a road running through the middle of the sections before mentioned, fenced at the place in question on both sides with rail fences. In 1865 Lyons planted a hedge fence across the south end of his 80 and on the north side of the rail fence that separated his land from the road. He testified he planted his hedge as close to the rail fence as he could and have room enough between it and the rail fence to cultivate his hedge on the south side with one horse and a plow. The rail fence did not run in a straight line, and the hedge was planted in a line that was not entirely straight, but to some extent followed the course of the rail fence; the distance between the hedge and the rail fence being greatest at the east side of Lyons' 80. The rail fence was allowed to stand until the hedge made sufficient growth to answer the purpose of a fence. From time to time, as the hedge grew, parts of the rail fence were removed; the last of it being removed about 1875.

The proof shows very little work was done on the road by the road authorities. A ditch about the depth of a plow furrow was made on the north side of the traveled track, and one witness testified that by direction of the road authorities he mowed the grass and weeds along the side of the road up to the hedge fence at one time. The traveled track of the road was somewhere near the middle of the space left between the original fences. In muddy times the road was a bad one, and people in traveling over it in vehicles would sometimes travel out of the traveled track on the north side of the ditch for a distance of about 60 rods of the east part of the road. Sixty rods west of the east line of the Lyons 80 the ditch washed so deep that it could not be crossed, and over that part of the road travel had to be on the south side of the ditch. Between the ditch and the hedge fence at that place brush and saplings grew up. Lyons sold the 80-acre tract described about 1890 to his son, and some two years later his son sold it to appellee, who still owns it. In trimming the hedge fence, the owner of the land would drop the brush on the south side of it, and it accumulated there until five or six years before bringing this suit, when appellee, wishing to destroy the hedge, burned the brush and the hedge, and built a wire fence south of the line of the old hedge fence. It is this wire fence that is alleged to be an obstruction in the highway.

The proof shows that at the east side of

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

the appellee's 80 the wire fence is about 8 feet south of the stumps of the hedge fence, and at the west side of the 80 about 4 feet south of the stumps of the hedge. As the hedge was crooked between those points, at some places the distance between the hedge and the wire was less than 8 feet. The appellant contends that the road as it existed by prescription or dedication was 66 feet wide, and 33 feet of it came off the south end of appellee's 80 acres. Measurements from stones supposed to mark the east and west half section line through the sections mentioned, according to the proof of appellant, show that at the east and west sides of appellee's land the distance between his wire fence and the stones is 29 feet, and at one place between those points 27 feet. By building his fence closer than 33 feet of the line of these stones, appellant contends appellee obstructed the public highway.

[1] As the road was not originally laid out under the statute by the commissioners of highways, its width would be determined by the fences built by the owners on each side of it, whether it existed by prescription or dedication. For the purpose of showing that the road was intended to be 66 feet wide, appellant offered in evidence an order spread upon the town clerk's records, made by the commissioners of highways in 1858. The order recited that a road on the east and west center line of sections 31, 32, 33, 34, 35, and 36 was then used as a public highway, and had been so used for 20 years, but it had never been recorded. It was therefore ordered that the road be ascertained, described, and entered of record according to a survey which had been made under the direction of the commissioners, and the road was described as 4 rods wide. The court sustained appellee's objection to the offer of this evidence. Appellant also, after proving the loss of the original petition, offered in evidence a copy of a petition presented to the commissioners of highways of Harmony township, dated February 12, 1908, signed by appellee and others, requesting that the width of the road through the sections mentioned, for a distance of 4 miles, be reduced from 66 feet to 60 feet. Objection by appellee to the introduction of this document was sustained, and it was not permitted to be introduced in evidence. Aside from the rulings of the court in refusing to admit this proof, and giving and refusing certain instructions, the controversy here is wholly one of fact.

[2, 3] The real question is: Did appellee place his fence on land that had been dedicated to and accepted by the public as a highway, or on land that the public had acquired a highway over by prescription? In our opinion, the rail fence on the north side of the road marked the boundary of the highway, and unless, when the rail fence was removed, the owner of the land dedicated the strip between it and the hedge fence,

or the public acquired a right to that strip by prescription and travel over it, the road never did extend to the hedge fence. Whether there was such dedication, or the right to the land was acquired by prescription, were questions for determination by the jury under all the facts and circumstances proven. It may be that under the facts these were debatable questions; but it cannot be said that under the evidence the jury were bound to find for appellant under both or either of said questions.

[4] Lyons, who owned the land until 1890, set out the hedge fence in 1865. It is true he testified he intended it for a permanent fence; but he also testified that he set it as close to the rail fence as he could and leave room to plow between the rail fence and the hedge with one horse. The proof further shows that in trimming the hedge the brush was dropped on the south side of it, and this practice was continued and the brush accumulated from time to time until shortly before the appellee built the wire fence, when he burned it for the purpose of destroying the hedge. Three or four years before appellee built the wire fence, a line of telephone poles was set along the south side of the hedge fence, and according to the proof the poles were set as close to the hedge as the brush piled on the south side would admit. The wire fence alleged to be an obstruction in the road is on the north side of this line of telephone poles. The evidence is not clear as to the exact location of the wire fence with reference to the old line of the rail fence; but from the descriptions given of the rail and hedge fences, and the distance left between them, and the distance between the wire fence and the stumps of the hedge fence, which are still standing and show clearly its line, we think the conclusion is amply warranted that the wire fence is substantially on the line of the old rail fence. As we have said, the distance between the wire fence and the hedge is not uniform, because of the fact that the hedge fence was not built in a straight line. The greatest distance between the wire fence and the hedge is at the east line of appellee's 80, and is about 8 feet. One witness testified on behalf of appellee that he measured the distance between every post in the wire fence and the hedge stumps throughout the entire 80 rods. He testified several posts were less than 3 feet from the hedge, and in this he was not contradicted by anybody who made measurements.

[5] In our opinion, the order of the commissioners of highways of 1858, and the copy of the petition of the commissioners of 1908 to reduce the width of the road, could have had no material influence on the result of the trial if they had been admitted in evidence, and the refusal of the court to admit them in evidence affords no ground for a reversal of the judgment, even if it be conceded that they were competent. Neither

do we think there was any error in the giving or refusing of instructions.

In our opinion, the verdict and judgment were warranted by the evidence, and the judgment is affirmed.

Judgment affirmed.

(250 Ill. 63)

PEOPLE v. BERNSTEIN.

(Supreme Court of Illinois. April 19, 1911.)

1. INDICTMENT AND INFORMATION (§ 132*)—JOINDER OF ACCOUNTS—ELECTION—DIFFERENT OFFENSES IN SAME TRANSACTION.

An indictment for arson contained three counts drawn under Cr. Code, § 13, and three under section 14 (Hurd's Rev. St. 1909, c. 38); the first three charging arson in burning a building, and the last three with feloniously burning certain goods and chattels contained in a certain building, with intent to defraud an insurance company. *Held* that, as the offenses charged in the different counts grew out of one and the same transaction and were such that the defendant might be found guilty of both, the state was not required to elect.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 425-432; Dec. Dig. § 132.*]

2. INDICTMENT AND INFORMATION (§ 132*)—JOINDER OF COUNTS—ELECTION—DISTINCT OFFENSES.

A prosecutor will only be required to elect for which offense charged in an indictment he will ask a conviction, when the offenses charged are actually distinct and do not arise out of the same transaction.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 425-453; Dec. Dig. § 132.*]

3. ARSON (§ 37*)—EVIDENCE—SUFFICIENCY.

Evidence in a trial for arson *held* to sustain a conviction.

[Ed. Note.—For other cases, see Arson, Cent. Dig. §§ 71-73; Dec. Dig. § 37.*]

4. CRIMINAL LAW (§ 656*)—TRIAL—CONDUCT OF JUDGE—EXAMINATION AND CROSS-EXAMINATION OF WITNESSES.

During the trial the judge asked numerous questions of the defendant and his witnesses, and examined two witnesses in chief, and allowed the state's attorney to cross-examine, there being nothing in the records explaining why this was done, and the questions being such as would appear to the jury to be in the interest of the prosecution. *Held* reversible error.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1524-1533; Dec. Dig. § 656.*]

Error to Criminal Court, Cook County; Lockwood Honore, Judge.

Isaac Bernstein was convicted of arson, and he brings error. Reversed and remanded.

Max Luster (J. Ambrose Gearon, of counsel), for plaintiff in error. W. H. Stead, Atty. Gen., John E. W. Wayman, and W. Edgar Sampson (Robert E. Crowe, of counsel), for the People.

PER CURIAM. [1] Plaintiff in error was indicted at the March term, 1910, of the criminal court of Cook county, on the charge

of arson. The indictment contained six counts. The first three were drawn under section 13 of the Criminal Code, while the last three were under section 14. Hurd's Stat. 1909, p. 746. The first three, in varying form, charged him with arson in burning a building belonging to Otto Vogelmann; the last three, with feloniously burning or setting fire to certain goods and chattels contained in a certain building, with intent to defraud the Continental Insurance Company. Plaintiff in error was found guilty under the second count of the indictment, and, after motions for new trial were overruled, was duly sentenced. This writ of error was thereafter sued out.

Plaintiff in error moved to quash the indictment and that the state's attorney be required to elect upon which of the counts he would prosecute. These motions were overruled. It is now contended that the court erred in so ruling, as under the decisions of this court said two sections of the Criminal Code create separate and distinct felonies. *Mai v. People*, 224 Ill. 414, 79 N. E. 633; *Elgin v. People*, 226 Ill. 486, 80 N. E. 1014, and that the accused cannot be tried for separate and distinct felonies under the same indictment (*Kotter v. People*, 150 Ill. 441, 37 N. E. 932). If two or more offenses grow out of one transaction, and are of such a nature that the defendant may be found guilty of both, the prosecutor will not be required to elect for which offense charged in the indictment he will ask a conviction. [2] He will only be required to elect when the offenses charged in the different counts are actually distinct from each other and do not arise out of the same transaction. *People v. Well*, 243 Ill. 208, 90 N. E. 731, 134 Am. St. Rep. 357; *Goodhue v. People*, 94 Ill. 37; *Schintz v. People*, 178 Ill. 320, 52 N. E. 903. It is obvious from this record that the offenses charged in the different counts grew out of one and the same transaction. The trial court, therefore, did not err in overruling said motions.

[3] It is further urged that the evidence did not justify the conviction. Plaintiff in error occupied the first floor of the building at 3443 Sheffield avenue, Chicago—the front part as a tailor shop and the rear as living quarters. Two days before the fire he procured \$2,000 insurance upon the stock of goods therein with the Continental Insurance Company of New York. The evidence tended to show that at the time he had on hand only a small amount of stock—far less than the amount insured. The fire occurred Sunday afternoon, January 30, 1910. The day before this, plaintiff in error purchased a gallon of benzine, three pounds of Venetian red, and a paint brush. He testified that the night before the fire he had been painting his floor with a mixture of the benzine, Venetian red, and a small amount of oil from

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

the sewing machine oil can, working very late; that the next morning he got up late and did some work, and, being tired, laid down in the afternoon and went to sleep, and was waked up by being dragged out of the building by a man, who left him standing on the porch, outside; that he did not know who the man was. The evidence tends strongly to show that benzine mixed with Venetian red and a small amount of machine oil will not make a paint. The firemen testified that after the fire they found a large charred space around the stove, and the stove, while it had a little fire in it, was cool, with nothing to indicate that a fire could have started from it; that there was no gas coming from any of the gas jets; that there was a furnace in the building, but it had not been used for some time; that the front door of the shop was locked. One of the witnesses saw the flames coming out of the top of the front windows, and ran, with a number of other men, across the street to the building. He testified that he went around to the rear, and saw plaintiff in error coming out of the back door, and that no one else was there. The assistant fire marshal testified that he found plaintiff in error in the bakery shop next door, sitting in the corner, mumbling to himself, apparently crying, and that the hair on one side of his head was singed; that, when asked whether he had any insurance, the plaintiff in error first said he did not know, and later said he thought he had \$2,000, and that the value of the contents of the store and household furniture was about \$500. The plaintiff in error denies that he made this statement, and claimed that the contents of the store were worth \$2,000. In filing his claim with the insurance company he valued the property at \$2,703.02. While the evidence as to the origin of the fire was almost all, if not entirely, circumstantial, we think it justified the jury in finding plaintiff in error guilty, and we would not disturb the verdict, if no errors had been committed on the trial.

[4] It is insisted that the trial court committed reversible error in asking numerous questions of the plaintiff in error and his witnesses. Ordinarily it is not good practice for the presiding judge himself to examine witnesses at length. The circumstances may be such in a given case as to justify the court in so doing. *Carle v. People*, 200 Ill. 494, 66 N. E. 32, 93 Am. St. Rep. 208. This court, however, has more than once said that the examination of witnesses is the more appropriate function of counsel, and the instances are rare and the conditions exceptional which will justify the presiding judge in conducting an extensive examination. It is always embarrassing for counsel to object to what he may deem improper questions by the court. Then, in conducting a lengthy examination, it would be

almost impossible for the judge to preserve a judicial attitude. While he is not a mere figurehead or umpire in a trial, and it is his duty to see that justice is done, he will usually not find it necessary to conduct such examinations. The extent to which this shall be done must largely be a matter of discretion, to be determined by the circumstances of each particular case; but in so doing he must not forget the function of a judge and assume that of an advocate. *O'Shea v. People*, 218 Ill. 352, 75 N. E. 981; *Dunn v. People*, 172 Ill. 582, 50 N. E. 137. In this case, also, the trial judge examined two witnesses in chief and allowed the state's attorney to cross-examine. We find nothing in the record explaining why this was done. Such a practice is not to be commended, and can only be permitted when it is shown that otherwise there may be a miscarriage of justice. We are convinced that in the examination of the witnesses by the trial judge, doubtless unconsciously on his part, he made statements and asked questions in such a form as would almost certainly lead the jury to conclude that he thought the plaintiff in error was guilty. We are impressed from a reading of the record that the questions of the judge would appear to the jury to be in the interest of the prosecution. Expressions of opinion by the judge are liable to have great weight with the jury, and therefore especial care should be observed that nothing be said by him to the prejudice of either party. *Lycan v. People*, 107 Ill. 423; *Synon v. People*, 188 Ill. 609, 59 N. E. 508; *South Covington & Cincinnati Street Railway Co. v. Stroh (Ky.)* 66 S. W. 177, 57 L. R. A. 875, and note.

The evidence in this case as to the guilt of the plaintiff in error is of such a nature that we are constrained to hold that plaintiff in error was prejudiced by the remarks of the judge and his method of examining the witnesses. It is unnecessary to consider the other errors assigned.

The judgment of the criminal court of Cook county will be reversed, and the cause remanded for further proceedings not inconsistent with this opinion.

Reversed and remanded.

(250 Ill. 62.)

BLACK v. HOOPESTON GAS & ELECTRIC CO.

(Supreme Court of Illinois. April 19, 1911.)

1. SPECIFIC PERFORMANCE (§ 41*)—ORAL CONTRACTS—PART PERFORMANCE—EFFECT.

Equity will enforce an oral contract, void under the statute of frauds, which has been so far performed by one of the parties that to permit its repudiation by the other will be a fraud.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 120-123; Dec. Dig. § 41.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep.'s Indexes

2. FRAUDS, STATUTE OF (§ 129*)—ORAL SALE OF REAL ESTATE—PART PERFORMANCE.

An oral sale of real estate is taken out of the statute of frauds by the payment of the price, the taking of possession, and the making of lasting and valuable improvements; but these acts of performance must be done by virtue of a contract and for the purpose of performing it.

[Ed. Note.—For other cases, see *Frauds, Statute of*, Cent. Dig. §§ 287-292; Dec. Dig. § 129.*]

3. FRAUDS, STATUTE OF (§ 129*)—ORAL SALE OF REAL ESTATE—PART PERFORMANCE.

The mere possession of a tenant after the expiration of his lease is not a part performance of an oral contract to convey land to him; but whether such possession is a holding under the contract or under the lease is a question of fact, and to constitute a holding under the contract it is not necessary that the tenant should surrender possession under the lease and re-enter under the contract; but the circumstances characterizing his possession, together with his expenditures, if any, in making improvements on the faith of the contract, must be considered.

[Ed. Note.—For other cases, see *Frauds, Statute of*, Cent. Dig. §§ 287-292; Dec. Dig. § 129.*]

4. CORPORATIONS (§ 513*)—CONTRACTS—ACTIONS.

A bill for the specific performance of a contract made by a corporation, which avers that the corporation made an oral agreement with complainant, need not aver the preliminary details involved in the making of the contract, though, where the making of the contract is not admitted, complainant must prove an agreement by lawful authority to sustain it.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. §§ 2017-2023; Dec. Dig. § 513.*]

5. VENDOR AND PURCHASER (§ 22*)—CONTRACTS—DESCRIPTION OF PROPERTY—SUFFICIENCY.

A contract for the sale of real estate, described as a specified part of a designated lot, to be located in the south part thereof, to include a building thereon, and to be bounded on the north by a line parallel with an avenue, sufficiently describes the property.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. § 27; Dec. Dig. § 22.*]

6. SPECIFIC PERFORMANCE (§ 114*)—CONTRACT FOR SALE OF REAL ESTATE—PLEADING—SUFFICIENCY.

A bill for the specific performance of a contract to convey land to complainant in consideration of his performing work for defendant need not aver that he has not received compensation for his work, and the fact that he has must be shown by defendant.

[Ed. Note.—For other cases, see *Specific Performance*, Cent. Dig. § 365; Dec. Dig. § 114.*]

Appeal from Circuit Court, Vermilion County; W. B. Scholfield, Judge.

Suit by James A. Black against the Hoopeston Gas & Electric Company. From a decree dismissing the bill, complainant appeals. Reversed and remanded:

J. C. McClure, for appellant. J. H. Dyer, for appellee.

DUNN, J. A demurrer was sustained to appellant's bill for specific performance, his bill was dismissed, and he has appealed.

It appears from the bill that the appellee was the owner of a triangular lot of land, of a portion of which the appellant was in possession as a tenant holding over under an oral lease from a former owner, on which portion he had erected a building. The appellee employed the appellant to do some concrete work for \$855, one half of which was to be paid in cash, and for the other half (\$427.50) the appellee agreed to convey to the appellant 427.5/1000 of the said lot of land, to be located in the south part thereof, to include appellant's building, and to be bounded on the north by a line parallel with Seminary avenue. The contract was oral. The appellant performed the work to the satisfaction and acceptance of the appellee, and, relying upon the contract, entered into possession of the premises with the knowledge and approval of the appellee, enlarged the building, changing it from a temporary to a permanent structure, made lasting and valuable improvements on the premises, and has ever since remained in the exclusive possession of such premises as owner; but the appellee has refused to convey them to him. The demurrer relied upon the statute of frauds, and it is insisted that the appellant did not enter into possession under the contract, that there is no sufficient part performance to avoid the statute, that it does not appear that there was any legal contract on the part of the appellee, and that the contract is indefinite and uncertain.

[1] The statute of frauds is for the prevention of frauds. Equity will not permit it to be used for the perpetration of fraud, and will therefore enforce an oral contract which has been so far performed by one party that to permit its repudiation by the other would be a fraud.

[2] The law is well settled that an oral sale of real estate may be taken out of the statute by the payment of the purchase money, the taking of possession, and the making of lasting and valuable improvements. These acts of performance, however, relied upon to take a case out of the statute of frauds, must have been done by virtue of the contract sought to be enforced and for the purpose of performing it. *Koch v. National Union Building Ass'n*, 137 Ill. 497, 27 N. E. 530. The appellee does not question the allegation as to the performance of the work which was the consideration of the contract or as to the making of improvements, but it insists that it appears that the appellant's possession was not taken under his contract with the appellee, but was only a holding over under his lease from a former owner.

[3] The mere possession of a tenant after the expiration of his lease is not a part performance of an oral contract to convey the land to him. *Koch v. National Union Build-*

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

ing Ass'n, supra. However, whether such possession is a holding over under the lease, or is a possession under the contract of sale, is a question of fact. It is not absolutely necessary that the tenant shall have actually surrendered the possession under his lease and re-entered under the contract; but all the circumstances tending to characterize his possession are to be considered, and, among others, his expenditures, if any, in making improvements on the faith of an oral agreement which he would not otherwise have made. *Morrison v. Herrick*, 130 Ill. 631, 22 N. E. 537. The bill averred that the appellant's possession was under the contract, and the truth of this averment must depend upon the proof.

[4] It is urged by the appellee that the bill is defective, because it does not show that the alleged contract was authorized by the appellee's board of directors. It is not necessary to allege all the preliminary details involved in the making of a contract. The bill avers that the appellee entered into an oral agreement with the appellant, and this allegation is sufficient. If it is not admitted, the complainant will have to prove an agreement made by lawful authority in order to sustain it.

[5] The appellee insists that the contract is not definite in its description of the land to be conveyed, because it provides that "the northern portion of said portion so to be set off was to be bounded by a line running parallel with the center of Seminary avenue." It is said that it thus appears that the land included in the oral contract was not to extend north of a line parallel with the center of Seminary avenue, while it appears by the plat attached to the bill as an exhibit that the appellant is seeking a conveyance of land extending a considerable distance north of a line parallel with the center of Seminary avenue. There are, of course, an infinite number of lines parallel with the center of Seminary avenue, some north and some south of it; but the particular line referred to in this agreement is that one which has south of it 427.5/1000 of the tract described in the bill. There is no uncertainty in the description.

[6] Another objection urged to the bill is that it does not allege that the appellee has not paid the appellant the full amount due for his work. The only thing due appellant for his work, according to the averments of the bill, is a deed for this tract of land. It is not necessary for him to aver that he has not received something else in lieu of it. If he has, the allegation and proof should come from appellee.

The decree is reversed, and the cause is remanded to the circuit court, with directions to overrule the demurrer to the bill.

Reversed and remanded, with directions.

STITZEL et al. v. MILLER.

(Supreme Court of Illinois. April 19, 1911.)

1. BILLS AND NOTES (§ 155*)—NEGOTIABILITY—STIPULATIONS AFFECTING.

A provision in a note that, if not paid at maturity, the holder may at his option extend the time of payment thereof, does not render the note nonnegotiable, under the negotiable instrument act of 1907 (Laws 1907-08, p. 403), which requires that a note to be negotiable must be a written promise by one person to pay to another named, or order, a fixed sum at all events and at a time specified therein, or at a time which will certainly arrive.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 407-410; Dec. Dig. § 155.*]

2. BILLS AND NOTES (§ 443*)—INDORSEMENT—ACTION BY INDORSEE.

The indorsement of the name of the payee on the back of a note and the sale and delivery thereof to another authorizes the latter to sue thereon in his own name.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1377-1423; Dec. Dig. § 443.*]

3. ACTION (§ 61*)—ACCRUAL OF CAUSE OF ACTION.

There cannot be any recovery in an ordinary common-law action, where the money is not due at the institution of the suit.

[Ed. Note.—For other cases, see Action, Cent. Dig. §§ 708-717; Dec. Dig. § 61.*]

4. PLEADING (§ 418*)—RULING ON DEMURRER—OBJECTION—WAIVER.

Whether an action on a note is premature, when begun before the maturity of the note, while summons was served thereafter, is not properly preserved for review, where defendant, on the overruling of a special demurrer charging that the action was prematurely brought, pleaded to the merits.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1403-1406; Dec. Dig. § 418.*]

5. EVIDENCE (§ 197*)—HANDWRITING—GENUINENESS—COMPARISON.

The genuineness of a signature may not be proved by comparison with other admittedly genuine signatures not admissible in evidence for other purposes, or not already a part of the record, but, where other signatures admitted to be genuine are already in the case, comparison may be made by the jury, with or without experts.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 681, 681½; Dec. Dig. § 197.*]

6. EVIDENCE (§ 563*)—HANDWRITING—COMPETENCY OF WITNESS.

One who has seen another write, or who has acquired a knowledge of the other's handwriting by correspondence or otherwise, may testify to the genuineness of the latter's handwriting.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2347, 2383, 2384; Dec. Dig. § 563.*]

7. EVIDENCE (§ 197*)—HANDWRITING—COMPARISON.

The rule that the genuineness of a signature cannot be proved by comparison with other admittedly genuine signatures not admissible in evidence for other purposes, or not already a part of the record, must be liberally construed, so as to serve as an aid in determining the genuineness of signatures; and the reason of the rule is founded on the danger of the selection of a false standard as the characteristic type of

handwriting, and bringing before the jury collateral issues.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 681, 681½; Dec. Dig. § 197.*]

8. EVIDENCE (§ 197*)—HANDWRITING—COMPARISONS—FAC SIMILES.

Where the issue is the genuineness of the maker's signature to a note, other notes bearing his signature are admissible to show that the signatures thereon and the signature on the note in issue are fac similes, to show that the disputed signature must have been traced from another signature by some process, and thus prove forgery.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 681, 681½; Dec. Dig. § 197.*]

9. EVIDENCE (§ 197*)—HANDWRITING—ADMISSIBILITY.

That two signatures are exactly alike is evidence that one was traced or otherwise reproduced from the other, or that both were made from still another signature.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 681, 681½; Dec. Dig. § 197.*]

10. EVIDENCE (§ 197*)—HANDWRITING—CHARACTER OF WRITING.

The authorship of a writing may be proved by the character of spelling or style of composition, and the proof of such peculiarities may be made in any way that is appropriate in other cases.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 681, 681½; Dec. Dig. § 197.*]

11. EVIDENCE (§ 186*)—PHOTOGRAPHS—ADMISSIBILITY.

A photographic copy of an instrument which cannot be produced in court is admissible on preliminary proof of the accuracy of the photograph.

[Ed. Note.—For other cases, see Evidence, Dec. Dig. § 186.*]

12. EVIDENCE (§ 561*)—OPINION EVIDENCE—DISPUTED HANDWRITING.

Where writings are admissible to aid in deciding whether they are fac similes of a writing, the genuineness of which is in dispute, expert testimony is permissible.

[Ed. Note.—For other cases, see Evidence, Dec. Dig. § 561.*]

13. EVIDENCE (§ 226*)—ADMISSIONS—CONCLUSIVENESS.

An heir may not by admissions or statements bind his coheirs.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 815-821; Dec. Dig. § 226; * Wills, Cent. Dig. §§ 135, 410.]

Appeal from Appellate Court, Second District, on Appeal from Circuit Court, Lee County; R. S. Farrand, Judge.

Action by George B. Stitzel and others against Loren B. Miller, administrator of D. C. Miller, deceased. From a judgment of the Appellate Court affirming a judgment for plaintiffs and granting a certificate of importance, defendant appeals. Reversed and remanded.

Trusdell, Smith & Leech, for appellant. H. A. Brooks, for appellees.

CARTER, J. This is a suit in assumpsit brought by appellees in the circuit court of Lee county against appellant upon a promissory note dated February 22, 1908, payable one year after date to Harrison Miller

and by him indorsed in blank and sold and delivered to appellees. This note was for the principal sum of \$6,500, with interest at 6 per cent., and purported to be signed by D. C. Miller. The appellant filed a special demurrer, charging that the suit was prematurely brought and the note nonnegotiable. On the demurrer being overruled the appellant pleaded nonassumpsit, with a verification denying execution of the instrument. Upon a jury trial appellees obtained a verdict for \$7,140.25. From the judgment entered thereon an appeal was prayed and allowed to the Appellate Court for the Second District. That court affirmed the judgment of the trial court and granted a certificate of importance. This appeal followed.

The original instrument sued on has been certified to this court. A printed blank prepared for the Stocking Trust & Savings Bank was used in making it. Everything is in print except the date, names, amount, time when payable and the rate of interest. The first part is printed in large type, and is the ordinary form of promissory note. A power of attorney to confess judgment follows in fine print, and thereafter, in like print, the following: "We also agree that in case said note is not paid at maturity, that it is at the option of the holder hereof to extend, as he deems proper, the payment of the above note, and that said extension shall not in any manner release one or either of us from the payment hereof."

[1] It is urged that the quoted words render the instrument nonnegotiable. This court has held that a promissory note "may be defined to be a written promise by one person to pay to another person therein named, or order, a fixed sum of money at all events and at a time specified therein or at a time which must certainly arrive." McClenathan v. Davis, 243 Ill. 87, 90 N. E. 265, 27 L. R. A. (N. S.) 1017. This definition substantially meets the requirements of the negotiable instrument act of 1907. The contention that said quoted words gave the holder the authority to extend the note as he pleased, that it could not be known what extensions he might grant, and that, therefore, the time when the note became due and payable was uncertain and indeterminate, rendering the note nonnegotiable, cannot be sustained. The note expressly provides that such option to extend can be exercised only upon the failure of the payors to make payment at its maturity. The time of payment is certain. The note is dated February 22, 1908, and payable one year thereafter. After a note is due its negotiability, for all practical purposes, is at an end. In Dorsey v. Wolff, 142 Ill. 589, 32 N. E. 495, 18 L. R. A. 428, 34 Am. St. Rep. 99, it was held that a provision in a note that, if it was not paid when due and suit was brought thereon, the maker should pay

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

an attorney's fee of 10 per cent., recoverable either in such suit or a separate action, did not destroy the negotiability of the note as it did not take effect until after maturity. Numerous authorities are cited from this and other states by counsel for appellant on this question. In most of them the note recites that the payee reserves the right of option of extension at any time, either before or after maturity, and we do not consider them in point. The quoted words do not affect the character of the note, before or up to its maturity, either in its certainty, amount to be paid, the date of payment or the person to whom the payment is to be made. The clause in question does not destroy the negotiability of the note. The following authorities in other jurisdictions tend to uphold this conclusion: *National Bank v. Kenney*, 98 Tex. 293, 83 S. W. 368; *First Nat. Bank v. Buttery*, 17 N. D. 326, 116 N. W. 341, 16 L. R. A. (N. S.) 878, and note; *Farmer, Thompson & Helsell v. Bank of Graettinger*, 130 Iowa, 469, 107 N. W. 170; *Anniston Loan & Trust Co. v. Stickney*, 108 Ala. 146, 19 South. 63, 31 L. R. A. 234, and note.

[2] The note being negotiable, the indorsement of the name of the payee on its back and its sale and delivery to appellees authorized them to maintain this action in their own names. *Kistner v. Peters*, 223 Ill. 607, 79 N. E. 311, 7 L. R. A. (N. S.) 400, 114 Am. St. Rep. 362; *Keenan v. Blue*, 240 Ill. 177, 88 N. E. 553.

[3, 4] The note matured February 22, 1909. The suit was begun December 19, 1908. The first summons not being served, a second was issued January 23, 1909, and served March 10th of the same year. It is insisted that the suit was prematurely brought. Without question there cannot be any recovery on an ordinary common-law action if the money is not due at the institution of the suit. *Bacon v. Schepflin*, 185 Ill. 122, 56 N. E. 1123, and cases cited; 1 Ency. of L. & P. 1082. We think this question was not properly preserved for review.

[5] It is further insisted that the trial court erred in refusing to admit certain other notes to be introduced in evidence for the purpose of showing that the signatures thereon and the signature on the note at issue were fac similes. The evidence shows that Harrison Miller and Lafayette Miller were nephews of D. C. Miller, deceased; that appellees purchased the note in this suit from Harrison Miller, and at the same time bought of him another note for \$4,500, also dated February 22, 1908, purporting to be executed by Lafayette Miller and D. C. Miller, payable to the order of Harrison Miller and by him indorsed. Evidence was also offered tending to show that a suit had been brought in the district court of Scott county, Iowa, by L. C. Miller against Ella Quinn, executrix of the estate of James Quinn, deceased, upon a promissory note dated at Davenport,

Iowa, September 14, 1907, for the sum of \$15,000, purporting to be executed by James Quinn and payable to the order of D. C. Miller, bearing upon the back thereof the purported indorsement in blank of D. C. Miller; that in a trial in said district court of Iowa as to said note the purported signature of D. C. Miller on the back was shown to be a forgery; that appellant had asked but had been refused leave to withdraw said note from the files of that court for use in this trial; that a correct photographic copy, of natural size, had been procured of this note and the back thereof; that on the trial of said case in Iowa the testimony showed that the writing filling up the blanks on the face of that note was in the hand of Harrison Miller. Counsel for the appellant offered said \$4,500 note and the photograph of the \$15,000 note in evidence, and offered to prove by an expert that the purported signature of D. C. Miller on the note here in question, and on said \$4,500 note, and on the back of the \$15,000 note (as shown by the photograph), were identical in every particular, and, if superimposed, would exactly coincide. The court refused to permit this evidence to be introduced. It is insisted that, if these facts had been shown, the conclusion would necessarily have been drawn that the three alleged signatures of D. C. Miller were all tracings from the same signature. This court has laid down the rule that the genuineness of a signature cannot be proved by comparison with other admittedly genuine handwriting or signatures not admissible in evidence for other purposes or not already a part of the record. When, however, other writings or signatures admitted to be genuine are already in the case, comparison may be made by the jury, with or without experts. *Himrod v. Gilman*, 147 Ill. 293, 35 N. E. 373; *Rogers v. Tyley*, 144 Ill. 652, 32 N. E. 393; *Bevan v. Atlanta Nat. Bank*, 142 Ill. 302, 31 N. E. 679; *Riggs v. Powell*, 142 Ill. 453, 32 N. E. 482; *Brobston v. Cahill*, 64 Ill. 356; *Jumpertz v. People*, 21 Ill. 375; *Massey v. Farmers' Nat. Bank*, 104 Ill. 327.

[6] Counsel for appellant strenuously insist that the offered evidence does not come within the reasoning of the decisions in this state; that this rule against comparison of handwriting only applies where it is sought to show that a signature is like the typical signature of another. A witness who has seen another write is competent to testify, as is also one who has acquired a knowledge of the other's handwriting by correspondence or in the ordinary course of business. 2 Jones on the Law of Evidence, §§ 559, 561; 1 Greenleaf on Evidence (Lewis' Ed.) § 577. In a sense all evidence of handwriting is in the nature of comparison, except where the witness saw the act of writing. The general rule of the common law was that proof of handwriting by comparison, by placing the documents in juxtaposition, was

not permissible. There were, however, two exceptions that were as well recognized as the rule itself: First, where writings otherwise irrelevant, offered for the mere purpose of comparison, were admitted when the writing in issue was so ancient as not to admit of proof from knowledge derived from seeing the party write; and second, where other writings were legitimately in the case for other purposes. 15 Am. & Eng. Ency. of Law (2d Ed.) 265; 3 Wigmore on Evidence, § 1991; 1 Greenleaf on Evidence (Lewis' Ed.) § 578. The tendency of legislation, as well as of judicial decisions, is to relax this rule, and to enlarge upon its exceptions, or, rather, to permit a more liberal use of comparison with any writing established to be the writing of the party whose handwriting is in issue, whether the writing is otherwise relevant or not. The rule has been so enlarged in England by statute in 1854 and also by statute in various states in this country. 15 Am. & Eng. Ency. of Law (2d Ed.) 265, 269. See an exhaustive review of this subject in note to *University of Illinois v. Spalding*, 71 N. H. 163, 51 Atl. 731, 62 L. R. A. 817. The reason generally given for permitting a comparison with writings already in evidence is that it is better to permit the jury to use such papers for this purpose, under proper instructions, than to confuse them with impracticable distinctions as to their use. The objections originally urged for rejecting proof by comparison of hands were three in number, namely: (1) illiteracy of jurors; (2) danger of fraud and bias in the selection of a standard of comparison; (3) danger of multiplicity of collateral issues arising from necessity of making proof of the genuineness of the standard. The first objection has long been obsolete. 3 Wigmore on Evidence, § 2002.

Assuming that counsel for the appellees is right in contending that this evidence would involve the principle of a comparison of handwriting, would its admission be in conflict with the decisions of this court on this question? This court has never decided the precise issue here raised, and so far as we are advised the rule insisted upon by appellees has never been enforced where the facts were similar to those in this case. Indeed, in the record that we have of the celebrated *Howland Will Case*, 4 Am. Law Rev. 625, the trial court there seems to have gone much further in the admission of evidence bearing on traced or forged signatures than is here contended for by the appellant. In discussing the question of the comparison of handwriting by bringing the documents into juxtaposition, Chief Justice Shaw, in *Moody v. Rowell*, 17 Pick. (Mass.) 400, 28 Am. Dec. 317, said: "It seems to be difficult to distinguish, in principle, between the case of a paper admitted or proved to be genuine, given in evidence for another purpose, and a paper, the genuineness of which

is equally well established, when offered for this express purpose. In both cases the result depends upon skill and judgment in making the comparison and discovering the resemblances and differences." The dangers arising from the admission of such papers are greatly minimized where the writings admitted are conceded by the opposite party to be genuine or he is estopped from denying them. 1 Greenleaf on Evidence, § 581. If such comparison will lead to the ends of truth and justice when the papers are admitted in evidence for other purposes, there is much force in the argument that any evils that may be suggested as arising from the selection of particular writings for the purpose of comparison may be left, as all such evidence must be, to be corrected by other evidence or the individual judgment of the jury. *Morrison v. Porter*, 35 Minn. 425, 29 N. W. 54, 59 Am. Rep. 331. In *University of Illinois v. Spalding*, supra, it is said at page 169 of 71 N. H., at page 733 of 51 Atl., at page 825 of 62 L. R. A.: "It may be safely stated as a fundamental proposition that on the question whether a given signature is in the handwriting of a particular person comparison of the disputed signature with other writings of that person known to be genuine is a rational method of investigation, and that similarities and dissimilarities thus disclosed are probative, and as satisfactory in the instinctive search for truth as opinion formed by the unquestioned method of comparing the signature in issue with an exemplar of the person's handwriting existing in the mind and derived from direct acquaintance, however little, with the party's handwriting." That this court concurs in this reasoning is shown in *Greenebaum v. Bornhofen*, 167 Ill. 640, 645, 47 N. E. 857, 859, where in discussing the evidence as to comparison of handwriting, it was said: "In considering the issue the court might, and should, compare the signatures of the papers so in evidence, as a means of determining whether the disputed signatures were genuine. * * * Of this means of determining the truth the Appellate Court and this court are deprived. That it was a most important and valuable aid is certain. It may have afforded the most convincing proofs that the signatures were genuine."

[7, 8] While we are not disposed to overrule or set aside the holdings of this court as to the comparison of writings placed in juxtaposition, we are convinced that on reason and authority the rule should not be made more rigid. On the contrary, it should be liberally construed, so as to serve as an "important and valuable aid" in determining the genuineness of signatures. The reason of the rule is not against the comparison of the signatures in different documents by bringing them together in order to show the genuineness or falsity of the signature, but it is against the selection of a false stand-

ard as the characteristic type or style of handwriting and bringing before the jury collateral issues. No danger of unfairness of selection could arise from the introduction of the offered evidence. If the signatures offered are fac similes, they cannot vary. They would be like the work of a printing press or typewriter when working accurately. There would be no opportunity for an arbitrary selection, and no chance to choose between the signatures of different kinds. Only signatures that are identical can be of any value for the purpose for which these documents were offered. The proof of fac simile signatures can hardly raise collateral issues. In attempting to prove a disputed signature by a genuine typical one the standards offered may be innumerable, and each one offered must be proved to be genuine or its genuineness admitted. Not only must the standards be shown to be genuine, but their weight as evidence will depend upon whether they are typical. No such danger is liable to arise in attempting to prove fac simile signatures. The number offered must, in the nature of things, be limited.

[9] A comparison to establish a type of handwriting differs from a comparison to reach a conclusion as to whether two signatures are identical. The two methods of comparison are clearly distinguishable. In seeking to prove that signatures are identical in every respect, the object of the comparison is precisely the opposite of that usually sought. In other words, in the ordinary case of comparison it is sought, from the similarity or dissimilarity of the disputed writing compared with the genuine one, to show whether the disputed writing is genuine or a forgery, while in a case like this it is sought to prove the forgery of a signature by establishing the fact that the disputed signature is so nearly identical with other signatures that it must be a forgery—that is, that the disputed signature was traced from another by some process. The authorities generally agree that no two signatures of an individual written in a natural way will be the same in all respects. The fact that two signatures are exactly alike is accepted as strong evidence that one was traced or otherwise reproduced from the other, or that both were made from still another signature. *Day v. Cole*, 65 Mich. 120, 31 N. W. 823; *Kemp v. Mackrill*, Sayre (K. B.) 130; *Hanriot v. Sherwood*, 82 Va. 1; *Taylor Will Case*, 10 Abb. Prac. (N. S. N. Y.) 300; *McDonogh's Succession*, 18 La. Ann. 419; 1 *Moore on Facts*, § 607.

The disputed evidence did not involve the doctrine of the comparison of hands in the sense in which that rule has been followed in this state. The offered proof is similar in some respects to that which was held competent in *Brooks v. Tichbourn*, 14 Jur. 1122, to show that Brooks was the author

of a disputed writing in which the name of Tichbourn was misspelled "Titchbourn." Other letters of Brooks were offered in the lower court in which the name was misspelled in the same way. The reviewing court said: "It was objected, however, that the mode of proof of that habit was improper, and that the habit should be proved as the character of handwriting is, not by producing one or more specimens and comparing them, but by some witness who is acquainted with it from having seen the party write or corresponded with him. But we think that is not like the case of the general style and character of handwriting. The object is, not to show the similarity of the form of the letters and mode of writing a particular word or words, but to prove a peculiar mode of spelling a word, which might be evidenced by the plaintiff having orally spelt it in a different way from others, or written it in that way once or oftener, in any sort of characters—the more frequently the greater the value of the evidence. For that purpose one or more specimens written by him with that peculiar orthography would be admissible."

[10] It has never been doubted that the authorship of a writing might be shown by other circumstances than the likeness or unlikeness of one handwriting to that of another, as by the character of spelling or style of composition. Such a fact does not come within the rule governing proof as to the likeness or unlikeness of handwriting. Proof of such peculiarities may be made in any way that would be appropriate in other cases. In *Pate v. People*, 3 Gilman, 644, the prosecuting witness, Randall, testified that a receipt and contract described in an indictment were never executed by him, and he proceeded to point out wherein the style of writing and spelling differed from his own. For the purpose of contradicting him, the prisoner introduced other papers written and signed by Randall which correspond in these particulars with the documents alleged to be forged. The court held that this evidence was proper, and that the prosecution then had the undoubted right to rebut this testimony and sustain Randall by showing that the papers introduced by the prisoner and traced to his possession previous to the trial were originally written as stated by Randall but had since been made to resemble the forged writings by alterations and erasures. Incriminating letters written on a typewriting machine, not signed, were offered in evidence against a defendant in a criminal case; their genuineness being shown by evidence that in the town where they were mailed a machine was found that had defects that would produce the same character of writings that were found in the letters. *State v. Freshwater*, 30 Utah, 442, 85 Pac. 447, 116 Am. St. Rep. 853. This court has held that it was proper to prove by an expert that two instruments were writ-

ten by the same person, holding that the question was not whether the two writings resembled each other, but whether, in the opinion of the expert, they were written by the same person. *Rogers v. Tiley*, supra.

In a prosecution under the United States statutes against the slave trade, it became necessary for the prosecution to show the citizenship of the vessel employed for that purpose. The vessel had been originally owned by one Marsden and engaged in a legitimate business. Just prior to embarking in the slave trade, it appeared to have been registered in the name of one Gray. The theory of the prosecution was that Marsden was still the real owner and that Gray was a fictitious person. The prosecution sought to prove this by showing that the name "Gray" on the register was a simulated one, and not signed by Gray; that no such person as Gray lived. It was sought to prove this by introducing other signatures and comparing them with the name "Gray" signed on the register. The signatures introduced were not claimed to be genuine signatures of Gray, but were ostensibly those of other persons connected with the vessel. It was claimed that they were all written by the same person, and the prosecution offered testimony of experts to that effect. It was argued that the rule regarding the comparison of hands applied, and that the evidence should not be admitted. The court in overruling the objection stated that, if the purpose of the offer had been to show by comparison that the signature "Gray" was in the handwriting of defendant, it would be necessary to have in evidence, as a standard of comparison, the genuine signature of the defendant, but that the purpose there was to show the circumstance that all of these papers, ostensibly signed by different persons, were in fact written by the same person, and from this circumstance draw the inference that they were spurious, and that "Gray" had not signed the registry. *United States v. Darnaud*, 25 Fed. Cas. 754, No. 14,918.

In *Anson v. People*, 148 Ill. 494, 35 N. E. 145, it was held competent to prove in a forgery case impressions of a notarial seal to show that the impression on the instruments purported to be forged was made by that same seal. The following authorities also tend to uphold the contention that the offered evidence did not strictly involve the doctrine of comparing hands, but was a species of circumstantial evidence to be admitted for the purpose of showing a plan to forge a series of notes or papers: *Blacklock v. Randall*, 76 Ill. 224; *United States v. Chamberlain*, 25 Fed. Cas. 394, No. 14,778; *State v. Webb*, 18 Utah, 441, 56 Pac. 159; *Levy v. Rust* (N. J. Ch.) 49 Atl. 1017; *Sudlow v. Warshing*, 108 N. Y. 520, 15 N. E. 532;

Tally v. Cross, 124 Ala. 567, 28 South. 912; *Balcetti v. Serani*, Peake's Cas. 192; 1 Wigmore on Evidence, §§ 304, 315, 318.

Fac simile signatures necessarily resemble the genuine signature of the person. Honest witnesses must testify that the handwriting is similar, and many will be constrained to testify that the purported signature is genuine. If evidence of the nature here offered be excluded, the reputed signer being dead, frequently the best evidence that could be produced to show a traced signature would be excluded. It could hardly be said that any better evidence could be offered to show that a signature was a fac simile, except that of persons who actually saw the tracing done. The admission of the testimony offered would not in our judgment conflict with the rule heretofore laid down by this court as to comparison of handwriting by documents placed in juxtaposition, and we are not disposed to extend that rule so as to preclude, under proper restrictions, this character of testimony.

[11] As we understand the record, proper proof was made that the original note for \$15,000 sued on in Iowa could not be produced on this trial, and the photographic copy, preliminary proof as to its accuracy having been made, was proper evidence. *Rogers on Expert Testimony* (2d Ed.) 336. This photographic copy of the \$15,000 note and the original note of \$4,500 should have been admitted in evidence for the purpose of aiding the jury in reaching a conclusion as to whether the three signatures in question were all fac similes.

[12] These writings being admissible, expert testimony was permissible to aid in deciding as to whether they were fac similes. *Rogers v. Tiley*, supra; 15 Am. & Eng. Ency. of Law (2d Ed.) 276; 2 Jones on Evidence, § 570; *University of Illinois v. Spalding*, supra, note on page 869 of 62 L. R. A.

[13] Evidence is found in the record of an interview by one of appellees with Loren B. Miller, the administrator, and his brother, Clark Miller, when appellees were negotiating for the purchase of the two notes of \$8,500 and \$4,500, to the effect that said appellee showed the notes to the two Millers and asked them if they were all right, and they made no reply. We think this evidence was incompetent and should have been excluded. The two Millers could not bind the other heirs at law by any admissions or statements they might make.

We find no error in the giving and refusing of instructions.

The judgments of the Appellate and circuit courts will be reversed, and the cause remanded to the circuit court for further proceedings not inconsistent herewith.

Reversed and remanded.

(250 Ill. 35)

MERCHANTS' LOAN & TRUST CO. et al. v. NORTHERN TRUST CO. et al.

(Supreme Court of Illinois. April 19, 1911.)

1. TRUSTS (§ 217*)—TESTAMENTARY TRUSTS—POWERS OF TRUSTEE—INVESTMENT—"VARY."

Where a will creating a testamentary trust gave the trustees full power to invest and reinvest the residue and to vary the securities and property, the words "to vary" would be construed to mean "to change to something else," authorizing the trustees to change the investments in which they found the residue at the time of testator's death.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 301-309; Dec. Dig. § 217.*]

2. TRUSTS (§ 217*)—TRUST FUNDS—INVESTMENT.

The creator of a trust may designate how the investments may be made, and what security may be taken, or that security may be dispensed with, and the trustees will be bound by the directions; the question of the authority of the trustees depending not on a rule of law, but on the interpretation of the instrument creating the trust.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 301-309; Dec. Dig. § 217.*]

3. TRUSTS (§ 217*)—TRUST FUNDS—INVESTMENT—STATUTES.

Hurd's Rev. St. 1909, c. 140b, providing the securities in which trust funds may be invested, is permissive, and not mandatory, and does not apply to a case where directions are given in the instrument creating the trust with reference to the investment of the funds.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 301-309; Dec. Dig. § 217.*]

4. TRUSTS (§ 217*)—AUTHORITY OF TRUSTEE—REINVESTMENT—CONVERSION OF REALTY INTO PERSONALTY—VICE VERSA.

Where a will confers authority on trustees to convert realty into personalty or vice versa, or invest or reinvest in their discretion, the trustees may purchase such securities as a prudent and provident person would purchase as good and safe investments, and are not restricted to the conditions and limitations imposed by law for the investment of trust funds.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 301-309; Dec. Dig. § 217.*]

5. TRUSTS (§ 217*)—POWER OF TRUSTEE—INVESTMENT OF FUNDS—EXTRATERRITORIAL PROPERTY.

Hurd's Rev. St. 1909, c. 140b, specifying securities in which trustees may invest trust funds, does not indicate a public policy of the state not to authorize investments in securities outside the state, and does not prevent such investments where the trustees are domiciled in Illinois and are subject to the control of the courts of that state for any breach of trust.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 304; Dec. Dig. § 217.*]

6. TRUSTS (§ 217*)—TRUSTEES—INVESTMENT OF TRUST FUNDS—REAL ESTATE IN OTHER STATES.

A will creating a trust for a period of 30 years conferred power to invest and reinvest and to vary the securities and property as might be necessary or convenient to carry into full effect testator's intentions, with authority in the trustees to exercise their own discretion. The will also gave them power to make purchases, investments, and exchanges of securities as to them should seem expedient, and to deal fully and expeditiously with the estate. It also provided that it had been testator's general intention to keep at least half of his estate invested in real estate and the rest in per-

sonal property, but the trustees were to exercise their own discretion in that regard, testator directing that the investments be made with reference to the security of the trust fund rather than the interest or income to be derived, and that, where real and personal property had been given in trust, a proper proportion be maintained between them. Testator at the time of his death had extensive real estate investments in other states, and provided, in case any of the provisions of the will were contrary to the laws of such states, the trustees should sell such lands and convert them into other personal property, and apply the proceeds in the same manner as provided concerning the property sold. Held, that the trustees were fully authorized to make investments in real estate in other states.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 304; Dec. Dig. § 217.*]

7. TRUSTS (§ 217*)—TRUST FUNDS—INVESTMENT IN FOREIGN COUNTRIES.

Though Hurd's Rev. St. 1909, c. 140b, specifying securities in which trust funds may be invested does not indicate a policy to prevent investments in other states of the Union, it does indicate a policy not to authorize such investment in foreign countries.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 304; Dec. Dig. § 217.*]

8. TRUSTS (§ 217*)—TRUST FUND—INVESTMENT—INCREMENT FROM CORPORATE SECURITIES—NEW STOCK—"ANY INCREASE THEREOF."

Hurd's Rev. St. 1909, c. 140b, specifying securities in which trust funds may be invested, provides that any trustee may continue to hold any investment received by him under the trust or any increase thereof. At testator's death, he owned stock in various corporations which became a part of a trust created of the residue of his estate with power to the trustees to invest and reinvest, declaring that it was his desire that the trustees should retain for his estate the better class of securities, including mortgages, railroad, or other stocks and bonds, or other securities in which they might find any part of his estate invested at his death. Held, that the trustees were authorized to acquire and pay for their pro rata share of any increase of capital stock offered to them by a corporation at less than market value by reason of their ownership of shares of stock which belonged to testator at his death, or which came to them by reason of their ownership of stock belonging to testator at that time, the words "any increase thereof," as used in the statute, being inclusive of stock so issued.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 307; Dec. Dig. § 217.*]

For other definitions, see Words and Phrases, vol. 1, pp. 412-433; vol. 8, pp. 7575-7577.]

9. TRUSTS (§ 179*)—TRUSTEES—DUTIES AND LIABILITIES.

While the law does not protect the beneficiary of a trust from risks impossible to foresee or guard against in the exercise of business sagacity, trustees are bound to exercise their powers and act in the utmost good faith and with sound judgment and prudence.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 233; Dec. Dig. § 179.*]

Appeal from Appellate Court, First District, on Appeal from Circuit Court, Cook County; Thomas G. Windes, Judge.

Bill by the Merchants' Loan & Trust Company and others against the Northern Trust Company for the construction of the will of the late Marshall Field concerning their

powers with reference to the investment of the residue. A decree was rendered in favor of the trustees which was affirmed by the Appellate Court, and a further appeal taken on a certificate of importance. Affirmed.

Holland & Elliott, for appellants. Wilson, Moore & McIlvaine and Isham, Lincoln & Beale, for appellees.

CARTER, J. Appellees, as testamentary trustees of the residuary estate of Marshall Field, deceased, filed their bill in the circuit court of Cook county for a construction of the will of Marshall Field in so far as it relates to their powers of investment of the residuary estate in certain forms of property. The circuit court entered a decree construing the will, and an appeal was thereupon prayed to this court. We were of the opinion that a freehold was not involved and transferred the cause to the Appellate Court for the First District. 245 Ill. 511, 92 N. E. 308. That court affirmed the decree of the circuit court, and granted a certificate of importance to this court. This appeal followed.

The will in question, after disposing of a considerable portion of testator's estate by specific bequests, created a trust as to the residue, primarily for the benefit of two grandsons, continuing until 1943. This residuary estate is valued at not less than \$30,000,000. The estate consisted of real estate in Illinois, New York, Wisconsin, and other states in the United States, and of personal property, including bonds, promissory notes, and stocks of railroad and industrial corporations incorporated either under the laws of Illinois or of other states of the United States. The powers of investment of the trustees of the said residuary estate are contained in the twenty-first and twenty-third articles of the will, which, so far as they bear directly on the subject, are as follows:

"Twenty-First— * * * I hereby give to and invest them and their successors and associates in trust with such powers over and such title and estate in and to the property in this will devised and bequeathed as may be necessary or convenient to carry into full effect my intentions and designs in the execution of this will and in the several devises, donations and legacies herein specified and made. * * * I authorize my executors and residuary trustees, the survivors or survivor of them, and their successors, to sell and convert any or all of my real or personal estate, whenever in their judgment it shall be important or judicious to do so, for the purpose of paying legacies or making divisions and apportionments of my estate, or for any other purpose that may be required under this will. If at the time of my decease I shall be the owner of any lands, tenements or hereditaments situate, lying and being in any other State or country than the State of Illinois aforesaid, and the laws of

such other State or country shall be such that any of the provisions of this instrument shall or might be in conflict therewith or would be to any extent made ineffective or inoperative thereby, then it is my will and I direct that my executors and residuary trustees shall have the power and shall proceed forthwith to sell such lands and convert them into money or other personal property, and the proceeds of such sale shall be applied as the property sold and converted was directed to be. * * * While I do not wish to control or embarrass the discretion of my executors and residuary trustees, it is my desire that they shall retain for my estate the better class of securities, including mortgages, railroad or other corporate stocks or bonds and other securities in which they may find any part of my estate invested at my death, and that in selling or converting any securities they shall in the first instance dispose of such as in their judgment shall seem to be of the less substantial and enduring value for the purpose of investment. * * *

"Twenty-Third—To the respective trustees of the several trust funds or estates created by this my will I give and devise full powers of management and control of the respective trust funds or estates, to invest and reinvest the same, and to vary the securities and property in which, from time to time, such trust funds or estates may be invested, and to let and demise any lands and tenements at their discretion, respectively; but in making leases it is my desire that preference be given to leases for long terms rather than shorter ones, not exceeding, however, except in cases of ground leases for building purposes, the period of twenty (20) years. The respective trustees are authorized and empowered to sell, transfer and convey any of the trust property for the purpose of rebuilding or for reinvestment. * * * It is my desire that the respective trustees shall give a preference, whenever it may be practicable to do so, to the making of ground leases instead of sales of lands under their powers of sale. * * * It is my will and I direct that investments be made with reference to the security of the trust fund rather than the rate of interest or income to be derived from it, and that where real and personal property have been given in trust, a proper proportion be maintained between them. It has been my general intention to keep at least half of my property in real estate and the rest in personal property, but in this particular my trustees are to exercise their own discretion and act in each case as may, under the circumstances, seem best to them."

The decree found that the trustees had power, under the provisions of the will, first, to make investment of funds in their hands belonging to the residuary estate in real estate situated in the state of Illinois and elsewhere in the United States; and, second,

out of the funds belonging to the residuary estate to acquire and pay for their pro rata share of any increase of the capital stock of any corporation which shall be offered to them, as trustees, by such corporation at a price less than its then market value, by reason of their ownership of shares of stock of such corporation which belonged to Marshall Field at the date of his death or which shall have come to them by reason of their ownership of stock belonging to said Marshall Field at the date of his death.

[1] It is apparent that the testator intended to give his trustees uncontrolled discretion in the management of the estate, with full power "to invest and reinvest the same and to vary the securities and property," "To vary" means to change to something else. Webster's Dict.; Century Dict. Under somewhat similar language, it has been held that trustees might properly change the form of the investment from railroad bonds to real estate. *Whittingham v. Schofield's Trustee* (Ky.) 67 S. W. 846. The record discloses that the estate at the time of testator's death was about equally divided between real and personal property, and the will directs "that where real and personal property have been given in trust, a proper proportion be maintained between them. It has been my general intention to keep at least half of my property in real estate and the rest in personal property, but in this particular my trustees are to use their own discretion and act in each case as may, under the circumstances, seem best to them." The ample powers of investment and reinvestment contained in the provisions of the will just referred to are fully confirmed by the further provision which grants the trustees such powers over the estate "as may be necessary or convenient to carry into full effect my intentions and designs in the execution of this will." The trustees could not carry out the intention of the testator and keep a proper proportion between real and personal property during the life of the trust—more than 30 years—if they were obliged to invest the trust estate and its accumulations in personal property only. Neither could the trustees carry out the intention and design of the testator as expressed in the will that they should exercise "their own discretion and act in each case as may, under the circumstances, seem best to them," without having the full authority of investment as found by the decree and affirmed by the judgment of the Appellate Court.

[2] The creator of a trust may designate how the investments may be made and what security may be taken or that security may be dispensed with, and the trustees will be bound by the directions. *Denike v. Harris*, 84 N. Y. 89; 1 *Perry on Trusts* (6th Ed.) § 452; 17 *Am. & Eng. Ency. of Law* (2d Ed.) 428, and cases cited. The questions, therefore, before us, depend "not on a rule of law but on the interpretation" of the will, so as

to find the intention of the testator. In *re Rush's Estate*, 12 Pa. 875. The intention of the testator is always the primary object to be sought in deciding as to the authority given the trustees. *McCoy v. Horwitz*, 62 Md. 188.

Whether the trustees under this will can invest trust funds in real estate in Illinois depends upon the testator's intention as gathered from the entire will, having in mind the duration of the trust, the amount of the estate, and the ample powers conferred upon the trustees. In this case we are considering an instrument in which there are specific directions as to the management and investment of the trust estate. Such was not the situation in *Sholty v. Sholty*, 140 Ill. 81, 29 N. E. 1041; *Butler v. Butler*, 164 Ill. 171, 45 N. E. 426; *White v. Sherman*, 168 Ill. 589, 48 N. E. 123, 61 *Am. St. Rep.* 132; *Penn v. Fogler*, 182 Ill. 76, 55 N. E. 192. In all of those cases, however, it is specifically stated or clearly implied that the trustees are authorized to invest trust funds in such manner as directed by the instrument creating the trust.

[3] The following statute was enacted in Illinois in 1905: "That investments of trust funds by trustees, may, when not otherwise provided by the will, deed, decree, gift, grant or other instrument creating or fixing the respective trust, be in the bonds of the United States or of any of the states of the United States, or in first mortgages upon real estate in any state, or in the bonds of any county, city or municipality in any state, or in the first-mortgage bonds of any corporation of any state upon which no default in payment of interest shall have occurred, for a period of five years, but no trustee shall be authorized by this act to invest trust funds in any bonds in which cautious and intelligent persons do not invest their own money, and any trustee may continue to hold any investment received by him under the trust, or any increase thereof." *Hurd's Stat.* 1909, p. 2252. This act was in force at the time of the testator's death. Such statutes are generally permissive rather than mandatory. They are intended to provide for situations where the instrument constituting the trust does not otherwise provide. *Willis v. Braucher*, 79 Ohio St. 290, 87 N. E. 185. Other investments than those named in the statute may be authorized by a trust instrument. *Clark v. Beers*, 61 Conn. 87, 23 *Atl.* 717; *Durrett's Guardian v. Commonwealth*, 90 Ky. 312, 14 S. W. 189. Even though the Constitution did not permit the Legislature to authorize the investment of trust funds in certain bonds or stocks, it was held that such investment might be authorized by the trust instrument. In *re Barker's Estate*, 159 Pa. 518, 28 *Atl.* 365, 368.

[4] Where the will gives authority to the trustees to convert realty into personalty or personalty into realty, or invest and reinvest,

in their discretion, the trustees may purchase such securities as a prudent and provident person would purchase as good and safe investments, and they are not restricted to the conditions and limitations imposed by law for the investment of trust funds. In *re Allis' Estate*, 123 Wis. 223, 101 N. W. 365. See, also, to the same effect, *Drake v. Crane*, 127 Mo. 85, 29 S. W. 990, 27 L. R. A. 653, and *Brown v. French*, 125 Mass. 410, 28 Am. Rep. 254.

[6] The words in an instrument, "with full power to make purchases, investments and exchanges in such manner as to them shall seem expedient," have been construed to be enabling words giving trustees the power to deal "fully and expeditiously with the estate," but not releasing them from the obligation to exercise sound judgment and reasonable and prudent discretion. In *re Day's Estate*, 183 Mass. 499, 67 N. E. 604.

[5] It is argued that the investment of the funds of an estate in real estate in other states will permit them to escape from the jurisdiction of our courts. The trustees named in this will are domiciled in this state, subject at all times to the courts of the state for any breach of their trust. The jurisdiction of our courts can therefore be invoked in disputes arising from investments outside of the state as well as from investments within the state. It is obvious from the statute referred to that it is not against the public policy of Illinois to authorize investments in securities outside of the state. If, without express authority in the trust instrument, a trustee may, under this statute, invest in real estate mortgages in other states, it can hardly be argued that the public policy of the state prohibits trustees from making investments in real estate in other states. A further argument in favor of the investment of the funds in lands in other states can fairly be based on the fact that the testator, himself a man of undoubted business sagacity and foresight, invested his own funds in that manner, and such facts "might well be taken into consideration by the trustees when called to exercise their best skill and discretion. They might reasonably and properly inquire and consider what the testator would do if the testator were placed in the situation in which they were placed." *Harvard College v. Amory*, 9 Pick. (Mass.) 446. In the case just referred to, the court held that the trustees had authority to invest money in a dwelling house for a daughter, in North Carolina. In *Thayer v. Dewey*, 185 Mass. 68, 69 N. E. 1074, it was held that the rule in that state as to the duty of trustees in making investments was that they should act in good faith in the exercise of sound discretion, and the court held, that, even though the trust instrument did not give the express authority, the trustees were justified in investing more than \$200,000 of the trust funds in real estate in Illinois. All parties conceded in that case

that, if the instrument so authorized, an investment could be made in real estate in another state.

It is contended that the cases of *McCullough v. McCullough*, 44 N. J. Eq. 313, 14 Atl. 123, and *In re Reed*, 45 App. Div. 196, 61 N. Y. Supp. 50, lay down a contrary rule. A later decision of the highest court of New York in effect announces the doctrine that, in the absence of statutory authority, uncontrolled powers of investment will not be held to limit investments to the state where the trust was created. In *re Hall*, 164 N. Y. 196, 58 N. E. 11. It may be conceded that the authorities are not all in harmony as to the investment of trust funds in states other than where the trustees reside, when not particularly authorized by the trust instrument. It seems clear, however, that the tendency of the decisions in recent years is to broaden the powers of trustees as to such investments. *Willis v. Braucher*, supra; *In re Nye's Estate*, 5 Watts & S. (Pa.) 254, 40 Am. Dec. 498, and note. Recent legislation and decisions in Great Britain are less restrictive as to the locality for trust investments than formerly. Power to invest in real securities in England or Wales has been held to authorize such an investment in Ireland. 17 Am. & Eng. Ency. of Law (2d Ed.) 455, and cases cited. Trustees have the power to invest in stocks or securities, not only of companies, incorporated or unincorporated, in the United Kingdom, but also of companies formed or registered outside. *Tennant v. Stanley*, 75 L. J. 56. See, also, *Rayner v. Rayner*, 73 L. J. Ch. Div. 111; *Ovey v. Ovey*, 2 L. R. Ch. Div. 524. That the testator intended the trustees to have the power to make investments in other states appears clear, not only from the broad powers given to them in the will as well as from the fact that he had made such investments himself, but also in that he expressly directs that, if the provisions of the will relating to his investments in real property in other states conflict with the laws of such other states, then such real estate should be sold. The conclusion is obvious that otherwise he intended such real estate to be retained as an investment, if the trustees so desired.

[7] The argument that the findings of the decree would extend the field of investments beyond the United States is not sound. The public policy of our state, as shown by the statute in question, only allows investments in states of the Union. It does not extend to investments in foreign countries.

[8] It is further contended that the decree of the circuit court is wrong in authorizing the trustees to acquire and pay for their pro rata share of any increase of capital stock offered to them by the corporation at less than market value by reason of their ownership of shares of stock which belonged to Marshall Field at his death or which came to them by

reason of their ownership of stock belonging to Marshall Field at his death. We think the findings of the decree in this regard are clearly within the authority granted by the will. Moreover, the statute referred to provides that "any trustee may continue to hold any investment received by him under the trust, or any increase thereof." This plainly includes, under the words "any increase thereof," such an investment as is above referred to.

In the management and investment of trust property the will provides that the trustees shall have regard for the certainty of the income rather than the amount, and this is the general rule. The law does not give trustees the same freedom of choice in investments that may be exercised by prudent business men in their own affairs. It permits the trustee to assume no risks in his investment other than those that are inseparable from every species of property. "Absolute freedom from risk is impossible. The most stable forms of property may lose their value; lands may depreciate; even nations may become bankrupt. From these reasons which inhere in every kind of ownership the law does not pretend to save the beneficiary, but from the risk growing out of the uncertainty of speculative investments the law does protect him by making the trustee personally responsible for all trust funds invested by him in such a manner," unless upon the express direction in the instrument creating the trust or statutory permission. 3 Pomeroy's Eq. Jur. (3d Ed.) § 1074.

[9] The trustees must always and ever, in exercising their powers; act in the utmost good faith and with sound judgment and prudence.

It is apparent from the entire will that the testator had great confidence in the ability and integrity of the trustees selected by him to manage his estate. He invested them with broad discretionary powers. They were charged with the investment of large funds. Their task is a great and responsible one. It was clearly the intention of the testator to permit them to invest the funds in accordance with the findings of the decree.

The judgment of the Appellate Court will be affirmed.

Judgment affirmed.

(250 Ill. 97.)

SHEA v. CLEVELAND, C., C. & ST. L. RY. CO.

(Supreme Court of Illinois. April 19, 1911.)

1. RAILROADS (§ 102*)—FARM CROSSINGS.

Where a farm of 60 acres was bounded on the south by a railroad, and south of and adjoining the railroad there was an electric road, and the farmer, desiring a farm crossing to reach the electric line, bought an acre south of and adjoining the electric line, he was entitled, under Railroad and Warehouse Act, §

4 (Hurd's Rev. St. 1909, c. 114, § 66), to a farm crossing between the two tracts.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 306-314; Dec. Dig. § 102.*]

2. RAILROADS (§ 1*)—INCORPORATION.

The railroad and warehouse act (Hurd's Rev. St. 1909, c. 114) is the only authority under which a commercial electric railroad, located on its own right of way, can be operated.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1; Dec. Dig. § 1.*]

3. RAILROADS (§ 102*)—FARM CROSSINGS.

Where a farm of 60 acres was bounded on the south by a railroad, and south of and adjoining the railroad there was an electric road, and the farmer, desiring a farm crossing to reach the electric line, bought an acre south of and adjoining the electric road, the railroad could not resist the farmer's right to a crossing under Railroad and Warehouse Act, § 4 (Hurd's Rev. St. 1909, c. 114, § 66), on the ground that he could not compel the construction of a crossing over the electric road.

[Ed. Note.—For other cases, see Railroads, Dec. Dig. § 102.*]

4. RAILROADS (§ 102*)—FARM CROSSINGS.

A notice to construct a farm crossing under Railroad and Warehouse Act, § 4 (Hurd's Rev. St. 1909, c. 114, § 66), need not give the precise location of the crossing, since the precise location is a matter which neither party has the absolute right to determine, and if the landowner does not select the precise spot the road may use a reasonable discretion.

[Ed. Note.—For other cases, see Railroads, Dec. Dig. § 102.*]

Appeal from Appellate Court, Third District, on Appeal from Circuit Court, Coles County; William B. Schofield, Judge.

Action by Martin Shea against the Cleveland, Cincinnati, Chicago & St. Louis Railway Company. From a judgment of the Appellate Court (158 Ill. App. 364), reversing a judgment for plaintiff on appeal from the judgment of a justice of the peace, plaintiff appeals. Reversed.

James W. & Edward C. Craig, for appellant. George B. Gillespie (L. J. Hackney, Gillespie & Fitzgerald, and James Vause, Jr., of counsel), for appellee.

DUNN, J. The appellant, Martin Shea, sued the appellee before a justice of the peace of Coles county. Upon an appeal to the circuit court, he recovered a judgment for \$67.40, which the Appellate Court reversed, without remanding the cause. A certificate of importance having been granted, an appeal was taken to this court.

The appellant sued, under section 4 of the "act in relation to fencing and operating railroads" (Hurd's Stat. 1909, p. 1750), to recover double the value of a farm crossing which he had built.

The appellant since 1862 has owned, resided upon, and farmed 60 acres of land a short distance east of the city of Mattoon, adjoining the railroad of the appellee, which formed the south boundary of the appellant's land. In 1903 the Mattoon City Railway Company built an electric railroad from

Mattoon to Charleston, the right of way for which, opposite the appellant's farm and for some distance east and west, was south of, adjoining, and parallel to the appellee's right of way. An east and west road ran past the appellant's farm, but there was no north and south road from about a mile and a half east to about a mile west of it. The electric road, which carried both passengers and freight, established a station immediately south of the appellant's farm, and he desired a crossing over the railroad to give him access to the electric cars. In March, 1909, he purchased an acre of land immediately south of and adjoining the right of way of the electric road, being a strip 4 rods wide, extending east and west 40 rods, and soon after he gave notice to the appellee and the Mattoon City Railway Company to construct a farm crossing between the two tracts of land, and another notice to the appellee to construct a farm crossing to give access to the electric road from the appellant's land on the north of the railroad. The appellee not having constructed the crossing, the appellant did so, and then brought this suit.

The appellant contends that the statute requires a railroad company to construct a farm crossing when necessary to enable an owner of land adjoining its right of way on one side to reach an electric road adjoining its right of way on the other side. He also contends that, where an owner of land adjoining a railroad on one side buys land adjoining the railroad on the other side, his right to a farm crossing will not be affected by his motive in buying the land. The appellee disputes these propositions, and in the view we take of the case it will be necessary to consider only the latter.

The facts are undisputed. It may be conceded that appellant bought the acre of land south of the railroad for the purpose of getting a crossing, and that he wanted the crossing to enable him to reach the electric road. Still, after he had bought the acre tract, he was the owner of a farm divided by a railroad. If it be said that the acre was not a part of the farm, but an independent tract, used separately and rented to a stranger, the answer is that the railroad alone makes it a separate tract, and that a crossing over the railroad is necessary to enable the owner to use his property as a connected farm, as he has a right to use it. This was, however, a question of fact, which the judgment of the trial court settled in the appellant's favor. There is no evidence tending to show that the land was other than ordinary farm land, or was used or capable of use, as located and surrounded, for any other purpose. If the appellant had inherited or bought 160 acres south of the railroad, surrounded on the east, south, and west by land of other owners, and with no electric road intervening, probably no question would be made of his right to a farm

crossing. So if the quantity had been 40 acres, or 20, or perhaps 10. It could not be said that the right to the crossing would not exist in any case where the land was of substantial value and capable of profitable cultivation and use. What has the appellant's motive in the acquisition of the land to do with his rights as a landowner after he has acquired it? The statute fixes the rights of the railroad company and adjoining landowners. Farm crossings must be constructed by railroad companies when and where they become necessary for the use of the proprietors of land adjoining the railroads. The right to buy land and the rights attached to its ownership are not limited by this provision. Such rights do not become fixed and unalterable by reason of the existence of a railroad adjoining a farm. Any person may buy any land he chooses, in any situation and for any reason that may appeal to him, and his rights as a landowner will be absolutely unaffected by the motives which induced him to buy. In this case the appellant owns the land mentioned in the evidence, and is entitled to all the legal rights attaching to such ownership, unaffected, in the slightest degree, by the motives which induced him to buy the land. The Appellate Court, having made no finding of facts, must have found the facts the same as the trial court. Whether a farm crossing had become necessary, and whether the acre south of the railroad was capable of use in connection with the farm and as a part of it, or was intended to be so used, were questions of fact, or, at least, questions of mixed law and fact, which the trial court found in favor of appellant.

[1] It is insisted by the appellee that the appellant's land south of the electric road does not adjoin the railroad. Where two railroads, parallel with and adjoining one another, pass through a farm, the farm adjoins each railroad, though each part of the farm may not touch both railroads. The owner of the farm is an adjoining landowner as to each railroad, and is entitled to the benefit of the statute.

[2, 3] It is also insisted that the appellant is not entitled to the crossing over the appellee's railroad, because such crossing will not connect the north and south tracts; and the appellant cannot compel the construction of a crossing over the electric road, because the Mattoon City Railway Company is incorporated under the general incorporation act, and is not subject to the act in question here. Under the evidence in this case, the Mattoon City Railway Company seems to be operating a commercial railroad upon its own right of way. The railroad and warehouse act is the only authority under which such a railroad can be so operated in this state. *Harvey v. Aurora & Geneva Railway Co.*, 174 Ill. 295, 51 N. E. 163; *Dewey v. Chicago & Milwaukee Electric Railway Co.* 184 Ill. 426, 56 N. E. 804. It may be doubt-

ed whether a corporation exercising the privileges and franchises granted by that act could repudiate the liabilities imposed by statute upon corporations organized under it. But, whether it may do so or not, a stranger cannot repudiate them in advance in a proceeding to which such railway company is not a party. If the right exists against the appellee, it is sufficient for this suit.

[4] It is also contended in behalf of appellee that the notice given by appellant was not sufficient, in not stating where the farm crossing had become necessary. The statute only provides that the notice should describe the lands on which the farm crossing was required to be built. The notice did this. The precise location was a matter which neither party had the absolute right to determine, without regard to the other. The interest of each and the safety of the public were to be considered. If the appellant did not select the precise spot, the appellee would be justified in using a reasonable discretion in choosing one, and vice versa.

The claim that the appellant is entitled to a crossing over the appellee's right of way by reason of the location of the station of the electric road we have not found it necessary to consider. The circuit court held that the appellant was so entitled, and the Appellate Court held this to be error. Whether it was so or not, it was not sufficient to reverse the judgment, because it did not affect the validity of the appellant's other claim, by reason of his ownership of farm lands which were divided by the railroad.

The judgment of the Appellate Court will be reversed, and that of the circuit court affirmed.

Judgment reversed.

(250 Ill. 102)

HEINROTH v. FROST et al.

(Supreme Court of Illinois. April 19, 1911.)

1. MORTGAGES (§ 590*) — JUNIOR INCUMBRANCE.

A person claiming through a junior incumbrance cannot maintain ejectment against those claiming under the foreclosure of a prior incumbrance.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 1691, 1692; Dec. Dig. § 590.*]

2. MORTGAGES (§ 535*)—FORECLOSURE—JUNIOR INCUMBRANCES.

The sale of land under a decree of foreclosure is a sale of every interest in the land belonging to any party to the suit and discharges the land from every lien of such party. All are merged in the certificate of purchase, and subsequent judgments do not become a lien on the property.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. § 1556; Dec. Dig. § 535.*]

3. MORTGAGES (§ 594*)—FORECLOSURE—RIGHT TO REDEEM—JUDGMENT CREDITORS—STATUTES.

The right of a creditor to redeem does not depend upon any lien on the property, but exists solely by reason of section 20 of chapter 77 of the Revised Statutes of 1874, providing that any judgment creditor having a judgment upon which execution can issue may redeem by following the course directed by the statute.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 1713-1714; Dec. Dig. § 594.*]

4. MORTGAGES (§ 497*)—FORECLOSURE—PARTIES—SUMMONS.

When a party to a foreclosure suit was summoned by publication and did not appear, while the judgment was not final as to her, as she had the right under Chancery Act (Hurd's Rev. St. 1909, c. 22) § 19, to appear and answer within three years, subject to such action on her part, the decree was as conclusive as if rendered on personal service.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 1469-1473; Dec. Dig. § 497.*]

5. MORTGAGES (§ 599*)—FORECLOSURE—RIGHT TO REDEEM—PARTIES INTERESTED—JUDGMENT CREDITORS.

Under Rev. St. 1874, c. 77, § 18, providing that a defendant interested in the premises may redeem within 12 months after the sale, and section 20, providing that a judgment creditor may redeem after 12 months and within 15 months after sale, a junior mortgagee may redeem as a party interested under section 18, and on foreclosure as a judgment creditor under section 20.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 1733-1741; Dec. Dig. § 599.*]

6. MORTGAGES (§ 599*)—FORECLOSURE—REDEMPTION.

A judgment creditor may redeem after 12 and within 15 months from a sale made under a decree to enforce a prior lien to which such judgment creditor was a party.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 1733-1741; Dec. Dig. § 599.*]

7. MORTGAGES (§ 594*)—FORECLOSURE—REDEMPTION—SUBSEQUENT INCUMBRANCE.

Whether a purchaser at a sale under a second foreclosure decree acquired anything thereunder, or whether she had a right to redeem as a successor to an interest which had not been represented in a prior foreclosure, she had a right under the statute and decisions to redeem as a judgment creditor from the prior foreclosure sale, and, where there was no irregularity in the proceedings prior or subsequent to the redemption, the title passed to the parties claiming under her as a purchaser at such sale, and must prevail against a title founded on a later mortgage.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 1709-1731; Dec. Dig. § 594.*]

Appeal from Circuit Court, Lake County; Charles H. Donnelly, Judge.

Action by Alice Heinroth against Albert C. Frost and others. From a judgment for defendants, plaintiff appeals. Affirmed.

Leslie A. Needham (George W. Field, of counsel), for appellant. Holland & Elliott, for appellees.

DUNN, J. Alice Heinroth brought an action of ejectment against appellees, and has appealed from a judgment in their favor.

The Winthrop Harbor & Dock Company is

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

the common source of title. On December 8, 1899, it mortgaged the premises in controversy, together with another tract containing about 1½ acres, to secure its note for \$10,000. The mortgage was foreclosed at the March term, 1902, of the circuit court of Lake county, and on May 13, 1902, the mortgaged premises were sold by the master under the decree to William Jones, the complainant. On August 13, 1903, Caroline Roth redeemed from that sale as a judgment creditor of the Winthrop Harbor & Dock Company. Another redemption by another judgment creditor followed, and litigation ensued between Mrs. Roth and the other judgment creditors of the Winthrop Harbor & Dock Company, which resulted in a decree setting aside the sale under Mrs. Roth's execution, ordering a sale of the premises by the master, and providing for the distribution of the proceeds. That litigation came to this court, where the decree was affirmed. *Burnham v. Roth*, 244 Ill. 344, 91 N. E. 472. A sale of the premises was afterward made by the master under that decree, and the appellees derive their title from that sale.

On January 31, 1901, the Winthrop Harbor & Dock Company conveyed to William T. Underwood the premises in controversy, together with a large amount of other real estate, in trust to secure a number of notes, and this trust deed was foreclosed at the March term, 1903, of the circuit court of Lake county. On May 19, 1903, the master sold, under this decree, to Caroline Roth all the real estate conveyed by the trust deed, including the premises which had been sold under the former decree, a year before, to William Jones. On June 25, 1904, Frank H. T. Potter, as assignee of a judgment against the Winthrop Harbor & Dock Company, redeemed from the master's sale of the premises in controversy and other premises, and subsequently, by virtue of a sale pursuant to said redemption, received from the sheriff a deed for all the premises so redeemed. It is under this deed that the plaintiff derives her title.

On November 26, 1900, the Winthrop Harbor & Dock Company executed a trust deed conveying to the Security Title & Trust Company, as trustee, the same property included in the mortgage of December 8, 1899, to secure the payment of 29 notes of the Winthrop Harbor & Dock Company; 28 being for \$600 each and 1 for \$700. These notes became the property of Caroline Roth, who redeemed from the sale under the first mortgage, and also became the purchaser at the sale under the subsequent trust deed to Underwood. The trustee, the Security Title & Trust Company, was made a party to the suit for the foreclosure of the first mortgage, as were also the unknown owners of the notes secured by the trust deed, who were notified by publication. Mrs. Roth was not made a party by name, and did not appear. The decree was by default against all

the defendants, finding the amount due the complainant only, and that it was a first lien. The sale was to the complainant for his debt, interest, and costs.

The 29 notes secured by the trust deed to the Security Title & Trust Company were also included among the notes secured by the Underwood trust deed, though their lien, except as to the property included in the former trust deed, was inferior to other notes secured by the latter. The unknown holder of these 29 notes, who was Caroline Roth, was made a party to the suit for the foreclosure of the Underwood trust deed. Mrs. Roth answered the bill, simply stating that she was the holder of the 29 notes secured by the Underwood trust deed. The decree found that these notes were a second lien, and ordered that, if the amount due on complainant's first lien was not paid, the lands should be sold, and, if there should be a surplus after satisfying the first lien, it should be applied upon the second lien up to \$18,951.16. All the property included in the first mortgage and in the trust deed to the Security Title & Trust Company had been sold at the master's sale under the first decree of foreclosure before the suit to foreclose the Underwood trust deed was begun, and no mention was made of either the mortgage or trust deed or of the decree or sale, in the bill, answer or elsewhere, in the later suit. During the pendency of this suit, on March 30, 1903, Mrs. Roth recovered a judgment in the circuit court of Cook county on a part of her 29 notes, a transcript of which was later filed in Lake county, and it was under this judgment, upon which a balance yet remained unpaid after the sale under the Underwood decree, that the redemption was made from the Jones sale.

[1] On behalf of the appellant, it is insisted that Mrs. Foley, the complainant in the suit to foreclose the Underwood trust deed, was not a party to the Jones suit to foreclose the first mortgage, and was therefore not bound by the decree in that case; but it is manifest that the Jones mortgage being prior to the Underwood trust deed, if its foreclosure and the sale, redemption, and subsequent conveyances were in conformity to law, the title of the Winthrop Harbor & Dock Company and all other parties to that suit has become vested in the appellees, and that the appellant, claiming through a junior incumbrance, cannot maintain ejectment against the appellees, who claim under the foreclosure of the prior incumbrance. Therefore, if the proceedings under which the appellees claim are found to be in conformity to law, it will be unnecessary to investigate the appellant's claim of title.

[2] The question of the validity of the appellees' title turns upon Mrs. Roth's right to redeem from the sale to Jones on May 13, 1902. No objection is made to the sufficiency of the decree or the formality of any of the proceedings, but it is insisted

that Mrs. Roth was not a creditor having a right under the statute to redeem. The proposition is advanced that a sale under a decree of foreclosure in default of payment of the amount due upon a prior mortgage lien directing the payment of the surplus arising from the sale upon a subsequent lien, not only extinguishes the subsequent lien, but forever discharges the land from the payment of the debt, even though no decree of sale for the satisfaction of the subsequent lien has been made. The sale of land under a decree of foreclosure is a sale of every interest in the land belonging to any party to the suit, and discharges the land from every lien of such party. All are merged in the certificate of purchase. *Ogle v. Koerner*, 140 Ill. 170, 29 N. E. 563; *Lightcap v. Bradley*, 186 Ill. 510, 58 N. E. 221. Subsequent judgments do not become a lien on the property.

[3] The right of a creditor to redeem does not depend upon any lien on the property, but exists solely by reason of section 20 of chapter 77 of the Revised Statutes of 1874. *Commerce Vault Co. v. Barrett*, 222 Ill. 169, 78 N. E. 47, 113 Am. St. Rep. 382. The only requirement of that section is that the creditor shall have a judgment upon which an execution is authorized to issue, and it may be in any county or any court in the state. Any such judgment creditor may redeem by following the course directed by the statute. Upon this statutory right appellant would impose two limitations not found in the statute, viz., that a party, though a judgment creditor, may not redeem from his own sale, and that a party may not have the right to redeem both as a defendant or person interested in the premises under section 18 of chapter 77 and as a judgment creditor under section 20.

[4] In connection with the latter proposition, it is insisted that, as Mrs. Roth was a party to the Jones foreclosure suit only as the unknown owner of the notes secured by the trust deed to the Security Title & Trust Company and was notified by publication only, the decree as to her was interlocutory, and did not become final until three years from its date. It is true that Mrs. Roth might under section 19 of the chancery act, within three years have appeared, answered the bill and made defense if she had desired to do so, and that all rights acquired under the decree would have been subject to the further action of the court. But subject to such action as might be had upon her application the decree was conclusive. It might be enforced and all rights acquired under or with reference to it would be valid to the same extent as if it had been rendered on personal service. Mrs. Roth did not appear and answer the bill, and the decree has at all times since its rendition had the same force, and the rights of all persons in relation

to it have been the same as if it had been rendered on personal service.

[5] The contention that a party may not have the right to redeem both as a person interested in the premises under section 18 and as a judgment creditor under section 20 has been decided adversely to the appellant in *Whitehead v. Hall*, 148 Ill. 253, 35 N. E. 871, and *Beadle v. Cole*, 173 Ill. 136, 50 N. E. 809. In each of those cases a second mortgagee was made a party to a bill to foreclose the first mortgage, and at the sale the first mortgagee became the purchaser for the amount of the decree, interest, and costs. It was held that the second mortgagee had a right to redeem within twelve months after the sale under section 18, and, having obtained a decree of foreclosure of his mortgage, was also entitled to redeem as a decree creditor under section 20 after 12 months and within 15 months of the sale.

Whether a party may redeem from his own sale or not is a question which is not presented by this record. Neither of the foreclosure sales here was Mrs. Roth's. They were not brought about by her. In the Jones decree she did not even answer, but the decree was by default. In the Underwood decree she answered, merely setting up her ownership of certain notes mentioned in the bill, but asking no relief. In neither case was her statutory right of redemption affected by the decree. Under the two cases last cited, she had a right to redeem from either sale within 12 months. Under them, also, if she obtained a decree or judgment so as to bring herself within the terms of the statute as a decree or judgment creditor, she would have a right to redeem after 12 months and within 15 months of the sale.

[6] We have many times recognized the right of a judgment creditor to redeem after 12 and within 15 months from a sale made under a decree to enforce a prior lien to which such judgment creditor was a party. *Boynton v. Pierce*, 151 Ill. 197, 37 N. E. 1024; *People v. Bowman*, 181 Ill. 421, 55 N. E. 148, 72 Am. St. Rep. 265; *Wehrhelm v. Smith*, 226 Ill. 346, 80 N. E. 908; *Wood v. Whelen*, 93 Ill. 153. Whether Mrs. Roth, at the sale under the second foreclosure decree on May 19, 1903, acquired anything or not—whether, as the successor to an interest which had not been represented in the previous foreclosure, she had any right to redeem or not—under the plain language of the statute and the decisions of this court which have been mentioned she had the right, as a judgment creditor, to redeem from the sale of May 13, 1902. No irregularity having been complained of in the proceedings prior or subsequent to the redemption, the title passed by those proceedings to the appellees and must prevail against a title founded on the later mortgage.

Judgment affirmed.

(250 Ill. 108)

PEOPLE v. PRICE.

(Supreme Court of Illinois. April 19, 1911.)

1. CRIMINAL LAW (§ 108*)—VENUE—BIGAMY.

Under Cr. Code (Hurd's Rev. St. 1909, c. 38) §§ 28, 29, making one who, having a former husband or wife living, marries another or continues to cohabit with such second husband or wife in the state, guilty of bigamy, etc., the offense of bigamy may be committed by marrying another person while the former husband or wife is living or by continuing cohabitation with the second husband or wife in the state while the former husband or wife is living, and the two offenses are so far distinct that an indictment may be presented in the county where the bigamous marriage was celebrated and in another county for unlawful cohabitation in pursuance of the bigamous marriage.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 221; Dec. Dig. § 108.*]

2. CRIMINAL LAW (§ 18*)—STATUTES—LEGISLATIVE POWER.

The Legislature may not make an act committed in a foreign state or country a felony in Illinois merely because the offender may be found and apprehended in Illinois.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 7; Dec. Dig. § 18.*]

3. CRIMINAL LAW (§ 18*)—STATUTES—LEGISLATIVE POWER.

The Legislature may for the protection of good morals and the punishment of indecency make the cohabitation of a man and woman in Illinois begun under a bigamous marriage in another state or country a felony.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 18.*]

4. CRIMINAL LAW (§ 108*)—VENUE—BIGAMY.

A prosecution for cohabitation in Illinois of a man and woman begun under a bigamous marriage celebrated in another state or country must, as required by Bill of Rights, § 9, be carried on in the county where the cohabitation occurs.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 221; Dec. Dig. § 108.*]

5. BIGAMY (§ 4*)—UNLAWFUL COHABITATION—INDICTMENT—REQUISITES.

Under Cr. Code (Hurd's Rev. St. 1909, c. 38) § 28, providing that whoever, "having a former husband or wife living," marries another or continues to cohabit with such second husband or wife in the state, shall be guilty of bigamy, an indictment for bigamy based on unlawful cohabitation in the county pursuant to a bigamous marriage celebrated elsewhere must allege that the former spouse of accused is living; the quoted phrase applying to the offense of unlawful cohabitation.

[Ed. Note.—For other cases, see Bigamy, Cent. Dig. §§ 19-29; Dec. Dig. § 4.*]

Hand, Cartwright, and Carter, JJ., dissenting.

Error to Criminal Court, Cook County; Kickham Scanlan, Judge.

Edward B. Price was convicted of bigamy, and he brings error. Reversed.

B. M. Thomas, for plaintiff in error. W. H. Stead, Atty. Gen., John E. W. Wayman, State's Atty., and W. Edgar Sampson (Zach Hofheimer, of counsel), for the People.

VICKERS, C. J. Edward B. Price was convicted in the criminal court of Cook county under an indictment charging him with

the offense of bigamy, and sentenced to an indeterminate term in the penitentiary. He has sued out of this court a writ of error for the purpose of bringing the record of his conviction before this court for review.

Numerous errors are assigned upon the record and argued in the briefs of counsel, but, in the view that we have of this case, it will only be necessary to consider the error assigned upon the overruling of plaintiff in error's motion to quash the indictment.

The indictment, omitting the formal parts, is as follows: "That one Edward B. Price, late of the county of Cook, on the third day of July, in the year of our Lord one thousand nine hundred and four, at the city of St. Joseph, in the state of Michigan, did lawfully marry one Ida M. Lambur, and then and there did have the said Ida for his wife, and that he, the said Edward B. Price, afterwards, and while he was so married to the said Ida, as aforesaid, to wit, on the first day of May, in the year of our Lord one thousand nine hundred and nine, in Kane county, in the state of Illinois, feloniously and unlawfully did marry and take to wife one Cora L. Suck, otherwise called Cora Zuck, and to her, the said Cora, was then and there last aforesaid married, the said Ida, the said former wife, being then alive, and the said Edward B. Price, at the time of his said marriage to the said Cora, well knowing that the said Ida, his former wife, was then alive, and afterwards, to wit, on the ninth day of May, in the year of our Lord one thousand nine hundred and nine, the said Edward B. Price, unlawfully and feloniously with the said Cora did live and cohabit and continue to cohabit with the said Cora, his second wife, as aforesaid, in the said county of Cook and state of Illinois aforesaid, contrary to the statute and against the peace and dignity of the same people of the state of Illinois."

The objection pointed out to this indictment is that it nowhere charges that the wife, Ida, was alive at the time the offense of unlawful cohabitation is alleged to have been committed in Cook county.

Sections 28 and 29 of our Criminal Code (Hurd's Rev. St. 1909, c. 38), relating to the offense of bigamy, are as follows:

"Sec. 28. Whoever, having a former husband or wife living, marries another person, or continues to cohabit with such second husband or wife in this state, shall be deemed guilty of bigamy, and be imprisoned in the penitentiary not less than one nor more than five years, and fined not exceeding \$1000: Provided, nothing herein contained shall extend to any person whose husband or wife shall have been continually absent from such person for the space of five years together, prior to said second marriage, and he or she not knowing such husband or wife to be living within that time. Also, nothing herein contained shall extend to any person that, or

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

shall be at the time of such second marriage, divorced by lawful authority from the bands of such former marriage, or to any person where the former marriage hath been, by lawful authority, declared void.

"Sec. 29. It shall not be necessary to prove either of the marriages by the register or certificate thereof, or other record evidence; but the same may be proved by such evidence as is admissible to prove a marriage in other cases. The offense may be alleged to have been committed, and the trial may take place in the county where cohabitation shall have occurred."

[1] It will be observed that the offense of bigamy may be committed by marrying another person while the former husband or wife is living, or by continuing cohabitation with such second husband or wife in this state while such former husband or wife is still alive. The offense of which plaintiff in error was convicted was unlawful cohabitation in Cook county in pursuance of a bigamous marriage contracted in Kane county, Ill. The situation presented is as follows: Plaintiff in error contracted his first and lawful marriage in St. Joseph, Mich., on the 3d day of July, 1904. He contracted his second and bigamous marriage in Kane county, Ill., on May 1, 1909. He unlawfully cohabited with his second wife in Cook county, Ill., on May 9, 1909.

It is contended on behalf of the state that the offense for which plaintiff in error was indicted and convicted was the bigamous marriage in Kane county, as to which the indictment charges that the wife, Ida, was then alive, and that the true construction of our statute which makes continued cohabitation an offense is merely intended to give the court, where such cohabitation occurs, jurisdiction of the offense of bigamy that was committed when the marriage was contracted in a county or state other than that in which the prosecution occurs. The construction contended for, in our opinion, if allowed to prevail, would render the statute open to a constitutional objection.

[2] Clearly the Legislature would have no power to make an act committed in a foreign state or country a felony in this state simply because the offender might be found and apprehended here.

[3, 4] There is no doubt of the power of the Legislature, for the protection of good morals and the punishment of indecency, to make the cohabitation of a man and woman begun under a bigamous marriage in another state or country a felony in this state, and a prosecution for that offense must be begun and carried on in the county where the unlawful cohabitation occurs. *State v. Stewart*, 194 Mo. 345, 92 S. W. 878, 112 Am. St. Rep. 529.

In the case above cited the Supreme Court of Missouri had under consideration a case where the party charged had contracted a bigamous marriage in Alexander county, Ill.,

and subsequently removed to St. Louis and there continued to cohabit with his bigamous wife while his first and lawful wife was still living. The statute of Missouri, like that of Illinois, made continued cohabitation in Missouri, founded on a bigamous marriage, bigamy. It was there contended that the Legislature had no power to make cohabitation in Missouri a distinct felony. That contention was overruled, and the Supreme Court, in an exhaustive and well-considered opinion, held that the Legislature had the power to make the mere continuation of cohabitation a distinct felony, and the fact that the Legislature had seen proper to call the offense thereby created bigamy was no objection to the validity of the statute. The same court, in *State v. Smiley*, 98 Mo. 605, 12 S. W. 247, held a statute unconstitutional which provided that "an indictment for bigamy * * * might be found and proceedings, trial, conviction, judgment and execution thereon had in the county in which such second or subsequent marriage or cohabitation shall have taken place or in the county in which the offender may be apprehended." That portion of the statute which purported to confer jurisdiction on the court in any county in which the offender was apprehended was held invalid under the Constitution of Missouri. The ground upon which this decision rests is that the Constitution of Missouri requires that an indictment for felony must be found by the grand jury of the county where the offense was committed. A similar statute was held unconstitutional in the Supreme Court of Arkansas in *Walls v. State*, 82 Ark. 585.

The English statute on the subject of bigamy permits the prosecution for a bigamous marriage to be carried on "in the county where the offender shall be apprehended or be in custody," but Mr. Bishop, in his work on Statutory Crimes, observes that he has not found much of this sort of legislation in America, and adds that in "some of the states it would be constitutionally objectionable, particularly as respects the place of trial."

Section 9 of the Bill of Rights provides that in criminal prosecutions the accused shall have the right to "a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed." Unless the continuation of cohabitation in pursuance of a bigamous marriage is regarded as an offense committed in the county where such cohabitation occurs, we are unable to see how the statute can be held constitutional. In the case at bar the bigamous marriage was contracted in Kane county. The offense of bigamy was complete in Kane county when the marriage was contracted. If plaintiff in error were indicted in that county, it would not be necessary to allege or prove cohabitation, but the offense committed in Cook county was cohabitation in pursuance of the unlawful marriage in Kane county. The two offenses

are so far distinct and separable that an indictment might have been presented in Kane county for the unlawful and bigamous marriage and in Cook county for the unlawful cohabitation in pursuance thereof.

[6] The only further inquiry is, Was it essential to allege that at the time of the unlawful cohabitation in Cook county the former wife was then alive? Regarding the unlawful cohabitation as a distinct offense committed in Cook county on the 9th of May, 1909, it was a necessary element of that offense that the former spouse of plaintiff in error was then alive. In the case of *Pritchard v. People*, 149 Ill. 50, 36 N. E. 103, this court held that the indictment for bigamy, which failed to charge that at the time of the alleged bigamous marriage the former wife was then alive, was not sufficient. The statute then read, as it does now, that "whoever, having a former husband or wife living, marries another person or continues to cohabit with such second husband or wife in this state, * * * shall be deemed guilty of bigamy." The phrase, "having a former husband or wife living," in our statute, cannot be limited in its application to the first offense of marrying another person, but applies also to the other offense created by the words "continues to cohabit with such second husband or wife in this state." In the case above cited, this court, on page 54 of the opinion in 149 Ill., on page 104 in 36 N. E., said: "It is, of course, indispensable to the commission of the crime of bigamy that the first husband or wife should be living at the time of the second marriage. Indeed, the crime, by its very definition, consists of marrying a second husband or wife while the first husband or wife is living and undivorced."

The case of *Tucker v. People*, 117 Ill. 88, 7 N. E. 51, is relied on by the state as an authority in support of the sufficiency of the indictment under consideration. In that case the indictment charged that the defendant on the 15th day of April, 1872, in Cook county, Ill., married one Mary I. Bennett, who then became his lawful wife; that afterwards, on the 19th of September, 1883, at St. Paul, in the county of Ramsey, in the state of Minnesota, he unlawfully married Mary E. Markham while the defendant was yet the lawful husband of the said Mary I. Bennett, never having been divorced from her and she being then living, and afterwards the defendant did unlawfully cohabit with the said Mary E. Markham in the county of Kankakee, in this state. The sufficiency of the indictment in that case does not appear to have been challenged either by a motion to quash or otherwise. After setting out the substance of the indictment as above, the court makes this statement: "The charge makes the offense under our statute." The indictment in the *Tucker* case had the precise defect in it that exists

in the one now under consideration, but, inasmuch as the sufficiency of the indictment was not in question in that case, the remark above quoted must be held as mere obiter. So far as we have been able to find, no case has been decided by this court involving the precise point that is here involved. While the *Tucker* indictment was similar to the one at bar, that case is not an authority. We think, on principle, that the indictment must be held fatally defective for want of an averment that plaintiff in error's former wife was living at the time of the unlawful cohabitation in Cook county. This question is not to be confounded with the question of proof or presumptions. If the averment were in the indictment, proof that his former wife was alive at some time prior to the date in question might afford a basis for a presumption of fact that she was alive at the date in question; but the question here is not one of proof but of pleading, and no presumption can be indulged in support of a defective statement in an indictment.

For the error in overruling the motion to quash the indictment the judgment of the criminal court of Cook county is reversed.

Judgment reversed.

HAND, CARTWRIGHT, and CARTER, JJ. (dissenting). The case of *Tucker v. People*, 117 Ill. 88, 7 N. E. 51, has been recognized and acted upon as the law of this state for 25 years, and we do not think that it should now be overruled, as is done by the majority opinion.

(250 Ill. 117)

BECKER et al. v. BECKER et al.

(Supreme Court of Illinois. April 19, 1911.)

1. CONTRACTS (§ 239*)—EXECUTORY CONTRACT—MODIFICATION.

An executory contract under seal cannot be modified by parol, so as to interpose a new element or add new terms, which may be accomplished only by writing, but some of the terms may be waived by parol.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. § 1124; Dec. Dig. § 239.*]

2. HUSBAND AND WIFE (§ 32½*)—ANTENUPTIAL CONTRACT—WAIVER—PAROL AGREEMENT.

Where, by an antenuptial contract under seal, it was agreed that decedent should keep his life insured for a specified sum in favor of his intended wife, and that, in case she predeceased him, all of her separate property should go to decedent and his heirs, it was competent for her to waive the insurance covenant by parol.

[Ed. Note.—For other cases, see *Husband and Wife*, Dec. Dig. § 32½.*]

Appeal from Circuit Court, Whiteside County; Frank D. Ramsay, Judge.

Suit by August Becker and others against Walter Becker and others. From a decree dismissing the bill on the merits, complainants appeal. Affirmed.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Skinner & Coe, Charles A. Biernatzki, and Jarvis Dinsmoor, for appellants. A. A. Wolfersperger, McMahon & Rogers, and McCalmont & Ramsay, for appellees.

VICKERS, O. J. Appellants, as the heirs at law of Augusta Mishler, deceased, filed a bill in the circuit court of Whiteside county to partition certain lands situated in said county which it was alleged belonged to said Augusta Mishler at the time of her death. Jesse Mishler, the surviving husband of Augusta Mishler, was made a party defendant to the bill and interposed a demurrer thereto, which was sustained and a decree was entered dismissing the bill for want of equity, and appellants appealed from said decree to this court. At the October term, 1909, this court entered a judgment reversing the decree of the circuit court and remanding said cause, with directions to the circuit court to overrule the demurrer. The former opinion of this court is reported as *Becker v. Becker*, 241 Ill. 423, 89 N. E. 737, 26 L. R. A. (N. S.) 858. After the cause was remanded to the circuit court, defendant below, Jesse Mishler, answered the bill and filed a cross-bill. A trial was had upon the issues made below upon evidence heard in open court, resulting in a decree dismissing the original bill and granting the relief prayed for in the cross-bill. Complainants below have again brought the record to this court for review.

This litigation grows out of an antenuptial contract which was entered into on the 16th day of March, 1889, between Augusta Scheer and Jesse Mishler, both of Whiteside county. The agreement is set out at large in the former opinion of this court. This agreement recites that whereas marriage is about to be solemnized between the parties, and whereas the said parties each own both real and personal property in their own right, and it is desired that each party shall remain in the possession, control, and enjoyment of all of the property owned by each, precisely as though no marriage had taken place, during the joint lives of the contracting parties, they mutually covenant that each of the parties shall own, control, and enjoy all of the separate property of such party free and clear from any right or claim, of any kind or character, of said other party. The agreement provided that, if at the death of Jesse Mishler the said Augusta Scheer should survive him, she shall be entitled to the money arising from a policy of insurance of \$2,000 on the life of Jesse Mishler in the Whiteman's Life Insurance Company, which said policy was at the time of the making of said agreement in full force and effect, and that said policy, or its equivalent in some reputable company, shall be kept in full force and effect during the life of said Jesse Mishler as part of the consideration of said contract. Said agreement recited further, in consideration of said marriage and the further consid-

eration of money, that Jesse Mishler would waive and release unto said Augusta Scheer all dower interest in the real estate possessed by her or which she might thereafter acquire, and likewise release all claim upon her personal property, and to allow her to receive, expend and reinvest all income, rents, and profits therefrom, at her discretion, for her own separate use the same as though she was unmarried. Said agreement also provided that, in consideration of the marriage and the covenants on the part of Jesse Mishler, Augusta Scheer relinquishes all right and claim, of every kind and character, in and to all of the property of the said Jesse Mishler or any property which he might thereafter acquire. The agreement further provided as follows: "And she [Augusta Scheer] hereby covenants and agrees, in consideration of said marriage and the aforesaid covenants and acquirements entered into on the part of Jesse Mishler, that the said Jesse Mishler shall at her, the said Augusta Scheer's, death have as his own an absolute fee simple title in and to all the real estate of which she may die seised, and shall have, possess, control and own absolute all the personal estate, of every description, of which she may die possessed or which she may be entitled to, free from let or hindrance upon the part of the heirs of the said Augusta Scheer. The purpose and meaning hereof being, that in case Augusta Scheer shall survive the said Jesse Mishler she have her own separate estate and the money arising from the life insurance policy aforesaid, discharged of any right or interest, claim or demands, of the heirs of the said Jesse Mishler, but in case she shall not survive the said Jesse Mishler, the latter shall at her death become immediately vested with all the absolute right, title and ownership in and to all the real and personal estate of which the said Augusta Scheer may die seised or possessed, to the exclusion of the heirs of the said Augusta Scheer."

The original bill alleged, and the proof showed, that the parties to this contract were married a short time after the date of the antenuptial agreement and lived together as husband and wife until the death of Augusta Mishler, which occurred in 1905. The original bill was filed by the children and grandchildren of a deceased brother of Augusta Mishler, who were her only heirs at law, and based their right to the real estate of which Augusta Mishler died seised upon the ground that the appellee Jesse Mishler did not keep the insurance policy mentioned in said contract in force, and permitted the same to lapse many years before the death of his said wife, and never took out any other policy of insurance in lieu thereof in any other insurance company, and that, in consequence of his failure to comply with said contract in respect to keeping up the insurance for his wife, he had thereby forfeited all right, title, and

interest in and to the real estate of which his wife died seized.

When the case was before this court on the former hearing, it was held that the original bill presented a state of facts which, if true, would deprive appellee of the right to claim the property which his wife owned at the time of her death under the antenuptial contract. By his answer and cross-bill the appellee sets up a waiver by his wife, in her lifetime, of that provision of the antenuptial contract which required him to carry \$2,000 of life insurance for his wife's benefit. Appellee alleges in his answer and in his cross-bill that the Whiteman's Life Insurance Company, in which said \$2,000 was carried, was soon after said antenuptial contract, and after said marriage, merged in some other company, and at that time, at the request of the said Augusta Mishler, said policy of insurance was dropped and discontinued; that appellee insisted upon taking out other insurance in the sum of \$2,000 in some other reputable insurance company to conform with the antenuptial contract, but that his wife insisted that he should not do so and that she would waive the same in said contract; and that at her request and upon her insistence he did not take out other insurance as stipulated in said antenuptial contract.

On the hearing before the court a number of witnesses were introduced who testified to conversations had with Augusta Mishler, in her lifetime, in relation to the \$2,000 life insurance policy upon the life of her husband. Calvin S. Mishler, a son of appellee, testified that he had a conversation with his stepmother in 1904, the year of the World's Fair at St. Louis. He testified that Mrs. Mishler said to him in the spring of that year that Mr. Mishler had carried life insurance, and that she thought it was like throwing money away to keep the life insurance going, and that she did not want him to carry the life insurance any longer. This witness testifies that this conversation occurred while he was visiting at his father's house, and while he was digging up a small space in the garden for his stepmother. This witness says, also, that his stepmother offered to give him \$10, and he said that he refused it, and she told him that he might as well take it for he would get it anyway some day; that she had left all her property to his father, and said, "Some time you will have a pretty nice lot of money;" that his stepmother said at that time that she did not want her husband to carry life insurance for her benefit; that she did not need the insurance and had plenty of money of her own to live on.

David Schafer testified that he was acquainted with appellee and his wife, and had been for a number of years, and that he worked for them digging a cellar and doing other work; that in the year 1903 or 1904, after the cellar was dug, he had some money com-

ing from Mr. Mishler and went to his house to get the money; that, when he arrived at the house, Mr. Mishler was not at home, and Mrs. Mishler asked him to take a seat and wait until Mr. Mishler came in; that while he was waiting for Mr. Mishler to come he had a conversation with Mrs. Mishler in German, and that in this conversation Mrs. Mishler asked him whether he owned his own place and whether he had insurance on his life, and that the witness said that he did own his place and that he had insurance for himself and wife; that Mrs. Mishler said, "You are foolish; don't get any insurance; save your money and don't have any insurance at all; that is all nonsense." She said that Mr. Mishler had insurance, and that it "busted up."

Melvin S. Mishler testified that he was 41 years of age and a son of appellee; that he was well acquainted with his stepmother, Augusta Mishler, before and after her marriage to his father. He testified to a conversation had at the home of his father with his stepmother, in which she said, among other things, that his father had been carrying insurance on his life and had paid in about \$13 and the company "busted," and that she did not want him to take out any more insurance.

John Eick testified that he had known Mrs. Mishler about all her life; that he knew her as far back as 1862; that he went to Mr. Mishler's home, in Sterling, in the year 1900, with his brother, who was a life insurance agent, for the purpose of soliciting insurance on the life of appellee; that his brother represented the Union Central of Cincinnati, Ohio; that a conversation occurred at that time in the Mishler home in which Mrs. Mishler said they did not want any insurance; that they had insurance in a company and the company had dissolved or gone out of business, and that she did not want her husband to put another dollar in insurance; that no insurance was written for Mr. Mishler at that time.

Jennie Cushman testified that she had been acquainted with Augusta Mishler ten years and knew her very intimately; that she lived in Mrs. Mishler's house for five years, and was often at her place, and that she visited Mrs. Mishler and took care of her several times during sickness; that she had a conversation with Mrs. Mishler, in the presence of her husband, in the year 1903, when Mrs. Mishler was sick; that at this conversation the death of a Mr. Waltz was spoken of, and Mrs. Mishler asked the witness if Mr. Waltz left any life insurance for his widow, and the witness said that she did not know; that Mrs. Mishler then asked the witness if her husband carried insurance, and Mrs. Cushman replied that he did. Mrs. Cushman then testifies that she asked if Mr. Mishler carried insurance for her, and Mrs. Mishler said that he had once, but the insurance com-

pany failed and that she did not have him take any more insurance; that she did not believe in insurance, and she never had him take out any more; that she did not want it and did not need it; that she had enough to live on without it. Mrs. Mishler also told this witness that one reason why she did not want Mr. Mishler to carry insurance for her was that, if he died suddenly, people might think she killed him. Mrs. Mishler was 73 years old when she died.

There is nothing in the record that contradicts any of the foregoing testimony. Upon this evidence the trial court held that Mrs. Mishler had waived the provision in the antenuptial contract requiring appellee to carry \$2,000 life insurance upon his life for her benefit and entered a decree for the specific performance of the contract, vesting the fee-simple title of the real estate of which Mrs. Mishler died seised in appellee. All of the foregoing evidence was received subject to the objection that it was not competent to vary or modify a written contract under seal by parol evidence.

[1] Appellants' most serious contention in this court is that the decree should be reversed because it is based upon incompetent testimony. Appellants' position may be stated as follows: The antenuptial contract related to marriage, and was therefore required by the statute to be in writing. Since the original contract was an instrument in writing under seal, any new agreement altering or enlarging its terms must also be in writing in order to be valid. In support of this general proposition many authorities are recited, several of which are Illinois cases. If the rights of the parties depended upon the rule contended for by appellants, no serious question could arise as to the correctness of the position assumed. There are many cases in this court that establish the rule, beyond controversy, that an executory contract under seal cannot be modified by parol, so as to introduce any new element into the contract or by which any new terms are added thereto. The rule contended for by appellants is thus announced by this court in *Alschuler v. Schiff*, 164 Ill. 298, where, on page 302, 45 N. E. 424, on page 425, this court said: "There can no longer be any contention in this state over the general rule insisted upon by appellee, that a sealed executory contract cannot be altered, changed, or modified by parol agreement. This rule of the common law has been adopted by this court and consistently followed in a long line of unbroken authorities"—citing *Chapman v. McGrew*, 20 Ill. 101; *Hume Bros. v. Taylor*, 63 Ill. 43; *Barnett v. Barnes*, 73 Ill. 216; *Loach v. Farnum*, 90 Ill. 368; *Goldsborough v. Gable*, 140 Ill. 269, 29 N. E. 722, 15 L. R. A. 294.

[2] The rule announced in these cases, and others in line with them, is too firmly established by the decisions of this court to be

seriously controverted at this time. Conceding the full force of the rule above announced, there is a well-defined distinction between a parol contract which adds to or modifies the terms of an executory written contract under seal and a parol agreement made by the parties by which some of the covenants in such written contract are waived by the party for whose benefit such covenant was inserted. Where a party to such written instrument by some affirmative action on his part induces the opposite party to believe that the strict performance of a covenant will not be insisted upon or that the same will be waived, and such other party fails to perform the covenant through the influence or request of the covenantee, in equity such party will be estopped to insist that the written contract is no longer obligatory upon him because of the nonperformance of such covenant. A waiver of a covenant by the party for whose benefit it is inserted into a written instrument may be made by parol, and such waiver is held not to be a modification or change in the terms of the original agreement.

The rule last above announced was recognized and applied by this court in *Worrell v. Forsyth*, 141 Ill. 22, 30, 30 N. E. 673, 675. In that case an antenuptial contract had been entered into by which the wife agreed that, if she should survive her husband, she was to have a certain described 80 acres of land and \$500 in money out of his estate in lieu of all other rights in and to his property. After the marriage the husband sold the 80 acres mentioned, and his wife joined in the deed therefor to the purchaser in consideration of the parol promise of the husband to give her another 80 acres of land of equal value, and at the same time the husband conveyed the latter tract to a trustee in trust for the husband during his life, but to be conveyed to the wife if she survived him, and it was held competent for the husband and wife to enter into the parol contract for the substitution of another tract of land in place of that first given to the wife. This court said: "An executed parol agreement may be shown to defeat a recovery upon an instrument under seal. If the new parol agreement, even though it be without consideration, has been executed, and by means thereof one of the parties thereto has been led into a line of conduct which must be prejudicial to his interests, an equitable estoppel arises in his favor"—citing *White v. Walker*, 31 Ill. 422; *Loach v. Farnum*, supra; *Cooke v. Murphy*, 70 Ill. 96; *Swanzy v. Moore*, 22 Ill. 63; 74 Am. Dec. 134; *Wheeler v. Frankenthal*, 78 Ill. 124.

The same principle was again applied by this court in *Moses v. Loomis*, 156 Ill. 392, 40 N. E. 952, 47 Am. St. Rep. 194. In that case the court had under consideration the effect of a parol waiver of a covenant in a lease against alterations made by the tenant

without the consent of the lessor, and it was held that it was within the power of the landlord to waive such covenant by parol. It is there expressly held that rights under sealed instruments may be waived by parol. This case seems to be decisive of the contention of appellants in the case at bar. It was there pressed upon the attention of the court, as it is here, that because the lease itself was a sealed instrument it could not be varied or abrogated by words not under seal. Notwithstanding this argument, this court held that the landlord might properly, by parol, waive, and in that case had waived, the covenant in the lease against alterations without the consent, in writing, of the landlord. To the same effect is the case of *Starin v. Kraft*, 174 Ill. 120, 50 N. E. 1059.

In the case of *Chicago & Eastern Illinois Railroad Co. v. Moran*, 187 Ill. 316, 58 N. E. 335, it was held that a provision in a contract under seal might be waived by a parol agreement. In that case a written contract provided that no stone other than that specified in the contract should be used without the written consent of the company's engineer. The evidence showed that the engineer orally consented and permitted the substitution of other stone, which was accepted and used by the company. It was held that an estoppel was thereby created which prevented the company from defeating the right of recovery because stone other than that mentioned in the contract had been used.

These authorities distinguish the case at bar from the line of authorities relied upon by appellants. The evidence in this case is contradicted that Mrs. Mishler made repeated declarations to the effect that she did not need life insurance; that she had money enough to live on and did not believe in life insurance; that the premiums paid therefore were a waste of money; that, after the insurance company in which her husband had his insurance became insolvent, she protested against his taking out other insurance for her benefit; and that appellee, acting on these repeated statements of his wife, did not take other insurance for her benefit. Under these circumstances, it would be manifestly inequitable to allow her heirs to insist upon a forfeiture of the entire contract because this particular covenant was not performed, in view of the uncontradicted evidence that its nonperformance was not only assented to, but was urgently insisted upon by Mrs. Mishler in her lifetime. The parol evidence introduced was properly admissible for the purpose of showing that Mrs. Mishler waived the covenant in the antenuptial contract in regard to the life insurance, and such evidence justified the court below in finding, as it did, that there had been a waiver on her part of this covenant. There is nothing unreasonable or improbable in the evidence of the witnesses by whose testimony

the waiver is established when the situation of the parties is considered. Mrs. Mishler had no children and no descendants of children. She was above 70 years of age. The evidence shows that she had ample means of her own to keep herself comfortable in case she survived her husband. The item of \$2,000 life insurance was a matter of no serious consequence to her, and in view of her prejudice against life insurance generally, and the fact that the company in which her husband carried his insurance had become insolvent, it is not at all unreasonable that she would insist upon his not again reinsuring his life. At all events, the uncontradicted evidence shows that she did so insist and that her wishes in this regard were respected and carried out by the appellee. Her heirs should therefore, in equity, be estopped from taking any advantage of appellee's failure to continue the insurance for his wife's benefit.

The decree of the circuit court of Whiteside county being in accordance with the views herein expressed will be affirmed.

Decree affirmed.

(250 Ill. 122.)

DOHERTY v. SCHIPPER & BLOCK.

(Supreme Court of Illinois. April 19, 1911.)

1. MASTER AND SERVANT (§§ 35, 42*)—WRONGFUL DISCHARGE—REMEDIES.

Where a servant is discharged without cause before the expiration of his term of employment, and has been paid to the date of his discharge, he may sue for breach of contract of employment, and if the suit is not commenced, or is not tried until the term of employment has expired, he may recover the contract price, less what he has earned, or by reasonable diligence could have earned, subsequent to his discharge.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 12, 41, 57, 58; Dec. Dig. §§ 35, 42.*]

2. JUDGMENT (§ 594*)—CONCLUSIVENESS—SUBSEQUENT ACTION—BAR.

Where a servant, after being wrongfully discharged, recovered judgment for one week's wages, which judgment was satisfied, she could not thereafter be considered in defendant's constructive service; and hence such judgment was a bar to a subsequent action to recover for wages which would have subsequently accrued, had the contract not been terminated.

[Ed. Note.—For other cases, see *Judgment*, Cent. Dig. § 1109; Dec. Dig. § 594.*]

Appeal from Appellate Court, Second District, on Appeal from Circuit Court, Peoria County; N. E. Worthington, Judge.

Action by E. Doherty against Schipper & Block. A justice's judgment in favor of plaintiff, affirmed by the Circuit Court, was reversed on appeal to the Appellate Court, and plaintiff appeals on a certificate of importance. Affirmed.

Luther C. Hinckle, for appellant. Page, Wead, Hunter & Scully, for appellee.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

HAND, J. This was an action commenced by E. Doherty against Schipper & Block, a corporation, before a justice of the peace in Peoria county, to recover for 8 weeks of service, at \$25 per week, rendered by the plaintiff to the defendant as a milliner trimmer in its store, in the city of Peoria. The plaintiff recovered judgment for \$200. The defendant appealed to the circuit court, where the case was tried before the court without a jury, and plaintiff recovered in that court judgment for \$200. Schipper & Block prosecuted an appeal to the Appellate Court for the Second District, where the judgment of the circuit court was reversed, without remanding the cause, and, a certificate of importance having been granted, the appellee in the Appellate Court has prosecuted an appeal to this court.

It appears from the evidence that the appellant was employed by the appellee for 18 weeks at \$25 per week, payable weekly. At the end of the ninth week the appellant was discharged, as she claims, without cause. On the day she was discharged she was paid in full. She returned on the day following her discharge, and offered to continue work, but was refused permission to work. At the end of the following week she brought suit before a justice of the peace for one week's wages, and recovered a judgment for \$25 and costs, which appellee paid, a transcript of which judgment was introduced in evidence on trial of this case.

The trial court refused to hold the following proposition of law offered by the defendant: "The court holds that the recovery of the judgment and a satisfaction of the same, as shown in the evidence in this case, in the suit formerly brought by the plaintiff against the defendant before William Fielder, then a justice of the peace in and for Peoria county, Illinois, is a bar to the plaintiff's right of action in this case, and the plaintiff cannot recover in this suit, and the finding must be for the defendant."

The sole question raised in this court and argued in the briefs filed by the respective parties is: Was the first judgment rendered by the justice of the peace a bar to this action?

[1] It is well settled that in case an employé is discharged without cause before his term of employment has expired, and he has been paid in full up to the time when he is discharged, he may treat the contract of hiring as continuing and bring an action for a breach of the contract of employment against his employer for discharging him, and if the suit is not commenced, or if commenced before, but not tried until, his term of employment has expired, he may recover the contract price of his wages, less what he has earned, or by reasonable diligence could have earned, in other employment subsequent to his discharge. *Mt. Hope Cemetery Ass'n v. Weidenmann*, 139 Ill. 67, 23 N. E. 834. There is a class of cases which holds this

remedy is not exclusive, but that, in addition to such remedy, the employé, where his wages, by the terms of the contract, are payable in installments, may bring an action for each installment of wages as it falls due, subsequent to his wrongful discharge, and that the recovery on one installment is not a bar to the recovery on subsequently accruing installments. *Gandell v. Pontigny*, 4 Camp. 375. The recovery for each installment of wages allowed in the class of cases referred to, as it falls due, is based upon the theory of constructive service, and while the right of a recovery was thus permitted for a time in England and in the courts of some of the states in the Union, that theory of recovery has been abandoned in England (*Archard v. Horner*, 3 C. & P. 349; *Smith v. Hayward*, 7 Ad. & Ell. 544; *Fewings v. Tisdal*, 1 Exch. 295), and quite generally in this country (*James v. Allen County*, 44 Ohio St. 226, 6 N. E. 246, 58 Am. Rep. 821; *Howard v. Daly*, 61 N. Y. 362, 19 Am. Rep. 285; *Richardson v. Eagle Machine Works*, 78 Ind. 422, 41 Am. Rep. 584; *Olmstead v. Bach & Son*, 78 Md. 132, 27 Atl. 501, 22 L. R. A. 74, 44 Am. St. Rep. 273).

[2] This court does not seem to have passed specifically upon the precise question presented here for decision, although in dealing with other questions growing out of the relations which exist between employer and employé the court has at times used language which might indicate a recovery could be had for the several installments of wages as they fall due, while at other times expressions have been used by the court which would indicate that such recovery could not be had. *Hamlin, Hale & Co. v. Race*, 78 Ill. 422; *Mt. Hope Cemetery Ass'n v. Weidenmann*, supra. We have examined the numerous cases bearing upon the subject which have been cited in the briefs, and are of the opinion that upon principle the only action which logically can be maintained, upon the facts of this case, against the appellee, is an action for the breach of the contract of employment growing out of the wrongful discharge of the appellant, and that all damages resulting from such breach must be recovered in one action, and that, after one recovery has been had, that recovery is a bar to all future actions based upon the contract of employment, or growing out of the relation of employer and employé, by reason of the wrongful discharge of appellant.

We think the doctrine of constructive service, as applied to a case like this, and where used as a basis of recovery, is illogical and unsound. This court has universally held that the proper measure of damages in a case like this is the contract price, less what the employé earned or could have earned. That being so, if the discharged employé can find employment, it is his duty to accept it. How can it then be said that, while he is performing service for another

person, he is constructively engaged in the employ of the employer by whom he was discharged? The result of this doctrine would be that the employé was actually performing service for one person while he was constructively performing service for another. The only true basis upon which an action like this can rest is for damages for breach of contract, and as the breach of contract occurs at the time of the discharge the cause of action is then complete, and such cause of action cannot be split up, but all the damages must be recovered in one judgment and in the first action; and, this being true, no subsequent action can be based upon the cause of action which has been merged in the first judgment. We therefore conclude that the judgment recovered before the justice of the peace was a complete bar to the subsequent action.

The conclusion of the Appellate Court was correct, and its judgment will be affirmed. Judgment affirmed.

(300 Mass. 227)

RIVARD v. AMIOT.

(Supreme Judicial Court of Massachusetts.
Bristol. May 20, 1911.)

MASTER AND SERVANT (§ 137*)—INJURY TO SERVANT—LIABILITY.

A servant was injured while raising a plank to the second story of a building in process of construction. The servant, with two others, stood on the first floor and pushed the plank, which was pulled by three persons, including the master, on the second floor. The latter gave an unusually quick movement, and the plank hit the servant and knocked him through a hole in the first floor. The movement was due in part to the actual manual act of the master. The servant was aware of the hole, and used care not to fall into it, and he had no reason to anticipate the sudden swinging movement of the plank. Held, that the master was guilty of actionable negligence.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 137.*]

Exceptions from Superior Court, Bristol County; John H. Hardy, Judge.

Action by Joseph Rivard against Joseph M. Amiot for personal injuries to plaintiff, who was injured while engaged with other workmen under direction of defendant in raising a heavy plank to the second story of a building in process of erection. There was a verdict for plaintiff, and defendant brings exceptions. Overruled.

John W. Cummings and Chas. R. Cummings, for plaintiff. David F. Slade and Foster R. Greene, for defendant.

HAMMOND, J. There is no question as to the pleadings. Upon the evidence the jury might have found that at the time of the accident the plaintiff, by the order of the defendant, for whom he was at work, was engaged in helping put the plank through

the hole in the second floor; that in doing this he stood with two others upon the first floor and was pushing the plank, which at the same time was being pulled by three persons, including the defendant, upon the second floor; that while all were thus working to move the plank an unusually quick and forward movement was given by those pulling on the second floor; that this movement was intended and desired by the defendant and was due in part to his own manual exertions in pulling; that as the natural result of the movement those on the first floor partially lost control of their end of the plank, by reason whereof that end swung, and hitting the plaintiff knocked him through a hole in the first floor into the cellar, whereby he was injured.

The jury might further have found that the plaintiff was fully aware of the hole in the first floor, and was using reasonable care not to fall into it; that he had no reason to anticipate the sudden forward and swinging movement of the plank, and that in no way was the accident attributable to any lack of care on his part; and, further, that the movement was due in part to the actual manual act of the defendant, and that in view of the injury liable to occur to those below standing so near to the hole because of such a movement, the violent pulling was a careless act.

Upon such findings the plaintiff had a case. The question of liability was properly submitted to the jury. See *Connolly v. Booth*, 198 Mass. 577, 84 N. E. 799; *Bowie v. Coffin Valve Co.*, 200 Mass. 571, 86 N. E. 914; *Sarrisin v. Slater & Sons*, 203 Mass. 253, 89 N. E. 529. In this last case the decision was for the defendant on the ground that the act of which the plaintiff complained was the act of a fellow servant and not the act of the defendant or of a superintendent. In the present case the act of which the plaintiff complains was in part the personal act of the defendant.

Exceptions overruled.

(300 Mass. 55)

MYERS v. BOSTON & M. R. R. (two cases).

(Supreme Judicial Court of Massachusetts.
Suffolk. May 18, 1911.)

NEGLIGENCE (§ 23*)—INFANTS—INJURIES TO LICENSEES—LIABILITY.

An infant, who is in an empty railroad car on tracks adjacent to the premises occupied by a lessee of the railroad company, and who has not been invited into the car by any one having right to act for the company, is at most a mere licensee, and the duty of the company is only to refrain from wanton or reckless conduct tending to injure him.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 33, 34; Dec. Dig. § 23.*]

Exceptions from Superior Court, Suffolk County; Lloyd E. White, Judge.

Actions by Frederick J. Myers, an infant,

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep't Indexes

and by Patrick J. Myers, his father, against the Boston & Maine Railroad. There was a verdict for defendant in each action, and plaintiff in each action brings exceptions. Overruled.

Frederick J. Myers sustained an injury while in an empty car of defendant on its track adjacent to premises occupied by a lessee of defendant.

Danl. H. Coakley and Arthur Harrington, for plaintiffs. Archibald R. Tisdale, for defendant.

HAMMOND, J. These are two actions of tort, the first being for personal injuries sustained by a minor, and the second by his father for loss of services of the minor. The actions were tried together.

There is no evidence that the minor was invited into the car by any one representing or having the right to act for the defendant; and he was therefore at the most a mere licensee. The measure of the defendant's duty was to refrain from wanton or reckless conduct tending to injure him. There was no evidence of such conduct.

The order directing verdicts for the defendant was correct. In each case the entry must be:

Exceptions overruled.

(209 Mass. 48)

PEOPLE'S NAT. BANK v. NEW ENGLAND HOME FOR DEAF MUTES, AGED, BLIND, AND INFIRM.

(Supreme Judicial Court of Massachusetts. Suffolk. May 18, 1911.)

1. CHARITIES (§ 46*)—CHARITABLE CORPORATIONS—CONTRACTS—REPRESENTATION BY OFFICERS.

The president and treasurer of a charitable corporation have no right to make a note for the corporation without special authority, and on its face a note signed by them does not purport to bind the corporation without proof of their authority.

[Ed. Note.—For other cases, see Charities, Cent. Dig. § 104; Dec. Dig. § 46.*]

2. CHARITIES (§ 46*)—CHARITABLE CORPORATIONS—CONTRACTS—AUTHORITY OF OFFICERS.

A vote at a meeting of trustees of a charitable corporation, reciting certain terms on which real estate had been offered to it, calling for payment in part by giving certain notes and mortgages, and purporting to authorize the president and treasurer to execute and sign the necessary papers, no reference being made to the note in suit, which was given to an agent of the corporation to secure a loan to be used in the transaction, did not authorize the president and treasurer to execute the note in suit.

[Ed. Note.—For other cases, see Charities, Cent. Dig. § 104; Dec. Dig. § 46.*]

3. CHARITIES (§ 46*)—CHARITABLE CORPORATIONS—CONTRACTS—AUTHORITY OF OFFICERS.

Eight of the 15 trustees of a charitable corporation, whose by-laws require the presence of two-thirds of the whole number of trustees to

authorize the purchase, lease, or sale of real estate, could not give such authority.

[Ed. Note.—For other cases, see Charities, Cent. Dig. § 104; Dec. Dig. § 46.*]

4. CHARITIES (§ 46*)—CHARITABLE CORPORATIONS—CONTRACTS—RATIFICATION.

Where an agent, acting for a charitable corporation in the purchase of real estate, falsely represented the price at which the owner would sell to the corporation at \$2,000 more than it really was, and the note in suit was to reimburse him for that amount, which he falsely represented that he had paid to the owner, the entire contract being subject to the defense that it was not the act of the corporation, as the officers executing it had no authority to do so, the act of the corporation in retaining the real estate does not constitute a ratification of the note, or an estoppel to deny its validity, even in the hands of third persons, since the note constituted no part of the transaction with the owner of the real estate.

[Ed. Note.—For other cases, see Charities, Cent. Dig. § 104; Dec. Dig. § 46.*]

Report from Superior Court, Suffolk County; Wm. F. Dana, Judge.

Action by the People's National Bank against the New England Home for Deaf Mutes, Aged, Blind, and Infirm. Verdict directed for defendant, and cause reported to Supreme Judicial Court. Judgment on the verdict

L. M. Friedman and R. Dow, for plaintiff. F. G. Cook, for defendant.

KNOWLTON, C. J. [1] This is an action upon a promissory note, against a charitable corporation. The note was signed by the corporation's president and treasurer. As officers of such a corporation, they had no right to make a note without special authority, and on its face the note does not purport to bind the corporation, without proof of their authority to sign it. *Packard v. Universalist Society*, 10 Metc. 427; *Dedham Institution for Savings v. Slack*, 6 Cush. 408; *Craft v. South Boston Railroad Company*, 150 Mass. 207, 22 N. E. 920, 5 L. R. A. 641; *Merchants' National Bank of Gardner v. Citizens Gas Light Co.*, 159 Mass. 505, 34 N. E. 1083, 38 Am. St. Rep. 453; *Jewett v. West Somerville Bank*, 173 Mass. 54, 52 N. E. 1085, 73 Am. St. Rep. 259; *Slattery v. North End Savings Bank*, 175 Mass. 380, 56 N. E. 606.

[2] The vote at the meeting of the trustees did not authorize these officers to make this note. It recited certain terms upon which the real estate had been offered, calling for payment in part by giving certain notes and mortgages, and it purported to authorize the president and treasurer to "execute and sign the necessary papers." The note in suit is not included among these papers. [3] But even more fundamentally, the meeting could give no authority to purchase, lease, or sell real estate, because the by-laws of the corporation require the presence of two-thirds of the whole number of trustees to transact that kind of business, and at this meeting,

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep't Indexes

only 8 of the 15 trustees were present. Upon the undisputed facts, therefore, the note sued on was not the note of the corporation and no action can be maintained on it, even by a holder in due course, unless the corporation by its subsequent conduct has created a liability upon it.

[4] The plaintiff contends that the defendant has ratified it as a binding note, or has become estopped to deny its validity. The defendant has had no dealings or relations with Mitchell, the payee, which, in connection with its subsequent conduct, amount to a ratification in his favor, or estop it to deny the validity of the note as against him.

Mitchell acted as the agent of the defendant in negotiating a purchase of real estate. He falsely represented the price at which the owner would sell the property, at \$2,000 more than it really was. This note of that amount, was to reimburse him for a payment of that sum, which he represented that he had made to the owner. In fact, he made no such payment and the note was without consideration. The officers of the corporation did not ascertain the facts until long after the purchase had been completed and they had entered into possession of the real estate. The question is whether the retention of the real estate by the corporation is evidence of a ratification of the note, or of an estoppel against the corporation from denying its validity.

Suppose that the officers ascertained all the facts. Was the corporation bound to give up all the real estate, or ratify this note given without authority? The argument is that a retention of the real estate was inconsistent with a refusal to pay this note. But the defendant did not receive the real estate from Mitchell. It had no dealings with him as a party to the contract whereby it obtained the real estate. His only relation to that transaction was as the agent of the defendant in negotiating for a purchase. The giving of the note was a separate transaction to compensate the payee for a pretended payment. To this note the corporation had three different defenses—one that it was obtained by fraud, one that it was without consideration, and one that it was not made by the defendant. The first two of these defenses would not avail it as against a holder in due course, but the last is effectual against anybody. As to this, a ratification by the corporation of the transaction conducted by its officers, between it and the former owner of the real estate, whereby it acquired its title, was not inconsistent with a refusal to ratify a merely collateral transaction whereby these officers undertook to borrow \$2,000 from Mitchell, and to give him a note and mortgage from the corporation to secure payment of the loan. The corporation and its officers, upon learning all the facts, well might say: We ratify the transaction of our repre-

sentatives with the former owner of the property, whereby the land was acquired; but we decline to ratify their action in giving a note to our fraudulent agent, which did not enter into the transaction with the former owner from whom we obtained our property.

We are of opinion that there is no evidence of ratification by the corporation, of the giving of this note, much less is there any estoppel against it.

Judgment on the verdict.

(209 Mass. 92)

WILLIAMS et al. v. BAKER.

(Supreme Judicial Court of Massachusetts.
Suffolk. May 19, 1911.)

TAXATION (§ 821*)—TAX DEEDS—DEFECTS—REMEDY OF PURCHASER.

The remedy of a grantee in a defective tax deed, prescribed by Rev. Laws, c. 13, §§ 44, 87, authorizing a grantee within two years to surrender the deed for defects, and providing that the municipality shall pay the grantee the amount paid for the deed, with interest, in satisfaction of all claims for damages, is exclusive, and he may not sue the tax collector on his covenant of warranty; the collector being obliged by chapter 25, § 97, to accept the office or subject himself to a fine, and sales of land for the nonpayment of taxes being authorized for the benefit of the public.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 1621-1629; Dec. Dig. § 821.*]

Report from Superior Court, Suffolk County; William Schofield, Judge.

Action by Moses Williams, Jr., and another, against Moses E. Baker. The court found for plaintiffs, and reported the case on agreed facts. Judgment for defendant.

F. W. Grinnell and R. D. Swalm, for plaintiffs. Henry T. Richardson, for defendant.

BRALEY, J. The defendant as tax collector of the town of Dedham sold certain real estate for nonpayment of taxes, which was purchased by the plaintiffs, to whom he gave a deed with a covenant of warranty that the sale in all particulars had been conducted according to law. But the sale having been declared invalid in *Williams v. Bowers*, 197 Mass. 565, 84 N. E. 317, because of an insufficient description of the premises in the collector's notice of sale, the plaintiffs sue at common law for breach of the covenant. By the report under which the case is before us the questions for decision are, if the action is well founded, and whether the damages are limited to the repayment of the consideration money with interest, or are measured by the fair market value of the land to which the plaintiffs never acquired title. We are of opinion that the action cannot be maintained. If before the enactment of St. 1862, c. 183, § 6, a collector of taxes chose to insert, in addition to the statutory requirements of the conveyance, a covenant of seisin or of the right to convey, he might be held personally in damages

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

for a breach. St. 1785, c. 70, § 7; Rev. St. 1836, c. 8, § 81; St. 1848, c. 166, § 5; Gen. St. 1860, c. 12, § 35; Bickford v. Page, 2 Mass. 455; Sumner v. Williams, 8 Mass. 162, 210, 5 Am. Dec. 83; Lynde v. Melrose, 10 Allen, 49. But as pointed out in Williams v. Dedham, 207 Mass. 412, 93 N. E. 696, St. 1862, c. 183, § 6, made an important change in our laws as to the form of the deed, and the rights of a purchaser at an invalid sale. The deed which the collector was required to execute and deliver under Gen. St. c. 12, § 35, was thereafter to "have inserted a special warranty that the sale has in all particulars been conducted according to the provisions of law." If subsequently it appeared that, by reason of errors or informality in any of the proceedings of assessment or sale, "the purchaser has no claim to the property sold," then upon his surrender of the deed the town or city was required to repay to him the amount paid, "which shall be in full satisfaction of all claims for damages, for any defect in the proceedings." By re-enactments as amended by St. 1878, c. 266, § 1, limiting the time in which the right could be exercised to two years from the date of the deed, and providing that at the election of the collector the purchaser should offer in writing either to surrender and discharge the deed, "or to assign and transfer to the town or city all his right, title and interest therein," this provision became Rev. Laws, c. 13, § 44, in force when the sale and conveyance in question were made. If the plaintiff's contention is sound, the remedy against the town is merely cumulative, or alternative, and the defendant remains liable on a covenant which the law required him to insert, or the conveyance would have been invalid. Rev. Laws, c. 13, §§ 44, 87. A collector of taxes, however, is obliged to accept the office, or subject himself to a fine. Rev. Laws, c. 25, § 97. And sales of land for the nonpayment of taxes are authorized in the interest and for the benefit of the public. If the Legislature, in making the changes, intended to impose a personal liability on a public officer, by requiring the special covenant, the collector would have been left to perform the duties of his office, under the penalty of a liability if the error avoiding the sale arose, not through any fault of his own, but from a mistake, or some informality of the assessors which he might not discover, before the sale and delivery of the deed, and there would have been no occasion to have gone further by providing for repayment by the city or town, or conferring a right upon the purchaser, which before the statute he did not possess.

But if the legislative purpose is fairly to be gathered from St. 1862, c. 183, § 6, that the provision was intended to provide an inexpensive but ample remedy where the land could not be held, Rev. Laws, c. 13, §

44, removes all doubt. It is there declared, that the payment "shall be in full for all damages," not only "for any defects in the proceedings," but "under the warranty in such deed." The "warranty" is a statutory covenant of the defendant, not of the town, against which the plaintiffs are without recourse, as their remedy under the statute was held in Williams v. Dedham, 207 Mass. 415, 93 N. E. 696, to have been lost by their failure to act within the period of limitation. It, moreover, would be anomalous to construe the statute as intended to give a remedy against the town if invoked within 2 years, while the defendant could be sued at any time within 20 years from the date of the deed. Rev. Laws, c. 202, § 1; Bickford v. Page, 2 Mass. 455; Clark v. Swift, 3 Metc. 390. By the construction adopted, the language of the statute is given its ordinary and obvious meaning. If the purchaser finds, within the time prescribed, that he cannot hold the land, or there are reasonable grounds to believe that the tax title is fatally defective, because of noncompliance with the statutory requirements, either preceding or attendant upon the sale, he need not expose himself to vexatious litigation, but can surrender the deed and receive back the purchase price. But if he neglects seasonably to institute the necessary proceedings, there is no obligation on the part of the city or town, or the collector, to reimburse him for the loss. The relief provided being fully adequate, it should be held to be exclusive, and, under the reservation in the report, judgment is to be entered for the defendant. Hodges v. Thayer, 110 Mass. 286; Staples v. Dean, 114 Mass. 125; Welch v. Boston, 208 Mass. 326, 94 N. E. 271.

So ordered.

(209 Mass. 147)

ELLIS et al. v. SMALL et al.

(Supreme Judicial Court of Massachusetts.

Suffolk. May 18, 1911.)

1. SPECIFIC PERFORMANCE (§ 14*)—OBJECTIONS TO RELIEF—NECESSITY OF CONSENT OF THIRD PARTY—ASSIGNMENT OF LEASE.

Where a lease contains a covenant not to assign without the lessor's consent, and a provision for forfeiture on breach of such covenant, the lessee will not be decreed to specifically perform an agreement to assign the lease, in the absence of any showing that the landlord has waived his right of re-entry, or any probability that he will do so.

[Ed. Note.—For other cases, see Specific Performance, Dec. Dig. § 14.*]

2. SPECIFIC PERFORMANCE (§ 59*)—CONTRACTS ENFORCEABLE—CONDITIONS.

A lessee of business premises, under a lease providing that the landlord might re-enter if the lessee became bankrupt or insolvent, or made an assignment for the benefit of creditors, organized a corporation to carry on the business on the premises, and orally agreed to assign the lease to the company. This was never done, and the corporation subsequently was adjudicated a bankrupt. Held, that it

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

would be a violation of the spirit of the conditions of the lease to decree specific performance of the agreement to assign, by decreeing the assignment directly to the trustees in bankruptcy of the corporation, or to do the same thing indirectly by decreeing that the lessee should hold the lease in trust for the corporation or its trustees in bankruptcy.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. § 181; Dec. Dig. § 59.*]

Exceptions from Superior Court, Suffolk County; J. B. Richardson, Judge.

Bill in equity by Ellis and others, trustees in bankruptcy of J. G. Small & Co., against J. G. Small and others. Heard on report of the master in the superior court, and defendants' exceptions thereto. Bill dismissed.

D. A. Ellis and J. B. Jacobs, for plaintiffs. Whipple, Sears & Ogden and E. H. Robinson, for defendant Small.

MORTON, J. This is a bill in equity by the trustees in bankruptcy of the J. G. Small Co., a Massachusetts corporation, to compel the assignment to them by the defendant Small of a lease of certain premises on Washington street, Boston, where the corporation was carrying on business when it was adjudged bankrupt, and had been since its incorporation a little more than a year before. The bill also contained a prayer that said defendant Small be decreed to hold said lease in trust for said corporation or for the plaintiffs as receivers of the same. The case was sent to a master and comes here from the superior court on his report and the defendants' exceptions thereto, such decree to be entered as justice and equity may require.

Before 1909 the defendant Small was carrying on business on the premises in question under the name of J. G. Small & Co., and had a written lease which expired December 31, 1908. In January, 1909, he procured from the owners a new lease for five years from January 1, 1909. In April, 1909, the business carried on by the defendant Small was incorporated by him under the name of the J. G. Small Company, with a capital of \$50,000, and all of the assets of the business except the lease were conveyed by him to the corporation. The corporation occupied the premises as tenant at will under the defendant Small and the business was carried on as it had been before the corporation was formed.

In December, 1909, the defendants Brewer and Macauley and the defendant Small and one Leavitt, who had a nominal interest, entered into a written agreement whereby it was agreed that said Small should transfer to said Brewer and Macauley each 150 shares of the capital stock of said corporation and said Brewer and Macauley should each thereupon pay into the treasury of the corporation \$15,000 in cash. It was also

agreed that Small should pay in \$5,000 in cash which he did. Nothing was said in the written agreement about an assignment of the lease and the master finds that the defendant Small had been requested by Brewer and Macauley to assign the lease and had refused before the written agreement was entered into. Shortly after the execution of the agreement Brewer and Macauley told the defendant Small that they would not carry out their contract unless he would agree, amongst other things, to assign the lease to the corporation. The master finds that Small did thereupon orally agree to assign the lease but has not done so. The corporation was at the time heavily in debt. After Small agreed to assign the lease Brewer proceeded to pay in the \$15,000 though not exactly as agreed. Macauley paid in \$5,000 and no more, though repeatedly requested to do so by Small. Stock to the amount of \$20,000 was issued to Brewer and Macauley and they with Small and Leavitt who had one share were elected and constituted the board of directors. The master finds that Macauley's failure to pay in the balance of \$10,000 pursuant to his agreement was a material breach of his contract and seriously embarrassed the corporation. Of the money paid in as aforesaid the master finds that from \$12,000 to \$14,000 was expended by the corporation in permanent improvements on the premises and in putting in fixtures in reliance upon the defendant Small's oral promise to assign the lease. The corporation was adjudged bankrupt in August, 1910. Before that the defendant Small had refused to carry out his oral agreement to assign the lease and had been advised not to execute a contemplated trust agreement in regard to the lease until the whole \$30,000 was paid in, and he never did execute the same. The lease contains a covenant on the part of the lessee not to assign or underlet except with the written consent of the lessor. It also provides that if the lessee or his representatives or assigns fail or neglect to perform any of the covenants on his part to be so performed, or if the lessee shall be declared bankrupt or insolvent or if any assignment of his property shall be made for the benefit of creditors, then in either case the lessors may without further notice or demand enter and expel the lessee and repossess themselves of said premises as of their former estate. The master finds that there is no evidence that the lessor has given or will give his consent to an assignment, and he is not a party to these proceedings.

We assume in favor of the plaintiffs, but without so deciding that there was sufficient consideration for Small's promise to assign the lease, and that there has been such part performance as to take the case out of the statute of frauds. But we think that

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the covenant not to assign except with the written consent of the lessor, which is wanting, constitutes an insuperable objection to granting the relief sought. It is possible that Macaulay's failure to pay in the balance of \$10,000 would also constitute an insuperable objection.

[1] An assignment by the defendant would be a violation of the covenant and would give the lessor an immediate right of re-entry. There is nothing to show that the lessor has waived his right of re-entry. It would be futile, therefore, to compel the defendant to assign the lease. Under such circumstances equity will not enforce specific performance. *Gannett v. Albree*, 103 Mass. 872; *Squire v. Learned*, 196 Mass. 134, 136, 81 N. E. 880, 11 L. R. A. (N. S.) 634, 124 Am. St. Rep. 525; *Thompson v. Guyon*, 5 Sim. 65; *Gregory v. Wilson*, 9 Hare, 683; *Lines v. Bond*, 18 Beav. 85; *Hurlbut v. Kantzler*, 112 Ill. 482.

[2] Moreover the lease provides that if the lessee becomes bankrupt or insolvent, or an assignment of his property is made for the benefit of his creditors the lessor may re-enter. It would violate the spirit and intent of these conditions to compel an assignment to the trustees in bankruptcy of a bankrupt corporation. The assignment when made would be an assignment by the lessee though made by order of court, and would be subject to the conditions of the lease. See *Shree v. Hale*, 13 Ves. 404. It would stand on a different footing from an assignment by operation of law, as to which see *Bemis v. Wilder*, 100 Mass. 446. The case is entirely different from a case where by reason of some infirmity in the title a party is unable to convey all that he has contracted to convey, but the other party to the contract is willing to accept partial performance with a proportionate reduction in the consideration. *Park v. Johnson*, 4 Allen, 259. In such a case the contract is enforced between the parties to it and there is no element of forfeiture involved. More analogous are the cases in which the holder of a liquor license has been required to transfer it to an assignee or purchaser subject to the possibility that the commissioners may issue a license to him. In *re Fisher* (D. C.) 98 Fed. 89; *Fisher v. Cushman*, 103 Fed. 860, 43 C. C. A. 381, 51 L. R. A. 292; In *re McArdle* (D. C.) 126 Fed. 442. But the conditions on which such licenses are issued are not at all like those contained in the lease in this case. If they were we may fairly assume that the court would not have felt that it could compel a transfer. As it was, there being no conditions such as exist in the lease in the case at bar, and a practice having grown up on the part of the board of police commissioners of the city of Boston by which a license has there come to have a sort of pecuniary

value attached to it, the court naturally took the view that if there was anything in the nature of property in the license, or anything which could be realized by means of it, the assignee should have the benefit of it. It should be noted that it has been held in this commonwealth that a license is nothing more than a personal privilege with elements of pecuniary value in Boston in consequence of the practice aforesaid. *Tracy v. Ginzberg*, 189 Mass. 260, 75 N. E. 637. What cannot be done directly by enforcing specific performance cannot be done, we think, indirectly by means of a decree requiring the defendant to hold, as trustee for the plaintiffs' benefit. From the nature of the case the court, for reasons already stated, cannot treat that as done which should have been done. A decree that the defendant should hold the lease in trust for the plaintiff would be in substance and effect a decree that in equity and good conscience the plaintiffs were entitled to a transfer notwithstanding the conditions of the lease were such that a transfer could not be made and would be plainly inconsistent with the denial of specific performance. The same reasons which prevent a decree for specific performance operate against a decree requiring the defendant to hold the lease in trust for the plaintiffs or for the corporation.

In view of the conclusion to which we have come on this branch of the case it is unnecessary to consider the effect of Macaulay's failure to pay the balance of \$10,000.

Bill dismissed.

(209 Mass. 213)

WEATHERBEE et al., Selectmen, v. DEDHAM & F. ST. RY. CO.

(Supreme Judicial Court of Massachusetts.
Norfolk. May 19, 1911.)

1. CARRIERS (§ 12*)—CONDITIONS IN GRANT OF LOCATION—ACQUISITION BY DIFFERENT COMPANY—FARES.

Where a street railway company acquired a location from the selectmen of a town, which provided that no higher than a specified fare rate should be charged, a subsequent corporation acquiring the assets and franchises of the original company under the general law, authorizing such acquisition by sale or consolidation (St. 1906, c. 463, pt. 3, §§ 144, 145), took subject to the same obligation.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 12.*]

2. CARRIERS (§ 12*)—CONDITIONS IN GRANT OF LOCATION—FARE RATE.

Where the selectmen of a town, on granting a street railway location, inserted a provision fixing the maximum fare to be charged within a locality covering three towns, such provision was a valid exercise of power granted by Pub. St. 1882, c. 113, and was not affected by St. 1898, c. 578, withdrawing such power from local boards, adopted within less than a month after the location became effective.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 12.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes 95 N.E.—6

3. CARRIERS (§ 12*)—FARES—CONDITIONS IN GRANT OF LOCATION—ENFORCEMENT—EFFECT—OPERATING EXPENSES.

Where a street railroad location contained a valid provision fixing the maximum fare to be charged for a specified locality, it was no answer to a suit, by the selectmen of a town granting the location, to restrain the railroad company from enforcing rates in excess of the maximum specified, that the management had not acted arbitrarily, that the increased fares were reasonable, and that the maximum rates specified by the location were insufficient to pay operating expenses, and, if enforced, would result in the curtailment of service.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 12.*]

4. CARRIERS (§ 18*)—CONDITIONS IN GRANT OF LOCATION—FARE RATES—ENFORCEMENT—LACHES.

Where an interval of only 19 months elapsed between the first charge of fares by a street railroad company in excess of those stipulated in its location, during which two further modifications of the fare schedule were made, before complainants instituted suit to enforce the maximum location rates, complainants' right to relief was not barred by laches.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 18.*]

5. EQUITY (§ 85*)—LACHES—GOVERNMENTAL OFFICIALS.

Laches is not usually imputed to public officers in respect of their governmental functions as representatives of the sovereignty.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 221; Dec. Dig. § 85.*]

6. WORDS AND PHRASES—"WAIVER."

"Waiver" is an intentional relinquishment of a known right.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 8, pp. 7375-7381; vol. 8, pp. 7381, 7332.]

7. CARRIERS (§ 12*)—CONDITIONS IN GRANT OF LOCATION—FARES—OPERATION.

While a street railway company was not compelled to operate its road at a loss, yet, so long as it continued to exercise the privileges conferred on it by location containing a maximum fare limitation, it was bound to conform thereto.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 12.*]

Report from Supreme Judicial Court, Norfolk County.

Suit by Henry E. Weatherbee and others, constituting the Selectmen of Westwood, against the Dedham & Franklin Street Railway Company. A trial was had before a single justice, and the case was reported to the full court. Decree for complainants.

E. C. Jenney, for plaintiffs. Blodgett, Jones & Burnham, for defendant.

RUGG, J. [1] This is a petition in equity by the selectmen of the town of Westwood to enforce compliance with a term of a street railway location as to fares. The defendant has succeeded to the rights and franchises of the Norfolk Western Street Railway Company. On August 10, 1898, after the required precedent proceedings by a majority of the directors of the Norfolk Western Street Railway Company, a street railway corporation

in process of formation under our laws, an original location was granted to it by the selectmen of Westwood, authorizing it to operate a street railway in certain public ways in Westwood. On August 19, 1898, this location was accepted by the directors of the Norfolk Western Company, "subject to all conditions and restrictions therein contained." A certificate of organization creating the Norfolk Western Street Railway Company a corporation was issued on September 23, 1898. One clause of the location was: "The rate of fare shall not exceed the sum of five (5) cents for any distance in one continuous trip within the limits of said town, or for a continuous trip from any point along the line of said road in said town of Westwood to its present terminus in Medfield or to its terminus in Dedham." It does not appear under what provision of law the defendant succeeded to the location granted to the Norfolk Western Street Railway Company. We are not aware of any special act authorizing it. In each of the ways permitted in the general law, by sale or consolidation under sections 52, 53 and 54, and at receiver's sale under sections 144 and 145, of St. 1906, c. 463, pt. 3, the right acquired by the succeeding company is no more extensive or less onerous than that of the original company as to locations. In January, 1908, the rate of fare was raised above the limit prescribed in the location, and although changed several times since then has been maintained higher than there provided. Before 1908 the road had been operated at a considerable loss for a number of years, and notwithstanding the practice of strict economy an indebtedness of several thousand dollars was accumulated. Since then its deficit has increased, although there have been no allowances for depreciation, and only necessary repairs have been made.

[2] The law governing the formation of street railway companies and the granting of locations to them in force at the time was Pub. St. c. 113. It has been decided that under this statute a restriction in an original location fixing the maximum fare to be charged for a locality covering three towns was a valid exercise of power by the selectmen, and when accepted by the directors of the street railway company became as binding upon the corporation as if inserted in a special charter of incorporation, and that subsequent legislation has not undertaken to abrogate or modify the force of such restrictions, and that they are binding upon another company succeeding to the franchises and privileges of the original company. Selectmen of Clinton v. Worcester Consolidated St. Rly. Co., 190 Mass. 279, 85 N. E. 507. It is there pointed out also that the earlier cases of Keefe v. Lexington & Boston St. Rly. Co., 185 Mass. 183, 70 N. E. 87, and Selectmen of

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Wellesley v. Boston & Worcester St. Rly. Co., 188 Mass. 250, 74 N. E. 355, arose under different and more recent provisions of law and are not inconsistent with this view. The location now under consideration became operative less than one month before St. 1898, c. 578, went into effect, which among other matters marked a change in the policy of the Legislature upon the subject of fares and deprived local boards of the power to regulate fares theretofore possessed by them. But there must always be some instant of time when every alteration of statute takes effect, and up to that instant the pre-existing law prevails with as much force as it ever had.

[3] The defendant urges that the road is operated with economy, and that the fares charged are reasonable and are about the same as the average charged by other street railways in the state, and that the management of the railway has not acted arbitrarily or without consideration for the convenience of its patrons in making successive small increases in fares in the hope of meeting expenses and has offered to elect one of the petitioners to its board of directors, and that out of regard to these considerations the court ought in its discretion to refuse to grant the relief prayed for. The court is clothed with jurisdiction to enforce the terms of locations on petitions of selectmen. Ordinarily the exercise of a judicial power conferred for the benefit of any class of persons or the public is not discretionary, but obligatory when an infringement of right is shown. It is a part of the Constitution that this commonwealth is established "to the end that this may be a government of laws, and not of men." The preservation and protection of a right established under the law of the land is not discretionary, but compulsory upon the courts. That it may appear to work hardship in some directions is no reason why they should not act. While in the exercise of equity jurisprudence there is a considerable field necessarily left to the exercise of a sound judicial discretion, the present is not a case of that kind. There is nothing in the statute under which this petition is brought (St. 1906, c. 463, pt. 3, § 157) to indicate that any exception to the general rule was intended. If, therefore, the petitioners make out a violation of a valid restriction these circumstances constitute no reason for not granting the remedy afforded by the Legislature for such cases.

It is also argued that if the rates of fare now charged are reduced, the inevitable result will be that the service will be curtailed, and thus the people of this and several other towns, through which run the tracks of the defendant and its affiliated railway, will be inconvenienced and deprived of transportation privileges now enjoyed by them. However much these consequences

might appeal to the sound judgment of a public board in deciding upon a course of conduct, they do not constitute a legal defense to an established right.

[4] The defense of laches cannot prevail. An interval of about 19 months elapsed between the first charge of fares in excess of those stipulated in the location, during which two further modifications in the fare schedule were made. There is no inflexible rule as to what constitutes laches, and each case depends upon its own facts. There would be a strong argument that, even if private obligations alone were involved, this delay in the light of the negotiations between the parties and the other circumstances did not constitute laches. The significance of delay arises when good conscience demands action. *Stewart v. Finkelstone*, 206 Mass. 28, 92 N. E. 37, 28 L. R. A. (N. S.) 834. But in bringing a suit of this sort, as in granting a location, the selectmen act as public officers, and not as agents of the town. They are not seeking to protect a private interest, but to enforce a public right, the benefits of which may not be confined to a municipality of which they are officers. [5] Laches is not commonly imputed to public officers in respect of their governmental functions or as representatives of the sovereignty. In *re County Com.*, 143 Mass. 424, 433, 9 N. E. 756; *Fairbanks v. Fitchburg*, 132 Mass. 42. See *Gaussen v. U. S.*, 97 U. S. 584, 24 L. Ed. 1009; *U. S. v. Insley*, 130 U. S. 263, 9 Sup. Ct. 485, 32 L. Ed. 968.

[6] There is nothing to indicate a waiver, even if it be assumed, which we do not intimate, that the doctrine of waiver can apply to such a restriction as that here sought to be enforced. Waiver is an intentional relinquishment of a known right. The selectmen do not appear to have done anything to indicate an intention not to maintain the public right.

[7] The defendant is not compelled to operate its road at a loss. But so long as it continues to exercise the privileges conferred upon it by the location, it must do so subject to all the burdens thereby imposed.

Mandatory injunction to issue.

(209 Mass. 123)

NOYES v. CUSHING et al.

(Supreme Judicial Court of Massachusetts.
Suffolk. May 18, 1911.)

DEEDS (§ 171*)—RESTRICTIONS.

The lots owned by plaintiff and defendant are subject to a restriction that no building shall be erected within 15 feet of the C. street line, and no mechanical shop, livery stable, or store shall ever be erected or used on such parcel, which shall be detrimental to the use of the locality for dwelling houses. C. street has always been used almost entirely for residences. Defendant owns an elevator and grain and hay store on R. street, parallel to C. street, and also owns a lot on C. street, immediately in

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

the rear of his R. street store, and seeks to erect a building on the C. street lot to be used, in connection with the store, for storing hay, etc., and some of the deliveries may be made from the building on C. street, though the great bulk will be made from the R. street building. *Held*, that the restriction did not prevent the erection of a building on defendant's C. street lot other than a dwelling house, if it would not be detrimental to the use of the surrounding property as a residential section; and while a finding that the use of a building thereon for the storage of hay, grain, etc., is not detrimental will be sustained, if supported by evidence, the use of a building on the lot for a garage might be detrimental to the use of the street for dwellings, and it cannot be used for the sale and delivery of goods on C. street, or for the reception or delivery of goods sold in the R. street building.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 537-542; Dec. Dig. § 171.*]

Appeal from Superior Court, Suffolk County.

Suit by Frank A. Noyes against Milton L. Cushing and others. From a decree in part for plaintiff, plaintiff appeals. Affirmed, as modified.

Hayes, Williams, Baker & Hersey, for appellant. W. E. Hutchins and H. L. Cummings, for appellees.

MORTON, J. The plaintiff and the defendants are owners of adjoining lots on Creighton street in Cambridge, each of which, in common with other lots on Creighton street, is subject to the following building restrictions, namely: "No building shall ever be erected within fifteen feet of said line of Creighton street, and no mechanical shop, livery stable, or store shall ever be erected or used on said parcel which shall be detrimental to the use of this locality for dwelling houses."

This is a bill to restrain and enjoin the defendants from erecting a building on their lot in violation of these restrictions. There was a decree restraining the erection of a building within 15 feet of Creighton street and enjoining the defendants from using the building as a store for the sale of goods on Creighton street, but permitting them to use the building for the storage of hay, grain and other materials or as a garage for the storage of automobiles or as a storage warehouse. The decree also restrained the defendants from using Creighton street to haul hay or straw to and from said building. The plaintiff appealed from the decree. The evidence was taken by a commissioner and is all before us.

The defendants own an elevator and store on Regent street, which is next southerly of and parallel to Creighton street, where they deal in hay, grain, straw, flour and other products. The lot on Creighton street adjoins in the rear their premises on Regent street, and the building on Creighton street is intended to be used in connection with the store on Regent street for storing hay, grain,

flour and other things that the defendants deal in. The great bulk of deliveries—90 per cent., one witness testified—will be made from the store on Regent street. But there was testimony tending to show that some deliveries might be made from the building on Creighton street. The evidence tended to show that Creighton street is and always has been almost entirely a residential street; and the presiding justice must be deemed to have found that, as alleged in the bill, the restrictions upon the lots of the plaintiff and defendants were imposed as a part of a general scheme for the benefit of other lots on Creighton street, and that the plaintiff was entitled to enforce such restrictions against the defendants. He must also be deemed to have found that there had been no such change in the locality intended to be benefited by the restrictions as to render it inequitable to enforce them. If the question of the correctness of these findings is open, we do not see how it can be said that they were plainly erroneous. The plaintiff does not find fault with them, as indeed he could not; but he contends that according to the proper construction of the restrictions only a building intended for a dwelling house can be erected on the defendant's lot, or, if that is not so, that the building in question which, we infer, has been erected in the main as planned since the decree was entered, is or may be "detrimental to the use of the surrounding locality for dwelling houses," and for that reason should be removed.

The restrictions, while forbidding the use or erection of a building for a "mechanical shop, livery stable, or store," contain no express provision limiting the use of the lot to the erection of a building for a dwelling house. On the contrary the implication from the provision that no building "shall ever be erected or used on said premises which may be detrimental to the use of the surrounding locality for dwelling houses" is that a building of a different character may be erected so long as it or the use to which it is put will not be detrimental to the use of the surrounding locality for dwelling houses. It was no doubt expected that the effect of the restrictions would be to impose upon the locality to which they applied a residential character. But in the absence of anything in them limiting the buildings to be erected to dwelling houses we do not see how the restrictions can be so construed.

The question whether the erection of such a building as the defendants have erected and whether its use for the storage of hay, grain, flour and other merchandise which they deal in would be detrimental to the use of the surrounding locality for dwelling houses is largely if not wholly one of fact. The presiding justice found apparently that the building and the use of it as contemplated would not be detrimental if the building was

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

not to be used as a store and goods and merchandise were not to be hauled through Creighton street to and from it. The evidence upon the subject was contradictory, and it plainly cannot be said, we think, that his finding was wrong. We think, however, that the use of the building as a garage for the storage of automobiles would or might be detrimental to the use of the street for dwelling houses (see *Daly v. Foss*, 199 Mass. 104, 85 N. E. 94; *Evans v. Foss*, 194 Mass. 513, 80 N. E. 587, 9 L. R. A. [N. S.] 1039), and that the decree should be modified by striking out that part of it, with leave to apply to the superior court to have the decree include a provision, if it sees fit, permitting the use of the warehouse for the storage of automobiles but not as a garage. We think that it should also be modified so as to restrain and enjoin the defendants not only from using said building as a store for the sale of goods on Creighton street and from transporting merchandise to and from said building through Creighton street, but also from using said building for the reception or delivery of goods sold or to be sold in the Regent street building, and from transporting goods and merchandise through Creighton street in connection with the Regent street store. As thus modified the decree will be affirmed.

So ordered.

(209 Mass. 62)

O'LEARY v. BOSTON ELEVATED RY. CO.
(Supreme Judicial Court of Massachusetts.
Suffolk. May 18, 1911.)

1. APPEAL AND ERROR (§ 1056*)—REVIEW—HARMLESS ERROR.

In an action against a street railway company for injuries received, where the jury found that the plaintiff was in the exercise of due care, the exclusion of an answer as to why the plaintiff did not keep out of the way of the car, as not responsive to the question, was harmless error.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4187-4193; Dec. Dig. § 1056.*]

2. TRIAL (§ 413*)—WAIVER OF OBJECTIONS.

Where an answer of a plaintiff was stricken out as not responsive, and counsel for plaintiff, though allowed to go over the matter in as much detail as he cared, declined to avail himself of the privilege, an exception to the exclusion of the answer will be overruled.

[Ed. Note.—For other cases, see *Trial*, Dec. Dig. § 413.*]

3. TRIAL (§§ 244, 267*)—INSTRUCTIONS—REQUESTS.

Where a requested instruction singled out only certain facts, it was not error to refuse it; for the trial court is not bound to make its selection of facts in the language of the request.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 577-581, 668-672; Dec. Dig. §§ 244, 267.*]

Exceptions from Superior Court, Suffolk County; John F. Brown, Judge.

Action by Margaret A. O'Leary against the Boston Elevated Railway Company. Verdict for defendant, to which plaintiff excepted. Exceptions overruled.

A. L. Doggett and W. M. Noble, for plaintiff. Fletcher Ranney and E. B. Horn, for defendant.

HAMMOND, J. The plaintiff alleges two exceptions, the first to the striking out by the court of an answer given by her on re-direct examination, and the second to the refusal of the court to give a ruling requested by the plaintiff.

[1] 1. As to the striking out of the answer. The question and answer were as follows:

"Q. If you saw the car coming just before you stepped along to go over the tracks on which the car was, why didn't you keep out of the way of the car?

"A. I moved out of the way, and then it came swifter and knocked me down."

The answer was excluded by the court as not responsive to the question. So far as the answer bore upon the question of the due care of the plaintiff, it has become immaterial by the finding of the jury that the plaintiff was in the exercise of due care. So far as it bore on the question of the negligence of the motorman, the statement that the car "came swifter" added nothing to what the plaintiff had said previously upon the stand; and hence, even if the answer was responsive, its exclusion is not shown to have been harmful to the plaintiff.

[2] But the decisive answer to this exception is that as a result of a colloquy of considerable length, in which the court and counsel on each side participated, the counsel for the plaintiff was allowed to go all over the matter in detail as much as he pleased, but he declined to avail himself fully of the privilege. For this reason the exception must be overruled.

[3] 2. As to the ruling requested. The request singled out only some of the facts bearing upon the questions of the plaintiff's due care and the defendant's negligence. The court was not bound to make the selection in the language of the request. The charge was specific and full enough upon these questions.

Exceptions overruled.

(209 Mass. 80)

COMMONWEALTH v. BOSTON WHITE CROSS MILK CO.

(Supreme Judicial Court of Massachusetts.
Suffolk. May 18, 1911.)

FOOD (§ 5*)—"MILK."

A product of a patented chemical process for treatment of milk, called "concentrated milk," diluted by water, does not constitute "milk," within Rev. Laws, c. 56, § 55, prohibi-

ing the keeping for sale of milk to which water has been added.

[Ed. Note.—For other cases, see Food, Dec. Dig. § 5.*

For other definitions, see Words and Phrases, vol. 5, p. 4506.]

Exceptions from Superior Court, Suffolk County; Wm. Cushing Wait, Judge.

The Boston White Cross Milk Company was convicted of keeping for sale milk to which water had been added, and brings exceptions. Exceptions sustained.

A. C. Webber, Asst. Dist. Atty., for the Commonwealth. Berry, Upton & Harvey, for defendant.

SHELDON, J. The indictment charges the defendant with having in its possession with intent to sell "milk to which water had been added." The evidence was to the effect that the defendant, having in its possession 120 quarts of what was called "concentrated milk," had added thereto 360 quarts of ice water, one gallon of heavy cream said to contain 40 per cent. of milk fat, and four gallons of "concentrated skim milk," and that the defendant intended to sell the mixture thus prepared. The government put in no testimony to show what was the composition of the "concentrated milk" which was the basis of the mixture intended to be sold, or how, where, or by whom this basis had been prepared or manufactured, except as follows: There was testimony that this "concentrated extract" looked like condensed milk, that it was white, thick, and of the consistency of molasses, and a half pint bottle containing a thick white liquid was put in as an exhibit of the "extract"; and it was testified that the "extract" to which the defendant had added water had the appearance of this exhibit. It also appeared that samples of the defendant's product had been taken by an assistant of the inspector of milk and had been analyzed by another assistant. Neither of these assistants testified, and no analysis of the defendant's "concentrated essence or product," or of the mixture when diluted as aforesaid, was put in evidence by the government. The defendant contended that the "concentrated milk" or extract to which it had added water was not milk within the meaning of the statute. It put in evidence of the following facts, which so far as appears were not controverted: The defendant obtained a license under letters patent of the United States for the production and sale of "concentrated milk," and built and equipped a factory for that purpose in Vermont. It bought from farmers in that vicinity the best fresh milk obtainable, such as was by test up to or above the standard fixed by the statutes of this commonwealth. St. 1908, c. 643. From this milk it separated the cream, and treated separately the cream and the skimmed milk. The cream

was treated for some hours to a temperature of not more than 140 degrees by means of hot-water pipes or jackets applied to the containing tanks, with the result that the cream became pasteurized at a temperature lower than that of ordinary pasteurization, the greater part of its water was evaporated, the bacteria in it were destroyed, and beneficial changes in it took place, so as to increase the time during which it would remain fresh and sweet, whereby it was purified and yet retained the taste and all the digestive and other qualities of the best fresh cream. The skimmed milk was simultaneously treated in other tanks by a similar application of heat and at the same time agitated and cooled by cold-air blasts for about five hours. This brought about the evaporation of at least three-fourths of the contained water, together with all odor from barns or cows, and killed the most of the bacteria in the milk. The original skimmed milk was thus concentrated and reduced to about one-fourth of its original volume and was at the same time purified or pasteurized, but at a low temperature, so that the milk solids were not so far cooked or changed as to make them less digestible or nutritious than in the original milk. The cream and the skimmed milk, thus separately treated, were then in certain proportions carried through pipes into a mixing tank, where they were blended according to a formula, so that the milk solids and the fat should be not less than four times the amount required by our statutes for standard milk and the water should not exceed one-fourth part of that allowed for such standard milk. This final product was the "concentrated milk" manufactured by the defendant, to which as aforesaid it added three parts of water, with the intention of selling the mixture thus produced.

Qualified experts also testified for the defendant that the chemical changes produced by the process stated were a mild form or incipient stage of curdling or coagulation of the protein of the milk, like that of the white of a soft-boiled egg; that there was some precipitation of the sugar and the phosphatic substances, the water and the gases were driven off, and the bacteria were reduced in number from several hundred thousand down to a few hundreds; that the concentrated product was not milk, but a manufactured product made from milk as a raw material; that the pasteurization process used by the defendant for cream differed from ordinary pasteurization, and the concentration process used for the skimmed milk was different from any method previously known or used for evaporating or condensing milk; and that the defendant's "concentrated milk" was not a condensed milk such as was previously known in commerce. One of these witnesses testified that whole

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

or natural milk is milk as it is taken from the cow's udder; that the defendant's product was not milk and was not evaporated milk, which is whole or natural milk with the cream in and evaporated, and that it was not the ordinary condensed milk of commerce, but that he would call it "a mixture of concentrated skim and pasteurized cream."

There was no evidence as to what was generally known or dealt with in the trade as milk.

It appears to have been undisputed that the mixture which the defendant intended to sell, being substantially a mixture of its "concentrated milk" with three parts of water, was fully up to the standard fixed by St. 1908, c. 643, was not adulterated, and had had no water or foreign substance added to it, except as has been stated, by the addition of three parts of water to one part of the "concentrated milk." It was assumed at the trial that in order to convict the defendant it must be shown that the "concentrated milk" to which the defendant had added water was "milk" within the meaning of R. L. c. 56, § 55.

The judge told the jury that the question was simply this: "Was the substance to which water was added by the defendant * * * milk within the meaning of the particular statute?" He said that "milk was the natural secretion from the mammary glands of the cow, substantially in the form in which it is taken from the cow, * * * or any substance generally known or dealt with in the trade as milk, as already defined. * * * If cream is generally known in the trade in that way, it is milk; if chalk and water are generally known in the trade and generally dealt with in the trade as milk, so that when a man says he wants to buy milk, in the trade it is generally understood chalk and water can be given to him, then that is milk within the language of that statute. But unless chalk and water is so understood, or unless any other product is actually and generally understood in the trade to be the same thing as milk as it comes from the cow, then it is not milk within the statute. That is the question you have got to decide: Was that product which has been shown here, the method of producing which has been described, known and treated generally in the trade as milk as it comes from the cow? Could you sell that product just as it stood on a contract which called on you to deliver milk? If you could deliver that product just as it stood, then the defendant is guilty; if you could not, then the defendant is not guilty." And this instruction was repeated more than once, in strong and unmistakable language. In his closing words to the jury, the judge said: "Is this product milk? If it is known in the trade, if it has acquired a standing in the trade, as milk, then the statute applies to it,

and the defendants are guilty for adding water to it."

It is not contended that the manufactured product of the defendant, to which it added water for reduction and sale, was natural milk as it comes from the cow. And we have searched the evidence in vain for anything upon which it could be found that this manufactured product had come to be known in the trade as milk. Certainly there is no such intimation in the testimony of the government, and that put in by the defendant is wholly to the effect that the defendant's "concentrated milk" was a new and unique product, manufactured only since 1908, under letters patent, at a factory equipped for that purpose, shipped to the defendant's place of business in Boston, and there extended by the defendant and put upon the market only in its diluted form. There is nothing in the evidence tending to show that the concentrated product had been dealt with in the market, or had been a subject of trade, or even had been in the hands of any dealers other than the defendant itself. A contract for the delivery of milk would not be satisfied by the delivery of this concentrated product, which must be diluted by the addition of water before it could be drunk like milk or made available for use as milk in the ordinary manner. It is no more milk within the meaning of such a contract than natural milk which does not come up to the prescribed standard. *Copeland v. Boston Dairy Co.*, 184 Mass. 207, 68 N. E. 218, and 189 Mass. 342, 75 N. E. 704. The fact that the word "milk" in this statute has been construed to include cream as one of its natural components (*Commonwealth v. Gordon*, 159 Mass. 8, 33 N. E. 709) does not indicate that it should include also a substance produced from it by a process of manufacture with artificial appliances involving some chemical changes. The substance itself is not milk, just as butter and cheese and condensed milk are not themselves milk.

For these reasons the defendant's exceptions to the instructions given to the jury must be sustained.

But as the result thus reached is merely to send the case to a new trial, when the other questions raised by these exceptions would necessarily have to be determined, we deem it proper to consider the fundamental question whether upon the facts here presented a conviction could be supported.

So far as it bears upon this indictment, our statute provides for the punishment of any one who has in his custody or possession with intent to sell "milk to which water * * * has been added." R. L. c. 56, § 55. That is the only offense here charged. It has been suggested that as there is no dispute that the mixture which the defendant produced by adding water to its "concentrated milk" did contain water which had not

come from the cow, but had been added to the mixture, the mixture itself was within the meaning of the statute milk to which water had been added. But we are unable to accept this argument. If it were sound, then for the same reason one who sold or had in his possession with intent to sell ordinary condensed milk which had been so extended as to resemble natural milk in appearance would be liable to conviction upon a charge like this. But we are dealing with a penal statute, and its scope is not to be extended beyond the natural meaning of its words. When the Legislature dealt with the sale of condensed milk, it used those words. R. L. c. 56, §§ 59, 63. It is claimed, to be sure, that the defendant's product is not condensed milk, but it certainly resembles that other manufactured article more closely than it does natural milk.

Moreover, the object of our statutes regulating the sale of milk, to insure the supply to consumers of a pure, unadulterated article of a certain nutritive value, is not interfered with by what the defendant has done. As we have seen, it was not denied that the diluted or extended mixture which it intended to sell was fully up to the required standard; it was not claimed that it contained any more water, was of any less nutritive value, or was less fitted in any respect for a food, than the best natural milk. If, as the evidence tended to show, the process of modified pasteurization to which the manufactured product had been subjected had resulted in greatly diminishing the number of bacteria and in prolonging the time during which the extended mixture could safely be kept, this is neither a reason against its use nor an argument for extending the statutory prohibition so as to include a product which is neither within the common meaning of its words nor, so far as now appears, within the mischief which the statute was designed to prevent.

If it should appear in any other case that such a product as this, after having been extended into the form in which it was intended to be sold and used, had been further altered by the addition of water or any other foreign substance, whether by the defendant or by any other person, a different question would be presented. But that is not this case. So, too, if the use of the defendant's product shall be found to involve any danger to the public health, or any risk of fraud being practiced by the sale of this manufactured article as milk, the Legislature undoubtedly will make proper provision against such evils. But it is not for us to extend the operation of the present statute beyond its legitimate scope.

The majority of the court are of opinion that if, as upon this bill of exceptions seems to have been the case, it was conceded by the government that the defendant's "con-

centrated milk" was such a substance, manufactured in such a manner, as appeared by the defendant's evidence, the jury should have been instructed to return a verdict of not guilty. If this was not the case, then the defendant's second and third requests should have been given substantially as asked for.

Exceptions sustained.

(209 Mass. 179)

BRYNE v. BRYNE.

(Supreme Judicial Court of Massachusetts.
Suffolk. May 18, 1911.)

1. **BILLS AND NOTES (§ 30*) -- PROMISSORY NOTE--CONSTRUCTION.**

An instrument, "Borrowed and received from G. M. B. five hundred and eighty-five dollars, payable April 1, 1904, with interest at six per cent.," signed by J. L. B., is a nonnegotiable promissory note; the word "payable" imparting a promise to pay the sum stated at the time fixed.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. § 60; Dec. Dig. § 30.*]

2. **BILLS AND NOTES (§ 537*)--ACTIONS ON--EVIDENCE--QUESTION FOR COURT.**

The question whether the instrument sued on was a promissory note was one of law for the court, and evidence that it was intended as a memorandum merely was rightly excluded.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1862-1894; Dec. Dig. § 537.*]

Exceptions from Superior Court, Suffolk County; George A. Sanderson, Judge.

Action by George M. Bryne against James L. Bryne. Case transferred from the superior court on exceptions to an instruction and to rulings in directing a verdict and on the exclusion of evidence. Exceptions overruled, with double costs.

The following is a copy of the note sued on:

"George M. Bryne
"Contractor for Public Works
"Room 802

"Boston, Mass., September 3, 1903.
"7 Water Street.

"Borrowed and received from George M. Bryne, five hundred and eighty-five dollars, payable April 1, 1904, with interest at six per cent.

"[Signed] J. L. Bryne."

J. T. Auerbach, H. S. MacPherson, and J. B. Mahar, for plaintiff. J. E. Crowley and D. T. O'Connell, for defendant.

MORTON, J. [1] It is plain, we think, that the instrument declared on is a promissory note. It is not a negotiable promissory note and is not declared on as such. The word "payable" in the connection in which it occurs imports a promise by the maker to pay at the time fixed the sum named. The promise is not one implied by law from an acknowledgment of indebtedness, but is

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

the maker's own promise. It is not contended that the other elements necessary to constitute a promissory note are not included in the instrument declared on. See, *Kimball v. Huntington*, 10 Wend. (N. Y.) 675, 25 Am. Dec. 590; *Mitchell v. Rome R. Co.*, 17 Ga. 574; *Carver v. Hayes*, 47 Me. 257; *Stagg v. Pepoon*, 1 Nott & McC. (S. C.) 102; *Cowan v. Hallack*, 9 Colo. 572, 13 Pac. 700; *Walshman v. Elsee*, 1 C. & K. 35; *Richer v. Noyer*, L. R. 5 P. O. 461, 466, 476.

[2] The question whether the instrument was or was not a promissory note was one of law for the court, and evidence that it was intended by the defendant as a memorandum merely was rightly excluded.

Exceptions overruled, with double costs and interest at 12 per cent.

(209 Mass. 285)

COKINOS v. BOSTON ELEVATED RY. CO.

(Supreme Judicial Court of Massachusetts.
Suffolk. May 20, 1911.)

STREET RAILROADS (§ 99*)—OPERATION—CONTRIBUTORY NEGLIGENCE.

In an action for injury to plaintiff's horse, carriage, and merchandise from collision with a street car, where the plaintiff was driving parallel to the track, and turned to cross it at a point where he had an unobstructed view of the track for a considerable distance, when a car was so near that it struck the horse before the wagon had got on the track, a verdict was properly directed for the defendant.

[Ed. Note.—For other cases, see *Street Railroads*, Cent. Dig. §§ 209-216; Dec. Dig. § 99.*]

Report from Superior Court, Suffolk County; John F. Brown, Judge.

Action by Constantine Cokinos against the Boston Elevated Railway Company. Verdict for defendant directed by the court, and the case reported to the Supreme Judicial Court, subject to a stipulation that, if the plaintiff was entitled to go to the jury, a judgment should be entered for him; otherwise, judgment to be entered on the verdict for defendant. Judgment on the verdict.

Francis H. Blackwell, for plaintiff. Wheaton Kittredge, for defendant.

HAMMOND, J. While driving home one Saturday evening in September, the plaintiff's team came into collision with a car controlled by a servant of the defendant, and his horse, carriage and merchandise were damaged.

The plaintiff testified as follows as to the circumstances of the collision: "When he reached Washington street on Massachusetts avenue he saw a car coming from Northampton street, a little south of Massachusetts avenue, the car running north towards Boston. To avoid crossing the rails in front of this car, he turned into the left and pro-

ceeded along the left-hand way, which is on Washington street between the elevated structure and the left-hand sidewalk going north. He passed along on this side for a distance of about 300 feet until near to Springfield street, the next cross street south of Massachusetts avenue. The car going north having passed, he turned to cross the tracks at the posts nearest to the stone crosswalk on Springfield street to go to the right-hand side of Washington street in the direction in which he was going. When his team was across the out-bound set of rails, those nearest to the plaintiff's path, his team was struck at the front axle and the left hip of the horse by a car going south toward Roxbury. The wagon was tipped over, the horse knocked down and freed from the wagon and the plaintiff thrown from his seat to the ground. The wagon and the horse were pushed along 10 or 12 feet. He was familiar with the locality, having done business around there for four or five years, and knew that Washington street, at and about the scene of the accident, was a big wide street, straight for a long way in both directions, and that the defendant maintained double tracks thereon over which surface cars run in and out of town quite often." He further testified that "as far as traffic was concerned there was nothing in front of him and that he had a clear view north down Washington street," that it was raining very hard, that he was an experienced driver, that the reins were secured, the horse properly hitched, that the team was of moderate weight and loaded with boxes, and that the wagon was a covered wagon with the sides rolled up or open. He also testified that before crossing the tracks he looked both ways and did not see this car.

The car was coming directly towards him at the moment he turned to cross and was in sight all the time. It was so near him that it struck the horse before the wagon had got on the track. It is not a case where he saw the car and thought he had time to get over the track. There is no reason why he should not have seen the car. If he looked, he looked carelessly.

While ordinarily in cases of collision between vehicles upon the highway the questions of due care and negligence are for the jury, yet where as in this case the undisputed facts show want of due care on the part of the plaintiff, it is the duty of the court in this class of cases as in any other to apply the law. In the opinion of the majority of the court the case, while not free from difficulty, must be classed with cases like *Haynes v. Boston Elev. Ry.*, 204 Mass. 249, 90 N. E. 419, and cases therein cited.

Judgment on the verdict.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

(208 Mass. 544)

WILLIAMS et al. v. JOHNSON et al.(Supreme Judicial Court of Massachusetts.
Suffolk. May 16, 1911.)**1. RAILROADS (§ 18*)—CORPORATE POWERS.**

The proprietorship of a real estate business by a railroad company is not within its corporate powers.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 39-44; Dec. Dig. § 18.*]

2. CORPORATIONS (§ 370*)—CORPORATE POWERS.

A corporation has power to do such business only as it is authorized by its act of incorporation to do, and no other.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. § 1511; Dec. Dig. § 370.*]

3. RAILROADS (§ 18*)—CORPORATE POWERS.

A railroad company, holding lands to be disposed of as no longer available for railroad purposes, cannot hold the land permanently or for an unreasonably long time as an investment; nor does its ownership thereof give it the right to carry on for a long term of years the business of dealing and speculating in land.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. § 42; Dec. Dig. § 18.*]

4. CORPORATIONS (§ 381*)—CORPORATE POWERS.

That which a corporation cannot do directly, because not within its corporate powers, it cannot do indirectly through the appointment of trustees.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. § 1541; Dec. Dig. § 381.*]

5. RAILROADS (§ 18*)—CORPORATE POWERS.

In disposing of its unused land, a railroad company can do nothing more than what is fairly incidental to a reasonable disposition of the property for its fair market value within a reasonable time.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. § 42; Dec. Dig. § 18.*]

6. RAILROADS (§ 18*)—CORPORATE POWERS.

The fact that a railroad, seeking to dispose of unused land, has not been able to sell it for its estimated value on account of risks attending the development and use of the property, which diminish the price, will not justify the directors in putting such risks on the stockholders, by creating a trust for the purpose of carrying on the business of developing and using the property for profit.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. § 42; Dec. Dig. § 18.*]

7. RAILROADS (§ 18*)—CORPORATE POWERS—PURCHASE OF STOCK IN OTHER CORPORATION.

A deed by a railroad company, conveying unused land to trustees, who are authorized to acquire shares in other corporations in disposing of the property as contemplated by the deed, is void, as violating St. 1906, c. 463, pt. 2, § 57, forbidding the holding by a railroad corporation of the stock of other corporations.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 39-44; Dec. Dig. § 18.*]

8. RAILROADS (§ 18*)—CORPORATE POWERS.

A deed by a railroad company, conveying its unused land to trustees, who are authorized to issue stock in developing this and other land acquired by them in carrying out a scheme for disposing of the property, is invalid, as creating a partnership between the corporation and parties who may be brought into the enterprise.

[Ed. Note.—For other cases, see *Railroads*, Dec. Dig. § 18.*]

9. CORPORATIONS (§ 379*)—CORPORATE POWERS—PARTNERSHIP.

A corporation cannot enter into a partnership.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. § 1538; Dec. Dig. § 379.*]

Petition by Moses Williams and others, as trustees, for the registration of title to land conveyed by a railroad company of which the respondents Lawrence H. Johnson and others are stockholders. Dismissed.

Warren, Garfield, Whiteside & Lamson, for petitioners. Henry Wheeler and Charles S. Rackemann, for respondents.

KNOWLTON, C. J. [1] This is a petition for the registration of the title to a tract of land in Boston, a part of which was formerly occupied as the station of the Boston & Providence Railroad Company, at Park Square. The diversion and extension of the railroad and the erection of the terminal passenger station in Boston under St. 1896, c. 516, rendered the property no longer available for railroad purposes, and it was conveyed by this corporation to the New York, New Haven & Hartford Railroad Company in consideration of improvements made by the grantee upon the property of the grantor, in connection with the location and erection of the new station. The validity of this conveyance was confirmed in *Little v. Old Colony Railroad Co.*, 202 Mass. 277, 88 N. E. 896. The petitioners claim title under a deed from the New York, New Haven & Hartford Railroad Company, bearing date September 15, 1909. The respondents, who are stockholders in the last-mentioned corporation, deny the validity of the deed, on the ground that it was ultra vires of the corporation and that the directors had no authority to make it.

The deed runs to the petitioners as trustees under a declaration of trust. The consideration expressed in it is one dollar and other valuable considerations. The conveyance is "subject to and upon the terms, provisions and trusts mentioned and set forth in the aforesaid declaration of trust." This declaration is of a peculiar kind. It provides that the trustees shall forthwith issue to the grantor certificates, in a form prescribed, for 52,000 shares, of a nominal par value of \$100 each, in payment for this real estate. The entire interest of the cestui que trust, or shareholders in the property, was to be represented, immediately after the conveyance, by these shares. The trustees were authorized to issue not exceeding 40,000 additional shares of the same nominal par value, in exchange for convertible notes or bonds that the trustees may issue to obtain money to be used in conducting the enterprise. The shares are transferable on the books of the trustees. The shareholders are not to have any legal title to the trust prop-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

erty itself, real or personal, and especially they are not to have a right to call for any partition. It is declared that they shall have no equitable estate in the lands and appurtenances constituting the trust property, but their interest shall consist only of an interest in the money to arise from the sale or other disposition thereof by the trustees, and, previous to such sale, in all the rights mentioned in the declaration, which are rights "of division of proceeds and profits, and the other rights and matters concerning the trust property."

The death of a shareholder is not to determine the trust, nor entitle his legal representatives to an accounting, but his rights are to pass to his executors, administrators or assigns, upon the surrender of the certificate of the shares. The trustees may from time to time invite and receive subscriptions to additional shares, for the purpose of increasing the capital of the trust, giving preference, upon such terms and conditions as they shall deem best, to existing shareholders, and to the holders of convertible notes or bonds. The trustees have no power to bind the shareholders personally for any debt, nor are the trustees to be personally liable for claims or debts against the trust, but all persons extending credit to the trustees are to look only to the property of the trust for their payment. The trustees have no pecuniary interest in the property of the trust, or in the business carried on under the trust, except for the payment of prescribed commissions upon receipts and expenditures, as compensation for their services.

The trustees are to have absolute control over and disposal of all real estate and other property held under the trust, including the power to improve it by building thereon or otherwise; to sell, for cash or credit, at public or private sale, any part of the property; "to lease or hire for improvement or otherwise, for a term beyond the possible termination of the trust, or for any less term; to let, to exchange, to release and to partition." They have power to borrow money to carry out the purposes of the trust, to issue notes or bonds and to secure the repayment of them by a pledge, mortgage or hypothecation of the property of the trust, or any part of it. The only limitation upon the power to borrow is that the total indebtedness at any one time shall not exceed four million dollars. Notes or bonds issued for such indebtedness may be made convertible into shares of the trust.

The trustees may acquire, by purchase or otherwise, any real estate or any interest therein in the general vicinity of that conveyed by the deed in question, "and any notes, bonds, shares or other securities of any corporation, association or real estate trust, organized or adapted for the purpose of acquiring, holding managing or improving real estate, or for the purpose of conducting

a lighting, heating, power or other business directly related to the management of real estate, if, in their judgment, such acquisition will in any manner tend to facilitate the laying out, development, management or improvement of the real estate" conveyed to them by the deed in question. They may lay out and construct or discontinue streets or ways, upon any property at any time held by them. They may dedicate to public use, or convey to the city of Boston, with or without compensation, any part of the property, with a view to the enhancement of the value of the remaining property. For a like purpose they may contribute money or other property to the cost of any public or quasi public undertaking. In all these matters the judgment and determination of the trustees is to be final and conclusive.

They may from time to time determine what of their receipts and expenditures shall be treated as capital and what as income, and their determination shall be final. They may divide net income among the shareholders, under certain limitations, and may set aside a part of the net income as a reserve or contingent fund. Their determination of what is net income is to be conclusive. The trust is to continue until the expiration of 20 years from the death of the last survivor of nine persons named, some of whom, presumably, are quite young, unless three-fourths in value of the shareholders shall appoint an earlier time for its termination, not earlier than the 2d day of July, in the year 1919, by an instrument in writing duly signed and acknowledged. After the termination of the trust by its own limitation, or by such an appointment of three-fourths of the shareholders, the proceeds are to be divided among the shareholders. The trustees, when vacancies occur in their number, may appoint their own successors.

By this conveyance and the accompanying declaration of trust, the New York, New Haven & Hartford Railroad Company set on foot a scheme to put property, of an estimated value of more than \$5,000,000, into the hands of trustees as managing agents, who were appointed irrevocably, to conduct a business for a term that might last nearly a century, with practically all the powers of an absolute owner, not only over the property conveyed, but for the acquisition of other real estate in the neighborhood, and of shares in corporations which have relation to the use, management and improvement of real estate. The scheme contemplates the borrowing of money to create an indebtedness not exceeding \$4,000,000 at any one time. It contemplates an unlimited extension and enlargement of the enterprise, in the discretion of the trustees, by the issue of additional shares to persons who subscribe for them. It contemplates a real estate business, if not a speculation, that may continue a long time and become gi-

gantic, of which the railroad corporation is now the sole owner. It needs no argument to show that, ordinarily, the proprietorship of such a business, by a railroad company as a beneficiary, is not within its corporate powers.

[2] As was said in *Davis v. Old Colony Railroad Co.*, 131 Mass. 258, 259, 41 Am. Rep. 221: "A corporation has power to do such business only as it is authorized by its act of incorporation to do, and no other. It is not held out by the government nor by the stockholders as authorized to make contracts which are beyond the purposes and scope of its charter. It is not vested with all the capacities of a natural person, or of an ordinary partnership; but with such only as its charter confers." In *Waldo v. Chicago, St. Louis & Fond du Lac Railroad*, 14 Wis. 575-581, we find this language: "When a corporation, created for the purpose of building and operating a railroad, goes into the business of banking, or manufacturing and selling goods, or dealing and speculating in real estate, because its corporators or board of directors think such adventures may be profitable, or if a bank should go to building and operating a railroad for like reason, it is easy to see that, in each instance, the corporation is attempting to transact business which, under its organic act, it has no right or power to do. And if the corporation might embark in a separate and distinct business not contemplated by its charter, merely because it was supposed it would be profitable, and increase its means and resources, there would be no safety to the public in granting any special charters, and none to individuals who might invest in the stock of the company." The following are a few among the many other cases that apply the same doctrine: *Attorney General v. Great Northern Railway*, 1 Dr. & Sm. 154; *Case v. Kelly*, 133 U. S. 21, 10 Sup. Ct. 216, 33 L. Ed. 513; *Pacific Railroad Co. v. Seely*, 45 Mo. 212, 100 Am. Dec. 369; *State v. Southern Pacific Co.*, 52 La. Ann. 1822, 28 South. 372; *Chicago v. Cameron*, 120 Ill. 447, 11 N. E. 899; *People v. Pullman Car Co.*, 175 Ill. 125, 51 N. E. 604, 64 L. R. A. 866; *Slater Woolen Co. v. Lamb*, 143 Mass. 420, 9 N. E. 823.

If the railroad company had taken its money and purchased land, and had applied it to a use like that contemplated by this scheme, no one would contend that it was acting within the law. We are left with only the question whether its ownership of this real estate justifies its creation of such an enterprise.

[3] Its ownership of the land, which came to it legitimately, left it with the property on hand, to be sold or disposed of, so that its proceeds could be properly used for the purposes for which the corporation was created. It did not give it the right to hold the land permanently, or for an unreasonably long time, as an investment for the production of income; much less did it give it

the right to carry on, for a long term of years, the business of speculating in land, or developing this and other land in the vicinity, and changing its general character, for the purpose of gain. [4] If the corporation could not do this directly, it could not do it indirectly through the appointment of trustees or agents who should continue the business for its benefit. *Attorney General v. New York, New Haven & Hartford Railroad Co.*, 196 Mass. 413, 84 N. E. 737.

The objection to such a venture on the part of a corporation is two-fold. On the part of the state it is that the corporation is usurping powers which were never conferred upon it, and is engaging in a business which the Legislature has not authorized it to do, and to which there may be grave objections on grounds of public policy. The trustees are managing for this corporation, as the beneficiary, a large amount of valuable real estate in the heart of Boston, and are authorized, in the interest of the beneficiary, to make donations of land or other property for public purposes, or to convey it to the city of Boston with or without compensation, to lay out and construct or discontinue streets, and become the owners of corporations engaged in other kinds of business relating to real estate, even in remote parts of the city. There may be grave reasons connected with the public interest why such powers should not be exercised in a city, and, incidentally, an influence possibly be exerted in behalf of a great railroad corporation. At all events, the Legislature has never seen fit to authorize their exercise. Corporations for the holding of real estate for purposes of profit have always been deemed objectionable, and the laws of this commonwealth do not permit the organization of such corporations.

The other objection is from the side of the stockholder in the corporation. He invests his money by subscribing for the shares of stock, with a knowledge of the purpose for which the corporation is organized, and with a view to the probable gain, and a thought of the possible loss, that may result from the transaction of the business of the corporation. He does not invest in any other kind of enterprise than that which is within the authority conferred upon the corporation. His protection requires that the company be confined strictly to the business and functions for which it was organized. It would leave him without compass or rudder in making his investment, if the managing officers, or a majority of the stockholders, could use the corporate property in a business foreign to that for which the company was established.

[5] In turning this real estate into money, the railroad company should not be held too strictly to sales to be made at once, and without expenditure for changes and improvements that would increase its marketable qualities. A reasonable latitude in that re-

spect is fairly incidental to ownership with a right to sell. *Dupee v. Boston Water Power Co.*, 114 Mass. 37. But nothing more than what is fairly incidental to a reasonable disposition of the property for its fair market value, within a reasonable time, is permissible.

The only debatable question in this case is whether such a scheme as has been devised is incidental to the right to sell, and reasonably necessary to enable the corporation to obtain the fair market value of the property. We are of opinion that it is not.

[6] The reasons relied on by the petitioners for adopting the scheme, as given in the statement of agreed facts, are that "earnest efforts, during several years, were made, without success, to sell the same and convert it into cash; but the risks and uncertainties attending the development and use of so large a tract of land, without streets or other facilities for its development, were such that no purchaser was in fact found, and no purchaser seemed likely to be found willing and able to purchase said property, except at a price so low as to indemnify him against all such risks and uncertainties, and much below the estimated real value of said land." This is, in substance, that the directors have not been able to sell the land for its estimated value, and that there are risks and uncertainties attending the development and use of the land, which a purchaser would take into account in determining what price he would pay for it. The directors decided to put these risks and uncertainties upon the stockholders of the corporation, by providing for a business of developing and using this property for many years, in the belief, doubtless, that the business would be more profitable than a sale to others who would assume the risks of such a business. This is not very different from taking \$5,000,000 in money of the corporation, if that amount happened to be on hand, and if land could be bought for its fair market value, and investing the money in such an enterprise, in the expectation that the assumption of these risks and uncertainties, in buying at a price diminished on account of them, would open a large field for profit in the business of developing and using the property.

The conveyance to the trustees merely changed the form of the property. It did not bring a dollar to the treasury of the corporation. If the trust were sustained, it might or might not be possible, at some time, to sell shares at their estimated value instead of selling portions of the land. But presumably, there will be no satisfactory market for any of these shares, unless and until it is demonstrated, after a considerable time, that the business is likely to prove profitable.

[7] In addition to the general objections already stated to such a venture on the part of a railroad corporation, there are special objections. If stock is purchased by the

trustees in other corporations, this corporation will become indirectly a holder of the stock of those other companies, in direct violation of St. 1906, c. 463, pt. 2, § 57, which expressly forbids the directly or indirectly subscribing for, taking or holding, by a railroad corporation, of the stock or bonds of any other corporation. *Atty. Gen. v. N. Y., N. H. & H. R. R.*, 198 Mass. 413, 84 N. E. 737. In *Williams v. Boston*, 94 N. E. 808 (Suffolk, April 4, 1911), it was decided that the certificate holders in such a trust are partners within the meaning of that word in St. 1909, c. 490, pt. 1, § 27.

[8] Moreover, if other stock is issued by the trustees, and other parties are brought into the enterprise, and other lands are bought, the railroad corporation will be in a community of interest in the profits and losses, and in all the activities of the business, with other owners. It will be virtually, if not technically, in partnership with them. [9] It is familiar law that a corporation cannot enter into a partnership. *Whittenton Mills v. Upton*, 10 Gray, 582, 71 Am. Dec. 681; *Bishop v. American Preservers Co.*, 157 Ill. 284, 41 N. E. 765, 48 Am. St. Rep. 317; *Burke v. Concord R. R.*, 61 N. H. 160; *Mallory v. Hanaur Oil Works*, 86 Tenn. 598, 8 S. W. 396; *Sabine Tram Co. v. Bancroft*, 16 Tex. Civ. App. 170, 174, 40 S. W. 837; *People v. North River Sugar Refining Co.*, 121 N. Y. 582, 24 N. E. 834, 9 L. R. A. 33, 18 Am. St. Rep. 843. Most of the reasons for this rule are as applicable to the present case as to an ordinary partnership. They are strongly stated in the first and last of the cases just cited. Through the trustees, who represent the interests of new shareholders as well as those of the creator of the trust, the rights and interests of the railroad corporation are controlled in part for those who are not members of it or peculiarly interested in it.

In the decision in *Kelly v. Biddle*, 180 Mass. 147, 61 N. E. 821, cited by the petitioners, it was assumed that the arrangement, only for a temporary purpose, might have been ultra vires of the corporation.

It is the duty of a railroad corporation holding real estate under such circumstances as exist in this case, to dispose of it and turn it into money with all reasonable dispatch, and in view of such circumstances it may take all action necessary to realize from it, so far as possible, its fair value. We do not attempt in the present case to prescribe the precise limits of the authority of a corporation for the accomplishment of this end. These must depend upon existing conditions. Some liberality should be exercised in allowing a choice of methods where the amount involved is large and the conditions complicated.

We are of opinion that the deed of the New York, New Haven & Hartford Railroad Company to the petitioners was beyond the

power of the corporation or the directors to make, and that the petitioners took no valid title under it.

Petition dismissed.

(208 Mass. 561)

JOHN SOLEY & SONS, Inc., v. JONES et al.
(Supreme Judicial Court of Massachusetts.
Suffolk. May 18, 1911.)

1. CONTRACTS (§ 93*)—CONSTRUCTION—LIABILITY OF PARTIES.

Parties cannot, as a general rule, be relieved from their contracts fairly made with knowledge of the facts, though they mistook their rights or failed to restrict their liabilities.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 415-419; Dec. Dig. § 93.*]

2. CONTRACTS (§ 309*)—LIABILITY—HAPPENING OF UNANTICIPATED EVENT—EFFECT.

Where an unanticipated event happens, which was not in the contemplation of the parties to a contract at its inception, and on the nonhappening of which the continued existence of the contract must depend, the contract is dissolved, and the promisor relieved from further performance.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 1444-1446; Dec. Dig. § 309.*]

3. CONTRACTS (§ 309*)—LIABILITY—HAPPENING OF UNANTICIPATED EVENT—EFFECT.

A contract with the Boston Transit Commission for the construction of a section of a street tunnel stipulated that the commission could cancel the contract on the engineer certifying the existence of a fact. The contractor let part of the work to a subordinate contractor. The subcontract provided that the work should be subject to the direction and to the satisfaction of the commission or its engineer, without referring to the original contract, or without stipulating that the subcontract should be dependent on the continued existence of the original contract. The subcontractor knew of the provisions of the original contract. The original contract was terminated, and the subcontractor could not perform. *Held*, that the contractor was liable on his promise to pay to the subordinate contractor the contract price, and he could not rely on the termination of his contract by the commission.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 1444-1446; Dec. Dig. § 309.*]

4. DAMAGES (§ 124*)—BUILDING CONTRACTS—BREACHES—MEASURE.

Where a subcontractor was prevented from performing his contract by the termination of the contract of the principal contractor, who had not protected himself against such a contingency, the subcontractor could recover the benefit of his contract, after deducting from the contract price the reasonable cost of completing the work.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. § 335; Dec. Dig. § 124.*]

Exceptions from Superior Court, Suffolk County; John H. Hardy, Judge.

Action by John Soley & Sons, Incorporated, against J. Edwin Jones and another, co-partners doing business under the name of Jones & Meehan. There was a verdict for plaintiff, and defendants bring exceptions. Overruled.

Defendants, having a contract with the Boston Transit Commission for the construction of section 3 of the Washington street

tunnel, Boston, contracted with plaintiff to do part of the work.

Louis L. G. De Rochemont, for plaintiff.
Meehan & Donahue, for defendants.

BRALEY, J. [1] It is a general rule that parties cannot be relieved from their contracts fairly made with full knowledge of the facts, although they may have mistaken their rights, or failed to have restricted sufficiently their liabilities. *Hawkes v. Kehoe*, 193 Mass. 419, 79 N. E. 766, 10 L. R. A. (N. S.) 125. The defendants knew that by its terms their contract with the transit commissioners could be canceled and discharged, if the engineer gave a certificate that they were not making such progress in the execution of the work as to indicate that it would be completed within the period fixed for performance. It was with this knowledge that they entered into the agreement with the plaintiff as a subordinate contractor to perform part of the work. The impossibility of the defendants' performance of the plaintiff's contract if the contingency arose could have been foreseen and provided for in the instrument. A provision that the promise should be dependent upon the continued existence of the principal contract would have been sufficient to protect the defendants if the plaintiff was compelled to abandon the work, because the contract with the commissioners was terminated. *New Haven & Northampton Co. v. Hayden*, 107 Mass. 525, 531. It is their contention that, when construed in connection with the circumstances, such a condition appears by implication, or is an unexpressed term of the agreement. *Hebb v. Welch*, 185 Mass. 335, 336, 70 N. E. 440. The plaintiff's contract contained a clause that the work should be performed subject to the directions and to the satisfaction of the commissioners, or of their authorized engineer, and the plaintiff concedes that the amount and character of the work could be ascertained only by resort to the specifications of the main contract. If the principal contract in its entirety had been referred to by appropriate language it would have been incorporated, but it cannot be read into the agreement by implication, where only that part which is germane to the plaintiff's performance may be implied, and the language is unambiguous. *De Friest v. Bradley*, 192 Mass. 346, 355, 78 N. E. 467; *Lipsky v. Heller*, 199 Mass. 310, 315, 85 N. E. 453. The auditor, whose finding is not questioned, reports that the plaintiff at the time of execution knew not only of the specifications under which its work must be done, but of the article of cancellation. It apparently acted upon this information, when it ceased work upon having been informed that the right of termination had been exercised. The act of the commissioners, and its decisive effect upon the plaintiff's right

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

to go forward under the contract, having been known to each party, further notice from one to the other of their several rights or demands would have been a vain formality. *Cumberland Glass Mfg. Co. v. Wheaton*, 208 Mass. 425, 94 N. E. 803.

[2] It is urged that, the possible disability which would prevent performance by the defendants having been known to the plaintiff at the inception of the contract, it was mutually understood that they did not intend to perform, and the plaintiff had no expectation of performance, unless the principal contract remained in force. But while we can construe the contract in writing which the parties made, we cannot make a contract for them. It is only where an unanticipated event happens, which was not in the contemplation of the parties at its inception, and upon which the continued existence of the contract must depend, that upon the happening of the event the contract is dissolved, and the promisor relieved from further performance. *Butterfield v. Byron*, 153 Mass. 517, 27 N. E. 667, 12 L. R. A. 571, 25 Am. St. Rep. 654; *Hawkes v. Kehoe*, 193 Mass. 419, 423, 79 N. E. 766, 10 L. R. A. (N. S.) 125; *Vickery v. Ritchie*, 202 Mass. 247, 251, 88 N. E. 835, 26 L. R. A. (N. S.) 810; *Rowe v. Peabody*, 207 Mass. 228, 93 N. E. 604; *Sun Printing & Publishing Association v. Moore*, 183 U. S. 642, 22 Sup. Ct. 240, 46 L. Ed. 366; *Bailly v. De Crespigny*, L. R. 4 Q. B. 180, 185. [3] If the plaintiff and defendants contracted with knowledge of the clause of termination, the defendants of course knew that when the principal contract came to an end, either with or without their fault, further performance by the plaintiff would be impossible. Instead of providing for a contingency reasonably to be anticipated, the defendants gave an absolute promise to pay the contract price on the basis that there should be no interference with the work of construction if the plaintiff's conduct was satisfactory to the commissioners as it appears to have been. Having made themselves responsible for the existence of the subject-matter of the contract until without fault on the plaintiff's part it had been performed, they are not within the exception or principle of construction recognized and followed in *Wells v. Calman*, 107 Mass. 514, 9 Am. Rep. 65, *Butterfield v. Byron*, 153 Mass. 517, 27 N. E. 667, 12 L. R. A. 571, 25 Am. St. Rep. 654, *Young v. Chicopee*, 186 Mass. 618, 72 N. E. 63, *Angus v. Scully*, 176 Mass. 357, 57 N. E. 674, 49 L. R. A. 562, 79 Am. St. Rep. 318, and *Hawkes v. Kehoe*, 193 Mass. 419, 79 N. E. 766, 10 L. R. A. (N. S.) 125, where the occurrence which discharged the contract was of such a character that the parties were held not to have had it in contemplation at the making of the agreement. See *Hebert v. Dewey*, 191 Mass. 403, 411, 77 N. E. 822; *Vickery v. Ritchie*, 202 Mass. 247, 88 N. E. 835, 26 L. R.

A. (N. S.) 810. The rulings on the question of liability upon which the measure of damages under the first count of the declaration must rest, that the causes for the termination of the principal contract were immaterial as the commissioners had reserved that right, and that there had been a breach, were in accordance with our construction of the rights of the parties. [4] The contract not having been dissolved, the plaintiff was not remitted to compensation for the fair value of the work done with a reasonable profit for such work, and also upon the work remaining to be performed, or restricted to a sum which would be proportionate to the contract price the defendants were to receive from the commissioners. But it was entitled to the benefit of the contract, after deducting from the contract price the reasonable cost of completing the work. *Olds v. Mapes-Reeve Construction Co.*, 177 Mass. 41, 58 N. E. 478; *Norcross Brothers Co. v. Vose*, 199 Mass. 81, 85 N. E. 468; *Gagnon v. Sperry & Hutchinson Co.*, 206 Mass. 547, 92 N. E. 761. The rulings requested were rightly refused, and the instructions given were correct.

Exceptions overruled.

(209 Mass. 100)

BERRY v. NEWTON & B. ST. RY. CO.

(two cases).

(Supreme Judicial Court of Massachusetts.
Norfolk. May 19, 1911.)

1. STREET RAILROADS (§ 114*) — DEATH OF PEDESTRIAN—NEGLIGENCE.

In an action to recover for death of plaintiff's decedent, killed by one of defendant's cars while crossing a street railroad track, held, that the operatives of the car were guilty of gross negligence.

[Ed. Note.—For other cases, see *Street Railroads*, Dec. Dig. § 114.*]

2. STREET RAILROADS (§ 117*)—CROSSING ACCIDENT—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.

Decedent was struck and killed by a street car at a street intersection. The car was behind time and running at twice its ordinary speed. Decedent's view to his right, from which direction the car came, was more or less obstructed by trees, especially if a car approached at high speed. When in close proximity to the track he was accosted by an acquaintance, to whom he waved his hand, and then went forward, passing behind a tree, paused for a short space of time, and then went on the track. Just before he was accosted, he looked in the direction from which the car came, and it was shown that he knew that no car was due at that time, and that the next car due would come from the opposite direction. Held, that he was not guilty of contributory negligence as a matter of law.

[Ed. Note.—For other cases, see *Street Railroads*, Dec. Dig. § 117.*]

3. STREET RAILROADS (§ 98*) — INJURIES TO PEDESTRIANS—CARE REQUIRED.

The rule governing the conduct of travelers at railroad crossings does not apply to persons using a public street through which street cars are running at stated intervals.

[Ed. Note.—For other cases, see *Street Railroads*, Cent. Dig. §§ 204-209; Dec. Dig. § 98.*]

Exceptions from Superior Court, Norfolk County; Wm. C. Wait, Judge.

Actions by M. Francis Berry, as administrator, etc., against Newton & Boston Street Railway Company. Judgment for defendant in each case, and plaintiff brings exceptions. Sustained.

J. Weston Allen, Lyon Weyburn, Henry W. Packer, and Otto C. Scales, for plaintiff. Pitt F. Drew, for defendant.

BRALEY, J. [1] The plaintiff sues in the first action to recover damages at common law for the conscious suffering, and in the second action under Rev. Laws, c. 111, § 267, now St. of 1906, c. 463, pt. 1, § 63, as amended by Acts of 1907, c. 392, and c. 428, § 4, for the death of her intestate. But no evidence was introduced at the trial as the judge on the opening ordered verdicts to be returned for the defendant. If the proof might have failed to support the actions, our decision must go upon the ground that the plaintiff's evidence would have corresponded with the statements on which the right of recovery was rested. The questions for decision, therefore, are whether, taking the opening to be true, the jury would have been warranted in finding that at the time of the accident the defendant was negligent, or its servants guilty of gross negligence, and that the intestate was in the exercise of due care. The car which was behind time was being run through the main thoroughfare of the village at a speed of some 25 miles an hour, or twice the speed of an ordinary car, without sounding the gong, or giving any warning of its approach. It had attained such momentum at the intersecting street, where the intestate was struck, that he was thrown a distance of 10 feet from the car, and then by force of the impact rolled some 10 feet further, while the car did not stop after the collision, but continued on its way. To operate a street railway car in this manner, and under the conditions described, was evidence of gross negligence under the statute of its motorman and conductor. *Hatch v. Boston & Northern Street Railway*, 205 Mass. 410, 413, 91 N. E. 523; *Horsman v. Brockton & Plymouth Street Railway*, 205 Mass. 519, 521, 91 N. E. 897; *Galbraith v. West End Street Railway*, 165 Mass. 572, 580, 581, 43 N. E. 501; *Evensen v. Lexington & Boston Street Railway*, 187 Mass. 77, 72 N. E. 355; *Spooner v. Old Colony Street Railway Co.*, 190 Mass. 132, 76 N. E. 660; *McNamara v. Boston & Maine Railroad*, 202 Mass. 491, 89 N. E. 131.

[2] The defendant, however, urgently insists that there were no affirmative statements which if proved are sufficient to warrant an inference that the intestate was ordinarily prudent, and that his conduct at the time of the injury rests on the merest conjecture. A few moments before the collision he left his place of business, and passing

along the intersecting street in the direction of his home it became necessary for him to cross the railway, consisting of a single track located about three feet from the edge of the sidewalk of the street through which it ran. To his right, from which direction the car came, were trees more or less intercepting the view especially if a car was approaching at high speed, while the tree nearest to him in the sidewalk over which he was going was of such size, and so close, as to preclude any actual observation in that direction until passed, when a step would bring him to the track rail. While proceeding on his way, and when in close proximity to the track he was accosted by an acquaintance to whom he waived his hand, and then went forward passing behind the tree, "paused for a relatively short space of time and then went on to the track." The exceptions recite, "that just before he was addressed, he looked in the direction from which the car came," and "that this car was not due to go by there * * * at that time, and except for a warning, or seeing a car, he had no reason to expect there would be a car there at the time he crossed," and that "at the time he reached the crossing the next car due there" was a car coming from the opposite direction. It further appears, as we have said, that the car, being late, was running outside of the schedule time, and "it passed some minutes after the time when it was supposed to pass, and was known to be due." It was stated that the running time of the cars, the location of the track, the usual rate of speed, and the general conditions of public travel at the place were well known by him, and the inference would have been justified that as he came to the track he supposed that the car had passed. The general rule whether a plaintiff has shown that he used due care, ordinarily, said Mr. Justice Colt in *Gaynor v. Old Colony & Newport Railway*, 100 Mass. 208, 212, 97 Am. Dec. 96, "is to be settled as a question of fact in each case as it arises, upon a consideration of all the circumstances disclosed in connection with the ordinary conduct and motives of men, applying as the measure of ordinary care the rule that it must be such care as men of common prudence usually exercise in positions of like exposure and danger. When the circumstances under which the plaintiff acts are complicated and the general knowledge and experience of men do not at once condemn his conduct as careless it is plainly to be submitted to the jury. What is ordinary care in such cases, even though the facts are undisputed, is peculiarly a question of fact to be determined by the jury under proper instructions. It is the judgment and experience of the jury, and not of the judge, which is to be appealed to."

[3] The rule governing the conduct of travelers at railroad crossings has no application when they are using a public way through

which street cars are running at stated intervals. *Robbins v. Springfield St. Ry.*, 165 Mass. 30, 86, 42 N. E. 334; *Hennessey v. Taylor*, 189 Mass. 583, 586, 76 N. E. 224, 3 L. R. A. (N. S.) 345; *Finnick v. Boston & Northern St. Ry.*, 190 Mass. 382, 386, 77 N. E. 500; *Beale v. Old Colony St. Ry.*, 196 Mass. 119, 81 N. E. 867; *Murphy v. Boston Elevated Ry.*, 204 Mass. 229, 90 N. E. 398; *O'Brien v. Lexington & Boston St. Ry.*, 205 Mass. 182, 184, 91 N. E. 204; *Rogers v. Phillips*, 206 Mass. 308, 92 N. E. 327, 28 L. R. A. (N. S.) 944; *Doherty v. Boston & Northern St. Ry.*, 207 Mass. 27, 29, 92 N. E. 1026. And it would be an extreme position to take that a pedestrian was bound at his peril to take precautions to avoid, or look for, a street car where according to the time schedule, with which he was familiar, he might reasonably believe that it had passed, and if he failed to look before stepping to the track, and was injured, he should be precluded from recovery. The cases of *Howland v. Union St. Ry.*, 150 Mass. 86, 88, 22 N. E. 434, and *Finnick v. Boston & Northern St. Ry.*, 190 Mass. 382, 77 N. E. 500, decided that failure to take this precaution under conditions very closely analogous was not a bar as matter of law. See, also, *O'Brien v. Lexington & Boston St. Ry.*, 205 Mass. 182, 184, 185, 91 N. E. 204, and cases cited. It also appears that almost up to the very moment of collision the movements of the intestate were observed, and from his conduct the jury with "their knowledge of the habits of thought and mind, and the natural instincts of men," could find that he was using the street in the ordinarily careful way, and continued to exercise the same degree of caution and observation in passing over the intervening space, to the point where he was unexpectedly struck. *Hinckley v. Cape Cod R. R.*, 120 Mass. 257, 265; *Horsman v. Brockton & Plymouth St. Ry.*, 205 Mass. 519, 522, 91 N. E. 897. In *Prince v. Lowell Elec. Light Corp.*, 201 Mass. 276, 87 N. E. 558, the intestate was killed from a shock of electricity caused by the defendant's negligence in permitting a broken wire charged with the current to be suspended in the street where the deceased was passing, and with which he came in contact, but there was no positive evidence of his movements immediately preceding his death. It was held, however, following *Maguire v. Fitchburg R. R.*, 146 Mass. 379, 15 N. E. 904, that "it is not necessary that any positive act of care should be proved, it may be inferred from the absence of fault when sufficient circumstances are shown fairly to exclude the idea of negligence on his part." It cannot conclusively be presumed that with no thought for his safety the plaintiff's intestate heedlessly and voluntarily permitted himself to be placed in jeopardy. *Robbins v. Dartmouth & Westport St. Ry.*, 203 Mass. 546, 548, 89 N. E. 1039.

If as he was about to step forward he again had looked, it may be that the unanticipated car, even if moving at an unusual and excessive speed, might not have been so closely upon him, but that he could have drawn back and avoided being injured. But whether under all the circumstances he ought to have done so, should have been left to the jury to decide.

Exceptions sustained.

(209 Mass. 38)

COMMONWEALTH v. GRAUSTEIN & CO.

(Supreme Judicial Court of Massachusetts.
Suffolk. May 18, 1911.)

1. FOOD (§ 20*)—CRIMINAL PROSECUTION—INDICTMENT—ISSUE, PROOF, AND VARIANCE.

Under an indictment charging that to milk sold by the defendant there had been added a certain foreign substance, a further description whereof is unknown to the complainant, evidence as to what the foreign substance was or consisted of is competent, and does not constitute a variance.

[Ed. Note.—For other cases, see *Food*, Cent. Dig. § 21; Dec. Dig. § 20.*]

2. CRIMINAL LAW (§ 314*)—EVIDENCE—PRESUMPTION—OFFICIAL ACTS.

Where an indictment for the sale of adulterated milk charged that there had been added to the milk a foreign substance, further description whereof is unknown to the complainant, it will be presumed, in the absence of any evidence to the contrary, that a further description was unknown to the complainant at the time the complaint was made, though from knowledge obtained after the complaint was made the state or the complainant himself could give a further description, and complainant, before making the complaint, could have been enabled to give a further description by reasonable inquiry.

[Ed. Note.—For other cases, see *Criminal Law*, Dec. Dig. § 314.*]

3. CRIMINAL LAW (§ 1167*)—APPEAL AND ERROR—REVIEW—HARMLESS ERROR—STATUTES.

Where the essential elements of crime are correctly stated, and it does not appear that a variance is prejudicial to the defendant, it will, under the express provisions of *Rev. Laws*, c. 218, § 35, be held harmless.

[Ed. Note.—For other cases, see *Criminal Law*, Dec. Dig. § 1167.*]

4. CRIMINAL LAW (§ 21*) — STATUTORY OFFENSE—INTENT.

Where the Legislature prohibits under penalty the performance of a specific act, the doing of which constitutes a crime, a criminal intent is immaterial.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 22; Dec. Dig. § 21.*]

5. FOOD (§ 14*) — SALE OF IMPURE MILK — CRIMINAL PROSECUTION.

Rev. Laws, c. 56, § 55, providing that whoever, himself or by his servant or agent, has in his possession with intent to sell adulterated milk, or milk to which water or any foreign substance has been added, shall be punished, is not limited to cases where the foreign substance has been added from a positive, intentional act, but extends to cases in which foreign substances have been added through intentional means or by acts attributable or not to negligence.

[Ed. Note.—For other cases, see *Food*, Dec. Dig. § 14.*]

6. FOOD (§ 14*) — STATUTORY REGULATIONS — CORPORATIONS—"WHOEVER."

In analogy to Rev. Laws, c. 8, § 5, which provides that the word "person" may "extend and be applied to bodies politic and corporate," unless a contrary intention is clearly shown, the word "whoever," under Rev. Laws, c. 56, § 55, which provides a punishment for the possession of adulterated milk with intent to sell, includes a corporation.

[Ed. Note.—For other cases, see Food, Dec. Dig. § 14.*

For other definitions, see Words and Phrases, vol. 8, p. 7448.]

Exceptions from Superior Court, Suffolk County; Charles A. De Courcey, Judge.

Graustein & Co., a corporation, was convicted of the sale of adulterated milk, and it brings exceptions. Exceptions overruled.

A. C. Webber, Asst. Dist. Atty., for the Commonwealth. John F. Barry, for defendant.

HAMMOND, J. [1] The evidence of Mott that the substance found in the milk consisted in part of "cow dung" was properly admitted. The objection of the defendant that it should have been excluded on the ground of variance is untenable. While it is true that the complaint charges that to the milk there had been added "a certain foreign substance," "a further description whereof is unknown to the complainant," still, although some witnesses called even by the government testified as to the real nature of the substance, it by no means follows as matter of law that at the time the complaint was made the complainant did know its nature. [2] In the absence of any evidence to the contrary the presumption is that a further description was unknown to the complainant at the time the complaint was made. *Commonwealth v. Thornton*, 14 Gray, 41; *Commonwealth v. Coy*, 157 Mass. 200, 32 N. E. 4. And the fact that from knowledge obtained after the complaint was made the government or even the complainant himself could give a further description of the substance is immaterial. And that is so even if the complainant before making the complaint could by reasonable inquiry have been enabled to give a further description. Upon this branch of the case the simple question was whether the allegation that a further description was unknown to the complainant was true. In the absence of evidence to the contrary the presumption is that it was true, but when there is evidence in rebuttal of such presumption then the question is for the jury. *Com. v. Thornton*, supra. [3] But, even if it be assumed in favor of the defendant that there was a variance, it appears that the essential elements of the crime are correctly stated, and it does not appear that by the variance the defendant was prejudiced in its defence; and hence the defendant is not entitled to have this exception sustained. R. L. c. 218, § 35.

Under the instructions the jury must have found that the milk which the defendant had in its possession with intent to sell contained a substance which got into the milk after it had left the cow; that this substance "could have been kept from getting in there by ordinary, reasonable care on the part of the persons handling the milk from the time it left the cow until the time it was delivered to the customer." In answer to a specific question they found that this foreign substance was in whole or in part soluble in milk. It is argued by the defendant that these findings are not warranted by the evidence; but without reciting the evidence in detail we are of opinion that they are.

It is strongly contended by the defendant that the foreign substance must be soluble in the milk. In view of the special finding this question becomes immaterial in this case. We do not mean to intimate, however, that in the absence of such a finding there would have been anything in the contention.

The defendant further contends that the statute applies only to cases where the "foreign substance has been added or caused to be added by the previous voluntary act of some person or persons." So far as material the statute, (Rev. Laws, c. 56, § 55) upon which this complaint is founded reads as follows: "Whoever, himself or by his servant or agent, * * * has in his * * * possession, with intent to sell, * * * adulterated milk or milk to which water or any foreign substance has been added, or milk produced from cows which have been fed on the refuse of distilleries, or from sick or diseased cows, or, as pure milk, milk from which the cream or a part thereof has been removed, * * * shall * * * be punished."

[4] No extended citation of authorities is needed in support of the proposition that in this class of cases the criminal intent is immaterial. See *Com. v. Mixer*, 207 Mass. 141, 93 N. E. 249. [5] The history of the milk legislation in this commonwealth shows conclusively the determination of the lawmaking power to protect the community from adulterated or impure milk. The ultimate purpose is to have pure milk, and to impose upon milk dealers the duty of seeing that the milk be such. In many cases it would be practically impossible to prove that the foreign substance had been purposely added. Nor does it make any difference to the consumer in what way it has been added. The intent is to see that impure milk be not sold, irrespective of the question by whom or in what way it became impure. In view of the history of the legislation on this subject, the emphasis placed by the Legislature upon the need of protecting the community from impure milk, and the fact that whether the foreign substance gets into the milk through a positive act intentional or unintentional,

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

or by accident attributable or not to negligence, is entirely immaterial so far as respects the health of the consumer, which is the ultimate thing to be protected, we are of opinion that the statute is not limited to cases where the foreign substance was added by a previous voluntary act of some person. The instructions to the jury upon this point were sufficiently favorable to the jury. There is nothing inconsistent with this position in *People v. Bowen*, 182 N. Y. 1, 74 N. E. 489, cited by the defendant.

[§] R. L. c. 8, § 5, provides that the word "person" may "extend and be applied to bodies politic and corporate," "unless a contrary intention clearly appears." Considering the evil intended to be reached by this statute we are of opinion that the word "whoever" includes a corporation like the defendant. See *Com. v. Boston & Worcester R. R.*, 11 Cush. 512; *Com. v. Boston Advertising Co.*, 188 Mass. 348, 74 N. E. 601, 69 L. R. A. 817, 108 Am. St. Rep. 494; *Com. v. N. Y. C. & H. R. R.*, 206 Mass. 417, 92 N. E. 766. The case is clearly distinguishable from *Benson v. Monson & Brimfield Manuf. Co.*, 9 Metc. 562.

Exceptions overruled.

(208 Mass. 523)

O'BRIEN v. SHEA.

(Supreme Judicial Court of Massachusetts.
Suffolk. May 16, 1911.)

1. SUNDAY (§ 24*)—SUNDAY CONTRACTS—ACTION ON—INSTRUCTIONS.

While one who contracts for the occupation of a house on Sunday may not be liable for the contract rental, under the statute (Rev. Laws, c. 98, § 2) forbidding Sunday contracts, his subsequent occupation of the house might render him liable to the owner, not on the theory of ratification, but as upon an informal adoption of the terms of the former agreement, so that, when sued for the rent under the Sunday contract, a directed verdict for defendant was properly refused.

[Ed. Note.—For other cases, see *Sunday*, Cent. Dig. § 58; Dec. Dig. § 24.*]

2. APPEAL AND ERROR (§ 173*)—OBJECTION BELOW—NECESSITY.

Where defendant, who had occupied a house under a contract therefor made on Sunday, failed to raise the question at the trial whether plaintiff could recover the contract rental under the circumstances, he could not raise it on appeal.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 1079-1120; Dec. Dig. § 173.*]

3. LANDLORD AND TENANT (§ 207*)—RENT—ACTIONS—INSTRUCTIONS.

Where a defendant, sued for the rent of a cottage under an alleged agreement with the owner, claimed that he was not liable for rent, having taken it under an arrangement with the mortgagee, whom the owner intended to hold for the rent, and that he had not made the agreement with the owner, the intention of the owner was not, of itself, decisive of the liability of the defendant; and hence instructions in substance declaring that, if the owner intended

to hold the mortgagee, the defendant is not liable, were properly refused.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Dec. Dig. § 207.*]

4. TRIAL (§ 244*)—INSTRUCTIONS—PROMINENCE OF PARTICULAR MATTERS.

In an action for rent, under an alleged agreement which the defendant denied, he could not have the trial judge single out the circumstances favorable to his defense and charge the jury upon them.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 577-581; Dec. Dig. § 244.*]

5. TRIAL (§ 244*)—INSTRUCTIONS—PROMINENCE OF PARTICULAR MATTERS.

Where the controverted facts are material, the trial court should not pick out the undisputed facts and charge upon them.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 577-581; Dec. Dig. § 244.*]

6. APPEAL AND ERROR (§ 173*)—PRESENTATION OF GROUNDS OF REVIEW IN COURT BELOW—NECESSITY.

Where the defendant in an action at law did not in the court below raise the question that a contract was illegal, because made on Sunday, he cannot raise it on appeal; for, under Rev. Laws, c. 173, § 117, only those exceptions preserved below are transmitted to the appellate court, and that tribunal does not have the whole case before it.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 1079-1120; Dec. Dig. § 173.*]

7. APPEAL AND ERROR (§ 173*)—PRESENTATION OF GROUNDS OF REVIEW IN COURT BELOW—EQUITY CASES—NECESSITY.

In an equity case, where the whole case comes before the appellate court, the objection that a contract is illegal, especially when the illegality amounts to a very high crime, may be for the first time raised on appeal.

[Ed. Note.—For other cases, see *Appeal and Error*, Dec. Dig. § 173.*]

8. SUNDAY (§ 2*)—STATUTES—VALIDITY.

Rev. Laws, c. 98, § 2, which makes it a misdemeanor to do work or carry on any business on Sunday, is a valid police regulation.

[Ed. Note.—For other cases, see *Sunday*, Cent. Dig. § 2; Dec. Dig. § 2.*]

9. SUNDAY (§ 11*)—CONTRACTS—ACTIONS—DEFENSES.

Rev. Laws, c. 98, § 2, making it a misdemeanor to do work or carry on any business on Sunday, if properly pleaded, is a complete bar to the enforcement of any ordinary contract made on that day.

[Ed. Note.—For other cases, see *Sunday*, Cent. Dig. § 30; Dec. Dig. § 11.*]

10. SUNDAY (§ 24*)—CONTRACTS—ACTIONS—DUTY OF COURT.

In an action on a Sunday contract, where the defendant has not raised the point that it is illegal, it is not the absolute duty of the trial judge of his own motion to refuse a recovery upon such contract; for while he has the power to refuse a recovery, yet, as the burden is upon the defendant to plead and present the illegality of the contract, it is not compulsory for the trial judge to refuse recovery.

[Ed. Note.—For other cases, see *Sunday*, Cent. Dig. § 58; Dec. Dig. § 24.*]

Exceptions from Superior Court, Suffolk County; Jabez Fox, Judge.

Action by Mary A. O'Brien against John H. Shea. Verdict for plaintiff, to which defendant excepts. Exceptions overruled.

This was an action for the unpaid rent of a cottage. The plaintiff introduced evidence that the defendant agreed to pay \$100 rent; while the defendant introduced evidence that plaintiff's cottages were mortgaged to one McNeil, and that on his suggestion, a number of the cottages being vacant, the defendant was allowed to occupy one rent free to attract other tenants. There was further evidence that the plaintiff intended and had attempted to hold McNeil for the rent. The uncontradicted testimony showed that the alleged contract, if made, was made on Sunday; but the point was not raised by the pleadings or at the trial, except so far as implied in the first instruction, asked by defendant, and refused. The following instructions, requested by the defendant, were refused:

"(1) Upon all the evidence the plaintiff is not entitled to recover."

"(3) If the jury find that the plaintiff's husband as her agent had general charge of the property in question, and permitted McNeil to arrange for the occupancy of the same by the defendant, holding and intending to hold said McNeil for any sum that might be due for the occupancy of the premises in question, the plaintiff is not entitled to recover."

"(4) If the plaintiff or her husband as her agent intended to hold Mr. McNeil accountable as mortgagee in possession or otherwise for the rent of the property in question during its occupancy by the defendant, the plaintiff is not entitled to recover."

"(7) If the jury find that no bill was ever rendered the defendant, and the plaintiff's husband as her agent attempted to recover the amount in question in a suit against McNeil begun in August, 1905, and that the present action was not begun until over three years after defendant left the premises, they may consider these circumstances upon the question of whether the plaintiff intended to hold McNeil or the defendant for the rent in question."

"(8) If the jury find that the plaintiff intended to hold McNeil for the rent in question, she cannot recover in this action."

J. A. McGeough, for plaintiff. I. R. Clark and G. F. Ordway, for defendant.

SHELDON, J. [1] There was no error in the court's refusal to rule absolutely that the plaintiff was not entitled to recover. The defendant's argument as to this rests entirely upon his claim that according to the uncontradicted evidence the contract of hire between the parties was made on Sunday and so could not support an action. R. L. c. 98, § 2; St. 1904, c. 460, § 2; Day v. McAllister, 15 Gray, 433; Stewart v. Thayer, 168 Mass. 519, 47 N. E. 420, 60 Am. St. Rep. 407; Horn v. Dorchester Mutual Ins. Co., 199 Mass. 534, 85 N. E. 853. But even if this position were open to him, the instruction requested could not have been given; for

although the defendant might have entered upon his occupation of the plaintiff's premises under a void agreement, yet by reason of his subsequent occupation under the right of the plaintiff he could have been held liable to her, not on the ground that the void agreement had been ratified so as to be in effect from the beginning, but because it could be found from the conduct of the parties that they had subsequently without formality adopted its provisions. Miles v. Janvrin, 200 Mass. 514, 86 N. E. 785; Shepley v. Henry Siegel Co., 203 Mass. 43, 88 N. E. 1095. [2] We need not consider whether in that case the plaintiff could recover the sum stipulated for on Sunday or whether her recovery could be only for the fair value of the defendant's occupation (Cranson v. Goss, 107 Mass. 439, 441, 442, 9 Am. Rep. 45), for this point was not taken at the trial, no question of pleading was raised, and the only exceptions were to the refusal to give the defendant's first, third, fourth, seventh and eighth requests.

[3] The other requests were rightly refused. If there was such an agreement between the parties as the plaintiff claimed, the relations between the plaintiff and the mortgagee became immaterial. Those relations were no doubt important for the jury to consider in determining what if any agreement or understanding had been reached between the plaintiff and the defendant; but her intention as to what claim she would make on the mortgagee was not necessarily decisive of the issue in this case. The refusal to give the third, fourth and eighth requests was right.

[4] Nor was it wrong to refuse to give the seventh request. The defendant could not require the judge to single out the circumstances favorable to the defence and instruct the jury to consider these. It might have seemed to the jury to make the intention of the plaintiff as to the mortgagee the controlling feature of the case, whereas it was really only one of the circumstances to be weighed. Green v. Boston & Lowell R. R., 128 Mass. 221, 227, 35 Am. Rep. 370; Delaney v. Hall, 130 Mass. 524; Bugbee v. Kendrick, 132 Mass. 349; Murphy v. Boston & Albany R. R., 133 Mass. 121, 126; Hopcraft v. Kittredge, 162 Mass. 1, 37 N. E. 768; Lakeside Manuf. Co. v. Worcester, 186 Mass. 552, 558, 559, 72 N. E. 81. As in the case last cited, this instruction might have confused and misled the jury. [5] Nor was the judge required to pick out uncontroverted facts and rule upon them, for the disputed facts were material. Pierce v. O'Brien, 189 Mass. 58, 61, 75 N. E. 61.

[6] The defendant complains that the verdict for the plaintiff rested only upon the finding that he occupied her cottage under an express agreement with her for the payment of rent, and that on the evidence this agreement was made on Sunday, and so that the verdict cannot be sustained. But this

point was not brought to the attention of the judge at the trial or taken in any way in the superior court. The whole case is not before us. We can deal only with the exceptions that were saved and allowed, and can consider only the questions raised by these. *R. L. c. 173, § 117*; *Littlefield v. Gilman*, 207 Mass. 539, 93 N. E. 809; *Bond v. Bond*, 7 Allen, 1, 6, referred to in *Webb v. Hanley*, 206 Mass. 299, 305, 92 N. E. 429; *McRae v. Locke*, 114 Mass. 96, 97; *Rich v. Lancaster Railroad*, 114 Mass. 514; *Jarvis v. Mitchell*, 99 Mass. 530, 532; *Com. v. Althause*, 207 Mass. 32, 45, 93 N. E. 202. Such cases as *Parrott v. Mexican Central Ry.*, 207 Mass. 184, 190, 93 N. E. 590, and *Vermilye v. Western Union Tele. Co.*, 207 Mass. 401, 93 N. E. 635, do not help the defendant; for this point was not only not referred to by counsel or raised at the trial, but it was not open on the pleadings. [7] A different rule may be applied in equity where the whole case comes before this court on appeal, especially when the illegality amounts to a very high crime, as in *Dunham v. Presby*, 120 Mass. 285. No contention can be made in this court upon a point which was not taken in the superior court. *Colvin v. Peabody*, 155 Mass. 104, 29 N. E. 59; *Barker v. Lawrence Manuf. Co.*, 176 Mass. 203, 57 N. E. 386; *Henderson v. Raymond Syndicate*, 183 Mass. 443, 446, 67 N. E. 427; *Howard v. Fall River Iron Works*, 203 Mass. 273, 277, 89 N. E. 615. We cannot set aside the verdict on this ground.

But it is said that the plaintiff was allowed to go to the jury upon her claim that an express contract had been made between her and the defendant, although it then appeared that the contract was made on Sunday, and so was illegal and void. The contention is that no court will consciously lend its aid to the enforcement of an illegal contract. *Claffin v. United States Credit System*, 165 Mass. 501, 503, 43 N. E. 293, 52 Am. St. Rep. 528, and cases cited. It is said that for this reason, although that defence was not pleaded and the point was in no way called to his attention, the judge at the trial ought of his own motion to have interfered and to have ruled that the action could not be maintained upon the express contract, and that this court ought now, although having before it only specific exceptions which, as we have seen, do not raise this point, to order a new trial in order that the error of the judge of the superior court may be corrected. It is at least doubtful whether this court has the power to take such action under the provisions of *R. L. c. 156, § 3*. *Com. v. Scott*, 123 Mass. 418, 420. But we need not determine that question; for in our opinion the judge at the trial was not bound to make the ruling contended for.

[8, 9] The illegality in this case was the violation of the statute already referred to which forbids the doing of any work or busi-

ness on Sunday. This is a valid police regulation (*Com. v. Has*, 122 Mass. 40), and if the defence is properly pleaded, is a complete bar to the enforcement of any ordinary contract made on that day. [10] And it may be assumed that the judge at the trial might of his own motion have ruled upon the question in favor of the defendant, if he had seen fit to do so, and that the plaintiff would then have had no right of exception. But the defendant, not having raised the question, could not require this to be done. As was said by Gray, C. J., in *Cardoze v. Swift*, 113 Mass. 250, 252, the defendant had no right to offer evidence of such illegality, "or even to avail himself of it when disclosed in the plaintiff's testimony, if the court [did] not refuse to entertain the case." *Granger v. Ilsley*, 2 Gray, 521; *Bradford v. Tinkham*, 6 Gray, 494; *Goss v. Austin*, 11 Allen, 525; *Geer v. Putnam*, 10 Mass. 312, explained in *Robeson v. French*, 12 Metc. 24, 45 Am. Dec. 236; *Pratt v. Langdon*, 97 Mass. 97, 98 Am. Dec. 61; *Cassidy v. Farrell*, 109 Mass. 397; *Suit v. Woodhall*, 116 Mass. 547; *Goddard v. Rawson*, 130 Mass. 97; *Doherty v. Ayer*, 197 Mass. 241, 248, 83 N. E. 677, 14 L. R. A. (N. S.) 816, 125 Am. St. Rep. 355. Many other cases might be cited to the same effect if there were occasion to do so. See for example those collected in 37 Cyc. 571, 572. But the very fact that the defendant in a case like this has no right to prove the illegality and have it considered unless he has pleaded it goes far to show that there is no imperative obligation upon the judge to interfere and refuse to entertain the action by reason of the illegality. Were it otherwise, a defendant always would be allowed to raise the question, regardless of the state of the pleadings; every plaintiff would understand that it was for him to prove the legality of his contract, as indeed has been held in a few scattering cases, and would be prepared to do so. Certainly the court would not wilfully shut its eyes, and refuse to allow them to be opened, so as to plead ignorance of the illegality which it was sanctioning.

It is believed that in actions at law like the one at bar, in which the defence of illegality has not been set up, the court will recognize no absolute duty to interfere and of its own mere motion to sustain a defence not set up by the party, and generally will not so interfere, unless, first, the plaintiff's declaration shows that he relies upon an illegal agreement or violation of law, or, secondly, unless he has been obliged to show his own guilt in fully proving his case. Under the first of these heads come such cases as *Claffin v. United States Credit System*, 165 Mass. 501, 43 N. E. 293, 52 Am. St. Rep. 528, *Hazelton v. Sheckels*, 202 U. S. 71, 26 Sup. Ct. 567, 50 L. Ed. 939, and *Isler v. Brunson*, 6 Humph. (Tenn.) 277. In the second class are included such cases as *Oscanyan v. Arms Co.*, 103 U. S. 261, 26

L. Ed. 539, *Thomas v. Richmond*, 12 Wall. 349, 20 L. Ed. 453, *Fowler v. Scully*, 72 Pa. 456, 13 Am. Rep. 699, and *Alford v. Burke*, 21 Ga. 46, 68 Am. Dec. 449.

In many of the cases which have been relied on in behalf of the defendant, the point was raised in the pleadings, either by averments in the answer, by agreed statements of facts, or otherwise. See, for example, *Libby v. Downey*, 5 Allen, 299; *Smith v. Arnold*, 106 Mass. 269; *Palmer v. Kelleher*, 111 Mass. 320; *Eaton v. Kegan*, 114 Mass. 433; *Prescott v. Battersby*, 119 Mass. 285; *Snell v. Dwight*, 120 Mass. 9; *Baldwin v. Connecticut Mutual Ins. Co.*, 182 Mass. 389, 65 N. E. 837; *Kennedy v. Welch*, 196 Mass. 592, 83 N. E. 11. In *Horn v. Dorchester Mutual Ins. Co.*, 199 Mass. 534, 85 N. E. 853, the plaintiff was allowed to rely on the illegality of the surrender set up by the defendant. As the parties were at issue on the answer, the case stood as if the plaintiff had set up the defence by replication. R. L. c. 173, § 31.

There are some decisions and some statements in the books at variance with our conclusion. *Heffron v. Daly*, 133 Mich. 613, 95 N. W. 714; *Richardson v. Buhl*, 77 Mich. 632, 43 N. W. 1102, 6 L. R. A. 457; *Pietsch v. Pietsch*, 245 Ill. 454, 92 N. E. 325, 29 L. R. A. (N. S.) 218; *Escambia Land Co. v. Ferry Pass Inspectors' & Shippers' Association*, 59 Fla. 239, 52 South. 715. See, also, the cases collected in 15 Am. & Eng. Encyc. of Law (2d Ed.) 1015, not all of which, however, uphold the statement of the text. But we feel that the result which we have reached is supported both by principle and by authority.

Exceptions overruled.

(209 Mass. 68)

DE ANGELO v. BOSTON ELEVATED RY. CO.

(Supreme Judicial Court of Massachusetts. Suffolk. May 18, 1911.)

MASTER AND SERVANT (§ 155*)—INJURIES TO SERVANT—OBVIOUS DANGERS.

Where an adult servant was instructed to clean a machine the wheels of which were in motion, the danger of having his hand drawn in between the large wheel and an iron guard was obvious, and the master was not liable for a failure to instruct him as to such danger.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 310; Dec. Dig. § 155.*]

Report from Superior Court, Suffolk County; John F. Brown, Judge.

Action by Andrea De Angelo against the Boston Elevated Railway Company. There was a verdict for defendant, and, on report to the Supreme Judicial Court, judgment was entered on the verdict.

Frederick J. Daggett and Francis P. Garland, for plaintiff. William G. Thompson and F. Delano Putnam, for defendant.

HAMMOND, J. The plaintiff was given a piece of cotton waste and told to clean a large machine while the wheels were in motion. While he was doing the work, the waste was drawn in between the large wheel and an iron guard by suction caused by wind, and before the plaintiff let go his left hand was drawn in and injured.

The plaintiff says he was ignorant of the danger of his hands being drawn in, and that the defendant or the superintendent who gave the order was negligent in not informing him of this danger.

The plaintiff was a man of full age. The danger of having his hand drawn in was plain and obvious and the defendant had no reason to anticipate that the plaintiff needed instructions, nor was he under any duty to give him warning. See *Chmiel v. Thorndike Co.*, 182 Mass. 112, 65 N. E. 47, and cases cited.

Judgment on the verdict.

(209 Mass. 69)

MAGNER v. BOSTON ELEVATED RY. CO. CONNORS v. SAME.

(Supreme Judicial Court of Massachusetts. Suffolk. May 18, 1911.)

STREET RAILROADS (§ 117*)—ACTION FOR INJURIES—QUESTION FOR JURY—CONTRIBUTORY NEGLIGENCE.

Where one approaches a street railroad crossing, and stops to allow a team to pass in front of him, the question whether his failure to look around during the momentary passing is negligence, contributory to his injury on the crossing by a street car, is for the jury.

[Ed. Note.—For other cases, see *Street Railroads*, Cent. Dig. §§ 239-257; Dec. Dig. § 117.*]

Exceptions from Superior Court, Suffolk County; Frederick Lawton, Judge.

Actions by John J. Magner and by Sarah A. Connors against the Boston Elevated Railway Company. Judgments for defendant, and plaintiffs bring exceptions. Exceptions sustained.

J. J. Mansfield, J. J. Gearin, and J. F. Creed, for plaintiffs. J. E. Hannigan, for defendant.

SHELDON, J. While these cases are very close, the majority of the court are of opinion that they should have been left to the jury. The plaintiffs were not necessarily negligent in starting to cross Harrison avenue as they were passing along Beach street. Their stopping on the crossing to allow a team to pass in front of them could be found to have been merely a proper act of precaution. Their failure to look around during this momentary pause was not decisive of negligence. *Murphy v. Armstrong Transfer Co.*, 167 Mass. 199, 45 N. E. 93, and cases cited. The cases differ from *Byrne v. Boston Elevated Ry.*, 198 Mass. 444, 85 N. E. 78, *Callaghan v. Boston Elevated Ry.*, 200 Mass. 450, 86 N. E. 767, or *Smith v. Boston Elevat-*

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

ed Ry., 202 Mass. 489, 88 N. E. 1093. See Hennessey v. Taylor, 189 Mass. 583, 76 N. E. 224, 3 L. R. A. (N. S.) 345; Hunt v. Old Colony Street Railway, 206 Mass. 11, 91 N. E. 883; Kerr v. Boston Elevated Railway, 188 Mass. 434, 74 N. E. 669; Silva v. Boston Elevated Ry., 183 Mass. 249, 66 N. E. 803; Howland v. Union Street Ry., 150 Mass. 86, 22 N. E. 434. The case last cited closely resembles those now before us.

It does not appear to have been disputed that there was evidence of negligence for which the defendant was responsible.

Exceptions sustained.

(208 Mass. 569)

CHANDLER v. MATHESON CO.

(Supreme Judicial Court of Massachusetts.

Plymouth. May 17, 1911.)

HIGHWAYS (§ 184*)—USE OF HIGHWAY—QUESTIONS FOR THE JURY.

In an action for injuries received in a collision with an automobile, the question of negligence, in accordance with the general rule in such cases, where the law requires each traveler to use the highway with due regard for the rights of others, *held*, under the evidence, to be for the jury.

[Ed. Note.—For other cases, see Highways, Dec. Dig. § 184.*]

Report from Supreme Judicial Court, Plymouth County.

Action by George H. Chandler against the Matheson Company. There was a judgment for plaintiff, and the court refused to allow defendant's bill of exceptions, and the case was heard on a report upon a petition to prove exceptions, a commissioner having been appointed. Exceptions overruled.

This is an action of tort for injuries to the plaintiff and his wagon, the result of a collision upon an automobile on the road running from Marshfield to Marshfield Hills. At the trial in the superior court it appeared in evidence, and the jury might have found, that the plaintiff was an undertaker, residing in Marshfield, and that on the evening of August 12, 1907, he was, in the course of his business, called to that part of Marshfield called "Marshfield Hills"; that between 10 and 11 o'clock in the evening, as he was driving home over the road generally used by travelers going from Boston to Brant Rock, a collision occurred between his vehicle and an automobile, belonging to the defendant and being driven by a person in its general employ, which was being demonstrated to one Batchelder, a prospective purchaser. At the point where the accident occurred the traveled part of the way was nearer to the side of the road on which the plaintiff was driving (his right) than it was to the other side of the road, and for 500 feet between the two vehicles, as they approached the point where the accident occurred, the road was level and straight. When the plaintiff

saw the approaching automobile, he turned out so that his left rear wheel was about in the rut nearest the side of the road on which he was traveling (his right) when the collision occurred, and his left forward wheel was a little to the right of the rut. The plaintiff testified: "I turned way out into the ditch. I drove my horse out of the roadway into the grass, so that she was walking out of the traveled part of the road in the grass." The defendant's automobile was being driven at the rate of 15 to 20 miles an hour toward Boston, and was running in the traveled part of the way at the time of the collision. The driver of the auto had not turned out of the ruts or worn part of the road at all when the accident occurred, although the plaintiff was blinded by the lights on the automobile just before the collision, and could not see how close the automobile was to him. The defendant offered no evidence and at the end of the plaintiff's case rested and asked the court that a verdict be directed in its favor. The court refused to order a verdict for the defendant, to which the defendant excepted and the jury found for the plaintiff for \$6,877. Robert F. Raymond, J., did not allow a bill of exceptions filed by defendant, and the case came before the Supreme Judicial Court on a report upon a petition to prove the exceptions; a commissioner having been appointed to pass upon the truth of the same.

Willard Howland and C. A. Warren, for plaintiff. H. C. Sawyer and W. V. Taylor, for defendant.

HAMMOND, J. While the plaintiff was driving upon the highway a collision occurred between his carriage and an automobile driven by a servant of the defendant. In cases of collision between travelers upon the highway, where the law requires that each traveler shall use the way with due regard for the rights of every other, the question of the care or negligence of either traveler, depending for solution as it does upon a variety of circumstances about any one of which the evidence may be conflicting, is generally for the jury. After a careful reading of the evidence we are of opinion that the questions of due care of the plaintiff and negligence of the defendant's servant were for the jury.

Exceptions overruled.

(208 Mass. 593)

MANUFACTURERS' BOTTLE CO. v. TAYLOR-STITES GLASS CO.

(Supreme Judicial Court of Massachusetts. Suffolk. May 18, 1911.)

1. PLEADING (§ 138*)—DECLARATION IN SET-OFF—WHAT CONSTITUTES.

A declaration in set-off, authorized by Rev. Laws, c. 174, is a statement of a cause of action in favor of the defendant for the amount claim-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

ed, constituting in substance in most particulars an independent suit to recover the sum alleged to be due.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 286; Dec. Dig. § 138.*]

2. ABATEMENT AND REVIVAL (§ 5*)—PLEA IN ABATEMENT—OTHER ACTION PENDING.

The pendency of an action by a defendant in the form of a declaration in set-off is good ground for a plea in abatement for "other action pending" to another action on the same cause.

[Ed. Note.—For other cases, see Abatement and Revival, Cent. Dig. §§ 27-30; Dec. Dig. § 5.*]

3. ABATEMENT AND REVIVAL (§ 6*)—OTHER ACTION PENDING—UNAVAILABLE SET-OFF—DISMISSAL.

Where a claim sued on had been previously pleaded as a set-off in a former action, and was unavailable as such because it was unliquidated, a plea in abatement of "other action pending" in a subsequent suit on the claim, because of such set-off in the former suit, was unsustainable; it appearing that the insufficiency of the set-off had been determined adversely to the pleader before determination of the plea in abatement.

[Ed. Note.—For other cases, see Abatement and Revival, Cent. Dig. §§ 35-37; Dec. Dig. § 6.*]

Exceptions from Superior Court, Suffolk County; Loranus E. Hitchcock, Judge.

Action by the Manufacturers' Bottle Company against the Taylor-Stites Glass Company. From an order overruling a plea in abatement, defendant brings exceptions. Overruled.

Wm. Charak and Jacob L. Wiseman, for plaintiff. Fowler, Bauer & Kenney, for defendant.

KNOWLTON, C. J. On July 12, 1906, the defendant in this case brought in the superior court an action against the present plaintiff to which the defendant in that case filed a declaration in set-off. To this declaration in set-off a demurrer was filed, and litigation continued upon the issue raised by these pleadings, until a decision was rendered and a rescript sent by this court in favor of the plaintiff in that suit, on February 25, 1909, which decision appears in *Taylor-Stites Glass Co. v. Manufacturers' Bottle Co.*, 201 Mass. 123, 87 N. E. 558. On December 19, 1907, this suit was brought upon the same cause of action that was set out in the declaration in set-off in the former suit, and on January 21, 1908, an answer in abatement was filed, setting up the bringing of the former suit, and the declaration in set-off therein for the same cause of action as that which is the foundation of the present suit, and that the former action was still pending. This answer was sustained in the municipal court; but upon an appeal to the superior court the answer, after a hearing, was ordered to stand until the demurrer in the former suit should be disposed of. After the entry of judgment in accordance with the rescript in the former suit, the answer in abatement in the

present case was brought up again and overruled. The case is now before us upon an exception to the order overruling the answer in abatement.

[1] The declaration in set-off, filed under the provisions of R. L. c. 174, is a statement of an action in favor of the defendant for the amount claimed in the declaration, and in substance and effect it is, in most particulars, like the bringing of an independent suit to recover the sum alleged to be due. *Looney v. Looney*, 116 Mass. 283-286; *Green v. Sanborn*, 150 Mass. 454, 23 N. E. 224; *Squier v. Barnes*, 193 Mass. 21-24, 78 N. E. 731.

[2] The pendency of an action by a defendant in the form of a declaration in set-off, is as good a reason for an answer in abatement to a subsequent action upon the same claim, as is the pendency of an original and independent suit for the same cause of action. This has been held in different cases. It rests on sound principles, and we know of no decision to the contrary. *Pennsylvania R. R. Co. v. Davenport*, 154 Pa. 111, 25 Atl. 890; *Demond v. Crary* (C. C.) 1 Fed. 480; *Woody v. Jordan*, 69 N. C. 189-197; *Banigan v. Woonsocket Rubber Co.*, 22 R. I. 93, 46 Atl. 183; *Snodgrass v. Smith*, 13 Ind. 393; *Lock v. Miller*, 3 Stew. & P. (Ala.) 13.

[3] The question arises whether the facts that the cause of action was one that could not be enforced under a declaration in set-off and that the first suit had been ended before the entry of the order overruling the answer in abatement, to which exception was taken, justified the decision of the superior court.

At common law and in the early practice of the courts in this country, the doctrine that one should not be vexed by the pendency of two actions for the same cause, at the same time, was enforced with great strictness. The subject was fully and ably considered by Chief Justice Parsons in *Com. v. Churchill*, 5 Mass. 174, and it was held to be sufficient to abate a writ that a former action for the same cause was pending when the second suit was begun, even if it was discontinued or otherwise disposed of before the plea in abatement was filed. It was implied, if not distinctly decided, that if the second writ was for the same cause of action, the suit must be deemed vexatious if it was begun while the former was pending, without reference to the reasons for bringing it. This case has been followed and the rule applied with strictness in some other courts. *Gamsby v. Ray*, 52 N. H. 513; *Demond v. Crary* (C. C.) 1 Fed. 480; *Le Clerc v. Wood*, 2 Plin. (Wis.) 37; *Frogg v. Long*, 3 Dana (Ky.) 157, 28 Am. Dec. 69; *Merrillam v. Baker*, 9 Minn. 40-44 (Gil. 23); *Orman v. Lane*, 130 Ala. 305, 30 South. 441.

But later adjudications, a part of them by some of the same courts whose decisions are cited above, are more liberal in favor of

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

plaintiffs who have brought a second suit during the pendency of the first, for the same cause of action, for the purpose of curing a defect in the former proceedings, or who have discontinued the first action before the decision of the court upon the plea in abatement in the second action. Cases permitting an inquiry as to whether the second suit was justified, by reason of defects or peculiar conditions in the former one, are the following: *Quinebaug Bank v. Tarbox*, 20 Conn. 510; *Downer v. Garland*, 21 Vt. 362; *Blackwood v. Brown*, 34 Mich. 4; *State v. Dougherty*, 45 Mo. 294; *Griffin v. Levee Commissioners*, 71 Miss. 767, 15 South. 107; *Norfolk & Western R. R. v. Nunally*, 88 Va. 546, 14 S. E. 367; *Rogers v. Hoskins*, 15 Ga. 270; *Gilmore v. Georgia R. R. & Banking Co.*, 93 Ga. 482, 21 S. E. 50; *Express Co. v. Burdette*, 7 App. Cas. (D. C.) 551; *Phillips v. Quick*, 68 Ill. 324; *Byne v. Byne*, 1 Rich. (S. C.) 438; *Langham v. Thomson*, 5 Tex. 127.

Cases stating the doctrine that a plea in abatement, founded on the pendency of a former action for the same cause, may be avoided by the discontinuance or other termination of the former action after the plea is filed, are *Banigan v. Woonsocket Rubber Co.*, 22 R. I. 93, 46 Atl. 183; *Wilson v. Milliken*, 103 Ky. 165, 44 S. W. 660, 42 L. R. A. 449, 82 Am. St. Rep. 578; *Warder v. Henry*, 117 Mo. 530, 23 S. W. 776; *Page v. Mitchell*, 37 Minn. 368, 34 N. W. 896; *Nichols v. State Bank*, 45 Minn. 102, 47 N. W. 462; *Moorman v. Gibbs*, 75 Iowa. 537, 39 N. W. 832; *Trawick v. Martin Brown Co.*, 74 Tex. 522, 12 S. W. 216; *Grider v. Apperson*, 32 Ark. 332; *Chamberlain v. Eckert*, 2 Biss. 124, Fed. Cas. No. 2,576; *Moore v. Hopkins*, 83 Cal. 270, 23 Pac. 318, 17 Am. St. Rep. 248; *Dyer v. Scalmanini*, 69 Cal. 637, 11 Pac. 327; *Porter v. Kingsbury*, 77 N. Y. 164-167; *Crossman v. Universal Rubber Co.*, 127 N. Y. 34-39, 27 N. E. 400, 13 L. R. A. 91; *Toland v. Tichenor*, 3 Rawle (Pa.) 320-324; *Findlay v. Kelm*, 62 Pa. 112, 117, 118; *Winner v. Kuehn*, 97 Wis. 394, 397, 398, 72 N. W. 227; *Farris v. Hayes*, 9 Or. 81-87.

There is similar liberality to plaintiffs in such cases under the present rules of practice in England. See *Haigh v. Paris*, 16 M. & W. 144; *McHenry v. Lewis*, 22 Ch. D. 397.

We are of opinion that it is more equitable, where a second action is brought for a cause that was made the foundation of a former suit which is defective in some essential particular, to allow the plaintiff to discontinue the former suit upon proper terms, and proceed with the later one, rather than to order an abatement of the last action, and compel him to begin anew after the termination of the first suit.

In the present case it appears that the claim could not be maintained under the declaration in set-off because it was unliquidat-

ed. Perhaps it would have been better to have compelled the plaintiff to elect between the two actions when the answer in abatement first came up for a hearing in the superior court, by an order for an abatement, unless the declaration in set-off was abandoned. But we have no occasion to consider this question, as the exception is only to the order made at the last hearing.

Exceptions overruled.

(208 Mass. 563)

COMMONWEALTH v. PRATT. SAME v. PRATT et al. SAME v. SOMERVILLE EVENING SUN.

(Supreme Judicial Court of Massachusetts. Middlesex. May 17, 1911.)

1. LIBEL AND SLANDER (§ 148*)—CRIMINAL LIABILITY—PRIVILEGE—CANDIDATES FOR PUBLIC OFFICES.

The rule of libel, limiting privilege to fair comment and criticism, as distinguished from erroneous statements of fact, made honestly, applies to publications in regard to candidates for public office, as it does to those in regard to the conduct of public men, and other ordinary matters of public interest.

[Ed. Note.—For other cases, see *Libel and Slander*, Cent. Dig. §§ 407-411; Dec. Dig. § 148.*]

2. CRIMINAL LAW (§ 814*)—INSTRUCTIONS—REQUESTS—APPLICABILITY TO EVIDENCE.

The charges of libel relied on by the commonwealth being all matters of alleged fact, and none of them purporting to be made as reasonable criticism or comment on real acts, requests for instructions as to such criticism or comment are properly refused, as inapplicable to the evidence.

[Ed. Note.—For other cases, see *Criminal Law*, Dec. Dig. § 814.*]

3. LIBEL AND SLANDER (§ 150*)—CRIMINAL LIABILITY—FURNISHING MATTER FOR PUBLICATION.

One is liable for libel published in a newspaper, where he arranges to state the libelous matter to a representative of the paper, intends that it shall be published, and furnishes the statement to the reporter, knowing that it is being taken with a view to its ultimate publication.

[Ed. Note.—For other cases, see *Libel and Slander*, Cent. Dig. § 414; Dec. Dig. § 150.*]

Exceptions from Superior Court, Middlesex County; Daniel W. Bond, Judge.

Three indictments for libel, one against George H. Pratt, another against George H. Pratt and E. Eben Bayliss, and the third against the Somerville Evening Sun. Verdict of guilty was in each case returned, and defendants excepted. Exceptions overruled.

Ward F. Porter, for Bayliss. Powers & Hall, for Pratt and Somerville Evening Sun. John J. Higgins, Dist. Atty., for the Commonwealth.

KNOWLTON, C. J. These exceptions were taken at the trial of three indictments, all growing out of publications of alleged libels in the Somerville Evening Sun, a newspaper published in Somerville. The person

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alleged to have been libeled was John M. Woods, then the mayor of Somerville and a candidate for re-election. An important question is raised by the exceptions in reference to the extent of the qualified privilege enjoyed by voters in discussing the character and qualifications of a public officer who is a candidate for re-election.

[1] One of the defendant's requests for rulings was as follows: "Assuming that the John M. Woods named in the indictment was a candidate for re-election to the office of mayor of Somerville, on or about December 10, 1909, then the printing and publication of the charges as alleged in the indictment was privileged, and no conviction can be had of either defendant if the jury are satisfied that he believed said charges, and had reasonable ground for his belief in them, and acted in good faith in uttering them, unless actual malice is proved." The charges alleged in the indictment were of misconduct, of intoxication, and of maladministration of office, and were plainly defamatory. The subject to which they purported to relate, namely, the fitness of Woods to hold the office of mayor, was one of public interest and was especially of interest to the voters of the city of Somerville. It is the rule everywhere that fair and reasonable comment and criticism upon the acts and conduct of public men, and especially of candidates for public office, are privileged, if made in good faith. But it is generally held that this privilege does not include the right to make false statements of fact, or falsely to impute to an office holder malfeasance in office. On the other hand it is held in some jurisdictions that if erroneous, defamatory statements of fact are made by a voter in good faith, without malice, against a candidate for office, in an honest belief, founded on reasonable and probable grounds, that the statements are true, they are protected by the privilege of the voter. See cases cited in 18 Am. and Eng. Encyc. of Law, 1040-1042, notes; 25 Cyc. 400-404, notes.

In this commonwealth it has been decided that false statements of fact in regard to the conduct of a public man are not privileged, merely because the manner in which he performs his public duties is a matter of general interest to the people whom he was chosen to serve, while comment and fair criticism are permissible, even though they are very disparaging. This distinction is pointed out and affirmed in *Burt v. Advertiser Newspaper Company*, 154 Mass. 238, 28 N. E. 1, 13 L. R. A. 97, and is reasserted in *Dow v. Long*, 190 Mass. 138-141, 76 N. E. 667, and in *Hubbard v. Allyn*, 200 Mass. 166-170, 86 N. E. 356. The only question upon this part of the case that is not covered by our decisions is whether the rule limiting privilege to fair comment and criticism, as distinguished from erroneous statements of fact, made honestly, shall be applied to publications in regard to candidates for a public

office, as it is applied to publications in regard to the conduct of public men, and other ordinary matters of public interest.

While there are dicta in our books that would furnish some ground for an answer in the negative, we are of opinion that the weight of reasoning and authority requires us to answer in the affirmative.

Most publications in regard to candidates for office are general and reach a large number of persons besides those who are interested as electors. Moreover, many of the charges touching conduct and private character affect only remotely the fitness of the candidate for the performance of the duties of a particular office, while, if false, they may be exceedingly damaging. These and other considerations make it proper to limit the privilege as to statements touching only the general interest of the whole community, and likely to become generally known, as it is not limited in making statements to a particular person to whom one owes a duty, as in answering an inquiry as to the character of a servant. We are of opinion that there was no error in the refusal of this request. For other cases in Massachusetts bearing upon the general subject, see *Com. v. Clap*, 4 Mass. 163, 3 Am. Dec. 212; *Dodds v. Henry*, 9 Mass. 262; *Bradley v. Heath*, 12 Pick. 163, 22 Am. Dec. 418; *Curtis v. Mussey*, 6 Gray, 261; *Smith v. Higgins*, 16 Gray, 251; *Joannes v. Bennett*, 5 Allen, 169, 81 Am. Dec. 738; *Com. v. Wardwell*, 136 Mass. 164; *Haynes v. Clinton Printing Company*, 169 Mass. 512, 48 N. E. 275.

As to all the charges alleged to be libelous, the jury were instructed that, if they were true, the defendant should be acquitted. R. L. c. 219, § 8.

[2] The defendant Bayliss' twenty-first request for an instruction was rightly refused because it did not refer to the possibility of conviction on the ground of express malice. We are also of opinion that this and his twenty-second request and other similar requests were rightly refused, because the charges relied on by the commonwealth were all of matters of alleged fact and none of them purported to be made as reasonable criticism or comment upon the real acts of Woods, or the consequences likely to follow from his acts. The requests were, therefore, inapplicable to the evidence.

The instruction that the truth, if proved, was a justification of the statements, in the absence of express malice, sustains so much of the defense as was applicable to these charges under the law. If the charges as to matters of fact were shown to be true, there was complete justification, as there was nothing else left that was libelous. If they were not true, there was no part of the defamatory language that was a fair criticism and reasonable comment on facts. The defendants were not injured by the failure of the judge to instruct the jury as to the law of qualified privilege.

[3] The defendant Bayliss contends that there was no evidence that would warrant the jury in finding him legally responsible for the libel, or any part of it. We are of opinion that the judge was right in leaving to the jury the question whether he arranged to state libelous matter to a person representing the newspaper, and whether it was so published in pursuance of that arrangement. Although there was some contradiction, there was much evidence and many circumstances tending to show that he intended that this libelous matter should be published against Woods, and there was no dispute that he furnished the substance of it to the reporter of the newspaper, knowing that it was being taken with a view to its ultimate publication. Without reviewing the testimony, we are of opinion that there was no error in this part of the case.

Exceptions overruled.

(209 Mass. 96)

BANES S. S. CO. v. AMERICAN IMPORTING & TRANSPORTATION CO.

(Supreme Judicial Court of Massachusetts. Suffolk. May 18, 1911.)

1. SHIPPING (§ 51*)—CHARTER PARTY—CONSTRUCTION—BREACH BY OWNER.

A charter party, stipulating that the vessel shall be tight, staunch, strong, and fitted for the service when delivered, that the owner shall maintain her in an efficient state in hull and machinery during the services, and that the charterer shall not be liable for hire during the time required for repairs, is not breached, where the owner maintained the vessel in a condition fit for the services for which it was chartered during the time of the charter party, except periods when necessary repairs were made within a reasonable time; and the charterer may not cancel the charter party on merely showing that the vessel was unseaworthy when ordered to sail on a designated date, due to the fact that repairs were needed, which were completed within a reasonable time, so that the vessel, when the repairs were completed, was in a seaworthy condition.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 203-210; Dec. Dig. § 51.*]

2. SHIPPING (§ 42*)—CHARTER PARTY—CONSTRUCTION.

A charter party, stipulating that the vessel shall be tight, staunch, strong, and fitted for the service when delivered, and that the owner will maintain her in a thoroughly efficient state, is performed where every defect and want of suitable repairs were remedied as soon as by the use of reasonable diligence they could be discovered and proper opportunity be had to repair the same and make the vessel seaworthy.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 156-164; Dec. Dig. § 42.*]

3. SHIPPING (§ 49*) — CHARTER PARTY — BREACH—REMEDY.

A stipulation in a charter party that the charterer shall not be liable for the hire of the vessel during the time required for repairs compensates him for any delay to which he may be subjected, because necessary to make repairs, provided the delay is not unreasonable.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 187-202; Dec. Dig. § 49.*]

4. SHIPPING (§ 51*)—CHARTER PARTY—LIABILITY.

That an owner of a vessel entering into a charter party for a specified period chartered the vessel to third persons for a trip with the consent and approval of the charterer did not relieve the latter from liability for his failure to comply with the charter party.

[Ed. Note.—For other cases, see Shipping, Dec. Dig. § 51.*]

Exceptions from Superior Court, Suffolk County; George A. Sanderson, Judge.

Action by the Banes Steamship Company against the American Importing & Transportation Company. There was a verdict for plaintiff, and defendant brings exceptions. Overruled.

Fitz-Henry Smith, Jr. (Bingham, Smith & Hill, of counsel), for plaintiff. Wm. B. Orcutt, for defendant.

MORTON, J. This is an action to recover for one month and one day and two hours' hire of the steamship Banes pursuant to a charter party entered into between the owners and the defendant. There is no controversy as to the one day and two hours. The dispute relates to the hire for the month beginning September 17 and ending October 17, 1909. The case was tried by the court without a jury, and was heard partly on agreed facts and partly on oral and written evidence. The court found for the plaintiff and the case is here on exceptions by the defendant to the refusal of the presiding justice to give certain rulings that were requested.

The charter party was dated February 27, 1909, and by it the defendant hired the steamship for seven months beginning from the time of delivery between March 15th and 31st, and agreed to pay \$2,600 per calendar month, in advance monthly from the date of delivery. The vessel was delivered March 17th, and the defendant paid in advance as agreed for the calendar months beginning March 17th, April 17th, May 17th, June 17th, and July 17th, respectively. On August 16th the defendant sent the plaintiff a check for \$2,047.09, being the amount due for the calendar month beginning August 17th, less certain deductions for the time when it was alleged the vessel was "off hire" during the month of July. The letter inclosing the check concluded as follows: "From the best information obtainable it is very doubtful whether the S. S. Banes can complete her charter in a reasonably satisfactory manner, and we have every reason to fear that she is far from seaworthy." The vessel arrived at Philadelphia on or about August 13th, where she was detained several days. The defendant ordered the vessel to sail August 16th, but the captain could not do so because of repairs that were required. On August 19th the plaintiff notified the defendant, through the brokers who had chartered the ship for them of the detention, adding that

they could not "say when [the] ship will be ready for sea." Thereupon the defendants telegraphed, "Hereby surrender Banes, being utterly unseaworthy, demand return of charter and coal money." The plaintiff declined to accept the surrender. Some correspondence followed between the parties, and on August 21st the plaintiff notified the defendant that the repairs had been completed and that the captain awaited their orders. Still further correspondence followed, when on August 28th the defendant telegraphed the plaintiff ordering the vessel to sail for Port Maria in Jamaica, to which place the ship sailed, arriving on September 4th. On arrival the captain reported to the defendant's agent. The vessel lay there till September 29th, when pursuant to the request and by the authority of the defendant pending efforts at an adjustment the ship was chartered by the plaintiff to other parties for a trip to Baltimore, and on its arrival at that port laid there without any further orders from the defendant till the expiration of the charter party. The defendant did not pay and never has paid the hire alleged to be due for the calendar month beginning September 17th.

The defendant contends that the plaintiff was bound to have the vessel fit for the service it was to perform under the charter party during the whole time covered by the charter party and at each stage of every voyage that it should make in such service. In other words it contends that there was a warranty of seaworthiness which applied during the whole time covered by the charter party and that inasmuch as the vessel was not in a condition to go to sea when ordered to do so by the defendant on August 16th, the warranty was broken and the defendant had a right to cancel the charter party. It may well be doubted whether the attempted cancellation was not waived by ordering the vessel to sail on August 28th, and by the subsequent authority given to the plaintiff to charter her to another party for a trip to Baltimore.

But, however that may be, the agreement of the plaintiff was not that the vessel should be seaworthy at all times during the period covered by the charter party, but that she should be "tight, staunch, strong and in every way fitted for the service" when delivered to the defendant in Baltimore, and that the plaintiff should "maintain her in a thoroughly efficient state in hull and machinery for and during the services"; and the charter party expressly contemplated that the vessel might have to be withdrawn at times for repairs, and provided that the defendant should not be liable for the vessel's hire during the time required for repairs. The court found that the vessel was unseaworthy when ordered by the defendant to sail on August 16th, but that that was due

to the fact that certain repairs were needed which were completed in a reasonable time, namely, by August 19th, and the vessel was then in a seaworthy condition and continued to be so until the expiration of the charter party. The court also found that "the plaintiff maintained the * * * vessel in a condition fit for the service for which it was chartered during the whole time of the charter party, excepting during certain periods when necessary repairs were being made." It follows from these findings which were warranted by the evidence that there was no breach of its agreement by the plaintiff, or failure to perform its part of the contract, and that the defendant had no right to cancel the charter party as it attempted to do. It also follows that it has no claim against the plaintiff for damages for an alleged breach of contract by it. The plaintiff did not warrant that the vessel should at all times be seaworthy and fit for the service she was to perform. It covenanted that she should be tight, staunch, strong and in every way fitted for the service when delivered to the defendant, and agreed that it would maintain her in a thoroughly efficient state in hull and machinery.

[2] It is not contended that she was not tight, staunch, strong and in every way fitted for the service when delivered, and the agreement to "maintain her in a thoroughly efficient state" "was well kept and fully performed if every defect and want of suitable repair were remedied as soon as by the use of due and reasonable diligence they could be discovered and proper opportunity be had to repair the same and make her seaworthy." *Cook v. Gowan*, 15 Gray, 237, 239; *The Francis Wright*, 105 U. S. 381, 392, 28 L. Ed. 1100.

[3] The defendant was compensated for any delay, if not unreasonable, to which he might be subjected, by the provision in the contract that it should not be held liable for the hire of the vessel during the time required for repairs. *The Francis Wright*, *supra*, 105 U. S. 392, 28 L. Ed. 1100.

[4] There is nothing in the contention that the chartering of the vessel by the plaintiff to other parties for the trip to Baltimore relieved the defendant from liability. It was done with the consent and approval of the defendant.

Exceptions overruled.

(206 Mass. 597)

McMAHON v. RICE.

(Supreme Judicial Court of Massachusetts. Suffolk. May 18, 1911.)

1. MASTER AND SERVANT (§ 155*)—INJURIES TO SERVANT—DUTY TO WARN.

Where defendant, remodeling a building, hired a carpenter, whose first work was to help to make a fence outside the building to protect persons passing along the highway, and other

workmen were knocking down a brick wall in an open manner, the master was not required to warn him as to the obvious danger that a brick might be dropped from the wall.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 310; Dec. Dig. § 155.*]

2. MASTER AND SERVANT (§ 177*)—INJURIES TO SERVANT—FELLOW SERVANTS.

A master is not liable to a servant for injuries caused by the negligence of a fellow servant.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 352-353; Dec. Dig. § 177.*]

Exceptions from Superior Court, Suffolk County; J. B. Richardson, Judge.

Action by William S. McMahon against Charles S. Rice. There was a verdict for defendant, to which plaintiff excepted. Exceptions overruled.

Wm. H. Brown and John H. Coakley, for plaintiff. Walter I. Badger, Wm. Harold Hitchcock, and Chester M. Pratt, for defendant.

HAMMOND, J. While the plaintiff was at work for the defendant in remodeling the two lower stories of a brick building, he was directed by the latter who personally superintended the work to move a temporary brace which was supporting the second floor, and put in a stronger one. As soon as he got to the place indicated and as he was taking hold of the brace, he was struck on the head by a brick which had slipped from the control of a fellow workman who was engaged in tearing down a part of the wall upon the Brattle street side of the building. The plaintiff began to work for the defendant on the morning of the day of the accident, which occurred at about 1 o'clock p. m. He testified that he knew the building was going to be remodeled; that he did not notice during the forenoon that any bricks had been taken from the wall, although when he came back from dinner he did notice an opening in it about 20 feet from the ground, and that some of the wall was down, but he "couldn't tell what they were doing," and that he saw no staging on the Brattle street side and saw no men at work about the wall, and that he did not stop to think "where the bricks had gone from the wall."

One Rudd testified as follows as to the way in which the work of tearing down the wall was carried on: "The wall had been taken down, to some extent at least, before the day of the accident. The wall was taken down by men employed by Mr. Rice and they chopped and loosened the brick with chisels and were supposed to chuck them down on the outside. There was a staging on the outside of the wall. The workmen cut at the brick with hammer and chisel, loosened them up and chucked them down, they took them in their hands and threw them down on this inclosed sidewalk. On the morning of the accident there were a good many brick in

this inclosure. On the morning of the accident I couldn't tell how much of the wall was taken down. Some of it was down. The men were not supposed to throw brick on the inside of the building. I didn't see any thrown there." He described the circumstances of the accident as follows: "I was on the first floor and McMahon [the plaintiff] went below where I couldn't see him. * * * Some one said, 'Look out!' and I looked up just in time to see the mason making a grab for those bricks. There was no part of the wall fell except this bunch of bricks which the workmen had just dislodged. * * * When I heard the words 'Look out!' it was then I looked and saw the brick falling down. The workman was knocking the brick off not directly above the plaintiff, but somewhat to one side, three or four feet to one side; but when he grabbed the brick he shoved it, and of course it went off somewhat sideways." This witness further testified that "taking down walls by taking out the bricks and throwing them down was about the only way you can take them down, the only way I ever saw it done."

[1] There was no evidence that would justify a jury in coming to the conclusion that the way adopted was unusual or improper. But the plaintiff contends that the defendant was negligent in ordering him to work upon the brace without proper precautions to protect him. He invokes the familiar rule that the master owes to his servant the duty of proper protection and to inform him of danger.

The building does not seem to have been a large one. The two lower stories were to be remodeled, a work which of necessity required some changes. The plaintiff had been a carpenter for 30 years and must be assumed to have known what kind of work was going on and how it was being done. Indeed he testified that the first thing he did on the building was to help put up a fence around the sidewalk on Brattle street, that he did not "know what it was for unless it was to keep people out and from getting hurt from anything falling from the building." Whether or not he was so blind or inattentive, as he testified, to the manner in which the work, especially the demolition of the wall, was going on, it is certain that everything was before his eyes, and that the defendant had the right to assume that an experienced carpenter like the plaintiff could and would properly take care of himself so far as respected the usual and obvious dangers of the employment, and that he needed no instruction. Independent of any question of the assumption of risk by the plaintiff (as to which see *Marshall v. Norcross*, 191 Mass. 568, 77 N. E. 1151), it cannot be said that there was any negligence on the part of the defendant in failing to inform the plaintiff of the possibility that a brick might escape

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

from the control of the men at work on the wall.

[2] If there was any negligence it was that of the fellow servant who dropped the brick. For such negligence the defendant is not answerable. See *Flynn v. Campbell*, 160 Mass. 128, 35 N. E. 453; *Fay v. Wilmarth*, 183 Mass. 71, 66 N. E. 410; *Bolsvert v. Ward*, 199 Mass. 594, 85 N. E. 849.

Exceptions overruled.

(209 Mass. 6)

ALBEE v. BOSTON ELEVATED RY. CO.
(Supreme Judicial Court of Massachusetts.
Suffolk. May 18, 1911.)

STREET RAILROADS (§ 117*)—INJURIES TO TRAVELERS— NEGLIGENCE— CONTRIBUTORY NEGLIGENCE.

In an action for injuries to a pedestrian by being struck by a street car while attempting to cross the track in front of it, whether plaintiff looked as often as she ought, whether she was justified in thinking she had time to cross ahead of the car, and whether the accident was due to the motorman's failure to slow up when approaching plaintiff rather than to any proper lack of judgment on her part, and whether the motorman was negligent, *held* for the jury.

[Ed. Note.—For other cases, see *Street Railroads*, Cent. Dig. §§ 239-257; Dec. Dig. § 117.*]

Exceptions from Superior Court, Suffolk County; Robert O. Harris, Judge.

Action by Jennie O. Albee against the Boston Elevated Railway Company. Verdict for plaintiff, and defendant brings exceptions. Overruled.

Fredk. J. Daggett and Francis P. Garland, for plaintiff. Endicott P. Saltonstall, for defendant.

HAMMOND, J. While the plaintiff was crossing Boylston street, near Arlington street, in Boston, at 8:30 o'clock p. m., in November, the rain falling heavily at the time and a very high wind blowing, she came into collision with the left-hand corner of the fender of one of the defendant's cars while it was in motion, and was injured. She testified that she looked and saw the car twice, once when she stepped from the curbstone which was about 17 feet from the track, and once when she was about halfway between the curb and the track; that the last time she looked the car was about 125 feet away and coming slowly; that she thought she had time to get across and made the attempt. The evidence tended to show that she had got almost over the further rail of the track when she was hit. She testified further that the street at that place was substantially deserted, there being only this car and another car several hundred feet away from her in the opposite direction.

Upon all the evidence we are of opinion that the questions whether she looked as often as she ought to have looked and as late as she ought to have looked, and whether

she was justified in thinking that she had time to get over the track ahead of the car, as well as the questions whether the accident was due rather to the failure of the motorman to slow up when approaching the plaintiff than to any proper lack of judgment on her part, and whether the motorman was negligent, were for the jury. See *Hunt v. Old Colony Street Railway*, 206 Mass. 11, 91 N. E. 883; *Hennessey v. Taylor*, 189 Mass. 583, 76 N. E. 224, 3 L. R. A. (N. S.) 345; *McCrohan v. Davison*, 187 Mass. 466, 73 N. E. 553. The case is distinguishable from *Hollan v. Boston Elevated Railway*, 194 Mass. 74, 80 N. E. 1, 11 L. R. A. (N. S.) 166, and other similar cases cited by the defendant.

Exceptions overruled.

(209 Mass. 126)

CITY OF NEWBURYPORT v. DAVIS.

(Supreme Judicial Court of Massachusetts. Essex. May 19, 1911.)

1. TAXATION (§ 568*)—BONDS OF COLLECTOR— LIABILITY FOR SUCCESSIVE TERMS.

A bond which, after reciting the election of a treasurer and collector of taxes, provided that if he should well and truly perform the duties of his two offices during the term for which he had been elected, and for such further term or terms or portion of a term for which he might be elected or for which he might serve, and should annually obtain the approval of the aldermen and mayor, then the obligation should be void, created a continuing obligation for the current year and for each successive year of each election or service, and the clause providing that he should annually obtain the approval of the mayor and aldermen was not a condition precedent to liability under subsequent elections, being vague and apparently without exact significance.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. §§ 1102-1118; Dec. Dig. § 568.*]

2. MUNICIPAL CORPORATIONS (§ 145*)—OFFICERS—BONDS—VALIDITY.

Although the statute and ordinance required bonds to be given satisfactory to and approved by the mayor and board of aldermen, a bond for the faithful performance of duties of treasurer of a municipality is valid at common law, even though not so approved.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 319-322; Dec. Dig. § 145.*]

3. MUNICIPAL CORPORATIONS (§ 173*)—OFFICERS—BONDS—DISCHARGE OF SURETY.

Sureties upon the bond of a municipal officer holder are not discharged because of the negligence of other officers of the municipality in not discovering the defalcations of their principal.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 399-409; Dec. Dig. § 173.*]

4. MUNICIPAL CORPORATIONS (§ 173*)—OFFICERS—BONDS—LIABILITIES ON SUCCESSIVE BONDS.

Where successive bonds which provided for continuing liability were given by the same sureties for the faithful performance of the duties of a certain municipal officer, these bonds were substitutional in their nature, and not cumulative.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 399-409; Dec. Dig. § 173.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

5. MUNICIPAL CORPORATIONS (§ 173*)—BONDS OF OFFICERS—ACTIONS—DEFENSES.

Sureties upon the bond of a municipal treasurer, who in that capacity misappropriated money of the city by drawing checks on its bank deposits and by taking its cash from the drawer, cannot set up as a defense that the treasurer, as borrowing agent of the city, issued unauthorized notes, with the proceeds of which he replaced the amounts embezzled, for that procedure did not change the original transaction.

[Ed. Note.—For other cases, see *Municipal Corporations*, Dec. Dig. § 173.*]

6. MUNICIPAL CORPORATIONS (§ 173*)—BONDS OF OFFICERS—ACTION—EXECUTIONS.

In actions on bonds, judgment is usually entered for the penal sum, and the amount of execution determined later, but the amount of execution may be determined with the question of liability, if the record is ripe for it; and hence sureties upon the bond of the city treasurer, whose defalcations amounted to more than the penal sum of the bond, are liable for that sum, and the amount of execution may be fixed when the liability is decided.

[Ed. Note.—For other cases, see *Municipal Corporations*, Dec. Dig. § 173.*]

7. MUNICIPAL CORPORATIONS (§ 173*)—BONDS OF OFFICERS—DEFENSES.

Where a city has made out a prima facie case in an action against the sureties upon its treasurer's bond, and is entitled to a judgment for a breach, a restitution by the treasurer from the proceeds of notes wrongfully issued by him in the name of the city, all but one of which the city has been compelled to pay, and is defendant in a pending action upon that one, is not a good defense.

[Ed. Note.—For other cases, see *Municipal Corporations*, Dec. Dig. § 173.*]

Report from Superior Court, Essex County; Robert F. Raymond, Judge.

Action by the City of Newburyport against Charles E. Davis. On report from the superior court. Judgment for plaintiff.

R. G. Dodge and A. Withington, for plaintiff. Hannan & Healey and Sweeney & Cox, for defendant.

RUGG, J. This is an action against one of the sureties upon three several bonds, dated respectively January 1, 1894, January 1, 1898, and January 1, 1902, given to the plaintiff city by one Felker, its treasurer and collector of taxes from 1883 to 1906, who embezzled large sums from the plaintiff in and subsequent to 1896.

The bonds are identical in the condition which, after reciting the election of Felker to the office "for the current municipal year," provides that if he "shall well and truly perform all the duties and responsibilities which devolve upon him by virtue of his acceptance of the two offices aforesaid during the term for which he has been elected and for such further term or terms or portion of a term for which he may be elected or for which he may serve and if the said James V. Felker shall annually, not later than the first Monday of February, obtain the approval of the mayor and aldermen of said city of Newburyport, then this obligation shall be void; otherwise it shall remain in full force."

[1] 1. The bond is aptly phrased to express a continuing obligation, for the current year and for each successive year of continuous elections to or service in the offices named by the principal obligor. There can be no doubt of its binding force in this regard. *Chelmsford Co. v. Demarest*, 7 Gray, 1-3; *Middlesex Mfg. Co. v. Lawrence*, 1 Allen, 339; *Lexington & West Cambridge R. R. Co. v. Elwell*, 8 Allen, 371; *Singer Manufacturing Co. v. Reynolds*, 168 Mass. 588, and cases cited at page 590, 47 N. E. 438, 60 Am. St. Rep. 417; *O'Brien v. Murphy*, 175 Mass. 253, 56 N. E. 283, 78 Am. St. Rep. 487. But it is contended that language in the bond to the effect that Felker shall annually "obtain the approval of the mayor and aldermen" interposes as a condition precedent to the springing into being of liability under subsequent elections a renewed annual approval of the bond, and that accordingly his failure to comply with this condition prevents the continuing obligation feature of the bond from becoming vital and effective. While perhaps an instrument might be so framed as to express this purpose, the language of this condition does not do so. The meaning of this clause is not plain. It may perhaps be construed to require Felker to get an approval of himself, that is an auditing and an expression of satisfaction with his accounts, or that the bond should be presented anew to the proper city board as additional security to the general sureties in the event of the death or impaired financial standing of any of them. But whatever its exact significance, it does not purport to cut down the continuity of obligation unequivocally set forth in the earlier part of the sentence. It does not state a limitation upon liability, but a requirement of the doing of something by Felker default in performance of which raises an additional ground of liability on the part of the sureties. There is no ground for reversing the literal and grammatical meaning of words in order to effectuate a mere conjecture based upon a subsequent unanticipated event as to what might have been the intent of the parties in drafting a somewhat obscure sentence. These bonds expressed an obligation to the plaintiff arising upon each successive election to office of the principal obligor.

[2] 2. Although the statute and ordinance required bonds to be given satisfactory to and approved by the mayor and board of aldermen, it is not necessary to decide whether these were so approved for the reason that they were valid as common-law obligations. *Farr v. Rouillard*, 172 Mass. 303, 305, 52 N. E. 443, and cases cited.

[3] 3. The negligence of other officers of the plaintiff in not discovering the defalcations of Felker is no defense to this action. *Hudson v. Miles*, 185 Mass. 582-587, 71 N. E. 63, 102 Am. St. Rep. 370.

[4] 4. The bonds are not cumulative, but substitutional in their nature. It often happens that when a new bond is given voluntarily and unqualifiedly, not in accordance with a requirement of statute, ordinance or by-law, but by reason of agreement or in response to demand or on account of changed conditions or in other ways without compulsion it is held to be concurrent with previous like obligations. *Forbes v. Harrington*, 171 Mass. 386, 50 N. E. 641 and *Hudson v. Miles*, 185 Mass. 582, 587, 71 N. E. 63, 102 Am. St. Rep. 370, illustrate this principle. But these bonds were given by the incumbent of a public office which by law must be filled by an annual election. It requires plain and definite language to extend liability beyond the term of office for which the bond is given. When expressly continuing to future official terms, the nature of the sureties' liability on such obligations is such that it ought not to be stretched beyond its fair import. It was an implied condition growing out of the character of the offices held, and the general provisions of law touching them, that a new bond executed, delivered and approved by the proper authorities upon a new election should put an end to liability upon the old bond for defaults accruing thereafter. See *Richardson School Fund v. Dean*, 180 Mass. 242, 244.

[5] 5. The attempt has been made by the defendant to distinguish the capacities in which Felker injured the city, and to fix the wrongdoing which resulted in financial harm to the city upon him in some other capacity than that of treasurer. It is urged that he covered his direct embezzlements with the proceeds of notes which he was enabled to negotiate as a borrowing agent of the city under the authority of ordinance, and that his misappropriations in this capacity were not made as treasurer, and hence the defendant is not liable. But according to the facts found Felker took the money of the city either by drawing checks upon its bank deposits or by siphoning the cash from its drawer. That he succeeded in temporarily concealing his shortage by proceeds of notes in the name of the city, which he in fact had no right to issue, does not affect the character of his initial embezzlement. The essence of the transactions cannot be changed in this way. All that he did was in violation of his duty as treasurer. As there has been recovery against the city upon a considerable amount of these notes which were fraudulently put out by Felker, the city has been

left as it was at the first, defrauded by the original embezzlement. Each bond is a security for all that was stolen during the period covered by it.

[6] 6. Frequently in cases of this sort judgment is entered for the penal sum of the bond, and the amount of the execution is determined later. *Choate v. Arrington*, 116 Mass. 552. But there is no reason for not determining the amount for which execution should issue at the same time with the question of liability when the record is ripe for it. *Hudson v. Miles*, 185 Mass. 582-588, 71 N. E. 63, 102 Am. St. Rep. 370. The loss to the city arising from the breach of the bonds of 1898 and of 1902 far exceeds the penal sum. Hence upon the counts on these bonds the plaintiff is entitled to recover the full penal sum, to wit, \$4,000, with interest from the date of the writ. [7] It is plain also that there was a breach of the bond of 1894. Embezzlements occurred during the period covered by it. In any event judgment should be entered for a technical breach. Upon this point the only question is whether restitution was made from the proceeds of a \$25,000 note wrongfully issued by Felker, the proceeds of which, placed to the credit of the city, helped to conceal his deficits. Action against the city upon that note is pending. Recovery has been had against the city upon several notes similar in all respects to the one in suit. *Citizens' Savings Bank v. Newburyport*, 169 Fed. 766, 95 O. C. A. 232. The plaintiff made out a prima facie case by showing a breach of the bond. Such case is not met by showing a restitution made from the proceeds of several notes wrongfully issued by the treasurer in the name of the city, all but one of which the city has been compelled to pay and is defendant in a pending action upon that one. *Temple v. Phelps*, 193 Mass. 297, 302, 79 N. E. 482. The exact loss of the plaintiff cannot be determined until the conclusion of that litigation. But the plaintiff is entitled to a judgment upon a technical breach in the condition of the bond. The amount for which execution ought to issue on this bond should be settled after the end of the action upon the \$25,000 note.

Let the entry be:

Judgment for plaintiff upon counts 1, 2, and 3.

Judgment for defendant upon count 4.

Execution to issue upon counts 2 and 3.

Amount for which execution should issue on count 1 to be determined later.

(175 Ind. 659)

WILLIAMS v. DEXTER et al. (No. 21,717.)
(Supreme Court of Indiana. May 23, 1911.)

1. DRAINS (§ 32*)—ESTABLISHMENT—PROCEEDINGS—JURISDICTION OF COURT.

Although Acts 1907, c. 252, § 3 (Burns' Ann. St. 1908, § 6142), provides that the drainage commissioners shall provide ample means for the drainage or protection from overflow of the lands to be affected, having in view future contingencies, the failure of their report to state that they obeyed the statute does not deprive the court of its jurisdiction over the subject-matter of the parties.

[Ed. Note.—For other cases, see Drains, Cent. Dig. § 32; Dec. Dig. § 32.*]

2. DRAINS (§ 36*)—REVIEW—PRESENTATION OF GROUNDS OF REVIEW IN COURT BELOW—NECESSITY.

Under Burns' Ann. St. 1908, § 6143, the question of whether the drainage commissioners have complied with section 6142, requiring them to provide for future contingencies, may be raised in the court below, and hence cannot be raised for the first time on appeal.

[Ed. Note.—For other cases, see Drains, Cent. Dig. §§ 44, 45; Dec. Dig. § 36.*]

3. DRAINS (§ 73*)—ESTABLISHMENT—BENEFITS—ASSESSMENT—DESCRIPTION OF LAND.

As defective descriptions of lands against which assessments for drains have been made may be corrected and the assessments enforced, other landowners cannot claim that because of such defective descriptions the establishment of the drain is illegal, in that it will place too great a burden upon them.

[Ed. Note.—For other cases, see Drains, Dec. Dig. § 73.*]

Appeal from Circuit Court, Jasper County; Charles W. Hanley, Judge.

Proceedings by Harvey J. Dexter and others for the establishment of a drain, to which Cordelia M. Williams filed a remonstrance. From a judgment in favor of the petitioners, she appeals. Affirmed.

E. B. Sellers, for appellant. Abraham Halleck, for appellees.

MONKS, J. This proceeding was brought in the court below for the establishment of a public drain under the act of 1907 (Acts of 1907, p. 508, being section 6140 et seq., Burns 1908).

Drainage commissioners were appointed, who reported in favor of the establishment of said drain. Appellant filed remonstrance against said report and the assessments therein made against her real estate. The cause was tried by the court and a finding made in favor of the petitioners on all questions, except that certain assessments were modified. The court rendered judgment declaring the proposed work established and approving the assessments as modified, and ordered the drain constructed. From this judgment, appellant appealed.

Appellant insists: (1) That the court below did not have jurisdiction to render judgment establishing the proposed drain, for the reason that it was not stated in the drainage commissioners' report that, in lo-

cating and fixing the size and dimensions of the drain, they had provided "ample means for the drainage or protection from overflow of the lands to be affected, having in view future contingencies as well as the present."

(2) That, as the descriptions of certain of the lands assessed are defective, the assessments are void and may be lost to the drain, and by reason thereof the owners of the lands upon which the assessments are valid will be required to pay more than their just proportion of the cost of locating and constructing the drain. It appears from the record that neither one of these questions was presented to the trial court by appellant, or any other party, by remonstrance or otherwise.

[1] It is true that section 3 of the drainage law of 1907 (Acts of 1907, p. 514, being section 6142, on page 993, Burns 1908) provides that the drainage commissioners "shall provide ample means for the drainage or protection from overflow of the lands to be affected, having in view future contingencies as well as the present," but the fact that the drainage commissioners have not stated in their report that they have, so located the ditch and fixed its size and dimensions as to provide "ample means for the drainage or protection from overflow of the land to be affected, having in view future contingencies as well as the present," in no way affected the jurisdiction of the court below over the subject-matter or the parties.

[2] Whether or not the drainage commissioners have complied with said provision in locating and fixing the size and dimensions of the ditch may be put in issue and tried under the tenth clause of section 4 of the drainage law of 1907 (Acts of 1907, p. 515, being section 6143, Burns 1908). This was not done in the court below, and the question cannot be presented for the first time in this court.

[3] As to the contention in regard to the defective descriptions of some of the lands against which assessments were made by the drainage commissioners, such descriptions may be corrected and the assessments enforced against the land intended. Ager v. State, 162 Ind. 538, 70 N. E. 808, and cases cited; Luzadder v. State, 131 Ind. 593, 31 N. E. 453; State v. Smith, 124 Ind. 302, 24 N. E. 331.

Finding no error, the judgment is affirmed.

(175 Ind. 665)

PAINTER v. STATE. (No. 21,735.)

(Supreme Court of Indiana. May 23, 1911.)

CRIMINAL LAW (§ 1105*)—APPEAL—RECORD—TRANSCRIPT—CERTIFICATE.

Where the clerk's certificate authenticating the transcript was dated July 1, 1910, and the bill of exceptions containing the evidence was not signed by the judge until July 29, 1910, the clerk's certificate could not be treated as au-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes

thenticating the bill of exceptions, which could not, therefore, be regarded as a part of the record, under the rule that the certificate of the clerk only certifies to the correctness of all the papers filed, proceedings had, and entries made prior to the date of the certificate.

[Ed. Note.—For other cases, see *Criminal Law*, Dec. Dig. § 1105.*]

Appeal from Criminal Court, Marion County; John A. Pritchard, Judge.

Earl H. Painter was convicted of violating Act March 8, 1909 (Acts 1909, c. 151), requiring the record of the names and residences of persons engaged in or transacting business under names other than their own, either individually or as members of firms or partnerships, and providing penalties for the violation thereof, and was punished by a fine of \$25, and he appeals. Affirmed.

Chas. E. Averill, for appellant. James Bingham, A. G. Cavins, W. H. Thompson, and E. M. White, for the State.

MONKS, J. Appellant was convicted under an act approved March 8, 1909 (Acts of 1909, pp. 353, 359), and his punishment assessed at a fine in the sum of \$25. The only error assigned calls in question the action of the court in overruling appellant's motion for a new trial.

The certificate of the clerk authenticating the transcript was dated July 1, 1910. What purports to be a bill of exceptions containing the evidence was not signed by the judge until July 29, 1910, 28 days after the transcript was authenticated by the clerk. It has been uniformly held that the certificate of the clerk only certifies to the correctness of all the papers filed, proceedings had, and entries made prior to the date of said certificates, and cannot authenticate papers filed, proceedings had, or entries made subsequent to that time. *Nurrenbern v. Daniels*, 163 Ind. 301, 71 N. E. 889, and cases cited; *Ewbanks*, Manual, p. 43. It is clear, therefore, that the evidence is not properly in the transcript and cannot be considered. As the error assigned depends for its determination upon the evidence, which is not in the transcript, there is nothing to support said assignment.

The judgment is therefore affirmed.

(175 Ind. 648)

SELVAGE v. TALBOTT. (No. 21,773.)

(Supreme Court of Indiana. May 23, 1911.)

1. BROKERS (§ 43*)—STATUTE OF FRAUDS—DEROGATION OF COMMON LAW.

Acts 1901, c. 67, § 1 (Burns' Ann. St. 1908, § 7463), declaring that no contract for a commission for finding a purchaser for real estate of another shall be valid unless in writing, signed by the owner, is in derogation of common law, and must be strictly construed.

[Ed. Note.—For other cases, see *Brokers*, Cent. Dig. § 44; Dec. Dig. § 43; * *Frauds*, Statute of, Cent. Dig. § 131.]

2. CONSTITUTIONAL LAW (§ 211*)—CLASS LEGISLATION—IN GENERAL.

A classification of subjects of legislation must have some reasonable basis, and must operate equally upon all within the class. The reason for the classification must inhere in the subject-matter, and must be natural and substantial, treating all alike who, under the same conditions, are within its effect, and must embrace all within the class to which it is naturally related.

[Ed. Note.—For other cases, see *Constitutional Law*, Dec. Dig. § 211.*]

3. CONSTITUTIONAL LAW (§ 212*)—CLASSIFICATION—POLICE POWER—REGULATION OF BUSINESS.

The state under its police power has the right to regulate any and all kinds of business to protect the public health, morals, and welfare, subject to the restrictions of reasonable classification.

[Ed. Note.—For other cases, see *Constitutional Law*, Cent. Dig. § 684; Dec. Dig. § 212.*]

4. EMINENT DOMAIN (§ 2*)—APPROPRIATION OF SERVICES OR PROPERTY—REGULATION OF BROKERS.

Acts 1901, c. 67, § 1 (Burns' Ann. St. 1908, § 7463), which provides that no contract for the payment of any commission for finding a purchaser for real estate shall be valid unless it be in writing, signed by the owner of such real estate or his legal representative, is not in conflict with Const. art. 1, § 21, which declares that no man's particular services shall be demanded without just compensation, and that no man's property shall be taken by law without just compensation.

[Ed. Note.—For other cases, see *Eminent Domain*, Dec. Dig. § 2.*]

5. CONSTITUTIONAL LAW (§ 205*)—CLASS LEGISLATION—REGULATION OF BROKERS.

Acts 1901, c. 67, § 1 (Burns' Ann. St. 1908, § 7463), which provides that no contract for the payment of any commission for finding a purchaser for real estate shall be valid unless it be in writing, signed by the owner of such real estate, is not in conflict with Const. art. 1, § 23, which forbids the granting to any citizen or class of citizens of privileges or immunities which, upon the same terms, shall not equally belong to all citizens.

[Ed. Note.—For other cases, see *Constitutional Law*, Cent. Dig. §§ 591-624; Dec. Dig. § 205.*]

6. CONSTITUTIONAL LAW (§ 296*)—DUE PROCESS OF LAW—REGULATION OF BROKERS.

Acts 1901, c. 67, § 1 (Burns' Ann. St. 1908, § 7463), providing that no contract for a commission for finding a purchaser for real estate shall be valid unless in writing, signed by the owner, is not invalid as a deprivation of liberty or property without due process of law, contrary to Const. U. S. Amend. 14.

[Ed. Note.—For other cases, see *Constitutional Law*, Cent. Dig. §§ 825-830; Dec. Dig. § 296.*]

7. CONSTITUTIONAL LAW (§ 296*)—DUE PROCESS OF LAW—NATURE OF ACTS PROHIBITED IN GENERAL.

Const. U. S. Amend. 14, was not designed to interfere with the police power of a state to regulate business and occupations for the promotion of the public peace, morals, and welfare.

[Ed. Note.—For other cases, see *Constitutional Law*, Cent. Dig. §§ 825-830, 835-846; Dec. Dig. § 296.*]

8. BROKERS (§ 43*)—COMPENSATION—NECESSITY OF CONTRACT IN WRITING—STATUTES.

Under Acts 1901, c. 67, § 1 (Burns' Ann. St. 1908, § 7463), requiring that a broker's contract for commissions for effecting a sale of

real property shall be in writing, signed by the owner, no recovery can be had under a count in quantum meruit for selling under oral employment.

[Ed. Note.—For other cases, see *Brokers*, Cent. Dig. § 44; Dec. Dig. § 43.*]

9. BROKERS (§ 43*)—COMPENSATION—NECESSITY OF WRITING—SUFFICIENCY OF WRITING.

Under Acts 1901, c. 87, § 1 (Burns' Ann. St. 1908, § 7463), requiring a contract for the payment of a commission for the sale of real estate to be in writing, a contract which is only partially in writing and which leaves the amount of the commission to be ascertained by parol is not enforceable.

[Ed. Note.—For other cases, see *Brokers*, Cent. Dig. § 44; Dec. Dig. § 43.*]

Appeal from Superior Court, Marion County; Pliny W. Bartholemew, Judge.

Action by Joseph W. Selvage against Henry M. Talbott. Judgment for defendant, and plaintiff appeals. Affirmed.

Robert W. McBride, for appellant. Chas. W. Smith, John S. Duncan, Henry H. Hornbrook, and Albert P. Smith, for appellee.

MORRIS, J. Appellant sued appellee for services, on an oral contract, in negotiating a sale of real estate. The complaint is in three paragraphs, the first of which declares on an agreement for a commission of 2½ per cent. on the amount of the sale price, the second on an agreement for a reasonable compensation, and the third is based solely on the quantum meruit. The latter paragraph alleges the rendition of services by plaintiff to defendant at his special instance and request in finding for him a purchaser of certain real estate, the reasonable value of the services, and that the claim is due and unpaid. To each paragraph of complaint the lower court sustained a demurrer for insufficient facts. This action of the court is here assigned as error.

It is conceded by appellant that the lower court did not err in sustaining the demurrer to the first and second paragraphs of complaint if section 1 of the act of March 5, 1901, relating to contracts for services in selling real estate, is a valid enactment, but appellant claims that this section is unconstitutional and void because it conflicts with sections 21 and 23 of article 1 of the Constitution of Indiana, and also with the fourteenth amendment to the Constitution of the United States. Appellant further insists that, even though the act in controversy is constitutional, it applies only to express contracts, and therefore the third paragraph of complaint, which is on an implied obligation, is sufficient to repel a demurrer.

Appellee contends that the statute in controversy is valid, and that the contract sued on is invalid because not in writing. The section of the statute in question reads as follows: "That no contract for the payment of any sum of money, or thing of value, as

and for a commission or reward for the finding or procuring, by one person, or a purchaser for the real estate of another shall be valid, unless the same shall be in writing, signed by the owner of such real estate or his legally appointed and duly qualified representative." Acts 1901, p. 104; Burns' Stat. 1908, § 7463. Section 21, art. 1, of our Constitution, is as follows: "No man's particular services shall be demanded without just compensation. No man's property shall be taken by law without just compensation; nor, except in the case of the state, without such compensation first assessed and tendered." Section 23 of the same instrument reads as follows: "The General Assembly shall not grant to any citizen, or class of citizens, privileges or immunities which, upon the same terms, shall not equally belong to all citizens."

[1] At the outset, it may be conceded that this statute is in derogation of the common law, and therefore must be strictly construed. *Thornburg v. American Strawboard Co.* (1895) 141 Ind. 443, 40 N. E. 1062, 50 Am. St. Rep. 334.

[2] It may be further conceded, as appellant contends, that, when the General Assembly makes a classification of the subjects of legislation, it must have some reasonable basis on which to stand, and must operate equally upon all within the class; that the reason for the classification must inhere in the subject-matter, and must be natural and substantial. A proper classification treats all brought under its influence alike under the same conditions, and must embrace all within the class to which it is naturally related. *Bedford Quarries Co. v. Bough*, 168 Ind. 671, 80 N. E. 529, 14 L. R. A. (N. S.) 418, and cases cited.

[3] But it cannot be questioned that the state under its police power has the right to regulate any and all kinds of business to protect the public health, morals, and welfare, subject to the restrictions of reasonable classification. *Walker v. Jameson* (1894) 140 Ind. 591, 37 N. E. 402, 39 N. E. 869, 28 L. R. A. 679, 49 Am. St. Rep. 222; *Adams Express Co. v. State* (1903) 161 Ind. 706, 67 N. E. 1092; *Seeleyville, etc., Co. v. McGlosson* (1906) 166 Ind. 561, 77 N. E. 1044, 117 Am. St. Rep. 396; *Knight & Jillson Co. v. Miller* (1909) 172 Ind. 27, 87 N. E. 823. Several states have laws similar to the one in controversy. In *Baker v. Gillan*, 68 Neb. 368, 94 N. W. 615, the Supreme Court of Nebraska, in deciding a case involving the matter in issue here, used the following language: "The only question suggested by the petition in error and discussed in the briefs is whether an oral agreement like the one on which plaintiff relies is valid and enforceable. The first section of the act of 1897 [Laws 1897, c. 57] is as follows: 'Every contract for the sale of lands, between the owner thereof and any

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes

broker or agent employed to sell the same, shall be void, unless the contract is in writing and subscribed by the owner of the land and the broker or agent, and such contract shall describe the land to be sold, and set forth the compensation to be allowed by the owner in case of sale by the broker or agent.' It is conceded that the case falls within the provisions of this section, and that, if the law is constitutional, the judgment is right. We think the law is constitutional, and that the argument in support of the claim that it is special legislation is obviously unsound. It is, of course, competent for the Legislature to classify objects of legislation, and if the classification is reasonable, and not artificial or arbitrary, it will be upheld as a legitimate exercise of legislative power. The statute here considered is only a new instance of the exercise of that power. It may be that it is without exact precedent, but it has many familiar analogies in the legislation of this and other states. It is more special legislation than are those provisions of the statute of frauds which require certain contracts to be evidenced by writing. It is in fact a virtual extension or enlargement of the statute of frauds, and, like that statute, was designed to prevent the bringing of actions which experience had shown were often conceived in fraud and maintained by perjury. It purports to be, and it is, a general law. Its operation is uniform throughout the state. It affects alike all persons under the same conditions and circumstances, and, its object being the suppression of an evil believed to be peculiarly connected with the class of contracts with which it deals, it is not in our judgment open to the constitutional objection urged against it." In *Ross et al. v. Kaufman* (1908) 48 Wash. 678, 94 Pac. 641, the Supreme Court of the state of Washington in passing on the constitutionality of a statute similar to ours said: "The appellants argue here that the act of 1905, which requires contracts of this kind to be in writing, is unconstitutional because, first, it is class legislation; and, second, it is an unwarranted inference with the rights of contract. Neither of these reasons requires extended notice. All class legislation is not prohibited by the Constitution. This statute does not affect the right of contract further than to require certain contracts to be in writing; and this is without doubt within the legislative power. Otherwise the Legislature could require no contract to be in writing. We think the act is constitutional." It is a matter of common knowledge that before the enactment of this statute numerous suits were being instituted from time to time by agents and brokers who claimed commissions in sales of land on the ground that they had been instrumental in procuring purchasers, and these claims were often resisted by the defendants, because, as alleged, there was absolutely no basis for the same; on the other hand, brokers and agents complained that

owners when sales were once effected by the agents often after an expenditure of great effort were given to the repudiation of their honest obligation. An examination of court records will reveal the contradictory testimony of the interested parties in such cases, and show the extreme difficulty imposed on courts and juries in ascertaining the truth. No doubt the principal motive which actuated the members of the General Assembly in enacting the statute was to put an end to such disputes and prevent fraud and perjury, and we believe the enactment is well within the police powers of the state.

[4, 5] Appellant maintains that the classification in this act is purely artificial and arbitrary; that it singles out a particular class of agents—those engaged in real estate sales—and imposes restrictions on them not imposed on any other class of agents; that, in fact, it only applies to those real estate agents engaged in the selling and not to those engaged in the purchase of real estate. In regard to the latter claim, it is sufficient to say that it is a matter of common knowledge that brokers usually look to the owner of the real estate for compensation, rather than to the purchaser. This is a sufficient reason to warrant the exclusion of agency contracts for the purchase of land from the operation of the law. The act in controversy is not in conflict with either section 21 or 23 of article 1 of our Constitution. *City of New Albany v. New Albany St. R. Co.*, 172 Ind. 487, 87 N. E. 1084.

[6, 7] Nor is this statute in conflict with the fourteenth amendment to the federal Constitution. This amendment, broad as it is, was not designed to interfere with the police power of the state to regulate business and occupations for the promotion of the peace, morals, and welfare of the people. *Knight & Jilison Co. v. Miller*, supra; *Cincinnati, etc., R. Co. v. City of Connersville*, 170 Ind. 316, 83 N. E. 503; *Inland Steel Co. v. Yedinak*, 172 Ind. 423, 87 N. E. 229; *Smith v. Stephens*, 173 Ind. 564, 91 N. E. 167, 30 L. R. A. (N. S.) 704.

[8] No error was committed by the lower court in sustaining the demurrer to the third paragraph of complaint. Where the law makes an express oral contract for services invalid, it will not create, by implication, a liability for such services. It is admitted by counsel for appellant that this rule is declared in *Beahler v. Clark* (1903) 32 Ind. App. 222, 68 N. E. 613, but counsel claims it is erroneous. Where the question has been raised in other jurisdictions, a similar rule has been adopted. *Blair v. Austin*, 71 Neb. 401, 98 N. W. 1040; *Leimbach v. Regner*, 70 N. J. Law, 608, 57 Atl. 138; *Jamison v. Hyde*, 141 Cal. 109, 74 Pac. 695; *Keith v. Smith*, 46 Wash. 131, 89 Pac. 473, 13 Am. & Eng. Ann. Cas. 975, and note. In *Zimmerman v. Zehendner*, 164 Ind. 466, 73 N. E. 920, this court said: "In short, the contract, in so far as it relates to this action, is only partial-

ly in writing. The important feature—the amount of commission to be paid—is to be ascertained by parol testimony in regard to an understanding which may prove to be a misunderstanding, the exact thing which the statute was designed to prevent.”

[8] A contract partly written and partly verbal is a parol contract, and contracts required by law to be in writing must be wholly written to be enforceable.

Under this statute, no recovery can be had on the quantum meruit.

There is no error in the record. Judgment affirmed.

(175 Ind. 597)

STATE v. GROSS. (No. 21,761.)

(Supreme Court of Indiana. May 23, 1911.)

1. CRIMINAL LAW (§ 304*)—JUDICIAL NOTICE—POPULATION OF CITIES.

The Supreme Court takes judicial notice that the population of a city is less than 10,000, when so shown by the federal census.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 705; Dec. Dig. § 304.*]

2. PERJURY (§ 9*)—DESIGNATION OF JUDICIAL OFFICER—SUFFICIENCY.

Under Burns' Ann. St. 1908, § 8644, devolving the duties of city judge on the mayor in fifth-class cities, a conviction of perjury cannot be sustained on an affidavit charging that the offense was committed before the judge of the city court in such a city.

[Ed. Note.—For other cases, see Perjury, Cent. Dig. §§ 27-35; Dec. Dig. § 9.*]

3. PERJURY (§ 22*)—ACCUSATION—REQUISITES.

An accusation of perjury must correctly describe the court or tribunal before which it was committed and the officer administering the oath.

[Ed. Note.—For other cases, see Perjury, Cent. Dig. §§ 76-79; Dec. Dig. § 22.*]

4. PERJURY (§ 29*)—PROOF—REQUISITES.

In a perjury trial, description of the court and of the officer administering the oath must be substantially proved as charged.

[Ed. Note.—For other cases, see Perjury, Cent. Dig. § 104; Dec. Dig. § 29.*]

Appeal from Circuit Court, Wabash County; Samuel E. Cook, Judge.

Otto Gross was acquitted of perjury, and the State appeals. Affirmed.

Frank G. Carpenter, James Bingham, A. G. Cavins, E. M. White, and W. H. Thompson, for the State. D. F. Brooks and Watkins & Butler, for appellee.

JORDAN, C. J. This prosecution was originally instituted in the Huntington circuit court on an affidavit purporting to charge appellee with the crime of perjury committed by falsely testifying as a witness upon the trial of a certain cause in the city court of the city of Huntington, Huntington county, Ind. The defendant's plea was not guilty. The case was venued to the Wabash circuit court, wherein it was tried by a jury. At the conclusion of the state's evidence, the court, on the motion of the defendant, directed the

jury to return a verdict in favor of the accused, which the jury did, and thereupon a judgment was rendered discharging him. The state appeals.

The affidavit upon which the case was tried charges: That an action was brought in the city court of the city of Huntington, county of Huntington, state of Indiana, wherein one Eugene Redlinger was defendant, and the state of Indiana was plaintiff, and on the 31st day of January, 1910, said cause came on for trial and hearing before the Honorable Milo Feightner, the duly elected, qualified, and acting judge of said city court of said city of Huntington, county of Huntington, and state of Indiana, sitting as such judge, and that then and there the said Otto Gross appeared and presented himself as a witness, upon the trial and hearing of said cause. That said Gross was duly sworn by said Milo Feightner, the duly elected, qualified, and acting judge of said city court of said city of Huntington, and state of Indiana, said city judge having authority then and there to administer said oath, to said Otto Gross, to give true evidence in said cause. Whereupon the said Otto Gross did then and there, on his oath, as aforesaid taken, feloniously, willfully, etc.

The state at the trial introduced Milo Feightner, who testified that on the 31st day of January, 1910, he was the duly elected and qualified mayor of the city of Huntington, Huntington county, Ind.; that he had been the mayor of that city since the 1st day of January, 1910; that on the 31st day of January, 1910, he sat as judge in the case of the State of Indiana v. Eugene Redlinger on a charge of illegal sale of intoxicating liquors. He testified that he never had been elected city judge of the city of Huntington, and further stated that he acted as judge at the trial of said cause because he was the mayor of the city of Huntington.

The lower court held that the proof established by this evidence was a fatal variance between the allegations or charge as set forth in the affidavit, and directed an acquittal of the defendant on account of such variance. By section 8840, Burns' Ann. Stat. 1908, the same being section 215 of what is commonly known as the "cities and towns statute of 1906," it is declared that: "The judicial power of every city of the first, second, third and fourth classes, shall be vested in a city court. The officers thereof shall be a judge, a clerk, and a bailiff, etc. * * * Such court shall be a court of record, and all its judgments, decrees, orders and proceedings, shall have the same force and effect as those of the circuit court. * * * Provided, that in cities of the fifth class the mayor shall exercise all the powers and be required to perform all the duties herein provided for city judges, in so far as the same are applicable."

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Section 8644, Burns' Ann. St. 1908, provides: "That the elective officers of the cities of this state shall consist of a mayor, a city judge, a city clerk, a city treasurer and councilmen as hereinafter provided. * * * And second, that, in cities of the fifth class, the powers and duties of city judge shall devolve wholly upon the mayor."

[1] We judicially know that the city of Huntington, according to the United States census, has a population of less than 10,000, and therefore, under the classification as made by the cities and towns act of 1905, is a city of the fifth class, and consequently is not authorized to elect or have a judge of a city court. The duties and powers of such judge, as shown by the provisions of the cities and towns act of 1905, to which we have referred, devolve upon and are to be performed by the mayor of that city.

[2] In the affidavit there is no charge or allegation whatever to show that Milo Feightner was the mayor of the city of Huntington at the time of the trial of the cause in which the alleged crime was committed or at the time he administered the oath to defendant. There is no showing in the affidavit that he, as the mayor of the city of Huntington, was acting in the capacity of city judge and exercised the powers of such official in the trial in question. The affidavit described Feightner as the duly elected and qualified judge of the city court of Huntington; but the proof upon the trial does not consist with or satisfy this description. On the contrary, the proof shows that Feightner was not at the time of the trial in question *de jure* or *de facto* judge of the city court of the city of Huntington, for under the law that city neither had nor was entitled to have what is denominated under the statute as a "city judge." The proof shows that Feightner was the mayor of the city and acted under the law as judge in holding the city or mayor's court by reason of the fact that he was mayor of that city.

[3] The rule is well settled that the correct description of the court or tribunal before which the perjury is alleged to have been committed and a correct description of the officer who administered the oath to the accused are material and a matter of substance and must be correctly laid or set out in the affidavit or indictment in the particular case.

The defendant in a perjury case has a right to be correctly informed by the affidavit or indictment in respect to the officer before whom he took the oath alleged to have been false. *Kerr v. People*, 42 Ill. 307.

[4] It follows that a description of the court and of the person administering the oath must at least be substantially proven on the trial as laid or alleged by the state in its pleading. Or, in other words, the proof must substantially satisfy such description as the same is alleged in the indictment or affidavit; otherwise there will be a material or fatal variance between the pleading

and the proof in the case. *Stewart v. State*, 6 Tex. App. 184, and authorities there cited; *State v. Street*, 5 N. C. 156, 3 Am. Dec. 682; 2 Bishop on Criminal Procedure (3d Ed.) § 910; 2 Wharton's Criminal Law (10th Ed.) § 1290; *Guston v. People*, 61 Barb. (N. Y.) 35.

Mr. Bishop, in the section of his work on criminal procedure above cited, states that: "The name of the court or of the official person, before which or whom was the proceeding wherein the perjury is charged to have been committed, * * * is one of the identifying facts; hence it must be alleged, and correctly, as known in law."

In *State v. Street*, *supra*, it was held that in an indictment for perjury the court before which the perjury is alleged to have been committed must be legally set forth. In that case the court was described or styled in the indictment as "a certain superior court begun and holden for the district of Hillsborough"; but in the statute the court was denominated and known as the "courts of pleas and quarter sessions." The variance between the description of the court and the proof in that case was held to be fatal.

In *Stewart v. State*, *supra*, the official character of the person before whom the oath assigned as perjury was taken was described in the indictment as: "T. O. Hynes, then and there being and acting as one of the coroners of said county of Washington and said state, and that said Harrison Stewart was duly sworn before the said T. O. Hynes, coroner as aforesaid, as a witness before said coroner and said jury of inquest." The court in that case said: "Nowhere in the indictment is the officer before whom the oath was taken characterized otherwise than as coroner. Under our law as it now exists, and, indeed, since the adoption of the Constitution of 1869, no such office, separate, distinct, and specific, as that of coroner *eo nomine* has been or is known to our system. * * *

In the present Constitution there is no mention made of such an officer. We find, however, in the General Laws of the Fifteenth Legislature, p. 165, § 28, that 'Justices of the peace shall be commissioned by the Governor to act as justices of the peace in their respective precincts. * * * They shall also discharge all the duties of coroner, except such as devolve upon constables, by section 21 of the Constitution.' * * * The allegation in the indictment, to have been sufficient, should have alleged substantially that T. O. Hynes was a justice of the peace of Washington county, and that, at the time he administered the oath to defendant which is assigned as perjury, he, as said justice of the peace, was acting in the discharge of the duties of a coroner in said county."

Mr. Wharton, in section 1290, *supra*, in dealing with the offense of perjury, says: "The title of the court must be correctly given; and, if a quorum is essential to jurisdiction, it is proper to aver that a due quorum of the judges was present."

In *Guston v. People*, supra, the indictment on which the accused was convicted of perjury was held to be faulty in matters of substance because it charged that the action in which the perjury was charged to have been committed was pending in the Supreme Court of the city of New York, and that the referee who administered the oath was appointed by the Supreme Court of the city and county of New York. The court there said: "There are no such courts known to the law; certainly none so designated, of which judicial notice can be taken, as having jurisdiction of an action for divorce."

By section 9448, Burns' Statutes 1908, in case of the absence of the coroner or his inability to attend an inquest, any justice of the peace of the county is empowered to exercise the power of the coroner by holding an inquest over a dead body, and in so doing the justice is authorized to proceed in all respects as coroner. To illustrate, it may be said that, if the state were to institute a prosecution against a witness who had testified falsely at an inquest holden by a justice of the peace acting as coroner, such justice having also administered the oath to the accused party, certainly, under such circumstances, it would not answer for the state to lay or charge the crime in the indictment as having been committed by the defendant in giving false testimony at an inquest held by the coroner of the county, and that the oath had been administered to the witness by such coroner, for when upon the trial the proof disclosed that the inquest was not held by the coroner, but by a justice of the peace acting as coroner, and which justice also administered the oath upon which the perjury was assigned, necessarily, under such circumstances, a material variance would arise between the proof and the charge as presented by the indictment.

Under the facts in this case, we conclude that, for the reasons herein given, there was a fatal variance between the material allegations in the affidavit and the proof upon the trial. The lower court therefore did not err in directing a verdict in favor of appellee.

It follows that the appeal of the state herein is not sustained.

(175 Ind. 536)

DITTON et al. v. HART. (No. 21,746.)

(Supreme Court of Indiana. May 23, 1911.)

1. PLEADING (§ 8*)—MATTERS OF FACT.

An allegation in the petition of an administratrix to sell real estate for the payment of debts that, whatever might be the liability of a certain trust company which had possession of some of the decedent's personal property, it will not be sufficient to pay the debts, is an allegation of fact, and not a conclusion of law.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 12-23½; Dec. Dig. § 8.]*

2. EXECUTORS AND ADMINISTRATORS (§ 334*)—SALE OF REAL PROPERTY.

Although Burns' Ann. St. 1908, § 2828, gives a creditor one year from notice by the executor or administrator of his appointment, in which to file his claim, yet under section 2852, providing that, whenever an executor or administrator shall discover that the personal estate is insufficient to satisfy the liabilities, he shall without delay file his petition for the sale of real property, an executor or administrator is not compelled to delay the sale of real estate until claims which more than exhaust the personal estate have been filed if such valid claims exist.

[Ed. Note.—For other cases, see Executors and Administrators, Dec. Dig. § 334.]*

3. EXECUTORS AND ADMINISTRATORS (§ 278*)—PAYMENT OF CLAIMS—LIABILITY OF ADMINISTRATOR.

An administrator in paying a claim which has not been filed and allowed acts at his peril.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 1099-1101; Dec. Dig. § 278.]*

4. EXECUTORS AND ADMINISTRATORS (§ 325*)—CONVEYANCES—PERSONAL ESTATE.

If the personal estate of a decedent is sufficient to pay his debts, the real property cannot be resorted to.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 1339-1341; Dec. Dig. § 325.]*

5. EXECUTORS AND ADMINISTRATORS (§ 335*)—CONVEYANCES—PETITION—PARTIES.

A trust company which has possession of certain personal property belonging to decedent's estate is properly made a party in a petition by the administrator to sell the decedent's real estate for the payment of debts.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 1379-1384; Dec. Dig. § 335.]*

6. EXECUTORS AND ADMINISTRATORS (§ 335*)—CONVEYANCES—PETITION—PARTIES—INFANTS.

Where infants were beneficiaries under a will which had been set aside in the circuit court, a petition by the administratrix, afterwards appointed, to sell the decedent's real property for the payment of debts, properly included them as parties defendant; this being a proceeding in rem, and not one to obtain a personal judgment against the infants.

[Ed. Note.—For other cases, see Executors and Administrators, Dec. Dig. § 335.]*

7. APPEAL AND ERROR (§ 1040*)—REVIEW—HARMLESS ERROR.

Error in sustaining a demurrer to one paragraph of an answer which alleged facts provable under the general denial was harmless.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4094; Dec. Dig. § 1040.]*

8. WILLS (§ 369*)—APPEAL—STAY OF PROCEEDINGS FOR SALE OF REAL PROPERTY.

Where a decedent's will was set aside, and an appeal was taken, and the administratrix appointed brought an action to sell real estate for the payment of debts, the trial court properly refused to stay the proceedings until the disposition of the appeal, for it had no authority to prevent the sale of the real estate except upon the execution of a bond by those objecting, as required by Burns' Ann. St. 1908, § 2889.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 835; Dec. Dig. § 369.]*

9. WILLS (§ 369*)—APPEAL—STAY OF PROCEEDINGS FOR SALE OF REAL PROPERTY.

Where a decedent's will was set aside and an appeal was taken, it was proper to refuse such stay of proceedings where the real estate

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes

sought to be sold was not specifically devised, but was disposed of under the residuary clause and would have been the first land disposed of by the executors under the will for the payment of debts which the personal estate was shown to be insufficient to discharge.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 835; Dec. Dig. § 369.*]

**10. EXECUTORS AND ADMINISTRATORS (§ 341*)
—SALE OF REAL PROPERTY—EVIDENCE—SUFFICIENCY.**

In a proceeding by an executrix to sell the real property of her decedent to pay debts, evidence held to support a finding that the personal property was insufficient to discharge the debts.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 1434-1437; Dec. Dig. § 341.*]

Appeal from Circuit Court, Warren County; J. T. Saunderson, Judge.

Action by Abigail H. Hart, as administratrix of the estate of Jane Hawkins, deceased, against Minerva H. Ditton and others, to sell certain real estate for the payment of debts. From an order authorizing the sale of the real estate, defendants appeal. Affirmed.

See, also, 93 N. E. 961.

Kumler & Gaylord and Charles M. Snyder, for appellants. Edwin P. Hammond, Wm. V. Stuart, Dan W. Simms, Allison E. Stuart, Daniel Fraser, and Will Isham, for appellee.

JORDAN, C. J. This appeal is taken from an interlocutory order of the Warren circuit court authorizing upon the petition of the administratrix of Jane Hawkins, deceased, the sale of certain lands for the purpose of making assets for the payment of the debts and liabilities of said estate. The petition to sell was filed in the Benton circuit court on March 29, 1909.

The facts, among others, as disclosed by the petition, are: That the decedent, Jane Hawkins, died on the 24th day of March, 1908, at Benton county, Ind., and that Abigail H. Hart was on February 9, 1909, by the clerk of the Benton circuit court, duly appointed administratrix of her estate, and the proper letters of administration issued to her. This appointment was confirmed by the Benton circuit court on March 22, 1909. Abigail H. Hart duly qualified as such administratrix, and thereupon assumed the discharge of the duties of the trust. The heirs of the decedent, together with the Lafayette Loan & Trust Company, and other persons mentioned and named in the petition, were made parties defendant. The administratrix filed an inventory and appraisement of the real estate described in the complaint showing that these lands were of the value of \$43,925. She also filed an additional bond as required by the statute. The cause was venued to the Warren circuit court, wherein it, upon the issues joined, was tried and determined, and the lands described in the petition of the administratrix were on May 26, 1910, ordered by the

court to be sold at public sale upon the terms and conditions prescribed and fixed in the order, the proceeds arising out of such sale to be used and applied to the payment of the debts and liabilities of said estate.

The petition to sell the real estate in question further alleged that said Jane Hawkins at her death left an instrument in writing purporting to be her last will and testament, which document was admitted to probate in the Benton circuit court on the 2d day of April, 1908; that an action to contest the validity of this will was commenced in the Benton circuit court, but subsequently was venued to the Warren circuit court, wherein by a judgment of said Warren circuit court, duly rendered on the 8th day of February, 1909, the will was set aside and declared to be null and void and the probate thereof revoked; that in the action to contest the will all the heirs of the decedent and all the beneficiaries under the pretended will, together with the Lafayette Loan & Trust Company, which was nominated in said will as the executor, were all parties to that action and appeared therein. A duly certified copy of the judgment of the Warren circuit court setting aside the will and revoking the probate thereof was recorded in the records of wills in the office of the clerk of the Benton circuit court on the 9th day of February, 1909, and on that day, as previously shown, letters of administration upon the estate of said Jane Hawkins were duly issued by the clerk of the Benton circuit court to Abigail H. Hart, who duly qualified, and has since been and is now acting as such administratrix.

The petition further alleged that the decedent, Jane Hawkins, left surviving her as her only heirs at law her daughters, namely, Abigail H. Hart, wife of George H. Hart, Elizabeth H. Bond, wife of John L. Bond, Minerva H. Ditton, wife of William V. Ditton, and Martha J. Jewell, wife of Charles W. Jewell, and her grandson, James Hawkins. It is alleged that at the time of her death "said decedent was the owner, among other lands, of the following described real estate situated in Benton county, Ind." Here the real estate sought to be sold, and which is alleged to be liable to be made assets for the payments of debts and liabilities of said estate, is described and set out. The probable value of this real estate, exclusive of liens thereon, is alleged in the petition to be \$40,000. It is further averred therein that no personal estate of the decedent has come into the possession of said administratrix, but it is alleged that the personal property of the decedent was received by the Lafayette Loan & Trust Company, which was made executor of the pretended will of the decedent, and that company has not yet accounted for the assets of said estate received by it, and that the administratrix is unable to state the amount of such assets for which said Lafay-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

ette Loan & Trust Company is accountable to said estate; that a rule issued on petitioner's petition has been presented in this court against said company requiring it to file its account showing its doings with respect to the said estate and the amounts with which it is chargeable. It is, however, averred in the petition to sell that, "whatever may be the amount of the liability of the Lafayette Loan & Trust Company to said estate, the same will not be sufficient by many thousand dollars to pay the debts of said estate."

It is further alleged that claims have been filed and allowed against the estate amounting to \$38,000; that there is a note for \$4,000 executed by the decedent to the said Lafayette Loan & Trust Company, which has not yet been filed against the estate; that the expenses of administration will probably amount to \$1,000, and the taxes assessed against the property of decedent for the year 1908, and which were a lien against her real estate at the time of her death, are unpaid, and amount to \$1,115.55. It is further averred that on the 12th day of April, 1905, the decedent executed to the Lafayette Loan & Trust Company two bonds, one for the sum of \$20,000 and the other for the sum of \$2,500, payable five years after date, with interest at 5 per cent. per annum, and that she secured the payment of these bonds by executing to that company a mortgage on all of section 6 and all of section 7, except the S. E. $\frac{1}{4}$ of said section 7, all in township 25 N., range 9 W., in Benton county, Ind.; that these bonds so secured by mortgage remain unpaid except as to the interest thereon. This mortgage was duly recorded in the recorder's office of Benton county, Ind., and the Lafayette Loan & Trust Company, the holder of said mortgage and bonds, is made a party defendant to this petition. It is averred that the defendants James H. Ditton, J. Sumner Ditton, Jane Jewell, and Abigail Jewell were beneficiaries and devisees under said pretended will, and were parties defendant in the action in which said will was set aside. The prayer is that upon the hearing of the petition an order be granted by the court empowering the administratrix to sell the real estate specifically described, or so much thereof as may be necessary to discharge the debts and liabilities of the estate.

Three alleged errors are urged by appellants' counsel for reversal of the order: (1) The insufficiency of the petition on demurrer. (2) Sustaining demurrer of appellee to second paragraph of appellants' answer. (3) Refusal of the lower court to stay proceedings on the order. It appears that the adult defendants, as heirs, demurred to the petition, alleging as ground for demurrers insufficiency of facts. Other of the defendants who were minors by their guardian ad litem demurred to the petition on the same ground. The Lafayette Loan & Trust Company also separately demurred to the petition for want

of facts. These demurrers were each overruled and exceptions reserved. All of the defendants then separately answered the petition by an answer in two paragraphs, the first being the general denial. These answers are virtually identical. The second paragraph sets up and alleges substantially the following facts: That the land described in the petition of the administratrix is of the probable value of \$45,000; that at the time of the death of the decedent she was the owner of about 5,000 acres of land situated in Benton county, Ind., of the probable value of \$600,000; that the rental value of this land is about \$25,000 per annum, less the taxes to be paid thereon; that a sum sufficient to pay and satisfy all the debts of the estate can be borrowed by the administratrix at 5 per cent. interest per annum for a period of from three to five years; that such a loan can be carried as a debt against the estate and repaid out of the income of all the lands of which the decedent died seised. It is further alleged that the decedent left a will which after her death was probated in the Benton circuit court; that the decedent's heirs other than the Lafayette Loan & Trust Company were devisees under this will; that, in an action contesting the will, it was by a judgment of the Warren circuit court set aside and held to be null; that the defendants have appealed from this judgment to the Supreme Court of Indiana, wherein said appeal is still pending. The prayer of the paragraph is that the lands be not sold as prayed for in the petition. A demurrer by the administratrix for want of facts to the second paragraph of these answers was sustained.

Appellants' counsel argue that the petition is not sufficient on demurrer because: (1) It does not show the amount of the personal property belonging to the estate. (2) That it does not show the insufficiency of the personal property to pay the claims or liabilities of the estate. (3) It is also contended that the court erred in overruling the demurrers of the Lafayette Loan & Trust Company and of the infant defendants to the complaint. Each of these demurrers, it is insisted, should have been sustained for the additional reasons that neither the Lafayette Loan & Trust Company nor the infant defendants were necessary or proper parties defendant. (4) The contention is also advanced in respect to the sufficiency of the petition that under our statute concerning the settlement of the estate of a decedent it is the claims against an estate which have been actually filed and allowed that are entitled to be considered by the court in determining the sufficiency of the decedent's personal property to pay the debts or liabilities of the estate.

[1] The petition appears to substantially comply with the requirements of section 2854, Burns' 1908, the same being section 113 of the statute, pertaining to the estates of

decedents. It is entitled with the name of the petitioner and the defendants and also the court in which the estate of the decedent is pending for settlement. It contains a description of the real estate which, as averred, was owned by decedent at the time of her death, and which is liable to be converted into assets for the payment of debts and liabilities of the estate, and the probable value of such real estate, exclusive of liens. It is charged that no personal property of this estate has come into the possession of the administratrix because the personal property was received and is still held by the Lafayette Loan & Trust Company, which, as shown, was the executor of the will of Jane Hawkins, the decedent herein, and which is averred to have been set aside, etc.; that the petitioner is unable to state the amount of the personalty held by said company, and for which it is accountable to the estate, for the reason that the company has not yet made its report or showing in respect to the amount of the personal assets of the estate which it received and still holds, but the petition avers "that whatever may be the liability of said Lafayette Loan & Trust Company to said estate the same will not be sufficient by many thousand dollars to pay the debts of said estate." This latter statement is an allegation of fact, and not a conclusion of law as claimed by counsel for appellants.

It further shows that claims have been filed and allowed against the estate in the total amount of \$38,000; and, also, that there is a claim against the estate which has not been filed in the sum of \$4,000 evidenced by a note executed by the decedent to the Lafayette Loan & Trust Company; that the expenses of administration will probably amount to \$1,000, and that the taxes which were a lien upon the real estate at the time of the death of the decedent are unpaid and amount to over \$4,000. It is also shown that certain bonds executed by the decedent to the Lafayette Loan & Trust Company in the sum of \$22,500, secured by mortgage on the lands of the decedent, are outstanding and unpaid, and that said company is made a party defendant to the petition.

[2] The contention of appellants that it is only the claims against the estate which have been actually filed that can be taken into consideration in determining the sufficiency of the personal property of the decedent to pay the liabilities of the estate is untenable. Under section 2828, Burns' 1908, being section 86 of the statute pertaining to the settlement of a decedent's estate, a creditor is allowed a year from the giving of notice by the executor or administrator of his appointment as such to file his claim. While the claim may be filed after the expiration of the year, if the estate remains unsettled, nevertheless it must in such a case, under the provisions of this section, be prosecuted solely at the cost of the claimant, and, if

not filed at least 30 days before the final settlement of the estate, it is barred, except, etc. *Schrichte v. Stites' Estate*, 127 Ind. 472, 26 N. E. 77, 1009. Section 2852, Burns' 1908, provides that, whenever an executor or administrator shall discover that the personal estate of a decedent is insufficient to satisfy the liabilities thereof, he shall, without delay, file his petition, etc., for the sale of the real estate of the deceased to make assets for the payment of such liabilities. This section does not contemplate that the administrator shall postpone filing his petition to sell real estate until claims sufficient to exhaust the personal estate have been filed and allowed. Whenever he discovers, as in this case, by claims which have been filed and allowed and by legitimate claims or liabilities outstanding and unpaid that the personal estate is insufficient for the payment of debts, and that the real estate, if any, which may be liable, must be resorted to for that purpose, it is his duty without delay to take the necessary steps to subject the real estate to the payment of the debts of the estate.

[3] As a general rule, the claims and liabilities against the estate of a decedent should be filed as provided by the statute. To this, however, there are some exceptions, which we need not now point out. In case the administrator pays a claim which has not been filed and allowed as provided, he does so at his peril.

[4] We concede the contention of appellants' counsel that the personal estate of a decedent is primarily liable for the payment of his debts, and, where the personal assets are fully sufficient to satisfy and pay the debts, resort cannot be had to the real estate for that purpose; for the law intends that the real estate of the decedent shall, so far as possible, be preserved for the use of his heirs. *La Plante v. Convery*, 98 Ind. 499. The petition in this case certainly discloses by the facts therein averred that the personal property belonging to the estate is largely deficient to pay the debts and liabilities thereof; and therefore shows the necessity of subjecting for that purpose the real estate set out in the petition, or so much thereof as might be necessary.

[5] The Lafayette Loan & Trust Company is by the petition shown to have property in its possession belonging to the estate, and therefore at least was a proper party defendant to the petition to answer as to its interest therein.

[6] The minor defendants, who were beneficiaries under the will which had been set aside by the judgment of the Warren circuit court, from which an appeal had been prosecuted to the Supreme Court, cannot be said to have been improperly made parties to the proceedings to sell the lands in question. They were made parties as beneficiaries under the will which had been set aside, no doubt as a matter of precaution, in order

that, in the event this will was ultimately upheld, they might be barred by the judgment in this case from asserting any right as beneficiaries thereunder against the purchaser of the land sold under the order of the court herein. A petition to sell real estate by an administrator is a proceeding in rem, and the purpose thereof in this action was not to obtain a personal judgment against either the minor defendants or their codefendants. We conclude that the petition is sufficient and the demurrers thereto were properly overruled.

[7] If it could be said that the second paragraph of the answer stated facts which in any manner could constitute a defense to the proceeding, the overruling of the demurrer thereto was harmless, for the reason that the facts therein alleged, if admissible for any purpose, could be proven under the general denial, which constituted the first paragraph of the answers. *Jeffersonville Water Supply Co. v. Riter*, 146 Ind. 521, 45 N. E. 897; *Stark v. Lamb*, 187 Ind. 642, 78 N. E. 668, 79 N. E. 895; *Cheney v. Unroe*, 166 Ind. 550, 77 N. E. 1041, 117 Am. Rep. 391.

[8] At the close of the evidence given in support of the petition herein, appellants showed that the appeal from the judgment of the Warren circuit court setting aside the will of Jane Hawkins, the deceased, was pending undetermined in the Supreme Court, and thereupon they moved the court to stay the proceedings in the case at bar until there was a decision in that appeal. This motion the court denied. Of this ruling appellants complain. The motion in question was properly overruled, as the lower court was not authorized to prevent the sale of the real estate except as provided by section 2889, Burns' 1908, upon the execution of a bond by the appellants as required by that section. A compliance with this section is the only manner in which the granting of an order for the sale of real estate to pay the debts or claims of a decedent's estate can be prevented. *Davis v. Kendall*, 161 Ind. 412, 68 N. E. 894.

[9] Again, upon another view, appellants under the facts in this case have no legitimate reason for postponing or preventing the sale of these lands until a final decision is had in the action contesting the will of Mrs. Hawkins, for, as disclosed by the record, the only provision made by her in her will for the payment of debts was that they were directed to be paid out of her personal property other than her household goods. Under her will she disposed of all her real estate and the lands ordered to be sold in the case at bar were not specifically devised therein, but were passed into and belonged to the residuary clause, and were disposed of thereunder. Consequently, if the validity of the will should be ultimately upheld, it would be these same lands which her executor would be required to first subject to

the payment of debts of the estate before resorting to real estate specifically devised by the will. Hence certainly appellants cannot be harmed by the sale of the land by the administratrix herein, instead of a sale in the future by the executor of the will in the event the validity of that instrument is sustained.

[10] The evidence in this case fully supports the petition, and authorizes the order of sale of the real estate described therein. It shows that the inventory of the personal estate of the deceased outside of the disputed claim against the appellant, the Lafayette Loan & Trust Company, amounted to \$3,540.42; that all the cash received by the administratrix amounted to less than \$2,000; and that all of this amount except \$50 has been expended. It is shown that the administratrix had been compelled to borrow over \$2,000 to pay the taxes on the lands of her decedent; that all of the personal property of the estate has been used in paying the debts thereof, except about \$1,100, which is uncollected, and also the unsettled and disputed claim of about \$2,000 against the Lafayette Loan & Trust Company. It is shown that claims have been filed against the estate aggregating from \$40,000 to \$50,000, including the claim of the Lafayette Loan & Trust Company, which was not filed when the action was commenced, but was filed before the trial of the cause.

The court finds under the evidence that it will be necessary to sell all of the real estate described in the petition to make assets to pay the debts and liabilities of the estate. No evidence was introduced by appellants on the hearing of the cause in the lower court to meet or disprove any of the evidence introduced by the administratrix. It is fully established, we think, by the evidence that, after all of the personal estate of the decedent is exhausted, it will require all of the proceeds derived from the sale of the real estate ordered sold in this action to pay the valid debts and liabilities of the estate.

We have examined all of the questions presented, and find no error in the record. The order of the court is therefore affirmed.

(175 Ind. 621)

RISCH et al. v. BURCH. (No. 21,757.)
(Supreme Court of Indiana. May 23, 1911.)

1. QUIETING TITLE (§ 32*)—ANCILLARY RELIEF—TRESPASS TO LAND.

Ancillary injunctive relief may be granted to prevent a trespass to land in aid of a plaintiff in possession in an action to quiet title, where the object of the trespass is to remove a part of the substance of the inheritance.

[Ed. Note.—For other cases, see Quieting Title, Cent. Dig. § 63; Dec. Dig. § 32.*]

2. QUIETING TITLE (§ 34*)—COMPLAINT—INCIDENTAL RELIEF.

A complaint in an action to quiet title charging that defendants had unlawfully en-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

tered upon the land of plaintiff with a drilling rig, and had placed same in position for the purpose of drilling an oil and gas well on the land, and were intending and threatening to drill the well and would do so unless restrained, necessarily includes the purpose on the part of the defendants to remove from the depths of the land any oil and gas which might be discovered.

[Ed. Note.—For other cases, see Quieting Title, Dec. Dig. § 34.*]

3. APPEAL AND ERROR (§ 193*)—SUFFICIENCY OF COMPLAINT ON APPEAL—INTERLOCUTORY ORDERS GRANTING INJUNCTION.

On appeal from an interlocutory order granting a temporary injunction, the question of the sufficiency of the complaint is not deeply involved, and it will not be subjected to any technical tests when questioned for the first time in the Supreme Court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1226-1240; Dec. Dig. § 193.*]

4. QUIETING TITLE (§ 32*)—APPEAL AND ERROR (§ 954*)—REVIEW—DISCRETION OF COURT—INJUNCTION.

The granting of a temporary injunction to maintain the status quo until the final hearing in an action to quiet title rests in the sound discretion of the trial court, and this discretion will not be interfered with on appeal unless it is made to appear that the court's action was arbitrary or a clear abuse of discretion.

[Ed. Note.—For other cases, see Quieting Title, Cent. Dig. § 68; Dec. Dig. § 32.* Appeal and Error, Cent. Dig. §§ 3818-3821; Dec. Dig. § 954.*]

5. QUIETING TITLE (§ 32*)—INCIDENTAL RELIEF—INJUNCTION.

To authorize injunctive relief pending an action to quiet title, it is not necessary that a case shall be made out that will entitle the plaintiff to relief at all events at the final hearing; but it is enough if the court finds upon the pleadings and the evidence a case which makes the transaction a proper subject for investigation in a court of equity.

[Ed. Note.—For other cases, see Quieting Title, Cent. Dig. § 68; Dec. Dig. § 32.*]

6. MINES AND MINERALS (§ 77*)—LEASES FOR OIL AND GAS WELLS—FORFEITURES.

Oil and gas leases or contracts are in a class by themselves, and the ordinary rule that forfeitures are not favored does not apply with full force to them, if at all, and the provisions for a forfeiture usually found in them are generally held to be for the benefit of the landowner and clearly enforceable by him, where the lessee has done nothing to carry out the purpose of exploration, and has failed to make payments for the right to do so.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. § 204; Dec. Dig. § 77.*]

7. MINES AND MINERALS (§ 83*)—CONSTRUCTION—AGREEMENT TO DIG OIL WELL.

A contract provided that plaintiff, in consideration of \$40 and the covenants contained therein, granted to the defendants all of the oil and gas in and under the described premises, with the exclusive right to enter to drill and produce the same, and to hold the premises for one year and as much longer as gas and oil were found in paying quantities or the rentals paid as provided herein, and, if no well is commenced within 120 days, the grant shall be void unless defendant pays plaintiff at the rate of \$20 each month after such commencement is delayed. Held, that the contract did not create the relation of landlord and tenant, but a mere option to defendant, which

expired by the inaction of defendants at the end of 120 days, and by the payment of \$20 each month thereafter defendants could procure an extension of the option for a month at a time, and that these payments were to be made in advance, and that, upon failure of the defendants to act either by beginning a well or making a payment, plaintiff could declare their rights under the contract at an end.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 212-215; Dec. Dig. § 83.*]

Appeal from Circuit Court, Pike County; John L. Bretz, Judge.

Action by Amos Burch against Henry Risch and others. From an interlocutory order granting a temporary injunction, defendants appeal. Affirmed.

Samuel Emison, Le Roy M. Wade, and Robinson & Stillwell, for appellants. Wilson & Brumfield and Richardson & Taylor, for appellee.

COX, J. This is an appeal from an interlocutory order granting a temporary injunction to appellee restraining appellants from drilling an oil or gas well on the lands of appellee until the final hearing of the cause instituted by him against them to quiet his title to such lands, and for a permanent injunction. The cloud on his title against which appellee is seeking relief grows out of a contract between appellee and appellants for the exploration of appellee's lands for oil and gas by appellants.

The assignments of error deny both the sufficiency of the complaint and the evidence to sustain the action of the trial court in granting the temporary injunction. The complaint, the sufficiency of which is questioned first in this court, contains all of the allegations necessary to make a good short-form complaint to quiet title to real estate, and is admittedly good to secure that relief as against a demurrer for want of facts. To these allegations are added the following: "That said defendants have unlawfully entered upon said land with what is known as drilling rig, or outfit, and placed the same in position thereon for the purpose of drilling an oil and gas well on said land, and are intending and threatening to drill such well thereon and will so drill same, unless restrained from so doing." The conclusion is a prayer for an order restraining defendants pending the hearing, and for a perpetual injunction and the quieting of the plaintiff's title as final relief. The time of the hearing for the temporary injunction was agreed upon and the matter was submitted to the trial judge upon the verified complaint and evidence from both sides.

It appears that the appellee, then the owner and in possession of the real estate in controversy, consisting of 40 acres, in Pike county, on December 15, 1900, entered into a contract with appellants for the exploration of the land for oil and gas. This memorandum

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes

of agreement, as it is designated therein, omitting certain wholly immaterial parts, reads as follows: "That the said party of the first part, for and in the consideration of the sum of forty (\$40.00) dollars in hand paid, the receipt of which is hereby acknowledged, and of the covenants and agreements hereinafter contained, hereby grant and convey to the said party of the second part, all of the oil and gas in and under the following described premises, together with the exclusive right to enter thereon at all times for the purpose of drilling and operating thereon, and of producing therefrom said oil and gas, and to erect and maintain all buildings and structures and to lay and maintain all surface rods and pipes necessary for the production or transportation of oil and gas to, from or upon such premises as may be operated by said second party. Excepting and reserving, however, to the party of the first part the one eighth ($\frac{1}{8}$) part of all oil produced and saved from said premises hereinafter described, to be delivered in pipeline or tank with which second party may connect said wells, namely: [Here follows a description of the premises.] To have and to hold the above-described premises for a period of one year from the date hereof and as much longer as gas and oil is found in paying quantities on said premises or the rentals paid as herein provided for, upon the following conditions: If gas only is found, second party agrees to pay first party two hundred dollars each year for the gas from each well while the same is being marketed off the premises, the first party to have the gas free of cost to heat all stoves and light and jets in dwelling house on said premises during the same time. * * * In case no well is commenced on said premises within 120 days from this date, then this grant shall become null and void unless second party shall thereafter pay the first party at rate of twenty (\$20.00) dollars each month thereafter such commencement is delayed, payment to be made by depositing the amount thereof in First Nat. Bank of Winslow or by check delivered to the first party."

It is conceded that no well was begun within 120 days from the date of the agreement, December 15, 1909, and that nothing was done towards doing so within that time. Thereafter the evidence warrants the statement that on or before May 15, 1910, appellants paid to appellee \$20 on the contract, and on or before June 15th another \$20; that no further payments were made to appellee, and that no deposits were made in the First National Bank of Winslow by appellants for him; that as late as July 18th, appellee, not having received additional payments, went to the Winslow bank and found no money from appellants there for him; that on July 19th, after finding no money in the bank for him, appellee made a tentative agreement with another person for the oil and gas rights in his land on more favorable terms,

and on that day notified appellants that their rights therein were at an end; that the following day appellee closed his tentative agreement with the third party, and received among other more favorable considerations for the oil and gas rights in his land a large cash payment; that appellants, still asserting the existence of their rights under the agreement, sent a check to the Winslow bank for appellee July 19th, and on July 21st they moved a drill rig on the land preliminary to carrying out the expressed intention of drilling a gas and oil well thereon, and this was the first move they had made to carry out their implied agreement to make exploration of appellee's land. This action was begun July 27, 1910,

[1] While it is not contended by counsel for appellants that the complaint is lacking in any essential averment to make it good to quiet title, it is earnestly contended that it does not contain sufficient allegations to authorize the granting of a temporary injunction. That ancillary injunctive relief may be granted to prevent a trespass to land in aid of a plaintiff in possession in an action to protect his possession or to quiet his title, where the objective of the trespass is to remove a part of the substance of the inheritance, cannot be doubted. Such relief has been granted to prevent the removal of trees, coal, valuable ores, asphaltum, stone, and clay. *Thomas v. Oakley*, 18 Ves. Jr. 184; *Bates v. Slade*, 76 Ga. 50; *Leake v. Smith*, 76 Ga. 524; *More v. Massini*, 32 Cal. 590. That such a relief should be granted against a threatened trespass the purpose of which is the removal of oil and gas underlying the surface would seem to be still clearer for obvious reasons based on their peculiar nature.

[2] The charge in the complaint that appellants had unlawfully entered upon the lands of appellee with a drilling rig, and had placed the same in position thereon for the purpose of drilling an oil and gas well on the land, and were intending and threatening to drill the well, and would do so unless restrained, necessarily includes the purpose on the part of the appellants to remove from the depths of the land any oil and gas which might be discovered.

[3-5] On appeal from an interlocutory order granting a temporary injunction, the question of the sufficiency of the complaint is not deeply involved, and it will not be subjected to any technical tests when questioned for the first time in this court. The granting of a temporary injunction to maintain the status quo until the final hearing rests in the sound discretion of the trial court, and this discretion will not be interfered with on appeal unless it is made to appear that the court's action was arbitrary or a clear abuse of the discretion vested in it. The rule is that, to authorize the court to grant such relief, it is not necessary that a case shall be made out that will entitle the

plaintiff to relief at all events at the final hearing. It is enough if the court finds upon the pleadings and the evidence a case which makes the transaction a proper subject for investigation in a court of equity. *Spicer v. Hoop* (1875) 51 Ind. 365; *People's Gas Co. v. Tyner* (1891) 131 Ind. 277, 31 N. E. 59, 16 L. R. A. 443, 31 Am. St. Rep. 433; *Home, etc., Co. v. Globe, etc., Co.* (1896) 146 Ind. 673, 45 N. E. 1108; *Gagnon v. French Lick, etc., Co.* (1904) 163 Ind. 687, 72 N. E. 849, 68 L. R. A. 175; *City of Laporte v. Scott* (1905) 166 Ind. 78, 76 N. E. 878.

Counsel for both appellants and appellee discuss the proper construction of the contract for gas and oil privileges involved in this case as controlling the question of the validity of the order granting the temporary injunction, and it is true that upon that construction the ultimate right of appellee to succeed in his action depends, but it does not necessarily follow that the propriety of granting the temporary injunction depends on appellee's ultimate right to recover. The parties herein are at issue upon a question of legal rights, and it was fairly necessary in justice to both for the court to preserve their rights in statu quo until those rights could be finally determined. It rested in the court's discretion to consider the relative harm and benefit, convenience and inconvenience which might result to the parties from granting or withholding the writ and to determine that appellee would suffer greatest injury and inconvenience from the court's inaction. High on Injunctions (4th Ed.) § 13. It cannot be said that the facts involved would not have sustained the court's action even without a construction of the contract favorable to appellee.

But counsel on both sides treat the construction of the contract as involved, it being contended on the part of the appellants that the monthly payments of \$20 were to be considered rent which to save appellants' rights need not necessarily be paid until the end of the year, or, at most, at the end of each month; while for appellee the contention is that under the authority of *Dill v. Frazee* (1907) 169 Ind. 53, 79 N. E. 971, these payments must be held to be payable in advance, and, as there was a failure to pay, it was the right of the appellee, appellants not having taken any steps to drill a well, to declare a forfeiture. To save further contention we decide the question. We think the contention of appellee must prevail.

[8] Oil and gas leases or contracts are in a class by themselves, and the ordinary rule that forfeitures are not favored does not apply with full force to them if at all. The provisions for a forfeiture usually found in them are generally held to be for the benefit of the landowner and clearly enforceable by him where the lessee has done nothing to carry out the purpose of exploration, and has failed to make payments for the right to do so. In *Ohio Oil Co. v. Detamore* (1905) 165

Ind. 243-249, 73 N. E. 906, in speaking of a similar contract, the court said: "In this, as in other contracts of its class, the manifest purpose of the parties was exploration, and the mining of oil and gas. But here, to say the most of it, the grant is inchoate, and not absolute. It purports upon its face to grant all the oil and gas under the land, but in effect provides that, in consideration of \$120, the grantee shall have six months in which to decide whether it will accept the grant by entering into possession and beginning the work of exploration. Viewed from end to end, the contract amounts to nothing more or less than a six-month option, whereby the grantor bound himself not to lease the premises to another, and to give the grantee that length of time to consider and determine whether it would undertake the development of the land upon the terms named. If the grantee had decided in the affirmative, and had entered upon the land, and proceeded with the execution of the contract, and completed a well within the option period, then acceptance would have been complete, and the grant effective." In *Dill v. Frazee*, supra, a suit to cancel a gas lease, it was said: "The agreement contains an express provision for a forfeiture if a well is not completed within 60 days, unless the second party thereafter pays at the rate of \$40 per year for each year such completion is delayed. The unit of payment was \$40, and the question arises whether such payment was to be made in advance. While the ordinary rule governing rentals is that payment in advance is not required, unless so stipulated in the contract, yet, as the endeavor of the courts in the enforcement of agreements is to effectuate the intent of the makers, we are of opinion that in the circumstances of this case it should be held that it was the purpose of the parties that payment should be made in advance. * * *

The contract before us distinctly contemplates that a forfeiture should result at the end of sixty days (a well not being then completed), unless the operator should pay the consideration for delay. This plainly required him to become an actor if he would save his rights. In such a case the owner has the privilege of declaring the lease forfeited at the end of said time, except as the other party pays the sum stipulated for the delay." It is further held in *Ohio Oil Co. v. Detamore*, supra, that the failure of the lessee to make payments provided to extend the time for drilling similar to the monthly payments of \$20 each provided in the contract in suit for that purpose brought the option to an end.

[7] The contract in the case before us contains no express covenant on the part of appellants to be performed by them prior to such time as they might discover oil or gas. They do not expressly agree to drill a well, nor do they promise to pay the designated \$20 per month in advance or at any time:

And, taking into consideration the situation of the parties and the subject-matter of the contract, we are constrained to hold on the authority of the cases last above cited that the contract in the case under consideration did not create the relation of landlord and tenant, but was a mere option granted to appellants by appellee, for a valid consideration, for the exclusive right to explore his land for oil and gas which by its very terms was to expire by the inaction of appellants at the end of 120 days; that by the payment of \$20 "each month thereafter" appellants could procure the extension of the option for a month at a time; that these payments were to be made in advance; and that, upon the failure of the appellants to act either by beginning a well or making a payment, appellee had the right to declare their rights under the contract at an end.

The 120 days from the date of the contract ended with the 14th day of April, 1910. Two monthly payments of \$20 each were made by appellants, and, treating the monthly payments as being required to be paid in advance, appellants were delinquent in two payments when appellee gave them notice that their rights were forfeited. As said in *Dill v. Frazee*, supra, at page 58: "There is little or no reason for the interference of a court of equity to prevent a forfeiture before operations have begun, where the operator has sinned away his opportunity under the contract. The wandering and vagrant character of oil and gas is recognized by the courts, and contracts pertaining thereto are to be construed with reference to the known characteristics of the business."

The order of the lower court granting the temporary injunction is affirmed.

(175 Ind. 631)

STATE ex rel. CITY OF LA FAYETTE v. DUNCAN, County Treasurer. (No. 21,722.)

(Supreme Court of Indiana. May 23, 1911.)

1. OFFICERS (§ 110*)—PUBLIC OFFICERS—DUTIES—INCREASE—LEGISLATIVE POWER.

In the absence of constitutional restriction, the Legislature may at its pleasure increase or diminish the duties of public officers.

[Ed. Note.—For other cases, see *Officers*, Cent. Dig. §§ 176-179; Dec. Dig. § 110.*]

2. MANDAMUS (§ 73*)—OFFICERS.

Burns' Ann. St. 1908, §§ 9121-9135, relating to suits regarding bonds of public officers, apply when a bond has been filed but has become insufficient, but not where no bond has been filed and hence where a county treasurer failed to file the bond required by Acts 1905, c. 129, § 43 (Burns' Ann. St. 1908, § 8644), as amended by Acts 1909, c. 188, § 1, to secure the performance of his duties as city treasurer, mandamus would lie to compel compliance with the act.

[Ed. Note.—For other cases, see *Mandamus*, Dec. Dig. § 73.*]

Appeal from Superior Court, Tippecanoe County; Henry H. Vinton, Judge.

Mandamus by the State, on the relation of

the City of La Fayette, against F. Lee Duncan, Treasurer of Tippecanoe County. Judgment for respondent, and relator appeals. Reversed, with instructions.

Arthur D. Cunningham, for appellant.
Parks & Parks, for appellee.

MONKS, J. The relator brought this proceeding in May, 1910, against appellee, who was treasurer of Tippecanoe county, and who was acting as city treasurer of the relator as provided in section 1 of the act of 1909 (Acts 1909, pp. 454-458) which amends section 43 of the act of 1905, being section 8644, Burns 1908, to compel him by writ of mandamus to execute an official bond for the faithful performance of his duties as such city treasurer. Appellee's demurrer for want of facts to the alternative writ was sustained by the court, and final judgment was rendered against the relator.

It is agreed by the parties to the appeal that under said Acts of 1909, amending section 43 of the said act of 1905, the county treasurer of Tippecanoe county is required to "perform all the duties of city treasurer" of relator, the city of La Fayette. It is provided in said section of the act of 1909, which amends said section 43 of the act of 1905, that "in cities of the fourth class, where the county treasurer shall act as city treasurer, his salary as such shall be six hundred dollars, which may be increased by ordinance to any sum not exceeding one thousand dollars (\$1,000.00) per annum. * * * In addition to such salary the county treasurer shall receive four per cent. of the amount of all delinquent taxes collected by him for such city."

It is provided in section 44 of the said act of 1905, being section 8645, Burns 1908, that "every city officer of any city, except the mayor and the members of the common council, shall likewise execute a bond, to the approval of the mayor, payable to such city, in such penal sum as the common council of such city may enact by ordinance covering such cases, conditioned for the faithful performance of the duties of his office and for the payment to the proper person of moneys received by him as such officer; provided, that, in no case shall the bond of the treasurer, or county treasurer performing the duties of treasurer, be fixed in a less sum than one-half of the estimated amount of all taxes, including delinquent, to be levied for municipal purposes and collected in such city for the current year."

[4] It is settled that in the absence of constitutional restriction the Legislature may at its pleasure increase or diminish the duties of public officers. *Gilbert v. Board*, etc., 8 Blackf. 81; *Turpen v. Board*, etc., 7 Ind. 172, 173; *Walker v. Dunham*, 17 Ind. 483, 485; *Yeager v. Board*, etc., 95 Ind. 427, 430,

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

and cases cited; *Bynum v. Board, etc.*, 100 Ind. 90, 91; *Sudbury v. Board, etc.*, 157 Ind. 448, 456.† As was said in *Yeager v. Board, etc.*, supra, 95 Ind. 430: "The person who accepts and assumes to act in the office takes it cum onere, not only of existing duties, but subject to such as may thereafter be legally imposed and subject to such rights and liabilities as to compensation as the Legislature has or may declare. If the Legislature imposes burdensome or unremunerative duties, he must perform as required or resign the office." Said act of 1909 did not abolish the office of city treasurer, but the county treasurer of Tippecanoe by said act was required to act as the city treasurer of said city and perform the duties of that office. It is evident that county treasurers who are required by said section to act as city treasurers must give bond to the approval of the mayor, payable to the city in such sum as may be fixed by ordinance conditioned for the faithful performance of the duties of the office of city treasurer. It is not necessary therefore to determine whether or not appellee is liable on the bond he gave to secure the performance of his duties as county treasurer, for any failure to perform the duties of city treasurer of the city of La Fayette.

It appears from the alternative writ among other things that the common council of the city of La Fayette, the relator, had by ordinance fixed the penalty of the bond of the county treasurer performing the duties of city treasurer at the sum of \$100,000, that at the time this proceeding was brought appellee was treasurer of Tippecanoe county and was by virtue of such office acting as city treasurer of the city of La Fayette, the relator, and that he had been acting as the treasurer of said county and as city treasurer of said city since the 1st day of January, 1910; that he had failed and refused upon demand to execute the bond required by statute of a county treasurer performing the duties of city treasurer.

[2] Appellee insists that relief by mandamus can only be had where there is no other adequate remedy, and that as sections 9121-9135, Burns 1908, provide an adequate remedy, mandamus will not lie. Said sections apply when a bond has been filed, but has become insufficient for reasons mentioned therein, but they do not apply where, as in this case, no bond has been filed.

Under said act of 1905 as amended by said act of 1909 the treasurer of Tippecanoe county was the only person authorized to act as the city treasurer of relator. It was the duty of appellee, the treasurer of said county, to perform the duties of city treasurer of the relator, and as we have held to execute a bond to the approval of the mayor of said city, conditioned for the faithful performance of the duties of that office. Appel-

lee was acting as such city treasurer, but refused to give a bond as such. As he held the office of county treasurer it was his legal duty to give a bond conditioned for the faithful performance of the duties of treasurer of said city. It is clear that the relator's only adequate remedy to compel the execution of the bond was mandamus.

It follows that the court erred in sustaining appellee's demurrer to the alternative writ.

Judgment reversed, with instructions to overrule appellee's demurrer and for further proceedings not inconsistent with this opinion.

(47 Ind. App. 670)

SKINNER v. SKINNER. (No. 6,989.)

(Appellate Court of Indiana, Division No. 1.
May 23, 1911.)

1. DIVORCE (§ 108*)—PLEADING—DEFENSE—CONDONATION.
Condonation is a defense which must be specially pleaded.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 349-352; Dec. Dig. § 108.*]

2. DIVORCE (§ 51*)—CONDEMNATION—CONDUCT AFTER CONDONATION.

Condonation rests always upon the condition that the misconduct or injury will not be repeated, and the conduct of the defendant after condonation will entitle the plaintiff to consideration of the evidence of former cruel treatment.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 185-187; Dec. Dig. § 51.*]

3. DIVORCE (§ 240*)—ALIMONY—EXCESSIVE ALIMONY.

Where the proof showed that defendant was worth over \$4,000, and that at the time of the separation defendant had nothing, that he had permitted plaintiff to take what real estate they owned, worth \$400 or \$500, in her own name, and she had contributed largely to the purchase money of the same out of her earnings, and the proof showed that defendant relieved himself of the burden of taking care of their children at home, one of whom was their daughter, only seven years of age when he left, and during the 28 years he was away he contributed little to the support of wife and child, and during the time he was accumulating the \$4,000 plaintiff was weaving carpet and working in the garden and field, and such other work as she could find to earn a living for herself and their child, \$800 awarded as alimony was not excessive.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 675-678; Dec. Dig. § 240.*]

Appeal from Circuit Court, Jay County; J. F. La Follette, Judge.

Action by Rebecca Skinner against Robert Skinner. Judgment for plaintiff, granting a divorce and alimony, and defendant appeals. Affirmed.

Smith & Moran, for appellant. Emerson McGriff, for appellee.

HOTTEL, J. This was a suit for divorce. Trial, finding, and judgment for appellee, granting the divorce and alimony in the sum of \$800.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes
† 62 N. E. 45.

The questions relied upon and presented by the appeal are the sufficiency of the complaint and the ruling of the court on the motion for new trial. The complaint is attacked here for the first time, and is objected to on the ground that it attempts to charge abandonment, and that its allegations, in this regard, are not sufficient to constitute such charge. The answer to this objection is that the complaint sufficiently charges cruel and inhuman treatment and failure to provide, and is therefore sufficient.

One of the grounds of the motion for new trial insisted upon by appellant is that the decision of the court is not sustained by sufficient evidence. Counsel's contention being, in effect, that both the complaint and the evidence fail to show that the separation was without the consent of appellee. If the decision rested upon this ground of divorce alone, there would be merit in appellee's contention; but there was proof upon the other charges in the complaint above specified.

Appellee herself testified, among other things, that upon one occasion the appellant beat her head against the door, making a knot which she claims to yet carry; that on another occasion he left her and her infant child, 18 hours old, when the weather was extremely cold, without any fire or any one to look after her, and that her sister came and found her hair frozen to the bed-clothing; that he left and abandoned her and their children in 1878, and went to Kansas; that since that time he has not written or spoken to her, and contributed practically nothing to the support of herself and children.

Appellant, in effect, denies and gives a different version of the matters testified to by appellee, except the leaving and going West, which he admits; but, as excuse and justification therefor, details certain conduct of appellee. Appellant insists that a divorce cannot be granted upon the acts of cruel treatment testified to by appellee, for the reason that the evidence shows condonation of such acts.

[1] Counsel are in error in this contention for two reasons, viz.: (1) Condonation is a defense which must be specially pleaded, and no such answer was filed in this case. *Lewis v. Lewis*, 9 Ind. 105; *Sullivan v. Sullivan*, 34 Ind. 308; *Breedlove v. Breedlove*, 27 Ind. App. 560, 61 N. E. 797.

[2] (2) Condonation rests always upon the condition that "the misconduct or injury will not be repeated, and that the offending party will thereafter treat the other with conjugal kindness." *Wolverton v. Wolverton*, 163 Ind. 26, 34, 71 N. E. 123; *Rose v. Rose*, 87 Ind. 481; *Armstrong v. Armstrong*, 27 Ind. 186; *Sullivan v. Sullivan*, supra, at page 369, 34 Ind. Under the authorities, supra, the evidence of condonation, if any, should

not be considered; and, even if considered, the conduct of appellant, after the condonation, would entitle appellee to consideration of the evidence of former cruel treatment. And with this evidence considered the decision of the lower court was sustained by sufficient evidence, and was not contrary thereto.

[3] Another ground of appellant's motion for new trial, presented and urged in his counsel's brief, is that the judgment for alimony is excessive. The proof shows that appellant, at the time of the trial, was worth something over \$4,000. The proof further shows that, at the time of the separation, appellant had nothing; that he had permitted appellee to take what real estate they owned, worth \$400 or \$500, in her own name, but, under appellee's evidence, she contributed largely to the purchase money that paid for the same out of her earnings made by weaving carpet, and other hard labor. The proof also shows that appellant relieved himself of the burden of taking care of their children at home, one of whom was a daughter only seven years of age when he left. Under his own evidence, during the 28 years that he was away, he contributed but little to the support of his wife or child. During the period that he was accumulating the \$4,000 which he had at the time of the trial, the wife was weaving carpet and working in the garden and field, and at such other work as she could find to earn a living for herself and their child. Under such proof, appellant has no ground for complaint of the amount he must pay by way of alimony. There is no error in the record.

Judgment affirmed.

(47 Ind. A. 672)

WRIGHT v. CHICAGO, I. & L. RY. CO.
(No. 6,992.)

(Appellate Court of Indiana. May 23, 1911.)

1. TRIAL (§ 139*)—SUBMISSION OF CASE TO JURY—WHEN AUTHORIZED.

A plaintiff is entitled to have the case submitted to the jury, unless, after considering all the evidence and resolving all doubts and inferences legitimately drawn therefrom in his favor, it can be said that there is no evidence to establish one or more facts essential to a cause of action, in which case a directed verdict is proper.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 332, 333, 338-341; Dec. Dig. § 139.*]

2. TRIAL (§ 139*)—DIRECTION OF VERDICT—WHEN AUTHORIZED.

Where there is any evidence, however conflicting, proving the material allegations of the complaint, it is error to direct a verdict for defendant.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 332, 333, 338-341; Dec. Dig. § 139.*]

3. MASTER AND SERVANT (§ 264*)—DEATH OF SERVANT—ACTIONS—ISSUES AND PROOF.

One suing for the negligent death of a servant, occasioned while in the performance of his duties, must allege and prove the existence of

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes
95 N.E.—9

a duty of the master to protect decedent from the injury causing death, that he failed to perform that duty, and that the failure resulted in decedent's injury and death.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 264.*]

4. MASTER AND SERVANT (§ 155*)—OBLIGATION OF MASTER—DUTY TO WARN.

A master need not warn an experienced servant of open and obvious dangers, but he must not expose the servant to dangers not reasonably and fairly incident to and within the ordinary risks of the employment.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 310; Dec. Dig. § 155.*]

5. MASTER AND SERVANT (§ 278*)—INJURY TO SERVANT—NEGLIGENCE—EVIDENCE.

In an action for the death of a switchman caught between the bumper of a standing car and a car pushed by a switch engine against the standing car for the purpose of being coupled thereto, evidence held not to show actionable negligence, based on the failure of the engineer and foreman to warn decedent.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 278.*]

Appeal from Superior Court, Tippecanoe County; Henry H. Vinton, Judge.

Action by Martha Wright, administratrix of Perry M. Wright, deceased, against the Chicago, Indianapolis & Louisville Railway Company. From a judgment for defendant, plaintiff appeals. Affirmed.

Charles E. Thompson and Wilson & Quinn, for appellant. John F. McHugh, E. C. Field, and H. R. Kurrie, for appellee.

MYERS, J. Appellant brought this action against appellee to recover damages, on account of the alleged negligent killing of her decedent, Perry M. Wright. Issues were formed and submitted to a jury for trial. At the close of appellant's evidence, on motion of appellee, the court, over appellant's objection, instructed the jury to return a verdict in its favor. Appellant's motion for a new trial was overruled, and judgment rendered in accordance with the jury's verdict. The sustaining of appellee's motion to peremptorily instruct the jury, and the overruling of appellant's motion for a new trial, are each assigned as error. The only question for decision relates to the giving of said instruction.

The complaint is in two paragraphs. In the first it is shown, in substance, that appellee, at the city of La Fayette, maintained a switchyard, composed of 10 switch tracks, all connected at the south end by a lead track; that the decedent, at the time of his death, was a member of a certain switching crew, and under his employment with appellee his work consisted in coupling and uncoupling cars in said switchyard, under the direction of the yard foreman, who was a member of the same crew; that at the time and immediately before the accident the decedent was assisting in making up a certain train on track No. 1, by uncoupling cars on the various switch tracks and coupling them

up again on track No. 1. At the direction of said foreman, the decedent uncoupled a cut of five or six cars from a number then standing on track No. 3, and immediately returned to the south end of the cars standing on track No. 1, and began to examine the coupling pin, drawbar, knuckle, and coupling device on the south car, to see if the same was in good condition for service, as was his duty to do under his employment; that while so engaged in this work requiring his whole attention, and requiring him to occupy a position with his back to the south, the engineer in charge of the switch engine hitched onto said cut of five or six cars, moving them south along the lead track, past the south end of track No. 1. Then, in obedience to a signal given by said yard foreman, the head brakeman opened the switch leading onto track No. 1, and thereupon said cut of cars and engine were switched over onto said track, and said engineer, in obedience to a signal from said foreman to proceed with the cars, then ran them at a high and dangerous rate of speed toward and against the standing cars; that the engineer and said foreman knew at the time said cut of cars was being pushed along said track No. 1 that it was a part of decedent's work to examine and inspect the couplers and other mechanical devices composing the same, before coupling them together, and that the decedent was at the time engaged in this work, which required him to be on track No. 1, and between the rails. The foreman at the time of giving said signal, as well as the engineer, were on the east side of track No. 1, which track was straight and unobstructed, and the engineer could by looking have seen up and along the track to a point far beyond the place occupied by decedent, but, after said cut of cars was switched over onto track No. 1, the decedent could not be seen by said engineer, although said engineer could see along the side of said track far beyond the place where the decedent was killed, and could and did see that decedent was not in sight at the time he was running the cars along track No. 1; that all of said cars were equipped with automatic couplers, which, when properly adjusted and arranged for that purpose, and when the cars were of equal height, would couple by impact.

The acts of negligence charged are: (1) That the engineer, knowing that the decedent was between the rails, and at the south end of the standing cars, negligently and carelessly pushed the cut of cars taken from track No. 3 toward and against the decedent at a high and dangerous rate of speed, to wit, more than seven miles an hour. (2) That said engineer, knowing that said decedent was between the rails of track No. 1, and engaged in the performance of his duties, carelessly and negligently shoved said cut of cars up and against said stationary cars, without receiving a signal from decedent so to do. (3)

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes

That the yard foreman, knowing of the decedent's position on the track, and the dangerous rate of speed at which the cars were approaching the decedent, carelessly and negligently failed and neglected to signal the engineer to stop or slacken the speed of said cars and engine. (4) That the yard foreman, knowing the decedent's dangerous position on the track, carelessly and negligently and without any signals from the decedent signaled the engineer to run the cars attached to said engine against the standing cars, thereby killing the decedent. (5) That the yard foreman, knowing the high and dangerous rate of speed at which the cars were approaching the decedent, and knowing the dangerous position of the decedent in the performance of his duties, carelessly and negligently failed to give him any warning of the approaching cars. The second paragraph is the same as the first, except the engineer only is charged with negligence.

From the briefs filed in this case, it would seem that the court gave the instruction of which complaint is made upon the theory that the evidence failed to show any negligence on the part of the remaining members of the train crew which proximately contributed to the accident.

[1] The plaintiff was entitled to have the judgment of the jury, unless, after considering all of the evidence and resolving all doubts and inferences to be legitimately drawn therefrom in her favor, it can be said that there is no evidence to establish one or more facts essential to her cause of action; then the instruction was correct. *Gregory v. Cleveland, etc., R. Co.*, 112 Ind. 385, 14 N. E. 228; *Davis v. Mercer Lumber Co.*, 164 Ind. 413, 73 N. E. 899; *Pittsburg, etc., R. Co. v. Cozatt*, 39 Ind. App. 682, 79 N. E. 534; *Baltimore, etc., R. Co. v. Spaulding*, 21 Ind. App. 323, 52 N. E. 410; *Cooper v. Merchants', etc., Bank*, 25 Ind. App. 341, 349, 57 N. E. 569.

[2] We are not unmindful of the rule that it is not a question as to the weight of the evidence; for if there was any evidence, however conflicting, tending to prove the material allegations of her complaint, it would be error to direct a verdict. *Messick v. Midland Ry. Co.*, 128 Ind. 81, 27 N. E. 419; *Green v. Eden*, 24 Ind. App. 583, 56 N. E. 240.

[3] But this case is no exception to the rule requiring the plaintiff to allege and prove, not only the existence of a duty on the part of the defendant to protect the decedent from the particular injury causing his death, but that it failed to perform that duty, and that such failure resulted in his injury and death. For not until there is some evidence before the jury tending to prove each one of these facts can it be said that actionable negligence has been established. *Faris v. Hoberg*, 134 Ind. 269, 33 N. E. 1028, 39 Am. St. Rep. 261; *United States Cement Co. v. Koch*, 42 Ind. App. 251, 85 N. E. 490; *City of La Fayette v. West*, 43 Ind. App. 325, 87 N. E. 550; *Town of Boswell v. Wakley*, 149 Ind. 64, 48 N. E.

637; *Indiana, etc., Coal Co. v. Neal*, 166 Ind. 458, 77 N. E. 850; *Chicago, etc., R. Co. v. Lain*, 170 Ind. 84, 83 N. E. 632.

We have carefully read and considered all of the evidence as it appears in the record, and find that it is practically without any conflict. A general statement of the case as taken from the evidence shows that on September 5, 1905, at about 10 o'clock in the morning, on a clear day, the appellant's decedent was caught between the bumper on a standing car and one of a cut of cars, pushed by a switch engine up against the standing car for the purpose of being coupled thereto, and killed. At the time of the accident, the decedent was in the employment of appellee, and a member of one of its switching crews at work in its switchyard in La Fayette. This switchyard was composed of 10 parallel switch tracks, running north and south, all connected on the south by a lead track running northeast and southwest. The switch tracks were numbered from 1 on the west to 10 on the east. No. 1 is the track upon which trains are made up, and holds 60 to 70 cars of an average length of about 36 feet. The switching crew consisted of a yard foreman, who was in charge of the work, an engineer, a fireman, a head brakeman, who remained with the switch engine, and the decedent, who was the field man. The yard foreman gave orders and directed the other members of the crew as to the particular work they were to do. The switchyard was in charge of a general yardmaster, who furnished the yard foreman with the list of cars which were to compose the train being made up on track No. 1. This track at the center is higher than the other tracks, and slopes gradually to the north and south, until it reaches a level with the other tracks. The work of decedent was to couple and uncouple cars. The switch engine was in charge of the engineer.

After several cars had been placed upon track No. 1 and coupled up by the decedent, the crew proceeded to track No. 3, where a cut of six cars was detached by the decedent from a number of others standing on that track. The cars so detached and by the head brakeman coupled onto the switch engine were pulled to the lead track, and down to the south end of track No. 1 and switched onto that track; then, at the signal of the foreman and head brakeman, pushed north on track No. 1, until they came in contact with a cut of four cars. Then all were pushed north, until they struck standing cars, which were a part of the train. The head brakeman while moving the cars rode on the footboard in front of the engine, and when the cars collided the second time he uncoupled the engine, and it moved south down track No. 1 to the lead track. The cut of cars failed to couple with the made-up part of the train, and as the engine moved away they started south, when the foreman climbed upon the south end and set the brakes, stopping them at a point about 60 feet from

the standing cars. The foreman then went to the lead track, and with the engine to track No. 5, where they were to get additional cars to complete the train. The yard-master about this time discovered that Wright had been killed, and notified the rest of the crew. When the cut of cars was taken from track No. 3, Wright was present, and about the time they started north on track No. 1 he proceeded south, and around the cars standing on track No. 2, to track No. 1, and then north between tracks 1 and 2 to the point where these cars came in contact with the cut of four cars and the first coupling was to be made. The last time the engineer saw the decedent alive was when he went between the cars to make one of the two couplings.

There was no evidence that the foreman or the engineer knew that Wright was in a dangerous position between the cars where he was killed. There was no evidence that the foreman or the engineer knew, or by the exercise of reasonable care should have known, that Wright was between the bumpers, or in a dangerous position with respect to the moving cars at the time he was killed. No one saw him there. It is in evidence that the decedent went north with the moving cut of cars for the purpose of coupling them to the cars standing on the track, and that he was killed at the point where the second coupling was to be made. There is no evidence that the bumper or coupler on the car where the accident happened was in any manner out of order. There was no evidence from which it can be said that either the foreman or the engineer, by the exercise of reasonable care, should have known or expected the decedent to be on the track at the time the cars collided the last time. There was no evidence of any noise from other engines or cars moving in that vicinity at the time of the accident. There was no evidence that the foreman was in a position to warn the decedent of the danger, and thereby have prevented the accident. The evidence would not warrant the inference that the cars which caused the accident were run at a greater rate of speed than usual or customary in making up trains. There was no evidence showing that the foreman or the engineer were not where they should have been in the performance of their work at the time of and before the accident happened, nor was there any evidence tending to show that the train was not being made up in the usual and customary way of making up trains in that yard. The decedent was an experienced brakeman. He knew that the cars on track No. 1 were being moved to the north, and for what purpose. He was engaged at his regular employment—that of coupling the cars as they were pushed together. There is no claim that he did not fully understand and

realize the hazards of the work in which he was engaged, or that the danger was not open and obvious.

[4] It is not the duty of the master to follow an experienced servant through the various details of the work he is employed to perform, and warn him of open and obvious dangers. *Stalder v. City of Huntington*, 153 Ind. 354, 368, 55 N. E. 88; *United States Cement Co. v. Koch*, supra, 42 Ind. App. 261, 85 N. E. 490. But the master does engage that he will not expose his servant to dangers not reasonably and fairly incident to and within the ordinary risks of the servant's employment. *Jenney Electric L. & P. Co. v. Murphy*, 115 Ind. 506, 18 N. E. 30; *Guedelhof v. Ernsting*, 23 Ind. App. 188, 55 N. E. 113. Consequently in the case at bar, if there was any evidence from which it could be inferred that the engineer or the foreman knew, or by ordinary care should have known, that Wright was in the position, and engaged as alleged in the complaint, then appellee owed him the duty of stopping the cars before they reached him, or to have warned him of the danger in time for him to have made good his escape, and if, from a neglect of that duty, injury happened, appellee would be liable.

[5] After a careful consideration of this record, we must conclude that neither the engineer nor the foreman were in any manner to blame for decedent's death. They were certainly unaware that the deceased was exposed to any danger, or that the continued moving of the cars north would probably result in any accident or injury to the decedent. The evidence fails to establish actionable negligence on the part of the appellee. For that reason the court did not commit error in directing a verdict.

Judgment affirmed.

(43 Ind. App. 511)

WALLACE v. COONS. (No. 7,250.)¹

(Appellate Court of Indiana, Division No. 2
May 23, 1911.)

1. APPEAL AND ERROR (§ 598*)—TRANSCRIPT—CONTENTS.

Under Burns' Ann. St. 1908, § 691, relating to transcripts on appeal, all papers and entries must be copied into the transcript, and any original paper or entry made a part of it will not be considered, except that, under sections 657 and 667, an original bill of exceptions may be included.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2639-2644; Dec. Dig. § 598.*]

2. APPEAL AND ERROR (§ 607*)—TRANSCRIPTS—PRÆCIPE—SUFFICIENCY.

A transcript incorporating the original bill of exceptions containing the evidence is properly presented on a præcipe directing the clerk to include "the evidence given in the cause."

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 607.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes
1 Rehearing denied.

3. SALES (§ 377*)—CONTRACT TO BUY LIVE STOCK—BREACH—DAMAGES—PLEADING.

A complaint for breach of contract to purchase hogs at a live stock market was not insufficient as failing to show that they were sold at the market price, where the complaint stated that they were sold at the market at the best obtainable price.

[Ed. Note.—For other cases, see Sales, Dec. Dig. § 377.*]

4. EVIDENCE (§ 20*)—JUDICIAL NOTICE.

Courts take judicial notice of whatever ought to be generally known within their jurisdiction, including the common methods by which business is transacted.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 24; Dec. Dig. § 20.*]

5. SALES (§ 333*)—EXECUTORY CONTRACTS—BREACH BY BUYER—SELLER'S RIGHTS.

On breach of an executory contract to buy, the seller need not notify the buyer of his intention to sell elsewhere.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 919; Dec. Dig. § 333.*]

Appeal from Circuit Court, Johnson County; Wm. E. Deupree, Judge.

Action by Elijah S. Wallace against William H. Coons. Judgment for defendant, and plaintiff appeals. Reversed and remanded, with directions.

Wm. Feathernigill, for appellant. Elba L. Brangin and Thos. Williams, for appellee.

IBACH, J. Action for damages brought by Elijah S. Wallace, appellant, against William H. Coons, appellee, on account of the breach of a written contract for the sale of a car load of hogs. The complaint was in two paragraphs. In brief, the substantial averments of the first are: That on July 6, 1906, appellant and appellee entered into a written contract, a copy of which was filed with and made a part of the complaint, whereby Wallace should thereafter at any time during the last half of August, 1906, upon Coons giving him two days' notice of said time, deliver to Coons at Indianapolis, Ind., a double-deck car load of hogs weighing 200 pounds or better, the total net weight of the car load to be 32,000 pounds, to be weighed at Indianapolis, which Coons agreed to purchase from Wallace, and to pay him for the hogs \$7 per hundred pounds. That after July 6, 1906, Wallace at great labor and expense purchased and collected together the number and kind of hogs described in said contract, and kept them in Putnam and Hendricks counties, Ind., ready to deliver to Coons at any time during the last half of August, 1906, upon notice from Coons. That Coons failed to designate any time or to notify Wallace when he would receive said hogs, and failed to receive or accept them. That on August 31, 1906, Coons having failed to receive or accept the hogs, and to designate any time when he would receive them, Wallace shipped said hogs to the Union Stockyards at Indianapolis, Ind., and sold the same to other persons at a great loss for \$6-

37½ per hundred pounds, the same being the best price he could obtain for said hogs. That Wallace had fully performed all of his part of the obligations of said contract, and, by reason of Coons having failed to accept the hogs during said time at the agreed price, Wallace sold them to other persons at the great loss of \$200, and was damaged in the sum of \$200, which sum Coons has not paid. The second paragraph sets forth practically the same preliminary facts, and avers that Wallace agreed to sell the hogs to Coons, and that he kept the hogs ready to be weighed at Indianapolis and sold to Coons, and that he sold the hogs to other parties at a great loss of \$200.

A demurrer to each paragraph of complaint was overruled, and an answer in general denial filed. The cause was tried without a jury. The court made and filed a special finding of facts, and stated its conclusions of law thereon, to the effect that the appellant take nothing in his action, and that appellee recover costs. Appellant's motion to amend the special findings, motion for leave to amend his complaint, and motion for a new trial were overruled, and judgment was rendered against him for costs.

Appellant insists that his motion for a new trial should have been sustained for the reasons that the decision of the court is not sustained by sufficient evidence, and is contrary to law. Appellee contends that the bill of exceptions is not in the record, and therefore no question raised by the motion for a new trial can be considered. The præcipe for transcript filed by appellant, omitting the title of the cause, is as follows: "The clerk of the Johnson circuit court will prepare and certify a full, true, and complete transcript of all of the papers, orders, evidence, and proceedings, filed and had in the above-entitled cause to be used on appeal to the Appellate Court of Indiana, as follows, to wit." Here follow eleven particulars of which the fifth is: "(5) The evidence given in said cause." The certificate of the clerk as amended, the amendment having been authorized by this court on October 28, 1906, is as follows: "I, Joseph A. Schmith, clerk of the Johnson circuit court within and for said county and state, do hereby certify that the above and foregoing transcript contains full, true, and correct copies of all papers and entries in said cause, required by the above and foregoing præcipe and that said transcript contains the original bill of exceptions, containing the evidence introduced in said cause, as required by said præcipe, and as directed by the plaintiff herein above named." He also certifies to the filing on May 23, 1908, by the stenographer of the longhand transcript of the evidence which is incorporated in the bill of exceptions and made a part of the transcript, and that the regular judge of the court signed the bill and ordered it made a part of the

record, that it was filed in the clerk's office, and is the bill of exceptions contained in the transcript. Appellee earnestly insists that the bill of exceptions is not in the record because no bill of exceptions is mentioned in the præcipe, that the clerk is directed only to certify a transcript of the evidence given in said cause.

[1] It is well understood that, under our Code of Civil Procedure, all papers, entries, and documents must be copied into the transcript on appeal to the Supreme and Appellate Courts, and that no original paper can be incorporated in such transcript, and, if any such original paper, entry, or document is so made a part of the transcript, it will not be considered. Section 691, Burns' St. 1908; *Mankin v. Pennsylvania Co.*, 160 Ind. 447, 451, 452, 67 N. E. 229. The only exception to this rule is that made by sections 657 and 667, Burns' Statutes 1908, in which it is provided that the original bill of exceptions containing the evidence need not be copied into the transcript, but the original may be included in it, and thereby becomes part of it, and this court is required to give the same due consideration.

[2] It will be observed that the præcipe in this case notifies the clerk to prepare a full, true, and complete transcript of all the papers, orders, evidence, and proceedings in the case, and specifically, among other things, to include in the transcript "the evidence given in said cause," and the clerk certifies that the "transcript contains the original bill of exceptions, containing the evidence introduced in said cause, as required by the præcipe and as directed by the plaintiff." The præcipe does not in specific terms direct the clerk to make a copy of the bill of exceptions, but it does direct him to include in the transcript the evidence given in the cause. The certificate is in the form provided for by section 667, Burns' Statutes 1908 (section 7, c. 193, Acts 1903), and complies in all respects to the law prescribing what the clerk's certificate in such instances should contain, and, when this appears, any irregularities in the præcipe will be cured by the certificate of the clerk. The original bill of exceptions containing the evidence is included in the transcript as fully appears from the clerk's certificate, and, since the præcipe directs the clerk to certify a full, true, and complete transcript of the evidence given in the case, and in compliance therewith the original bill of exceptions is incorporated in the transcript, we conclude that the bill of exceptions is properly before us, and that we are authorized to consider the motion for a new trial.

[3] It is assigned as one reason for a new trial that the decision of the court is contrary to law. To determine this question, we must look first to the sufficiency of the complaint. Appellee urges that the first paragraph is bad for failure to allege that the hogs were sold at the market price, and, to

sustain his contention, relies largely on the case of *Ridgley v. Mooney*, 16 Ind. App. 362, 45 N. E. 348, a suit for damages for breach of a contract to purchase a quantity of chestnut bark. The complaint in that case did not allege specifically the time or place of sale of the bark, but "that the plaintiff sold the same within a reasonable time and exercised due diligence, and by good faith tried to realize the best price he could for the bark, and did realize the best attainable price therefor at said time." It was correctly held insufficient because it contained no allegation that the price obtained for the bark was the market value at the time and place of delivery under the contract.

The complaint which we are considering can be readily distinguished from the complaint in the case of *Ridgley v. Mooney*, supra. Though it does not allege in terms that the hogs were sold at the market price at the time and place of delivery, it does allege that on August 31, 1906, Wallace shipped the hogs in question to the Union Stockyards at Indianapolis, Ind., and sold the same at \$6.37½ per hundred pounds; the same being the best price he could obtain for said hogs. This averment is equivalent to an averment in terms that the hogs were sold for the highest market price at the time and place of delivery mentioned in his contract, for it states facts showing that Wallace sold the hogs at the time (August, 1906) and place (Indianapolis, Ind.) in the Union Stockyards for the best price there obtainable. It is a matter of common knowledge that a stockyard is a market for hogs and cattle, and the best price there obtainable must be the best market price, for sales there made determine the market price.

[4] "Courts of necessity take notice of the ordinary course of business and the common methods by which it is transacted." 7 Encyc. of Evidence, p. 934. They note "whatever ought to be generally known within the limits of their jurisdiction." *Simpson v. Pittsburgh Glass Co.*, 28 Ind. App. 352, 62 N. E. 753; 1 *Hogate's Pleading and Practice*, § 353. We eliminate further consideration of the second paragraph of complaint, as it is wholly insufficient.

[5] The court found specially, among other things, that Wallace shipped on August 30, 1906, the hogs purchased on the contract for Coons to Mansfield & Co., live stock commission merchants, at Indianapolis, Ind., and that the hogs were sold by Mansfield & Co. at the Union Stockyards at Indianapolis, on August 31, 1906, to persons other than Coons, for \$6.37½ per hundred pounds, that being the best price which could be obtained for them, and this finding was abundantly supported by the evidence. The special findings substantiate in every particular the allegations of the first paragraph of complaint. He makes also certain findings as to which there is no evidence, to the effect that appellant gave appellee no notice before selling the

hogs. Such notice was immaterial. Had the title to the hogs passed by the contract to appellee, and had he refused to receive them, appellant could not have sold them again without giving notice to appellee, if he expected to hold him for the difference in price. But such is not the theory of the paragraph of complaint upon which from the evidence it appears the case was tried. From the allegations found in the first paragraph, it is evident that the theory is for the recovery of damages fixed at the amount of the difference between the price fixed in the contract and the amount obtained at the sale in the stockyards at Indianapolis at the market price at the time of sale, which was \$6.37½ per hundred pounds, and the difference between that price and the contract price of \$7 per hundred pounds amounts on 32,000 pounds, which was the weight of the car load specified in the contract, to \$200, the amount for which recovery is asked. The contract between Wallace and Coons was an executory contract of sale, and appellant, before selling the hogs to others, had no need to notify appellee who had committed a breach of his executory contract by failing to receive the hogs. *Dill v. Mumford*, 19 Ind. App. 609, 613, 614, 49 N. E. 861; *Ridgley v. Mooney*, supra.

We do not commend the complaint as a model of clear and exact pleading, but we hold the first paragraph sufficient, and as it is sustained by the evidence and by the special findings of the court, and since the court erred in stating his conclusions of law, the case is reversed and remanded to the trial court, with instructions to restate his conclusions of law in accordance with this opinion, and render judgment in favor of appellant, and against appellee, in the sum of \$200 and costs.

(250 Ill. 289)

PEOPLE ex rel. ALDRIDGE et al. v.
RENDLEMAN et al.

(Supreme Court of Illinois. April 19, 1911.
Rehearing Denied June 7, 1911.)

QUO WARRANTO (§§ 6, 29*)—DISCRETION OF COURT.

Where information in the nature of quo warranto is presented by relators, seeking to redress a private wrong, the court is vested with a wide discretion as to allowing it to be filed, and may refuse leave because of prejudicial delay in applying for relief, so that the matters complained of, being irregularities in the organization of a drainage district, of which relators must have known in the early stages of its organization, or of which they must at least be presumed to have known, having been notified, in the manner required by statute, of the organization proceeding, refusal of leave to file the information, asked for four years after the organization, during which an expense of \$8,000 was incurred in connection with the organization, is not an abuse of discretion.

[Ed. Note.—For other cases, see *Quo Warranto*, Cent. Dig. §§ 7, 31-33; Dec. Dig. §§ 6, 29.*]

Error to Circuit Court, Union County; A. W. Lewis, Judge.

Quo warranto, on the relation of Thomas L. Aldridge and others, against Robert M. Rendleman and others. Leave to file information was denied, and relators bring error. Affirmed.

William D. Lyerle (R. J. Stephens, of counsel), for plaintiffs in error. A. Ney Sessions and James Lingle, for defendants in error.

VICKERS, C. J. William D. Lyerle, state's attorney of Union county, presented to the circuit court a petition for leave to file an information in the nature of a quo warranto against Robert M. Rendleman and Samuel F. Davie, of Union county, and Thomas J. McClure, of Alexander county, to require them to show by what authority or right they claimed to hold and execute the office of commissioners of Clear Creek Drainage and Levee District, of the counties mentioned, and by what right they claimed that said district had a legal existence, and a right to hold and execute the franchise of a corporation, and to exercise the rights and privileges of a drainage district. The petition was presented on the information and relation of a number of citizens and landowners in said district, and was verified by the oath of a number of the relators. The petition was accompanied by a copy of the proposed information, which is in three counts. Upon the presentation of the petition, on June 21, 1910, a rule to show cause by the following Monday was entered against the defendants. In response to the said rule the defendants entered their appearance, and on a hearing before the court on June 28th three affidavits, together with oral and documentary evidence, were submitted by the respective parties to the court. On July 1st the court entered an order refusing leave to file the information, and dismissed the petition, and adjudged the costs against the relators. The relators excepted to the order and judgment of the court, and preserved by the bill of exceptions all matters connected with the hearing of the petition, and have sued out this writ of error for the purpose of obtaining a review of the order refusing leave to file the information.

The petition recites that said pretended drainage district was organized upon a petition presented by C. E. Anderson and 89 other persons to the March term, 1907, of the county court of Union county, alleging that the petitioners constituted a majority of the landowners of the proposed district and represented one-third or more of all the lands embraced therein, and praying for the organization of the territory described in the petition into a drainage and levee district. The petitioners in the proceeding

at bar charged that the petition to organize the drainage and levee district did not contain a description of the proposed starting points, route, and terminus of the work thereby proposed, and that said petition did not contain a sufficient description of the lands affected by the proposed district and did not give the names of the owners thereof, and it is further alleged that a majority in numbers of the landowners of the district did not sign the petition to organize. It is also alleged that the county court acted, in the organization of the said district, without sufficient and proper notice being published or given, as required by the statute. It is charged in the petition that at the date of filing the petition for the organization of the drainage district Ezekiel Moore was an owner of land located within the boundaries of the proposed district, that said Moore then resided in Jackson county, that no notice of any kind was sent to him within three days after the first publication or at any other time, and that said Moore had not entered his appearance to said petition or proceedings thereon. The petition alleges that at the May term, 1907, a hearing was had in the county court, and an order entered granting the prayer of the petition and appointing respondents herein commissioners of Clear Creek Drainage and Levee District. It is alleged, further, that the said commissioners assumed the powers, privileges, and prerogatives of drainage commissioners, and that in January, 1908, the said commissioners submitted to the county court a report, accompanied by maps, profiles, etc., making estimates and giving descriptions of certain work by said commissioners laid off and proposed, the cost of which, including incidental expenses, they estimated at \$225,512.81; that afterwards, in May, 1908, an amended report was filed by the commissioners, in which the estimated cost of the proposed work was reduced to \$225,000, which said amended report was then approved and confirmed by the court, and an order of court entered declaring the district, with certain boundaries in said order set forth, duly established as provided by law; that on December 27, 1909, the commissioners filed their roll of assessments of benefits and damages, by which they distributed and apportioned to the various tracts and parcels of land, including railroads and plank roads, the aggregate sum of \$285,000, which exceeded the estimated cost of the proposed work \$60,000; that thereupon said commissioners caused notice to be published of their intention to apply to the court on January 17, 1910, for the purpose of having a jury impaneled to consider the assessment roll aforesaid; that on February 23, 1910, the commissioners also filed their petition to condemn land for a right of way for levees and ditches. The petition avers that after the impaneling of a jury to consider the assessment

roll in January, 1910, the commissioners withdrew the assessment roll and procured a discharge of the jury, and thereupon made material alterations in the plans, specifications, and estimates for the proposed work without having another petition signed by the landowners, or a majority of them, and it is alleged that the aggregate estimated cost of the work as shown by the last report was \$330,000; that said commissioners afterwards filed another roll of assessments of benefits and damages, and distributed and apportioned to the several tracts of land in said district said sum of \$330,000 and annual benefits of \$3,300, and caused notice to be again published of their intention to have a jury impaneled for the purpose of considering the assessment roll as finally corrected. It is also alleged that an amended petition for condemnation of right of way was filed on November 1, 1909, and that respondents are insisting upon their right to proceed to have said assessment roll confirmed and to condemn a right of way for ditches and levees.

The foregoing statement contains the substance of the averments of the petition, upon which the court entered a rule on the respondents to show cause against petitioners for leave to file an information. Upon a hearing of the petition the court considered, among other things, the affidavit filed by Mr. Sessions, who testified that he is the owner in fee simple of more than 450 acres of land within the boundaries of the proposed drainage district, that he is an attorney for the commissioners of said drainage district, and that he is familiar with the physical situation of the district as well as the various proceedings that have occurred in connection with the organization of the same. The affidavit of Mr. Sessions gives a detailed history of the proceeding from the time the original petition for the organization of the district was filed down to the present, and sets out at large copies of the petition, notice, and various orders of the court made in connection with the organization of this drainage district. The affidavit shows that there is a total of 39,816.59 acres of land within the boundaries of the proposed district; that a petition was duly presented to the county court, praying for the organization of a drainage and levee district, to be known as Clear Creek Drainage and Levee District, on March 16, 1907; that said petition contained a description of the boundaries of said district, and set up facts from which it appears that all of the lands within said district require embankments and grades to protect them from overflows from the Mississippi river and tributary streams, and require ditches to carry off the water, and pumps and machinery and other apparatus for the purpose of relieving said lands from overflow; that with the said petition was filed a paper entitled "Clear Creek Drainage and Levee District—Names of

Landowners and Acreage," which said paper is known in the record as "Paper A" and contains the names of 196 persons as owners of land within said district, together with the acreage of each set opposite the respective names of such owners. It also appears that a notice was published in *The Talk*, a newspaper published at Anna, in Union county, and that said notice was published for three successive weeks, the last insertion thereof being on the 5th day of April, 1907. A copy of said notice is recited in Mr. Sessions' affidavit, from which it appears that all persons were duly notified that the petitioners were asking for a hearing on said petition at the May law term of the county court of said Union county, on the second Monday in May, 1907. Said notice contains a copy of the original petition, and is signed by a number of petitioners as a committee. It also appears that a number of the relators in this proceeding appeared and participated in various proceedings had in court in connection with the organization of this district. The petition for the organization of this district was filed March 16, 1907. Notice of a hearing was published in April, and the hearing was had in May, of said year, when the court appointed the commissioners and entered an order declaring the district duly organized. At the time this order was entered in 1907 it is stated in the affidavit of Mr. Sessions that the total costs that had been incurred at that time did not exceed \$25 or \$30. At the time the application for leave to file the information was made, in June, 1910, the costs and expenses incurred for which the district was indebted were between \$7,000 and \$8,000.

In the view that we have of this case it will only be necessary to consider one question. Upon an application for leave to file an information in the nature of quo warranto, the court is vested with a wide discretion, and may consider the necessity of filing the information, and any circumstances or facts which are brought to the court's attention which show that the relators have been guilty of laches in applying for relief. *People v. Schnepf*, 179 Ill. 305, 53 N. E. 632. In a case where the relators have not applied in apt time, and during the delay the respondents have expended money or incurred liabilities which might have been saved by a prompt action, the court may properly, in the exercise of its discretion, refuse to enter into a consideration of the informalities set up in the information, and deny the leave to file such information solely because of the prejudicial delay in applying for relief. *People v. Harker*, 197 Ill. 409, 64 N. E. 253; *People v. Hepler*, 240 Ill. 196, 88 N. E. 491; *High on Ex. Legal Rem.* (2d Ed.) § 659. The rules announced in the foregoing authorities apply to all cases where the information is presented by relators who

are seeking to redress a private wrong. There is a distinction in this respect between cases that are presented on the information of the Attorney General or state's attorney for the redress of a public wrong, and those that are prosecuted on the relation of private persons, and where the people are merely the nominal prosecutors. *High on Ex. Legal Rem.* § 652.

The irregularities in the organization of this drainage district that are set up in the petition relate to matters that existed at the time the court entered an order confirming the organization of the district. Knowledge of these supposed defects must have been acquired by the relators in the early stages of the organization of the district. At all events, they were notified in the manner required by the statute, and they must be presumed to have had knowledge of the irregularities upon which they relied. Nearly four years elapsed after this district was organized before the relators applied for leave to file this information. During that time the affidavits filed in opposition to the motion show that an expense of about \$8,000 has been incurred in connection with the organization of this district. There has been much labor expended, and in addition to the money there has been a vast amount of work done which is not represented by the money expended. This circumstance was entitled to great weight in determining whether the court, in the exercise of its discretion, would allow the information to be filed. Without reference to the other questions, we are of the opinion that the decision of the court below may be sustained entirely on the ground that the application to file this information was not made in apt time. Relators, having been notified, in the manner required by the statute, of the time and place when the petition to form this district would be considered, might have appeared at that time and urged the matters now complained of as objections to the organization of the district. Not having availed themselves of such remedy, and having waited until the district has been organized and expended a large amount of money, the court did not abuse its discretion in refusing leave to file this information, and its judgment will accordingly be affirmed.

Judgment affirmed.

(350 Ill. 330)

CHICAGO & A. R. CO. v. PEORIA & P. U. RY. CO.

(Supreme Court of Illinois. April 19, 1911.
Rehearing Denied June 7, 1911.)

CARRIERS (§ 177*)—CONTRACTS—CONSTRUCTION—LIABILITY.

Where a terminal railway company owning transfer facilities for the transfer of cars of railway companies entering the city contracted with one of such companies whereby it could use, for an annual rent and payment for

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

the maintenance of the tracks, all terminal facilities, and whereby it obligated itself to deliver to the terminal company all freight cars for transfer, and whereby the terminal company agreed to transfer cars, such company was a lessee of the terminal company with the right to use the terminal facilities subject to a similar right by the terminal company and other railway companies, and cars transferred by the terminal company as ordered by such lessee remained under the exclusive possession of such lessee and the terminal company was not liable for any loss of goods while such cars were on its terminal facilities.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 775-803; Dec. Dig. § 177.*]

Carter, J., dissenting.

Appeal from Appellate Court, Second District, on Appeal from Circuit Court, Peoria County; L. D. Puterbaugh, Judge.

Action by the Chicago & Alton Railroad Company against the Peoria & Pekin Union Railway Company. From a judgment of the Appellate Court affirming a judgment for plaintiff and granting a certificate of importance, defendant appeals. Reversed and remanded.

Stevens, Miller & Elliott, for appellant. Page, Wead, Hunter & Scully, for appellee.

DUNN, J. The Appellate Court for the Second District affirmed a judgment of the circuit court of Peoria county in favor of the appellee against the appellant, and granted a certificate of importance and appeal to this court.

Appellee's claim was for reimbursement of the amount paid by it to several claimants for the loss of goods from freight cars transferred by the appellant. The appellant is a railroad corporation owning and operating a railroad from Peoria to Pekin. It owns extensive terminal facilities in Peoria, consisting of main tracks, side tracks, switches, turn-outs, connecting tracks, roundhouses, freighthouses, passenger depots, and storage and unloading tracks, together with cars and locomotives necessary in carrying on its business. It does an extensive business in transferring for other railroad companies whose railroads enter the city of Peoria, loaded and empty freight cars between the terminal points of such railroads in the city and between such terminal points and the points of destination of such cars on the tracks of appellant in the city. The appellee is a railroad corporation running its trains into the city of Peoria, but not owning or operating any terminal facilities there. By virtue of a contract with the appellant, it is entitled to the use of all the terminal facilities of the appellant in Peoria, and is obligated to deliver all its freight cars coming into or going out of or through Peoria to the appellant to be transferred, and the appellant is bound to transfer all loaded or empty cars between all freighthouses, warehouses, and the various other points of delivery on its tracks and the tracks and warehouses of oth-

er railroads with any of which any of the appellant's tracks shall be connected and the tracks and divisions of appellee's railroad. The appellee was granted the right to use the tracks and terminal facilities, but not exclusively, the appellant reserving the right to make or renew similar contracts with other railroad companies and to use such tracks and terminal facilities for the operation of its own trains. The appellee agreed to pay as rental for the said tracks and terminal facilities \$22,500 per annum; to pay its just proportion, according to a rule established by the contract, of the maintenance, renewal, and repair of certain of the tracks and premises; to pay such reasonable sum for each of its passenger, mail, and baggage cars entering or leaving the appellant's union passenger depot at Peoria as should be fixed by the appellant, being a uniform rate for each car to be charged all companies running their passenger trains to and from the said depot without discrimination; to pay all such reasonable charges as should be made by the appellant for the transfer service to and from connecting railroads, being a uniform rate for each car, previously fixed by the appellant, to be charged to all companies for such service, without discrimination; and to pay all such reasonable charges as should be made by the appellant for handling and switching its loaded and empty cars to and from freighthouses, warehouses, packing houses, stockyards, grain elevators, distilleries, mills, and other industries at the cities of Pekin and Peoria, being a uniform rate for each car, which should have been previously fixed by the appellant, to be charged to all companies for such service, without discrimination. The contract provided for the full and equal use and enjoyment, without discrimination, by the appellee, and by all other companies having the right to such use and enjoyment, of all the said tracks, switches, depots, freighthouses, and other property, of the service of handling, switching, and transferring cars, of equal facilities and accommodations for their business, and of equal care and attention to it on the part of the appellant, and that the general management, control, and supervision of all the property, and of the use, location, improvement, and repair of it, should be in the full and sole control of the appellant. The written contract is long, but it is believed that what has been set out discloses sufficient of its terms for the proper disposition of the case. It was under this contract that the goods, the loss of which constitutes the appellee's claims, first came to the possession of the appellant. The goods were shipped over different railroads from different places, at different times, to different consignees, and were all brought by the appellee in its trains to Peoria to the yards of the appellant. The appellee in each instance directed the appel-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

lant to transfer the car to the appellant's Water street track, to be unloaded by the consignee. The cars were transferred by the appellant and left on the track where the appellee directed them to be placed. Before they were unloaded, the cars were broken into and a part of the goods were stolen.

The chief controversy is as to the existence of a duty on the part of the appellant to exercise care to prevent the loss of the contents of the cars after they had been placed upon the track where directed by the appellee. The parties agree that in transferring the cars the appellant acted as a common carrier. Their disagreement is as to when the appellant's service ended. The appellant claims that it had performed its whole duty when it set the cars for unloading as directed by the appellee, and that its liability for the cars or their contents then ceased. The appellee insists that after the cars were placed for unloading the appellant was still bound to exercise care to prevent the loss of them, and that its liability was that of a warehouseman. On the trial propositions of law were submitted by either side as to the appellant's duty and liability. Those stating the appellee's view were held by the court and those stating the appellant's view were refused.

By the cases of *Peoria & Pekin Union Railway Co. v. United States Rolling Stock Co.*, 136 Ill. 643, 27 N. E. 59, 29 Am. St. Rep. 348, and *East St. Louis Connecting Railway Co. v. Wabash, St. Louis & Pacific Railway Co.*, 123 Ill. 594, 15 N. E. 45, it is determined that appellant was not liable as a common carrier after placing the cars. The trial court and the Appellate Court, however, held it liable as a warehouseman or bailee for hire, and in so doing fell into error. In the contract between the parties the appellee is referred to as a lessee. In fact, it is a lessee. It has a right to the possession and use of the tracks and property mentioned in the contract as complete, though not so extensive, as that of the appellant, who owns them. The right is not exclusive, but is shared with the appellant and the other railroad companies to whom similar leases have been made. Whenever any part of the appellant's track is occupied by the appellee's cars, placed there, under the contract, for delivery to the consignee, the occupancy is the appellee's occupancy. It is for the time being exclusive, and as rightful and complete as if the appellee were the sole owner of the track. Whenever the appellee orders a car placed on one of the appellant's tracks which the appellee has the right to use, and the car is accordingly so placed, the appellee's possession and control of the car are as complete and its rights and obligations in respect thereto are the same as if the car stood upon

any part of the appellee's own track, except that the appellee cannot use its own motive power to change the location of the car but must call upon the appellant for that purpose. In switching and transferring cars in accordance with the appellee's directions, whether from the appellee's terminal at Peoria to the track of appellant convenient for delivery to the consignee, or from one of the tracks or divisions of the appellee's railroad to another of such tracks or divisions, or to another railroad, or from one of the appellant's tracks to another, the appellant's duty and liability are the same. In all this switching service, of whatever character, it acts merely as the agent of the appellee to shift the latter's cars from one track which the appellee has a right to use to another track which it has a right to use, for the purpose of enabling the appellee conveniently to complete its contract of carriage and make delivery to the consignee. There is nothing to indicate that the appellant, when switching cars, knows anything about the car or its contents or consignee, or has any right to demand any such information. So far as appears, it merely receives notice to move a certain car from one track to another, and has nothing to do with or knowledge of the consignee, the unloading, the delivery or the notice to the consignee. It has no further duty to perform in connection with that car until again requested to move it.

The contract of the appellant with the appellee was not to deliver to the consignee. That was the duty of the appellee. Since it had no facilities for delivering freight at its own terminal it obtained from the appellant a lease of other premises for that purpose, and since it could reach such premises only over the appellant's track, it employed the appellant to switch its cars to such premises. These premises, in the present case, were the appellant's Water street track, which was leased to the appellee in common with others, the lessor also reserving a certain use to itself. The service performed by the appellant was the hauling of cars from one of defendant's tracks to another, and, when that service was performed, the appellant's liability ended. When the cars were placed on the Water street track, they were no longer in the possession of the appellant, but were in the possession of the appellee, and the duty of delivery to the consignee, and the care of the car and its contents until such delivery, rested not upon the appellant but upon the appellee.

The judgments of the Appellate Court and circuit court will be reversed, and the cause will be remanded to the circuit court.

Reversed and remanded.

CARTER, J., dissenting.

(250 Ill. 351)

PEOPLE v. NOLAN.(Supreme Court of Illinois. April 19, 1911.
Rehearing Denied June 8, 1911.)**1. ROBBERY (§ 17*)—INDICTMENT—DESCRIPTION OF PROPERTY—"PIN."**

An indictment for the robbery of a diamond pin, which the evidence showed was a stud suspended from the shirt by a corkscrew piece of metal, which describes the property as "one pin, of" a specified value, sufficiently describes the property, within Const. art. 2, § 9, giving accused the right to demand the nature of the accusation; a "pin" being defined as an ornament fastened to the clothing by a pin.

[Ed. Note.—For other cases, see Robbery, Cent. Dig. § 19; Dec. Dig. § 17.*

For other definitions, see Words and Phrases, vol. 6, p. 5379.]

2. ROBBERY (§ 1*)—NATURE OF OFFENSE.

The gist of the offense of "robbery" is the force or intimidation and the taking from the person against his will of a thing of value and belonging to him, and the nature and value of the property taken is immaterial.

[Ed. Note.—For other cases, see Robbery, Cent. Dig. §§ 1, 13; Dec. Dig. § 1.*

For other definitions, see Words and Phrases, vol. 7, pp. 6258-6264; vol. 8, p. 7792.]

Cartwright and Vickers, JJ., dissenting.

Error to Criminal Court, Cook County; Albert C. Barnes, Judge.

Christ Nolan was convicted of robbery, and he brings error. Affirmed.

Louis Greenberg and John F. Tyrrell, for plaintiff in error. W. H. Stead, Atty. Gen., John E. W. Wayman, State's Atty., and Fred H. Hand (Thomas Marshall and Claude F. Smith, of counsel); for the People.

CARTER, J. Sidney Campbell, Robert Boyd, Frank Noonan, and the plaintiff in error, Christ Nolan, were indicted at the September term, 1907, of the criminal court of Cook county for robbing Maurice A. Schenick, on the 18th day of August, 1907, of "one pin, of the value of \$400." Noonan was acquitted, and Campbell, Boyd, and the plaintiff in error were found guilty, under said indictment. The case as to Campbell was considered by this court in *People v. Campbell*, 234 Ill. 391, 84 N. E. 1035, 123 Am. St. Rep. 107. The facts as to the robbery are sufficiently set out in that opinion, and need not be restated here.

[1] It is contended that the property is not sufficiently described in the indictment to comply with section 9 of article 2 of the Constitution, which provides that "the accused shall have the right * * * to demand the nature and cause of the accusation," etc.; and it is further contended that there is a variance between the proof and the indictment, the latter describing the property as "one pin," while in the evidence it is called a "diamond stud," a "stud solitaire with a screw" or "spiral."

[2] The gist of the offense of robbery is

the force or intimidation, and the taking from the person, against his will, of a thing of value belonging to him. In such case it is not necessary or material to describe accurately or prove the particular identity or value of the property taken, further than to show it was the property of the person assaulted or in his care, and had a value. *Burke v. People*, 148 Ill. 70, 35 N. E. 376; *Schroeder v. People*, 196 Ill. 211, 63 N. E. 678. The words "pin" and "stud" were both used in referring to this identical property in *People v. Campbell*, supra, and no question was raised, either by counsel or the court, that the property was not properly described as "one pin" in the indictment or that the terms "pin" and "stud" could not be used interchangeably. Webster defines a pin as "an ornament * * * fastened to the clothing by a pin; a piece of wood, metal, etc., generally cylindrical, used * * * as a support by which one article may be suspended from another." New Int. Dict. See, also, Standard Dict. In *Rex v. Moore*, 1 Leach, 335, an ornament was described in the indictment as "one diamond pin." In commenting on this case in 2 Russell on Crimes (6th Ed.) p. 88, the author describes this ornament as "a heavy diamond pin, with a corkscrew stalk twisted in a lady's hair."

In this case the diamond ornament was fastened to or suspended from the shirt by a corkscrew piece of metal. Manifestly, under the authorities cited, the property in question was correctly described as a pin. This question was not raised on the trial below by plaintiff in error or his counsel. Evidently he was not misled as to the property described in the indictment. An indictment for robbery sufficiently describes the property taken if it enables the jury to identify the chattels stolen with those referred to in the indictment. *State v. Burke*, 73 N. C. 83; *State v. Sanders*, 14 N. D. 203, 103 N. W. 419; *People v. Richards*, 136 Cal. 127, 68 Pac. 477; 34 Cyc. 1804.

We find no reversible error in the record. The judgment of the criminal court will be affirmed.

Judgment affirmed.

CARTWRIGHT, J. (dissenting). A stud is not a pin, either in common parlance or according to any lexicographer. It is defined as a "detachable, button-like device made in various forms, to be inserted through one or more buttonholes or eyelets and serve as a fastener, for ornament, etc." Webster's New Int. Dict. In *King v. Moore*, 1 Leach, 335, the indictment was for robbery, and the only question raised or considered was whether the taking was with sufficient force to constitute that crime. The ornament consisted of seven buttons of peculiar brilliancy, fixed on a long silver screw-stock of consid-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

erable weight, which was very deeply twisted into the hair of the owner, and her hair was strongly craped all around it. It was not a stud and bore no resemblance to one, and, while the question whether it was a pin was not considered, the fact that a part of an ornament is not straight, or is bent or curved for greater security, would not change its character, provided it is, in fact, a pin.

VICKERS, J. I concur in the dissenting opinion of Mr. Justice CARTWRIGHT.

(250 Ill. 297)

CLANCY et al. v. CLANCY et al.

(Supreme Court of Illinois. April 19, 1911.

Rehearing Denied June 8, 1911.)

1. WILLS (§ 560*)—CONSTRUCTION—DESCRIPTION OF PROPERTY—PARTIAL INTESTACY.

Testator, who owned only the S. E. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$ and the E. $\frac{1}{2}$ and the N. W. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$ of a section, comprising in all 160 acres, devised to his wife for 13 years, the S. $\frac{1}{2}$ of the W. $\frac{1}{2}$ of the N. E. $\frac{1}{4}$ of the section, also the W. $\frac{1}{2}$ and the N. $\frac{1}{2}$ of the E. $\frac{1}{2}$ of the S. W. $\frac{1}{4}$. Held, that only 80 acres were devised, and that the balance was intestate property.

[Ed. Note.—For other cases, see Wills, Dec. Dig. § 560.*]

2. WILLS (§ 581*)—CONSTRUCTION—DESCRIPTION OF PROPERTY—REFORMATION.

Where a description of property intended to be devised in a will is true in part only, if by eliminating the false description enough remains to identify the subject of the devise, this may be done by striking out the false part of the description; but nothing may be substituted in place of what was stricken out.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1268, 1269; Dec. Dig. § 581.*]

3. WILLS (§ 705*)—CONSTRUCTION—DECREE.

A decree construing a will, and finding that certain intestate property descended to testator's children, and that no persons other than such children had any interest in the premises, "except such rights as the executor may be required to assert in settling said estate and the payment of any debts against the same or the costs and expenses of administration thereon, which should be determined by the county court in which said estate is being administered," safeguarded the rights of all parties, and was not erroneous in failing to order that the intestate property be first resorted to for the payment of debts and costs of administration.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1682; Dec. Dig. § 705.*]

Appeal from Circuit Court, Champaign County; Solon Philbrick, Judge.

Bill by Anna Clancy and others against H. E. Clancy and others. From the decree, complainants appeal. Affirmed.

Schaefer & Dolan, for appellants. H. I. Green, for appellees.

FARMER, J. This is a bill in chancery, filed by appellants, the widow and four minor children of Thomas Clancy, deceased, who died testate October 29, 1909, leaving the appellant Anna Clancy, his widow, and the

other appellants, Agnes, Margaret, Annie, and Alice Clancy, his minor children. The widow was the second wife of the testator, and the four minor children mentioned were his children by her. The executor of the will was also a party complainant. Seven children by a former marriage, all adults, survived the testator, and they were made defendants to the bill. The bill alleged there were latent ambiguities in the will, and that it was necessary for the court to construe it so that its true intent and meaning might be ascertained, and the will and intention of the testator given effect.

[1] At the time of his death Thomas Clancy owned a home, where he resided, in the city of Champaign, personal property worth about \$2,000, and a farm of 160 acres in Champaign county. By the first clause of his will he gave his wife all his personal property and the homestead in the city of Champaign in fee simple. The second and third clauses of the will are as follows:

"Second—I also will to my wife, Anna Clancy, the use of the following described property for the term of thirteen years: The south one-half of the west one-half of the northeast quarter of section four (4), also the west one-half and north one-half of the east one-half of southwest quarter of section four (4), all in township eighteen (18), range eight (8) east of the third principal meridian, in Champaign county, Illinois, she to pay all taxes and assessments that may be levied against said land as the same become due; she to have all the remainder for her and the minor children's support.

"Third—After the said thirteen years have expired, I will that the executor of this my last will and testament shall sell the above described land, and after paying all costs and any other claims against my estate the remainder to be divided as follows: To my daughter Mary Ann Doney \$800; to my son J. E. Clancy \$800; to my son John P. Clancy \$800; to my son M. F. Clancy \$800; to my daughter Elizabeth Brennen \$800; to my daughter Lena Shikes \$800; to my son Thomas Clancy \$800. The remainder I will to my wife, Anna Clancy, to have during her lifetime; after her death it shall be divided as follows: To my daughter Agnes Clancy one-fourth; to my daughter Margaret Clancy one-fourth; to my daughter Annie Clancy one-fourth, and to my daughter Alice Clancy one-fourth. Should either of the last named four children die before receiving their part of said estate, then their part to be equally divided between the survivors of the four younger children."

The bill avers Thomas Clancy owned the S. E. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$, the E. $\frac{1}{2}$ of the S. W. $\frac{1}{4}$ and the N. W. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$ of section 4, township 18; alleges he intended by his will to devise it all to his wife for

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

13 years, for the support of herself and four children until the youngest should become of age, and at the end of said period of 13 years all of it was to be sold by the executor, and after deducting the amount of the debts against the estate, and costs, the proceeds were to be divided as specified in the will. Defendants, appellees here, answered the bill, denying that it appeared from the will the testator intended to dispose of the whole 160 acres, as alleged in complainants' bill, denying there was any latent ambiguity in said will, and denying the authority of a court of equity to construe it so as to give the widow the whole farm for 13 years, after which it was all to be sold by the executor and the proceeds distributed. The answer averred the testator disposed of only 60 acres of the farm and that the remaining 100 acres were intestate property. The defendants filed a cross-bill, asking for partition of the 100 acres alleged to be intestate estate among all the children of said Thomas Clancy, deceased. The cause was referred to the master in chancery upon both the original and cross-bills. After hearing certain proof, the master reported that Thomas Clancy did not, at the time of his death, nor at any time during his lifetime, own the land described in the will in the N. E. $\frac{1}{4}$ of said section 4; that said Thomas Clancy intended by his will to devise to his widow for 13 years, to be then disposed of as provided in said will, the 120 acres he owned in the S. W. $\frac{1}{4}$ of section 4, and that the words "north one-half of" should be stricken out of the description of the land devised in that quarter section, so that the description would read, "the west one-half and the east one-half of the southwest quarter of section four (4)." Both parties excepted to the report of the master before the chancellor. The chancellor sustained appellees' exceptions in part, modified the report of the master, and entered a decree finding that the testator by his will devised to his widow for a term of 13 years the N. $\frac{1}{2}$ of the W. $\frac{1}{2}$ of the S. W. $\frac{1}{4}$ and the N. $\frac{1}{2}$ of the E. $\frac{1}{2}$ of the S. W. $\frac{1}{4}$ of said section 4; that he did not own the other land described in the will, and that the S. E. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$ and the S. $\frac{1}{2}$ of the E. $\frac{1}{2}$ of the S. W. $\frac{1}{4}$ were intestate estate, and descended to the heirs of the testator, and a decree for partition of said two last-mentioned tracts was entered, and commissioners appointed to make partition thereof. Complainants below have prosecuted this appeal from that decree.

The first tract of land described in the second clause of the will is the S. $\frac{1}{2}$ of the W. $\frac{1}{2}$ of the N. E. $\frac{1}{4}$ of section 4. Thomas Clancy owned no land in that quarter of the section. He did own the S. E. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$. The second description is the W. $\frac{1}{2}$ and N. $\frac{1}{2}$ of the E. $\frac{1}{2}$ of the S. W. $\frac{1}{4}$ of said section 4. Thomas Clancy did not own the whole of the W. $\frac{1}{2}$ of the S. W. $\frac{1}{4}$

but he did own the N. $\frac{1}{2}$ of said W. $\frac{1}{2}$ of the S. W. $\frac{1}{4}$. He owned the whole of the E. $\frac{1}{2}$ of said quarter section. Appellants insist that the court erred in not construing the will to devise the whole farm, and the appellees contend the decree is erroneous in finding that more than 60 acres of it was devised by the will, and have assigned cross-errors to that effect.

[2] It has been held in numerous cases decided by this court that where a description of property intended to be devised in a will is true in part, but not true in every particular, if by eliminating the false description enough remains to identify the subject of the devise, so that effect will be given to the intention of the testator, this may be done without violating the rule against the reformation of wills. But this can only be done by striking out the false part of the description, and nothing can be substituted in place of what is stricken out. It is unnecessary in this case to discuss the decisions upon that question. They are cited and reviewed in the late case of *Graves v. Rose*, 246 Ill. 76, 92 N. E. 601. It is clear that to hold the S. E. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$ was devised by the description in the will of the S. $\frac{1}{2}$ of the W. $\frac{1}{2}$ of the N. E. $\frac{1}{4}$ would be a reformation of the will. The second description in clause 2 includes land the testator did not own, and omits land he did own. By no process of striking out words of false description will there be left remaining a sufficient description to identify and include the whole 120 acres owned by testator in the S. W. $\frac{1}{4}$ of the section.

Appellees contend the second description in clause 2 refers only to the E. $\frac{1}{2}$ of the S. W. $\frac{1}{4}$ and devises the W. $\frac{1}{2}$ and the N. $\frac{1}{2}$ of the 80. As these descriptions overlap, they would include only 60 acres. We do not agree with this construction. The testator owned the N. $\frac{1}{2}$ of the W. $\frac{1}{2}$ of the S. W. $\frac{1}{4}$. The devise was of the whole 80, and was operative to devise the half of it testator owned. The remaining description is the N. $\frac{1}{2}$ of the E. $\frac{1}{2}$ of the S. W. $\frac{1}{4}$, which is clear, definite, and certain, but includes no part of the south 40 acres of the E. $\frac{1}{2}$ of the S. W. $\frac{1}{4}$. To construe the will to devise more of the 160 acres than 80 acres would require striking out parts of a true description and the substitution of other words of description. This the law does not allow, notwithstanding the presumption that the testator intended to dispose of all his property by his will. We think it clear the chancellor placed the proper construction upon the will.

[3] Appellants contend, if the decree was correct—that 80 acres of the testator's land was intestate estate—the intestate property must first be resorted to for the payment of debts and costs of administration, and that the decree should have so ordered. Paragraph 20 of the decree finds that the 80 acres

held to be intestate property descended to the children of Thomas Clancy upon his death, "subject to any right the executor may have therein as may be required to settle said estate." Paragraph 21 finds that no other persons than said children have any title to or interest in the premises, "except such rights as the executor may be required to assert in settling said estate and the payment of any debts against the same or the costs and expenses of administration thereon, which should be determined by the county court in which the said estate is being administered." We do not think the court was required to, or could properly, go further in this case. The decree safeguards the interests of all parties, and deprives none of them of any rights.

Appellants further contend that, if any land is held to be intestate estate, the legacies of \$800 to each of appellees should be made a charge upon that part of the land. The will specifically makes those legacies a charge against the land devised to the widow for 13 years. At the expiration of that period the land so devised is to be sold by the executor, and the legacies paid out of the proceeds. No authority exists to direct said legacies to be paid out of the proceeds of the sale of other land.

We find no error in the decree of the circuit court, and it is affirmed.

Decree affirmed.

(250 Ill. 170)

HUTCHINSON et al. v. HUTCHINSON
et al.

(Supreme Court of Illinois. April 19, 1911.
Rehearing Denied June 7, 1911.)

1. WILLS (§ 281*)—PROBATE—ANNULMENT—ALLEGATIONS OF COMPLAINT.

It is sufficient, to give jurisdiction of a suit to annul an order of probate, that the complaint alleged that an order was entered granting probate of the will, though it also alleges that the evidence was not heard in open court or by the judge.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 639; Dec. Dig. § 281.*]

2. WILLS (§ 286*)—PROBATE—ANNULMENT—ISSUES.

In an action to annul the probate of a will for testator's mental incapacity, the question whether the order of probate was entered upon a proper showing, or was based upon any evidence, cannot be considered.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 649; Dec. Dig. § 286.*]

3. WILLS (§ 285*)—PROBATE—ANNULMENT—AMENDMENTS TO BILL.

Since the period of the same term of court is regarded as one day, an order made in an action to annul the probate of a will, allowing an amendment striking a paragraph of the bill alleging the probate of the will, and one permitting the withdrawal of such amendment made at the same term, will be regarded as made at the same time, so that the court was not deprived of jurisdiction by the amendment striking the allegations as to probate, even though the time within which the court could

have acquired jurisdiction had elapsed before the second order was made.

[Ed. Note.—For other cases, see Wills, Dec. Dig. § 285.*]

4. JUDGMENT (§ 686*)—CONCLUSIVENESS—DIFFERENT ACTION.

A decree for testator's wife in a separation action in which testator denied the marriage is conclusive of the fact of marriage in a subsequent proceeding to annul the probate of testator's will.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1209; Dec. Dig. § 686.*]

5. WILLS (§ 166*)—UNDUE INFLUENCE—SUFFICIENCY OF EVIDENCE.

Evidence, in a suit to annul probate of a will, held not to show that the will was procured by undue influence.

[Ed. Note.—For other cases, see Wills, Dec. Dig. § 166.*]

6. WILLS (§ 329*)—PROBATE—ANNULMENT—INSTRUCTIONS—INSANE DELUSIONS—APPLICABILITY TO EVIDENCE.

The fact that decedent, the probate of whose will was sought to be set aside for insane delusion, denied that a valid common-law marriage had existed between complainant's mother and him after the court had adjudged, in a separation action, that such marriage existed, and denied the facts testified to upon which such judgment rested, though admitting the binding force of the judgment as establishing his marriage in law, and making complainants his children, did not authorize instructions on the theory that decedent was under an insane delusion that he was not married, and that complainants were not his children; to disagree with the facts on which a judgment is based not being evidence of insanity.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 778; Dec. Dig. § 329.*]

7. WILLS (§ 38*)—VALIDITY—INSANITY—"INSANE DELUSION."

A belief which a rational person may hold, however erroneous, is not an insane delusion.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 78-81; Dec. Dig. § 38.*]

For other definitions, see Words and Phrases, vol. 4, pp. 3644-3646; vol. 8, p. 7689.]

8. WILLS (§ 82*)—DISPOSITION OF PROPERTY—TESTAMENTARY RIGHTS.

A testator has the legal right to dispose of his property to others than his children if he sees fit.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 203; Dec. Dig. § 82.*]

Hand, J., dissenting.

Appeal from Circuit Court, Cook County; Charles M. Walker, Judge.

Action by Charles G. Hutchinson and others against Douglas W. Hutchinson and others. From a judgment for plaintiffs, defendants appeal. Reversed and remanded.

Eddy, Haley & Wetten and John T. Murray (Charles H. Pegler, of counsel), for appellants. Fred A. Bangs (Grover C. Niemeyer, of counsel), for appellees.

DUNN, J. Charles G. Hutchinson died on February 26, 1907, and an instrument executed on May 24, 1905, and purporting to be his will, was admitted to probate on April 12, 1907. A proceeding begun by his heirs

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

in the circuit court of Cook county to set aside this probate was prosecuted to a decree granting the relief sought, and the executor and principal devisees have appealed.

The grounds alleged for the contest were the mental incapacity of the testator and undue influence exerted upon him to procure the execution of the will. The latter ground was withdrawn by the court from the consideration of the jury. Cross-errors have been assigned upon the record by the appellee, and various questions have been argued by counsel for the respective parties, not all of which will require our determination.

[1] A preliminary question arises upon the action of the court in denying the appellants' motion to dismiss the suit for want of jurisdiction. This motion was based on the claim that the original bill did not aver that the alleged will had ever been admitted to probate. This claim is an error, because the bill did aver that the instrument was exhibited in the probate court for probate "and an order was therein entered granting probate of the same." The subsequent allegations that the evidence was not heard in open court or by the judge of the court are immaterial. It is the existence of the order admitting the instrument to probate which is material. It is that order which is sought to be set aside.

[2] Whether it was properly entered upon the showing made, or was based upon evidence which was competent or incompetent, sufficient or insufficient, or upon any evidence whatever, is not the subject of inquiry in this proceeding. On April 29, 1908, after a special demurrer had been sustained to the bill, and more than a year after the probate of the instrument, appellees amended it by striking out the paragraph referring to the probate. This was a manifest inadvertence, and on May 6th, at the same term, the appellees, by leave of the court, withdrew this amendment, leaving the bill as originally filed. Later the bill was amended by striking out the allegations of the bill to the effect that the evidence had not been taken in open court or by the judge of the court.

[3] It is insisted that the amendment of April 29th, striking out all reference to the probate of the bill, deprived the court of jurisdiction of the cause of action, and that, the time within which the court could acquire jurisdiction having elapsed, the amendment of May 6th could not restore such jurisdiction. Whatever force this proposition might have if the term had elapsed (and this we do not determine), it has none in this instance. The term of court is regarded as a single day, to which all the proceedings of the term have reference. The order allowing the amendment and that allowing its withdrawal, being made at the same term, are to be regarded as made at the same time and did not affect the jurisdiction of the court.

[4] The decedent left four children, the

appellees, Charles G. Hutchinson, Jennie C. Schutte, Daisy Grace Hutchinson, and Violet Hutchinson, as his only heirs, and their mother, Jennie Curtis Hutchinson, his widow. His marriage was not ceremonial, and in 1884 he deserted his wife and children. In 1899 he was sued by his wife for separate maintenance, and he denied that he was ever married to her. The cause was strenuously contested and resulted in a decree in favor of the wife, which was affirmed by the Appellate Court and by this court. *Hutchinson v. Hutchinson*, 96 Ill. App. 52; Id., 196 Ill. 432, 63 N. E. 1023. That decree established the marriage and is conclusive here. 1 Greenleaf on Evidence, § 525; *Burden v. Shannon*, 3 Gray (Mass.) 387. After the decree the decedent continued to deny the existence of the marriage and never recognized his wife as bearing that relation to him, except in so far as the existence of the decree made such recognition compulsory. He lived as an unmarried man with one or another of his brothers, who are the chief beneficiaries under his will. He left an estate of several hundred thousand dollars. By his will he gave legacies of \$5,000 each to Mary E. Tiffany and Josie Tobin and of \$2,000 each to his daughters Grace and Violet. All the rest of his estate after the payment of his debts was devised to his three brothers, William A. Hutchinson, Chester M. Hutchinson, and Douglas W. Hutchinson, the latter of whom was nominated as executor without bond. The devise to his two daughters and the only reference to his wife or children in the will are found in the second and third clauses, which are as follows:

"Second. Whilst the courts of the state of Illinois have decreed that one Jennie C. Hutchinson, who was always known to me as Jennie C. Curtis, is my common-law wife, I know that in truth and in fact she is not and that no such common-law marriage took place as was testified to by her on the trial of the case of Jennie C. Hutchinson vs. Charles G. Hutchinson; and it is my express will that she shall have no share whatsoever in any of my estate other than that which she may obtain under and by virtue of the laws of the state of Illinois, and any of my property which may come to her after my death she will obtain solely because the laws of the state of Illinois give such property to her and not because I desire that she shall have the same.

"Third. I give and bequeath to the two youngest daughters of the said Jennie C. Hutchinson, namely, Grace Hutchinson and Violet Hutchinson, the sum of two thousand dollars (\$2,000) each."

Appellees by the assignment of cross-errors have questioned the action of the court in withdrawing from the jury the issue of undue influence. This action was right. There is no evidence in the record which has any tendency to show that the execution of the

instrument in question was procured by the undue influence of the appellants, or either of them, or that either of them had anything to do with or knowledge of its execution. At the time of its execution, May 24, 1905, James Maher, who had been Charles G. Hutchinson's attorney for a number of years, represented him in litigation which was then pending and had occasion to go to see him frequently at William A. Hutchinson's house, where testator was then living, about this litigation and his other business. At one of these times testator talked with Mr. Maher about writing his will and gave directions for that purpose. At his request Mr. Maher prepared a draft of the will, which was submitted to him, and afterward another draft, or more than one. The instructions in regard to the will came entirely from Charles G. Hutchinson. Nobody else made any suggestions or spoke to Mr. Maher about it or was present at any of his conferences with the testator. It was executed in the presence of Mr. Maher and two others, who were asked by testator to sign it as witnesses, and no other person was present, though Earl Dunning, who was an attendant upon the testator, was in the next room. There is no evidence that any suggestion was made to the testator by any of the appellants or any other person that he should make this will or any will. In 1899 and in 1900 the testator had made two wills, in each of which a substantially similar disposition of his estate was made to substantially the same persons, differing only in minor details.

[5] There is no indication that at the time of the execution of any of these wills the testator was under any sort of restraint or influence aside from his own wishes, or that he acted in any manner otherwise than as an entirely free agent.

Much testimony was introduced at the trial on the question of the testator's mental capacity. He was 60 years old when he died, and the testimony covered more than 40 years of his life. In 1865 or 1866 he came home from college in the East, and from that time for many years was employed in his father's bottling works in Chicago as a foreman and a bookkeeper. About 1867 he began to have illicit relations with Jennie Curtis, which continued until 1875, when they were united by a common-law marriage. The extent to which they openly lived together thereafter is uncertain, though three children were afterward born to them. They never lived together after 1884. He invented a stopper for bottles, which was patented in 1879. Soon after he organized a corporation in conjunction with his brother George and was actively engaged in the management of its business for many years. He was successful in business and accumulated a large amount of property. He had gonorrhea when he was about 20 years old and syphilis about 20 years before his death. He had

a slight stroke of an apoplectic nature in 1895, which rendered him unconscious and partially paralyzed. He gradually recovered from this, though he did not fully recover the use of his hands and wrists, his limbs remained stiff, and his feet dragged. His eyes were crossed, and for a time he saw double; but these troubles were afterward cured. He suffered a second and much more severe stroke of the same character in 1899. He experienced some loss of feeling in his body, arms, and legs, loss of control of his legs, of his bladder, and of his bowels, was weak in his hips, knees, and ankles, and could not readily lift his legs and advance them. The muscles about his shoulders and arms were wasted and the nerves degenerated. There is unanimity among the medical witnesses who testified on the subject that the cause of the trouble was syphilis. By some it is called syphilis of the brain and spine, by others sclerosis, arterial sclerosis, multiple sclerosis, post-lateral sclerosis, paralysis, or paresis. Though stiff and uncertain, the testator did not lose his power of locomotion until confined to his bed shortly before his death. There is no contradiction as to the testator's physical condition. As a result of syphilis there was a degenerated condition of the spinal cord and of the posterior portion of the brain, and this condition was incurable.

Many witnesses, medical and nonmedical, were examined whose knowledge of the testator covered the last 40 years of his life. A very large majority of them expressed the opinion that he was of sound mind. The testimony of expert medical witnesses was also introduced by each party, whose opinions, given in answer to hypothetical questions, tended to support the views of the respective parties calling them. It is insisted by the appellees that the testator was afflicted with paresis—a progressive disease, manifesting itself at first, perhaps, by a slight loss of memory, dropping of words or carelessness as to dress and person, these conditions becoming more marked as the disease progresses and affecting in an increasing degree the memory, judgment, and mental functions, until, in an advanced stage of the disease, the mental powers of the victim are wholly destroyed. Syphilis is the principal, if not the sole, cause of paresis. There is no evidence that the testator was of unsound mind prior to December, 1902. The fact that he was afflicted with syphilis and the extent to which the disease had progressed indicated that there was occasion to fear mental impairment in the future, but not that such impairment then existed. At that time the testator went to Palmyra, Wis., where he entered the Palmyra Springs Sanitarium as a patient. He remained there about three months, and during a part of that time he was delirious and irrational and was sub-

ject to frequent illusions and hallucinations. The evidence is conflicting as to whether this condition was caused by drugs administered to him or was due to another cause. The will in question was not executed until more than two years after the testator left the sanitarium, and in the meantime there had been no recurrence of the illusions or hallucinations. Since the decree must be reversed for error occurring on the trial, we shall not discuss the evidence or state it in detail or express any opinion as to its weight.

[6] The appellees insisted on the trial, and argue here most earnestly, that the testator did not recognize his children as objects of his bounty and was therefore not of sound mind. It is insisted that he was under the insane delusion that he was not married to his wife, and that the appellees were not his legitimate children. The jury were instructed that the decree in the separate maintenance case conclusively established that the testator was married to Jennie C. Hutchinson, and that four children were born to them, and that if the jury found that the complainants were the children of the testator they would also find that they were natural objects of his bounty and affection. Thereupon the complainants requested, and the court gave also, the following instructions:

"The court instructs the jury that if you believe, from the evidence, that the complainants are the children and heirs of Charles G. Hutchinson, deceased, and that said Charles G. Hutchinson, deceased, after August 8, 1900, and before May 25, 1905, stated that he was a single man, and during such time would not admit to his solicitor that the complainants were his children, but denied that they were his children, and then told his solicitor, in substance, that he did not want them to ever get anything more than he allowed them in his will; and if the jury shall find, from the evidence, that the deceased, Charles G. Hutchinson, was prior to August 8, 1900, married, and that he knew on said date that he was married and that the complainants were his children and by him acknowledged as his children; and if the jury shall further believe, from the evidence, that some time between August 8, 1900, and May 24, 1905, Charles G. Hutchinson, deceased, thought and believed without any cause or reason, that he was a single man, and that the complainants, or any of them, were not his children, and that such belief would not and did not, and could not yield to evidence or reason, and if they further believe, from the evidence, that said Charles G. Hutchinson, deceased, was governed and controlled by that belief, and that such belief was operating upon the mind of said Charles G. Hutchinson, deceased, at the time of the signing of the writing in evidence purporting to be the last will and testament of Charles G. Hutchin-

son, deceased, bearing date May 24, 1905—then the jury are instructed that they shall find that the writing in evidence purporting to be the last will and testament of Charles G. Hutchinson, deceased, bearing date May 24, 1905, is not the last will and testament of Charles G. Hutchinson, deceased."

"The court instructs the jury that if you believe, from the evidence, that complainants are the children and heirs of Charles G. Hutchinson, deceased, and that said Charles G. Hutchinson, deceased, after August 8, 1900, believed that he was a single man, and that such belief, if any, would not, did not, and could not yield to evidence or reason, and that such belief caused the said Charles G. Hutchinson, at the time of signing the paper purporting to be the will of May 24, 1905, to believe that the complainants, or any of them, were not his children, and that such belief as to his children, if any, had no other foundation whatsoever, then the jury shall find that the paper purporting to be the last will of Charles G. Hutchinson, deceased, dated May 24, 1905, is not his will."

These instructions required the jury to find against the validity of the will if they believed, from the evidence, that the testator, after August 8, 1900, believed, without any cause or reason, that he was a single man and that the complainants or any of them were not his children, and that such belief would not yield to evidence or reason but was operating upon his mind at the time of the signing of the supposed will. They are based upon the supposed existence of an insane delusion of the testator as to his marriage and his children, and they do not have a sufficient basis in the evidence. The question of what constitutes an insane delusion rendering one incapable of making a will was considered by this court in the case of *Owen v. Crumbaugh*, 228 Ill. 380, 81 N. E. 1044, 119 Am. St. Rep. 442, and a number of definitions by various courts are there cited.

[7] In whatever words such definition may be expressed, a belief which a rational person may entertain, however erroneous, does not constitute an insane delusion. There is no basis in the evidence for contending that the testator was under a delusion as to any fact, except during the times of his temporary delirium at the Palmyra Springs Sanitarium. He knew that on August 8, 1900, a decree had been rendered declaring Jennie C. Hutchinson to be his wife and that four children were born of his marriage to her. He knew that the appellees were those children, and that in law Jennie C. Hutchinson was his wife and the appellees were his children. There is no evidence that he ever had any doubt of these things as matters of fact. The will itself recognizes the decree establishing the status of his wife. He knew that in law she was entitled to, and would receive, the share of his estate given to a surviving wife by the laws of Illinois, and that

he could not prevent it. His legal obligation the same as that of any other man to his wife and children.

[§] He had the legal right to dispose of his property to other persons than his children if he saw fit. They were natural objects of his bounty, though not the only natural objects thereof. His brothers were also natural objects of his bounty, and among them all the testator had the right to choose what claims he would recognize as most worthy. The will shows that he recognized the claims of two of his children. Under normal family relations he would naturally have provided for all his children with greater liberality. But his family relations were not normal, and the fact that he did not make his children the sole objects of his bounty, or the chief objects, does not tend to justify the conclusion that he was insane. He deserted his family in 1884. In 1898, when sued by his wife for separate maintenance, he denied the marriage, and it was only against his most determined opposition that it was established and against his testimony as a witness in denial of the facts constituting the marriage. The decree, and its affirmance by the appellate tribunals, did not, and could not be expected to, change his attitude towards the facts in the case. He had denied under oath the facts on which the decree was based, and, while the force of the law compelled him to submit to the decree, it did not and could not compel him to change his belief as to the facts or his declarations as to his belief. The natural effect of the litigation might have been to include the children in the bitter hostility to the mother. During the pendency of that suit the testator made a will not materially different from the one now in controversy, and immediately after the decree another very similar. The evidence tends to show from the first an earnest design to shake off absolutely, so far as possible, the claim of his wife and of her children, first by repudiating the marriage, if possible, and, if not, then by disposing of his property away from them, and that he never departed from this intention, but strictly adhered to it to the end. There was no change in his attitude toward his wife and children on or after August 8, 1900. The decree entered on that day made no difference in his mental attitude or mental condition. The fact that he adhered stubbornly to his belief in the facts after the court had found them against his sworn testimony was no evidence of an insane delusion. It is not evidence of insanity to disagree with the judgment of a court. The hypothesis contained in these instructions, that Charles G. Hutchinson believed, after August 8, 1900, that he was a single man, and that the complainants, or any of them, were not his children, and that this belief would not and did not and could not

yield to reason, has no foundation in the evidence. The instructions were misleading, and it was error to give them.

The decree is reversed, and the cause remanded.

Reversed and remanded.

VICKERS, C. J., and FARMER, J. (concurring specially). We concur in the reversal of the decree below for the reason stated in the opinion of Mr. Justice DUNN; but in our opinion the evidence is wholly insufficient to sustain the verdict of the jury, and we think that the decree should be reversed upon this additional ground.

HAND, J. (dissenting). In my opinion there is sufficient evidence in the record to sustain the decree and upon which to base the instructions referred to in the majority opinion, and I think the decree should be affirmed.

(250 Ill. 322.)

PROUTY v. CITY OF CHICAGO.

(Supreme Court of Illinois. April 19, 1911.

Rehearing Denied June 7, 1911.)

1. LIMITATION OF ACTIONS (§ 127*)—AMENDED DECLARATIONS.

Where an amended declaration, alleging for the first time an essential element of plaintiff's cause of action, is not filed until limitations would have barred a new action, if then brought, a plea of limitations is available to the declaration as amended.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 543-547; Dec. Dig. § 127.*]

2. TORTS (§ 7*)—NEGLIGENCE (§ 103*)—INJURY TO PERSON—RIGHT OF ACTION.

One suffering an injury to his person because of the wrongful or negligent act of another has a right of action for personal injury at common law, independent of statute.

[Ed. Note.—For other cases, see Torts, Cent. Dig. § 7; Dec. Dig. § 7; Negligence, Dec. Dig. § 103.*]

3. ABATEMENT AND REVIVAL (§ 54*)—DEATH (§ 10*)—PERSONAL INJURIES—SURVIVAL.

Where a person having sustained a negligent injury dies from some other cause, his action for the injury survives to his personal representative, but, if he dies from the injury, the action abates, and the only remaining right of action is for wrongful death authorized by Laws 1853, p. 97.

[Ed. Note.—For other cases, see Abatement and Revival, Cent. Dig. §§ 255-278; Dec. Dig. § 54; Death, Dec. Dig. § 10.*]

4. DEATH (§ 19*)—WRONGFUL DEATH—ACTION AGAINST CITY—NOTICE—STATUTES—CONSTRUCTION—"PERSONAL INJURY."

Laws 1853, p. 97, entitled "An act requiring compensation for causing death from wrongful act, neglect or default," provides that, when the death of the person is caused by wrongful act, such as would have entitled the party injured to maintain an action in respect thereof if death had not ensued, the person who would have been liable if death had not ensued shall be liable to an action for damages resulting to a widow and next of kin from such death. *Held*, that an action for wrongful death under such act was not an action for "personal injuries" within Laws 1905, p. 111, entitled "An act concerning suits

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

at law for personal injuries and against cities, villages and towns," requiring as a condition to the maintenance thereof that the specified notice shall be served on the defendant, and hence the service of such notice was not a necessary element of a cause of action by plaintiff against a city for the wrongful death of plaintiff's decedent.

[Ed. Note.—For other cases, see Death, Cent. Dig. §§ 13, 14; Dec. Dig. § 19.*

For other definitions, see Words and Phrases, vol. 6, pp. 5340-5344, vol. 8, p. 7753.]

Appeal from Branch Appellate Court, First District, on Appeal from Superior Court, Cook County; George A. Dupuy, Judge.

Action by James H. Prouty, administrator of Michael Doyle, deceased, against the City of Chicago. There was judgment of the Appellate Court affirming a judgment, overruling plaintiff's demurrer to the plea and dismissing the action, and plaintiff appealed the case to the Supreme Court on certificate of importance. Reversed and remanded, with directions.

George E. Gorman, James A. Brady, and Brady, Barnum & Rutledge (A. S. Langille and Daniel Belasco, of counsel), for appellant. Edward J. Brundage, Corp. Counsel, and Clyde L. Day, City Atty. (Edward O. Fitch, of counsel), for appellee.

CARTWRIGHT, J. On November 14, 1906, appellant, James H. Prouty, administrator of the estate of Michael J. Doyle, deceased, brought this action on the case in the superior court of Cook county against the appellee, the city of Chicago, and on November 21, 1906, filed his declaration, alleging in seven counts wrongful acts of the defendant committed on October 27, 1906, causing the death of Doyle on the same day and depriving the widow and next of kin of their means of support. A plea of the general issue to the declaration was filed. There was no averment in any of the counts that notice had been given to the city in accordance with section 2 of the act entitled "An act concerning suits at law for personal injuries and against cities, villages and towns," in force July 1, 1905. Laws of 1905, p. 111. On April 17, 1908, by leave of court, plaintiff filed seven additional counts, which were identical with the original counts except that each contained an averment of service of such notice on November 13, 1906. To these additional counts the defendant filed pleas of the general issue and the statute of limitations. The plaintiff demurred to the plea of the statute of limitations, and the demurrer was overruled. The plaintiff elected to stand by his demurrer, and the suit was dismissed at his costs. He appealed from the judgment to the Appellate Court for the First District and the cause was heard in the branch of that court, which affirmed the judgment and granted a certificate of importance and an appeal to this court.

If this suit is for a personal injury, the

giving of the notice specified in the second section of the act of 1905 was a fact which it was necessary for the plaintiff to prove in order to maintain the action, and therefore one of the facts which he was bound to aver in his declaration. *Erford v. City of Peoria*, 229 Ill. 546, 82 N. E. 374; *Walters v. City of Ottawa*, 240 Ill. 259, 88 N. E. 651.

[1] The averment was first made in the additional counts, more than one year after the date on which it was alleged that Doyle died, and, if the averment was a necessary one, the statute of limitations was a good plea, and the court was right in overruling the demurrer, but, if the suit is not for a personal injury, the court erred.

[2] One who suffers an injury to his person as a consequence of the wrongful or negligent act of another has a right of action for the damages resulting from such injury without the aid of any statute, but by a right which existed at common law. His action is for the personal injury, and he may recover for pain and suffering, physical and mental, for expenses of medical treatment and attendance, and permanent effects upon his person reasonably certain to result.

[3] If he dies from some other cause than the injury, the action for the injury to his person survives to his personal representative, who may recover damages for the personal injury. *Savage v. Chicago & Joliet Electric Railway Co.*, 238 Ill. 392, 87 N. E. 377; *Holton v. Daly*, 106 Ill. 131.

[4] In the common understanding and legal meaning such a suit is for a personal injury. That is also true of any suit for injury to a living person brought by one sustaining such relations to the injured person that the plaintiff suffered damages as a consequence of the injury. If an injured person survives and brings a suit for the personal injury and afterward dies from its effects, the action does not survive but abates, and a different right of action is substituted based upon a statute. That is the right of personal representatives of a deceased person to bring a suit and recover the pecuniary injuries to the widow and next of kin occasioned by his death, and that right exists in this state by virtue of the act of 1853, entitled "An act requiring compensation for causing death from wrongful act, neglect or default." Laws of 1853, p. 97. That act does not, in its language or in substance, create a cause of action for a personal injury. It provides that whenever the death of a person shall be caused by wrongful act, neglect or default, and the act, neglect, or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, the person or company or corporation which would have been liable if death had not ensued shall be liable to an action for damages resulting to the widow

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

and next of kin from his death. We are asked to say that a suit of that kind is the same as a suit by a living person for damages sustained on account of an injury to his person, but it seems to us that it would require a perversion and change of language to reach such a conclusion.

By the general statute of limitations (Hurd's Rev. St. 1909, c. 83, § 14) actions for damages on account of an injury to a person must be commenced within two years next after the cause of action accrued, but the statutory action is barred at the expiration of one year from the death of the person for which it may be brought. The title of the act requiring notice has already been given, and it relates only to suits at law for personal injuries. The first section provides that no suit shall be brought by any person for an injury to his person unless such suit or action be commenced within one year from the time such injury was received or the cause of action accrued. It would be impossible to include the statutory action in that section, both because its language is limited to suits brought by any person for an injury to his person, but also because the limitation of the statutory action was already one year. Section 2 provides for the notice, and counsel contend that it includes a class of cases not mentioned either in section 1 or in the title. That would not be the natural construction of the act unless there is specific language in section 2 requiring such a conclusion. The notice is to be given within six months from the date of the injury or when the cause of action accrued. Counsel think the section may apply by requiring notice within six months after the cause of action accrued, but that is precisely the same language used in section 1, which limits the right to bring suit to one year from the time the injury was received or the cause of action accrued. There is no change in the language which would justify an enlargement of the meaning.

The Appellate Court adopted the view of counsel that an administrator must give notice within six months after his appointment, citing *Crapo v. City of Syracuse*, 183 N. Y. 395, 76 N. E. 465, as authority for so holding. In that case the majority of the court were of the opinion that the cause of action accrued upon the appointment of the administratrix 16 months after the death, but our statute does not treat the action as accruing on the appointment of an administrator, but bars it in one year after the death. To adopt the conclusion of the Appellate Court, we would have to say that an administrator might be appointed near the end of the limitation fixed for bringing the suit, but the Legislature intended to give him six months after his appointment, extending after the action was barred, to give the notice. The section requiring notice imposes the duty upon the person who is about to bring the suit, which must necessarily be the administrator,

and to say that he may give notice within six months after his appointment would involve an absurdity. In the *Crapo* Case the majority of the court were of the opinion that the action was for personal injuries, but the question was immaterial in the case, as the court stated on the motion for a re-argument. It was then said that the majority differed among themselves whether the action was for a personal injury, but the question was immaterial so long as it was held that the cause of action did not accrue until the appointment of the administratrix. *Crapo v. City of Syracuse*, 184 N. Y. 561, 76 N. E. 1092. The judges who thought the action was for a personal injury were not in accord with the courts generally, which hold that a statute requiring notice of a personal injury does not include claims for damages suffered by third persons by reason of death. *McKeigue v. City of Janesville*, 68 Wis. 50, 31 N. W. 298; *Clark v. Manchester*, 62 N. H. 577; *Maylone v. City of St. Paul*, 40 Minn. 406, 42 N. W. 88; *Perkins v. Oxford*, 66 Me. 545; *Brown v. Salt Lake City*, 33 Utah, 222, 98 Pac. 570, 14 L. R. A. (N. S.) 619, 126 Am. St. Rep. 828.

It is urged that it would be as beneficial to a city to have notice in a case where an injury results in death as where the action is brought by the person injured for the injury to his person. Perhaps it would be a benefit to any defendant charged with a wrongful act, neglect, or default causing death to have timely notice of the facts mentioned in the statute, but whether provision shall be made for such notice is for the Legislature, and it is not for the courts to impose conditions not required by the law upon persons who are given a right of action for a wrong.

The theory that the Legislature intended to include actions for damages for the benefit of third persons, on account of death, in the category of suits for personal injuries, is sought to be sustained by decisions that the wrongful act, neglect, or default constitutes the cause of action in a suit brought by an administrator. *Crane v. Chicago & Western Indiana Railroad Co.*, 233 Ill. 259, 84 N. E. 222, and *Mooney v. City of Chicago*, 239 Ill. 414, 88 N. E. 194, are cited to show that the statutory action is for personal injuries. In the *Crane* Case the question was whether the statutory provision that no action should be brought to recover damages for a death occurring outside of the state referred to the death alone, or to both the wrongful act, neglect, or default and the death. It was held to include both, but it was not held that a declaration which merely alleged the wrongful act, neglect, or default, and did not aver the death, would state a good cause of action. The wrongful act, neglect, or default constitutes a cause of action in the sense that it is an interference with a right of the plaintiff or a breach of duty which gives the plaintiff ground for complaint and renders the defendant liable for any damage

that may result. If death is concurrent with the act, neglect, or default, no one stating the fact would think of saying that the person was injured, and death is never described as an injury to the person. In the Moon-ey Case it was held that, where the wrongful act, neglect, or default did not result in instant death, the administrator could not maintain an action unless the deceased had a right to sue at the time of his death, and, if he had released defendant, the statute would not authorize the administrator to sue. We find no reason for saying that notice is required by section 2 of the act in question where an action is by an administrator under the statute.

The judgments of the Appellate Court and superior court are reversed, and the cause is remanded to the superior court, with directions to sustain the demurrer to the plea of the statute of limitations.

Reversed and remanded, with directions.

(250 Ill. 242)

T. E. HILL CO. v. UNITED STATES FIDELITY & GUARANTY CO.

(Supreme Court of Illinois. April 19, 1911.
Rehearing Denied June 7, 1911.)

1. EXCEPTIONS, BILL OF (§§ 41, 44*)—SIGNING AND FILING.

If a bill of exceptions is presented to the trial judge at such time that it can be filed within the time provided by order of court, the party will not be prejudiced by the negligence or delay of the judge to sign the bill until after the time fixed for that purpose has expired. If the date of presentation appears on the bill when it is signed and sealed, it can be filed *nunc pro tunc* as of the date of presentation.

[Ed. Note.—For other cases, see Exceptions, Bill of, Cent. Dig. §§ 66, 73; Dec. Dig. §§ 41, 44.*]

2. EXCEPTIONS, BILL OF (§ 41*)—SIGNING.

Where a bill of exceptions was presented to the judge within the time provided by the order of court, and it was signed and filed after expiration of the time, the judge should have dated it as of the date when it was presented, and an order should have been procured filing it as of that date, but failure to do so was an irregularity which did not render the bill void.

[Ed. Note.—For other cases, see Exceptions, Bill of, Cent. Dig. § 66; Dec. Dig. § 41.*]

3. BANKRUPTCY (§ 113*)—BOND GIVEN BY CREDITOR.

Bankr. Act July 1, 1898, c. 541, § 3e, 30 Stat. 547 (U. S. Comp. St. 1901, p. 3423), provides that, on application to take charge of the property of a bankrupt prior to adjudication, a bond shall be filed conditioned for the payment, in case the petition is dismissed, of all costs, expenses, and damages occasioned by the seizure and detention of the property. Section 69a provides for the taking of possession of property by the marshal on the giving of a bond conditioned to indemnify the bankrupt "for such damages as he shall sustain in the event such seizure shall prove to have been wrongfully obtained." The act provides that the Supreme Court of the United States shall prescribe all rules and forms, and such court has issued a number of general orders, among others a form of bond to be given by the marshal, and has provided that the several forms annexed to the general orders shall be

observed and used with such alterations as may be necessary to suit each particular case. The creditor on the appointment of a receiver gave a bond conditioned to indemnify for such damages as should be sustained in the event the seizure should prove to have been wrongfully obtained. *Held* that, where the petition was dismissed, there was a breach of the bond, it not being necessary that there should be fraud or imposition, malice, and lack of probable cause.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 113.*]

4. BANKRUPTCY (§ 113*)—BOND OF CREDITOR.

Bankr. Act July 1, 1898, c. 541, § 3e, 30 Stat. 547 (U. S. Comp. St. 1901, p. 3423), provides that counsel fees, costs, and expenses and damages shall be fixed and allowed by the court and paid by the makers of a bond given on the appointment of a receiver. *Held* that, as against a surety company on a bond given on the appointment of a receiver to indemnify against such damages as should be sustained in case the seizure should prove to have been wrongfully obtained, it was not necessary that the damages, etc., should be fixed by the United States court before action on the bond.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 113.*]

5. BANKRUPTCY (§ 113*)—RECEIVERS—BONDS.

On the appointment of a receiver in bankruptcy, a bond was given to indemnify against such damages as should be sustained in the event the seizure should prove to have been wrongfully obtained, two months after the appointment of the receiver, the bankrupt made a voluntary assignment for the benefit of creditors and the petition was dismissed. *Held*, that wrongful detention of the property after the voluntary assignment amounted to damage to the bankrupt as used in the bond.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 113.*]

Error to Appellate Court, First District, on Error to Municipal Court of Chicago; John H. Hume, Judge.

Certiorari by the United States Fidelity & Guaranty Company to review a judgment of the Appellate Court reversing a judgment in favor of petitioner against the T. E. Hill Company. Affirmed.

John A. Bloomington, for plaintiff in error. Buell & Abbey and Fred W. Bentley, for defendant in error.

CARTER, J. This was an action brought in the municipal court of Chicago by defendant in error against plaintiff in error, the latter company having signed as surety a petitioning creditors' bond for the appointment of a receiver in an involuntary bankruptcy proceeding in the United States District Court. On November 18, 1905, shortly after the receiver took possession of the property, defendant in error made a voluntary assignment for the benefit of creditors. The order of the United States Court of Appeals affirming the decision of the district court dismissing the petition was entered November 25, 1906. The suit on this bond was begun February 6, 1907. The cause was submitted to the trial judge without a jury, and judgment entered in favor of plaintiff in error. The cause being taken to the Appel-

late Court for the First District by writ of error, the judgment of the trial court was reversed and judgment entered in the Appellate Court in favor of the defendant in error for \$5,000 debt and \$5,000 damages. Thereafter, on a petition for certiorari, the cause was brought here for further review.

Plaintiff in error has moved in this court to strike the bill of exceptions from the files, and this motion was taken with the case. The judgment was rendered in the municipal court March 19, 1908. On the same day an order was entered that a bill of exceptions be filed in 40 days. April 25, 1908, the time for filing a bill of exceptions was extended 30 days from April 28, 1908. June 15, 1908, the time for filing a bill of exceptions was extended 60 days from June 27th. September 28, 1908, the bill of exceptions was signed and was filed in the municipal court the same date. It was marked as follows: "June 25, '08, presented for signature.—John H. Hume, Judge." It was filed as of September 28, 1908, and not as of June 25th.

It is first insisted that the motion to strike the bill of exceptions from the files should be sustained because section 38 of the municipal court act (Hurd's Rev. St. 1909, c. 37, § 301) permits, in first-class cases such as this, only one extension of time for filing the bill of exceptions. If the bill of exceptions had been signed and sealed by the judge when it was presented on June 25, 1908, no question could be raised as to its being signed within the time required by statute. *Haines v. Danderine Co.*, 249 Ill. 259, 93 N. E. 743. It is further insisted by counsel that the bill of exceptions should be stricken because it was filed September 28, 1908, when it should have been filed by a nunc pro tunc order as of the date when it was presented to the trial judge. The rule is that, if a bill of exceptions is presented to the trial judge at such time that it can be filed within the time provided by the order of the court, the party will not be prejudiced by the neglect or delay of the judge to sign the bill until after the time fixed for that purpose has expired. If the date of presentation appears on the bill when it is signed and sealed, it can be filed nunc pro tunc as of the date of such presentation. *Hall v. Royal Neighbors*, 231 Ill. 185, 83 N. E. 145; *Underwood v. Hossack*, 40 Ill. 98; *Evans v. Fisher*, 5 Gilm. 453; *Goodrich v. Cook*, 81 Ill. 41. A bill of exceptions purports to be signed at the time the exception is taken in the course of the trial, whether it is presented then or afterwards, but, if it is presented within the time as extended by the court and that fact is shown on the bill, it may be afterwards filed as of that date within a reasonable time after it is actually signed. *Hall v. Royal Neighbors*, supra. Where a bill of exceptions is actually signed and filed 10 days after the trial, it is not necessary to render it effective that it should be entered

and filed nunc pro tunc as of the date of the trial. *Hunnicut v. Peyton*, 102 U. S. 333, 26 L. Ed. 113. The court said in the case just cited that, while the bill might be signed as of the date of the judgment, the giving of the true date would not destroy it; that "the reason why it is required that bills shall be presented for signature during the term is that the rulings made may be fresh in the memory. Are they any more fresh in his memory when he antedates the bill or orders it to be filed as of the date of the trial than when he gives to the signature and filing their true date? We cannot doubt that in a multitude of cases bills of exception have been signed after judgment and filed without any order that the signature and filing be entered nunc pro tunc, but, when the true time of the signature appeared, having been treated as sufficient whenever they have shown that the exceptions were taken during the trial." While it is true that this reasoning was applied in a case where the bill of exceptions was signed during the term, it applies with equal force where the bill of exceptions is actually presented to the judge within the time provided by the order of court, for it is conceded that, under the authorities, having been so presented it could be filed, after it was signed and sealed, as of the date when it was so presented, the same as a bill of exceptions signed and sealed during the term when the trial was had could be signed and sealed during the term and filed as of the date of the trial. As a matter of proper practice the judge should have dated it, after signing, as of the date when it was presented, and an order should have been procured filing it as of that date. At the most, however, the failure to do this was only an irregularity, and does not render the bill of exceptions void. *Railway Conductors' Benefit Ass'n v. Leonard*, 166 Ill. 154, 46 N. E. 756. The motion to strike the bill of exceptions will be denied.

It is insisted that there was no breach of the bond upon which this suit was brought. It was given pursuant to the order of the United States District Court, which, after reciting that the appointment of a receiver was necessary for the preservation of the estate, provided that the petitioning creditors file a bond in the sum of \$5,000, as provided by statute, before said receiver should take possession under the appointment. The condition of the bond given was that, if the receiver was appointed and seized the property, the said T. E. Hill Company should be indemnified "for such damages as it shall sustain in the event such seizure shall prove to have been wrongfully obtained," etc. It is provided by the national bankruptcy act July 1, 1898, c. 541, 30 Stat. 547 (U. S. Comp. St. 1901, p. 8423), in section 3e, that on an application being made after a petition has been filed to adjudge a person a bankrupt, to take charge of the property of said bank-

rupt prior to the adjudication and pending a hearing, a bond shall be filed conditioned "for the payment, in case such petition is dismissed, to the respondent, his or her personal representatives, all costs, expenses and damages occasioned by such seizure, taking and detention of the property," etc. Section 69a of the bankruptcy act provides for the taking possession of the property by the marshal on the giving of a bond conditioned to indemnify the bankrupt "for such damages as he shall sustain in the event such seizure shall prove to have been wrongfully obtained." The bankruptcy act also provides that the Supreme Court of the United States shall prescribe all necessary rules and forms of orders and the procedure for carrying the act into effect, and that court has accordingly issued a number of general orders, among others a form of a bond when the marshal is directed to seize the property. That court has also provided that "the several forms annexed to these general orders shall be observed and used, with such alterations as may be necessary to suit the circumstances in each particular case."

It is conceded that, if the condition of this bond had been in accordance with section 3e, there could have been a recovery as the petition in bankruptcy was dismissed, but it is argued that the form of the bond corresponded to section 69a, and that there can be no damages recovered because the seizure by the receiver was not proven "to have been wrongfully obtained." While the language as to the conditions of the bonds in the two sections differs, still, as the appointment of the receiver and the order for the marshal to take possession are intended to accomplish the same object, the provisions in the two clauses should, if possible, be given the same interpretation. That the receiver and the marshal take possession of the property for substantially the same purpose is shown, not only by the wording of subsection 3 of section 2 of the bankruptcy act, but has been so held by the courts. *Guaranty Title & Trust Co. v. Pearlman* (D. C.) 144 Fed. 550; *Whitney v. Wenman*, 198 U. S. 539, 25 Sup. Ct. 778, 49 L. Ed. 1157. Manifestly the Supreme Court of the United States was of this opinion, otherwise a special form of bond would have been prescribed for the appointment of a receiver under section 3e.

We have already held in *Hill Co. v. Contractors' Supply & Equipment Co.*, 94 N. E. 544, that the United States District Court had jurisdiction of the parties and the subject-matter in these same bankruptcy proceedings for the appointment of a receiver, and that, therefore, there was no common-law action, unless malice and lack of probable cause could be shown, growing out of such appointment of the receiver, even though the bankruptcy proceedings were subsequently dismissed. It must be held, therefore, that section 3e creates a new cause of action whereby damages and costs may be recover-

ed under the bond required, if the petition is dismissed without malice and probable cause being shown.

It is further insisted that as the court had jurisdiction the seizure of the property was not "wrongfully obtained," under the condition of the bond, merely because the petition was dismissed; that these words mean that the order must have been obtained through some fraud or imposition upon the court or with malice and lack of probable cause. If section 69a were the only provision of the bankruptcy act on this subject there would be force in this argument, but in the light of the common purpose of the two sections, "wrongfully obtained," in section 69a, should be held to include the securing of an order of seizure when thereafter the petition shall be dismissed. The two sections could then fairly be interpreted to provide for practically the same bond, as the Supreme Court provides in its rules, with such minor changes as may be necessary to suit the circumstances, such as substituting the word "receiver" for "marshal." This being so, the seizure of the property by the receiver must be held "to have been wrongfully obtained."

It is further argued that there could be no recovery under section 3e, reading, "counsel fees, costs, expenses and damages shall be fixed and allowed by the court and paid by the obligors in said bond," until after the damages had been fixed by the United States court. If the bond given had been expressly conditioned for the payment of such damages as should be first allowed by such court, then there would have been no breach of the bond until the bankruptcy court had first allowed such damages. The construction that we have placed upon the bankruptcy act justifies the conclusion that such allowance is not a condition precedent, that the remedy given under section 3e is cumulative, and the plaintiff may, if he pleases, pursue this remedy on the bond. The fact that the plaintiff in error is a surety company tends to strengthen this conclusion as to the proper construction of this bond, for its liability under this bond is to be held and construed, in a certain sense, as a contract of insurance. *United States Fidelity Co. v. First Nat. Bank*, 233 Ill. 475, 84 N. E. 670; *Leshner v. United States Fidelity Co.*, 239 Ill. 502, 88 N. E. 208; *American Bonding & Trust Co. v. Baltimore & Ohio & Southwestern Railroad Co.*, 124 Fed. 868, 60 C. C. A. 52.

The Contractors' Supply & Equipment Company, which filed the petition for the appointment of a receiver, consented, in writing, that the plaintiff in error could interpose as a set-off a claim due it from defendant in error. It is contended that the Appellate Court should have allowed this set-off. We deem it a sufficient answer to this contention to state that we find no proper proof in this record that said petitioning creditor

was the owner of any indebtedness at the time of the trial of this cause which it could transfer to plaintiff in error.

It is further urged that as the defendant in error made a voluntary assignment for the benefit of its creditors two months after the order appointing the receiver, and said bond was only to indemnify as to such damages as should come to defendant in error, no damages could be considered as to this assignee. The assignor in this case retained an interest in its property, and, notwithstanding the assignment, remains liable for debts. After their payment, the remaining property, if any, is to be returned to it. Wrongful detention of the property after the voluntary assignment would therefore "damage" the defendant in error, as that word is used in this bond.

The judgment of the Appellate Court will be affirmed.

Judgment affirmed.

(250 ILL. 211.)

PEOPLE v. GUKOUSKI et al.

(Supreme Court of Illinois. April 19, 1911.
Rehearing Denied June 7, 1911.)

1. CRIMINAL LAW (§§ 622, 1148*)—SEPARATE TRIAL—DISCRETION OF COURT—REVIEW.

A motion for a separate trial in a criminal case is addressed to the discretion of the court, and, unless there is a clear abuse of such discretion, its action in overruling the motion will not be reviewed.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1380, 3050; Dec. Dig. §§ 622, 1148.*]

2. CRIMINAL LAW (§ 530*)—EVIDENCE—CONFESSIONS—ADMISSIBILITY.

Confessions made by defendants, reduced to writing by police officers who spoke defendants' language, and who afterwards translated the confessions, sentence by sentence, to defendants in their own language, whereupon defendants signed them, were admissible in evidence, though defendants contend that their statements were not accurately taken, or that the writings contain statements that defendants did not know were in them when they signed them.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 530.*]

3. CRIMINAL LAW (§ 741*)—EVIDENCE—CONFESSIONS—WEIGHT AND CREDIT—JURY QUESTIONS.

The weight and credit to be given to confessions are matters for the jury.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1716; Dec. Dig. § 741.*]

4. HOMICIDE (§ 29*)—SUFFICIENCY OF EVIDENCE.

Evidence that defendants conspired with one K., a codefendant, to upset a bakery wagon belonging to a baker whose men were on strike, and destroy the bread, and that K. was to attack the driver, and that, on the arrival of the wagon, K. shot and killed the driver, sustained a conviction for murder; defendants being liable for the acts of K. done in furtherance of the common object.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 47; Dec. Dig. § 29.*]

Error to Criminal Court, Cook County; Richard S. Tuthill, Judge.

John Gukouski and others were convicted of murder, and bring error. Affirmed.

William Prentiss, for plaintiffs in error. W. H. Stead, Atty. Gen., John E. W. Wayman, State's Atty., and Joel C. Fitch (Robert E. Crowe, of counsel), for the People.

FARMER, J. On May 5, 1909, between 3 and 4 o'clock in the morning, Henry Tietlebaum was fatally shot near a grocery store at 756 West Seventeenth street, in the city of Chicago. Tietlebaum was a bakery wagon driver employed by Joseph Blonski, a baker doing business at 642 Milwaukee avenue. At that time there was a strike going on among the bakers employed by Blonski. No one other than the parties charged with the shooting saw it, but as soon as the shots were fired a crowd gathered and Tietlebaum was picked up from the sidewalk where he had fallen and taken to a hospital, where he died a short time afterwards. A hat found in the vicinity where the shooting was done led to the arrest of Bladislau Nogawischki the same day, and from information obtained from him John Gukouski and Alexander Krolkowski were at once arrested, and about 10 days later Wincenty Karcz was arrested in Atlanta, Ga., and brought back to Chicago. At the May term of the criminal court an indictment was returned against all four of the above-named parties, charging them with the murder of Tietlebaum. A trial was had at the November term of said court, the defendants were found guilty as charged in the indictment, and the punishment of each was fixed at 25 years in the penitentiary. After overruling motions for a new trial and in arrest judgment was rendered on the verdict. A writ of error has been sued out of this court by Nogawischki, Gukouski, and Krolkowski to review that judgment.

At the beginning of the trial, on October 26, 1909, counsel for Gukouski, Nogawischki, and Krolkowski made a motion, supported by the affidavit of Nogawischki, for a separate trial from the defendant Karcz. The motion was overruled, and this action of the court is assigned as error. At a previous term all the defendants had been arraigned and entered pleas of not guilty.

[1] Such a motion is addressed to the discretion of the court, and the action of the court in overruling the motion is not subject to be reviewed unless there is a clear abuse of the discretion. Gillespie v. People, 176 Ill. 238, 52 N. E. 250; Doyle v. People, 147 Ill. 394, 35 N. E. 372. From an examination of the affidavit upon which the motion was based we are of opinion there was no abuse of discretion by the court.

[2] Alleged confessions of each of the four defendants were offered and received in evidence. The confession of Nogawischki was made to Police Officer Kandzia on the day

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

he was arrested, and before either of the other defendants had been taken into custody. It was not reduced to writing, but was testified to by Capt. Kandzia. Krolkowski and Gukouski the next day made confessions, and their confessions were reduced to writing and signed by them. When Karcz was brought back to Chicago he also made a confession, which was reduced to writing and signed by him. Krolkowski and Gukouski also made affidavits used by the police officers in extraditing Karcz. The affidavits purported to relate the circumstances of the shooting of Tietlebaum, and they were sworn to by the parties before Judge Himes, of the municipal court. It is contended these confessions and affidavits were erroneously admitted in evidence by the court.

All the defendants were Poles, and none of them but Nogawischki could speak, read, or understand the English language. Capt. Kandzia testified that Nogawischki, when brought to his office after being arrested, was shown the hat that was found in the vicinity of the homicide, and said it was his, and said he might as well tell it all. Witness testified he told him to tell the truth, and inquired of Nogawischki if he was willing to have his statement reduced to writing and sign it. He said he was willing to do so, but it was not written out or signed. Witness and Nogawischki talked in the Polish language. Capt. Kandzia testified that the following day Nogawischki, Krolkowski, and Gukouski were all in his office at one time, and in the presence of each other, and in the presence of Sergeant Hellinski and Officer Pawlowski, Nogawischki repeated the confession or statement made the day before substantially as he made it the first time. At the same time Krolkowski and Gukouski made confessions, which were written down by Capt. Kandzia in the English language and were afterwards translated to each of them in the Polish language, sentence by sentence, and signed by Krolkowski and Gukouski, respectively.

Capt. Kandzia testified that Nogawischki said in the presence of Krolkowski and Gukouski that the four met in the afternoon before the shooting, and agreed to go out to Seventeenth street to upset a baker's wagon; that they met Karcz in front of the elevated station on Eighteenth street, in the vicinity where the homicide was committed, about one or half past 1 o'clock in the morning; that Karcz then said, "Now, let's go over and upset the wagon. I know the place, and I am the bravest man of us all. I will do the attacking;" that they went to Seventeenth street, near Wood, where Blonski's wagon was expected to deliver bread; that they waited there about two hours before the wagon came; that Nogawischki, Krolkowski, and Gukouski hid alongside the house, while Karcz remained in front, and, when the wagon came, Karcz began shooting at the driver. The other three started to run, and Nogawischki lost his hat. Capt. Kandzia testified

that, after Nogawischki had made this statement in the presence of Krolkowski and Gukouski, they said it was correct. Witness then asked Krolkowski and Gukouski if they would make a statement and have it written down, and they said they would. Witness testified he told them they did not have to make any statement if they did not wish, and that, if they did make it, it might be used against them. They expressed themselves as willing to make the statement. Capt. Kandzia testified they each talked in Polish, and that he translated their statements into English and wrote them down. After completing the statements he translated them, sentence by sentence, into the Polish language to the parties, and they were then signed by the parties, respectively. Nogawischki was present when these statements were made, translated, and signed.

Sergeant Hellinski testified he was a Pole and understood and spoke the Polish language; that he was present when the statements were made by Krolkowski and Gukouski to Capt. Kandzia and written down by him; and that Capt. Kandzia translated the statements from English into Polish before they were signed. The witness testified he himself read the statement of Krolkowski.

[3] There is no evidence whatever that these confessions or statements were not freely and voluntarily made. The defendants all testified in their own behalf, and did not deny that they made statements about the circumstances of the shooting freely and voluntarily, but they claim the statements they made were not taken down accurately by Capt. Kandzia, or, at least, that they did not know when they signed them that they contained certain matters that were in the papers when they were introduced in evidence. The written statements signed by Krolkowski and Gukouski the day following their arrest purported to be in their language, respectively. The circumstances under which they were made and signed entitled them to be admitted in evidence. The value of confessions as evidence depends upon the circumstances under which they were made. The jury had all the circumstances before them, and the weight and credit to be given to the oral confession of Nogawischki and the written confessions or statements by Krolkowski and Gukouski were matters for them to determine.

The substance of Krolkowski's signed statement was that about 1 o'clock on the morning of the shooting Karcz proposed to the other three that they all go to Seventeenth street to upset a bakery wagon and destroy the bread, and this was agreed to. Karcz said he was the bravest man, and would attack the driver. Karcz met the other three in front of the elevated station at Eighteenth street, and the four of them went to the grocery store where the bakery wagon was expected to deliver bread. They waited about an hour, hidden alongside the building, before the wagon came. When the wagon came,

Karcz jumped out and began to shoot at the driver. Krolkowski didn't know how many shots were fired. When he heard them, he ran away and went home. He did not know Karcz had a pistol. Karcz told him the driver was driving for Blonski, whose bakers were on a strike. The statement of Gukouski was not entirely in the same language as that of Krolkowski, but in their material features the two statements were substantially the same.

While the affidavits sworn to before Judge Himes by Krolkowski and Gukouski are not in the exact language of their signed statements, they are substantially so; the only difference being that in the affidavits they say Karcz said he was the "heaviest" man and would attack the driver, while in the signed statements "bravest" is used instead of "heaviest." Police Officer Pawlowski testified he was present when Krolkowski and Gukouski signed and swore to the affidavits before Judge Himes, that they were read over and translated by him correctly in the Polish language, and the parties were told that they need not sign them if they did not want to. Judge Himes testified he remembered swearing the parties to the affidavits, that he believed they were read over to the parties and they were made to understand them before they were signed, but he would not be positive as to that. His best recollection was that they were. We think under the proof they were properly admitted in evidence.

Karcz's statement was made the day he returned from Georgia to Chicago. He said he met the other three defendants at the elevated station on Eighteenth street and asked them what they were doing, and one of them said they were going to upset Blonski's wagon. Karcz said he would go with them, and they went to Seventeenth street near Paulina street. Karcz stopped in front of a grocery store, and the other three went he did not know where. He lit a cigarette, and, when the wagon came, he jumped to the driver, and told him to keep still and not move. The driver made a motion as if to reach for his pocket, and Karcz drew his revolver and fired three shots at him. He then ran away. He threw his revolver away, and when he got home told one of the boarders what had happened. The boarder told him he had better go to Atlanta, Ga., and he went there. He did not know the driver, but knew that it was Blonski's wagon, and knew that Blonski's bakers were on a strike. They were all bakers by trade, and, as we understand it, members of the Bakers' Union. Karcz testified on the trial, and denied the correctness of the statement written down by Capt. Kandzia. He did not deny making a statement and that it was written down by Capt. Kandzia, but denied that as written down it was correct. He testified that, when he met the other three defendants at the Eighteenth street station, he did not know where they were going; that he inquired

of them, and they told him they had a friend on Wood street and asked him to go with them; that, when they came to Wood street, they all took a drink of whisky out of a bottle Gukouski was carrying, and then went around a house; that Nogawischi said he would go and find out, and went out somewhere. Karcz asked Krolkowski what they were waiting for, and he said Blonski's wagon. Nogawischi then came back and said, "He is coming." The three, Nogawischi, Krolkowski, and Gukouski, then jumped out toward the wagon and Nogawischi drew his revolver. All three of them ran after the wagon and Nogawischi was shooting. Karcz then ran toward Paulina street and went home. He testified that, Nogawischi and Krolkowski came to his place and said to him that, if he ever told anybody about what happened, they would kill him.

Plaintiffs in error all testified on the trial. They denied stating to Capt. Kandzia that the four defendants went to the grocery store, by agreement, to turn over the bakery wagon and destroy the bread. In substance their testimony was that Karcz asked them to go with him, but they did not at the time know he contemplated anything more than talking with the driver of the bakery wagon. When he spoke of turning the wagon over and destroying the bread, they remonstrated with him against it, and, when he insisted upon doing so, they stopped some little distance before reaching the grocery store and shortly afterwards heard a number of shots fired. They then went home.

The foregoing is the substance of the material testimony upon which the verdict and judgment were based. It will be seen the testimony of plaintiffs in error on the trial was in conflict with that of Karcz, and the testimony of all of them was in conflict with their written confessions and that of Nogawischi with his oral confession. It was the province of the jury, therefore, to determine whether the testimony of the parties on the trial or their confessions and the affidavits of two of them made before the trial were true.

[4] It is very earnestly contended by counsel for plaintiffs in error that if the written statements or confessions of Krolkowski and Gukouski and their affidavits, and also the oral confession of Nogawischi, be accepted as true, they are insufficient to sustain the conviction of plaintiffs in error of the crime of murder. It is argued these confessions show that murder was not in their minds or contemplation; that their only purpose in going to the place where the shooting occurred was to upset the bakery wagon and destroy the bread in it; that they had no knowledge Karcz had a pistol or contemplated shooting the driver of the wagon, and his doing so was a great surprise to them. According to the confessions of the plaintiffs in error, the agreement was that they were to go to the store where Tietlebaum, the driver of Blon-

skil's bakery wagon, was expected to deliver bread, and upon his arrival there they were to upset the wagon and destroy its contents, and Karcz, either on account of being the "bravest" or the "heaviest" man of the four, was to attack the driver. The agreement contemplated, not only upsetting the wagon and destroying its contents, but personal violence to the driver of it. If their confessions are to be believed, plaintiffs in error anticipated that, in accomplishing their object of upsetting the wagon and destroying the bread, it would be necessary also to assault the driver. They must be presumed, therefore, to have intended to use whatever means might appear necessary to overcome any resistance of the driver of the wagon in attempting to protect it and its contents, and to prevent plaintiffs in error and Karcz from accomplishing their purpose. It was not necessary that they should have expressly agreed to take the life of the driver of the wagon in order to render all of them liable for the act of Karcz in shooting him. They had entered into a conspiracy to perform an unlawful act—to commit a crime. They contemplated that violence to the person of the driver would be necessary for the carrying out of their conspiracy and common purpose. In such case the law makes all the conspirators liable for the acts of one done in furtherance of the common object.

In *Brennan v. People*, 15 Ill. 511, it was said: "The prisoners may be guilty of murder, although they neither took part in the killing nor assented to any arrangement having for its object the death of Story. It is sufficient that they combined with those committing the deed to do an unlawful act, such as to beat or rob Story, and that he was killed in the attempt to execute the common purpose. If several persons conspire to do an unlawful act and death happens in the prosecution of the common object, all are alike guilty of the homicide. The act of one of them done in furtherance of the original design is in consideration of law the act of all." In *Lamb v. People*, 96 Ill. 73, it was said: "Where the accused is present and commits a crime with his own hands or aids and abets another in its commission, he may, in either case, be considered as expressly assenting thereto. So where he has entered into a conspiracy with others to commit a felony or other crime under such circumstances as will, when tested by experience, probably result in the unlawful taking of human life, he must be presumed to have understood the consequences which might reasonably be expected to flow from carrying into effect such unlawful combination, and also to have assented to the doing of whatever would reasonably or probably be necessary to accomplish the objects of the conspiracy, even to the taking of life. * * * The principle which underlies and controls cases of this character is the elementary and very familiar doctrine, applicable alike to

crimes and mere civil injuries, that every person must be presumed to intend, and is accordingly held responsible for, the probable consequences of his own acts or conduct. When, therefore, one enters into an agreement with others to do an unlawful act, he impliedly assents to the use of such means by his co-conspirators as is necessary, ordinary, or usual in the accomplishment of an act of that character. But beyond this his implied liability cannot be extended. So if the unlawful act agreed to be done is dangerous or homicidal in its character, or if its accomplishment will necessarily or probably require the use of force and violence which may result in the taking of life unlawfully, every party to such agreement will be held criminally liable for whatever any of his co-conspirators may do in furtherance of the common design, whether he is present or not."

In *Wharton on Criminal Law*, § 220, it is said: "It is not necessary that the crime should be part of the original design. It is enough if it be one of the incidental, probable consequences of the execution of that design, and should appear at the moment to one of the participants to be expedient for the common purpose. Thus where A. and B. go out for the purpose of robbing C., and A., in pursuance of the plan and in execution of the robbery, kills C., B. is guilty of the murder. In such cases of confederacy all are responsible for the acts of each, if done in pursuance of the common design. This doctrine may seem hard and severe, but, as has been well argued, has been found necessary to prevent persons engaged in riotous combinations from committing murder with impunity, for, where such illegal associates are numerous, it would scarcely be practicable to establish the identity of the individual actually guilty of a specific wrong." In 1 *McClain on Criminal Law*, § 196, the author says: "It results from the principle stated in the preceding section that every one connected with carrying out a common design to commit a criminal act is concluded and bound by the act of any member of the combination perpetrated in the prosecution of the common design. But it is not necessary that the crime committed shall have been originally intended. Each is accountable for all the acts of the others done in carrying out the common purpose, whether such acts were originally contemplated or not, if they were the natural and proximate result of carrying out such purpose, and the question whether the result is the natural and probable effect of the wrongful act intended is for the jury. Thus, if several persons agree to commit and enter upon the commission of a crime involving danger to human life, such as robbery, or assault and battery, or resisting an officer or resisting arrest, all are criminally accountable for death caused in the common enterprise. Thus, also, if the unlawful enterprise is likely to meet violent resistance, all will be

liable for a felonious assault committed by one of their number in consequence of such resistance, and if the common design, in general, involves acts of violence, all who participate in the common plan are equally answerable for acts of others done in pursuance thereof, although the result was not specially intended by them all."

If the jury believed the confessions of plaintiff in error to be true—and we are unable to say they were not warranted in doing so—they were justified, under the law, in finding them guilty of the murder of Tietlebaum.

There was no error in the giving or refusing of instructions of such prejudicial nature as to justify a reversal of the judgment, and it is affirmed.

Judgment affirmed.

(359 Ill. 135.)

PEOPLE v. CLEMINSON.

(Supreme Court of Illinois. April 19, 1911.
Rehearing Denied June 7, 1911.)

1. HOMICIDE (§ 236*)—POST MORTEM EXAMINATION—SUFFICIENCY.

Evidence in a murder trial held to show that a post mortem examination was made with sufficient thoroughness to establish death by chloroform.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 495-499; Dec. Dig. § 236.*]

2. HOMICIDE (§ 264*)—WITNESSES—EXAMINATION.

In a murder trial, it was error for the court, at the request of the state, to call and examine witnesses who were not eyewitnesses of the homicide, where the only reasons assigned were that the state did not care to vouch for the truth of their testimony and desired to cross-examine them, and that one of the witnesses was accused's employé.

[Ed. Note.—For other cases, see Homicide, Dec. Dig. § 264.*]

3. WITNESSES (§§ 330, 382*)—CROSS-EXAMINATION—IMPEACHMENT.

In a murder trial, cross-examination by the state tending to degrade a witness who had had friendly relations with accused, and who was called and examined by the court, and permitting evidence impeaching her statements, not bearing upon accused's guilt, was error.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1106-1108, 1223; Dec. Dig. §§ 330, 382.*]

4. HOMICIDE (§ 163*)—EVIDENCE—ADMISSIBILITY.

In a trial for uxoricide, it was error to permit the state to show evidence of accused's general immoral character, and that he had performed abortions.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 310-317; Dec. Dig. § 163.*]

5. HOMICIDE (§ 338*)—HARMLESS ERROR—ADMISSION OF EVIDENCE.

A conviction of murder will not be reversed for erroneous admission of evidence, where guilt is shown beyond reasonable doubt by competent evidence.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 709-713; Dec. Dig. § 338.*]

6. HOMICIDE (§ 236*)—UXORICIDE—EVIDENCE—SUFFICIENCY.

Evidence held to show uxoricide by chloroforming.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 495-499; Dec. Dig. § 236.*]

Vickers, C. J., and Cooke and Dunn, JJ., dissenting.

Error to Criminal Court, Cook County; William H. McSurely, Judge.

Haldane Cleminson was convicted of murder, and he brings error. Affirmed.

Burres & McKinley (Elijah U. Zollne, of counsel), for plaintiff in error. W. H. Stead, Atty. Gen., and John E. W. Wayman, State's Atty. (John E. Northup and William A. Rittenhouse, of counsel), for the People.

FARMER, J. Plaintiff in error (who will hereafter be called defendant) was indicted in Cook county for the murder of his wife, Nora Jane Cleminson, in the city of Chicago, on the 30th day of May, 1909. The first, second, third, fifth, sixth, and seventh counts of the indictment charged the defendant murdered his wife by administering chloroform to her, and the fourth charged the death was caused by administering a poison, the character of which was to the grand jurors unknown. Defendant pleaded not guilty, and after a trial lasting substantially a month the jury found him guilty of murder, and fixed his punishment at imprisonment for life in the penitentiary. Motions for a new trial and in arrest of judgment were overruled and judgment rendered on the verdict. This writ of error is sued out by defendant to reverse the judgment of conviction.

Defendant was married to Nora Jane Morgan in Michigan on Thanksgiving day, 1903. At that time both parties resided with their parents on farms near South Haven, Mich. Their first child was born in September, 1904. A few weeks after that event, defendant went to Chicago to study medicine. Shortly afterwards his wife, his mother, and father moved to Chicago, and the two families lived together about three years. Another son was born to defendant and his wife in June, 1906, and some time afterwards defendant, his wife, and children moved into a flat about eight blocks distant from the defendant's father and mother. Defendant was pursuing his medical studies and assisting in supporting his family by working at different kinds of employment. Defendant's family and that of his parents visited each other very often, and they usually had their dinners together on Sundays at the home of defendant's parents. In August or September, 1908, defendant and his wife moved to another flat about five blocks distant from his parents' home. Defendant graduated in medicine in 1908, and in September of that year engaged in the practice of his profession. About 5 o'clock in the morning of May 30, 1909, the defendant telephoned Dr. Hullhorst, who lived a few

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

blocks distant, to come to his house. Dr. Hullhorst testified the defendant said to him over the telephone, "Come down to the house as soon as you can. It looks as if an earthquake had struck the place. We have been done up." Dr. Hullhorst went at once arriving at defendant's house about 10 minutes past 5. The door was not fastened, and the doctor walked in without knocking or ringing the bell. Dr. Hullhorst had attended defendant's wife when she gave birth to her second child. He testified when he went in the house defendant was lying on the floor in the dining room, dressed in pajamas and a bathrobe. He inquired of defendant what was the matter, and defendant replied, "We have been done up. We have been robbed. We have been chloroformed." The doctor asked him where his wife was. He replied she was in the bedroom, and said, "I don't know what is the matter with her. I believe she is dead." The doctor went to the bedroom and found her body on the bed. She was dead, cold and rigid, and the doctor gave it as his opinion that she had been dead four or five hours. The doctor then went back in the room where defendant was and informed him his wife was dead. He asked defendant to tell him about it, and defendant said he did not know how it happened; that he awoke in the night and felt as if he had been sick and feverish all night; that he touched his wife with his foot and found she was cold; that he then jumped out of bed, and hardly knew what had happened since. The doctor testified he then examined defendant, felt his pulse, and found it was accelerated, fast, strong, and full. He had no fever, and the doctor did not then prescribe anything for him. There were no indications that he had been chloroformed and the doctor found no receptacle containing chloroform. Deceased was lying on her left side on the front of the bed, near the edge. Her head was thrown back slightly, and her mouth was open. The left hand was under her face and the right on her breast. Her legs were slightly flexed. On the back of the bed the covers were thrown back, and it appeared as if some one had occupied that part of the bed. The bed covers were over the body of the deceased up to the face, but were not over the face. Half of a napkin was found under the face of the deceased and another half under the sheet at the back of the bed, next the wall. They were apparently parts of the same napkin. Dr. Hullhorst smelled both pieces, but could detect no odor. On the sheet at the back of the bed was a dark-colored stain, but the doctor did not examine it carefully. He then talked again with defendant, who said, "This is tough," but that he could stand it if it were not for the boys. Defendant told the doctor if there was any occasion for an undertaker to call Fred Roberts. The doctor replied it was not a case for the undertaker, but for the coroner. He had previously notified the police station. Two police officers, Wood and Smith, arrived about

6 o'clock, while Dr. Hullhorst was still at defendant's house. Shortly afterwards defendant's mother and his wife's sister, Miss Cella Morgan, who boarded with defendant's parents, came. Later Roberts, the undertaker, came, but the police officers would not allow him to go into the house and take charge of the body. Dr. Hullhorst further testified that, when he entered defendant's residence, he found the drawers had been taken out of the furniture and papers and books scattered over the floor. In the dining room the drawers had been drawn out of the sideboard and linen scattered over the floor. In the bedroom the drawers had been taken out of the dresser and clothing scattered over the room. Defendant told the doctor they had been robbed of silverware and \$40 or \$50. Describing more fully defendant's condition when he found him lying on the floor, the doctor said he was gagging, trying to vomit, and crying, but he saw him vomit nothing but saliva. The doctor got him up and placed him on a couch. Afterwards he dressed. All the windows in the house were closed, except one, and that was open about an inch. The doctor gave it as his opinion the defendant was feigning the symptoms he manifested.

Policeman Wood testified he arrived at defendant's house about 5:45. He described how the drawers were pulled out of the furniture and their contents scattered over the floor, and the jewelry case open and empty. He testified there were a great many half-burnt matches scattered over the floor in all the rooms. When he arrived defendant was lying on the floor, but he did not talk to him until after he had gone into the bedroom and viewed the body of deceased. He described her position the same as Dr. Hullhorst. He testified he then went back into the room where defendant was and asked him to tell what had occurred; that defendant replied, "You are a reporter, and I will not talk with you," and turned his face away and gagged. He testified that he and his fellow policeman made a systematic search of the house, and that they found footprints outside the house under the window of the bedroom where the body of Mrs. Cleminson lay. They then went into the house and procured defendant's left shoe and fitted it into the tracks that led up to the window. They then discovered that the track of the right foot was deeper than that of the left. They then procured the right shoe and placed it in the tracks, and found that it fitted them exactly. They examined the windows and screens to see if they had been forced open and found them intact, except one screen in the dining room window had been removed and was on the sidewalk. The witness then again asked defendant what had happened, and he replied, "Somebody must have been in the house," and inquired where they got in. The witness replied he did not know, and defendant said they must have gotten in through the window because the screen was out. The wit-

ness asked defendant what he had that burglars could take and what was missing, and defendant said his wife's engagement diamond ring, his stickpins, and \$50 in money out of his pants pocket. Witness inquired where his pants were and defendant pointed to a chair and said he left them on the chair the night before. The witness found the pants folded up behind the chair on the floor, also a small, black leather pocketbook lying open beside them on the floor. The silver spoons were found by witness and his fellow policeman in the kitchen. When witness would ask defendant where the jewelry was kept he would reply that he was sick, and did not answer the inquiry. He continued to gag for a considerable time. His mother asked him to dress himself, and he finally did so. He talked a great deal to himself, or apparently to no particular person, about burglars and inquired why they came in there and killed such a sweet little woman when they were getting things in shape to enjoy life. At one time defendant went with his mother into the room where the body of his wife lay and said he wished they had got him instead of her. He told the witness that chloroform had been used, and said he could taste it in his mouth. Dr. Hervey, who was an assistant of defendant, came after the witness had arrived and defendant asked him to call an undertaker. That was about half-past 7. Hervey did so, but the witness told him it was no use until the coroner came there. Hervey asked witness if he could go into the room and look at the body. Witness told him he could do so and went with him. Hervey touched the body with his hand, and then drew out from under the face a napkin. Froth was coming out of the mouth of the body, and the napkin was moist from it. Witness then stopped Hervey and called Dr. Hullhorst. The doctor came in, opened the napkin, smelled of it then raised up the sheet and another napkin or part of one dropped out of its folds. The doctor smelled of that also and laid it down again. The witness smelled both napkins, but could detect no odor. The two pieces of napkin found in the bed were of the same pattern as another napkin found in some soiled clothing in the children's bedroom. Witness asked defendant if it was possible to kill any one with a little cloth like the napkin found in the bed, saturated with chloroform. He said it was if the person were asleep and it were put under the face and the bedclothes thrown over him so he could not get air. He said if a person could get no air chloroform would kill very quickly. A lieutenant and sergeant of police who came about this time had considerable talk with defendant in the presence of witness, and he told them it must have been about four hours after he had eaten supper that he was chloroformed; that as a physician he knew that his food had digested. He told them the same story about the jewel-

ry and money being taken, and also a gold watch. The sergeant searched his trousers, and found the watch in his pocket. He asked defendant why he did not call the police, and the defendant said he used his last nickel in calling Dr. Hullhorst. Dr. Reinhardt the coroner's physician, came and took charge of the body, opened it, removed and examined the brain and other organs or parts of them. Mrs. Cleminson was about eight months advanced in pregnancy. Police officer Smith substantially corroborated the testimony of Wood, except that he did not hear all that Wood testified defendant said in the different conversations had with him.

Lieutenant Culnane testified he arrived at defendant's house about 8:30 in the morning, in company with Sergeant O'Brien. Wood and Smith were there when he arrived. He talked with the defendant, who claimed that burglars had been in his house and robbed it. He asked defendant why he did not call the police station. Defendant said he did not have a nickel. The witness told him he did not need a nickel to call the police station, and defendant said he tried to get the station, but could not. Witness asked him why he could not and defendant made no reply. Witness found deceased's diamond ring and defendant's stickpins in defendant's coat pocket, in a closet. Defendant was taken by the police to the Alexian Brothers' Hospital about 4 o'clock in the afternoon. Sergeant O'Brien testified that he asked defendant to give him a report of the matter and inquired what time he went to bed. Defendant said: He went to bed about 10 o'clock. That he was a heavy sleeper, and fell asleep very soon after retiring. That he woke up about 5 o'clock in the morning very sick at his stomach, and called his wife and asked her to get up as he was very sick. She did not answer and he then reached over his hand and touched her and found she was cold and dead. That he then got up and telephoned Dr. Hullhorst. At this point Dr. Hervey spoke to the witness and said he wished the witness would not talk any further to defendant as he was very weak. Defendant said he was getting chills, and got up and put his overcoat on over his bathrobe and laid down on the lounge. The witness described the appearance of the house and the drawers being pulled out, substantially as the other witnesses had done. He testified to making a careful examination for evidence of the house having been entered by burglars and found none. The witness and Lieutenant Culnane searched the house for chloroform. They found a number of bottles in a medicine case none of which was labeled chloroform and none of which contained chloroform that they could detect by the smell. All bottles found were put in a box and given to an officer to take to the station.

Edward Strum, a police officer, testified he arrived at defendant's house about 9 o'clock on the morning of the 30th of May. When

he arrived Dr. Reinhardt, Roberts, the undertaker, and his assistant, Dr. Hervey, Lieutenant Culnane, Sergeant O'Brien, and Officers Smith and Wood were in the house, also defendant's mother. Witness testified he heard Roberts, the undertaker, ask defendant about arrangements for the funeral; that defendant said, "You know my circumstances as well as I do; my intention was to have her cremated"; that his mother heard him and said, "Oh! dear, that would never have been her wishes." Defendant then said, "All right, then; proceed." Witness testified he told defendant's mother he was a police officer, and she said, "This is awful," and defendant said, "Well, I understand this thoroughly. It is up to them to investigate and find the guilty party if they can." The witness accompanied defendant to the Alexian Brothers' Hospital, and testified that Dr. Rettig, of that hospital, after some examination and feeling of the pulse of defendant, said to him, "You, as a practicing physician, know what a time we have putting any one under the influence of chloroform. The burglars, by spilling chloroform in that room, would hardly have done that. You would have to get a cloth or something and cover the face with it." Defendant made no reply. Witness said to defendant, "It seems they don't take much stock in the burglary and chloroform story." Defendant replied, "If it is not burglars, I suppose it is up to me." Witness testified the doctors at the hospital proposed to pump out defendant's stomach; that he first objected, but finally submitted to it. Witness testified he went out awhile and afterwards returned and asked defendant if he thought his wife would take anything without consulting or seeing him; that defendant said he did not know what she might have done; that she had full knowledge of medicine. The witness then asked the defendant if he felt like talking to him about the matter. Defendant inquired if the witness was a Mason, and on being informed he was not said he was sorry—that, if he were a Mason, he might confide in him.

Frank A. Jernigan, a police officer, testified he was at defendant's house May 30th, and described conditions and appearances in the house substantially the same as other witnesses had. He testified to finding or seeing in the house a hypodermic syringe and bottles containing drugs. Among the medicines found was a small case made by the Abbott Alkaloidal Company, with bottles in it. Defendant testified the bottles contained morphine alkaloidal tablets, strychnine alkaloidal tablets, and one other that he could not remember.

Dr. Brune, of the Alexian Brothers' Hospital, testified he examined defendant and found his heart action rapid, but no evidence of disease. Defendant had taken a number of drinks of liquor during the day, and the witness testified he observed an alcoholic smell about him. He tested the urine and

examined the contents of his stomach, but found no evidence of chloroform. From the hospital defendant was removed to the Sheffield avenue police station.

George McGowan, a police officer of the Sheffield avenue station, testified that he, with other police officers, accompanied the defendant to the funeral, which occurred on June 1st; that they visited defendant's father's house and that defendant there went in the bathroom and washed and combed. Witness asked, "How did this thing happen, anyhow?" and defendant replied, "Officer, I could tell you, but I will explain everything afterwards." The witness testified that on their return to the station from the funeral the defendant said, "I didn't realize what I was up against, or I should have told the truth." On arriving at the station defendant was locked up in a cell, and witness testified that about 15 or 20 minutes afterwards he talked with defendant; that he asked him how he was feeling, and defendant said all right, but that there were better places. The witness asked him why he did not tell Capt. Kane how the matter happened; that it would be better for him to do so. Defendant replied he did not know the captain well enough, but, if the witness would get Clifton Woolridge, he would talk with him. Defendant belonged to the same Masonic lodge that Woolridge belonged to. Witness testified that he notified Woolridge, and that Woolridge talked with defendant about 8 o'clock the same evening. The witness testified that on June 4th he took defendant from the Sheffield avenue police station to the Rogers Park police station for the inquest, and on the way asked defendant how his wife came to her death. Defendant said that on the evening before her death he took a hot bath and went to bed about 10 o'clock; that he did not know what time his wife went to bed. He said she took chloroform.

William M. Parker, a police officer of the Sheffield avenue police station, testified he went to the cell of defendant on the night of May 31st and told him he would like to talk to him, but defendant said he did not want to talk—that he had nothing to say. Witness next saw defendant the next night after he was taken from Capt. Kane's office back to his cell, and inquired of defendant how he felt. He testified defendant said he felt better. Witness informed him that Capt. Kane had said he (defendant) had told him all. Defendant said he had, and witness asked him what he told the captain. Defendant refused to state and told him to ask the captain. Witness said he would rather have defendant tell him, and defendant asked witness if he was a married man. Witness answered that he was, and defendant said "Love, friendship, and honor go a long way until children commence to come. Well, things were that way in my family until children commenced to come and then it was different. Things have not been, since chil-

dren commenced to come, as they were prior to that." Witness then asked about the burglary story, and defendant said, "Oh! that was a fake, I made that up to save the honor of my family and my children." Witness then asked how about the chloroform, and defendant said, "I made that up, too." Capt. Kane then came in and told witness to bring defendant up to his office. He did so, and Capt. Kane asked defendant if there was anything he thought of that his wife could have taken. He said there was a bottle of dope in the medicine cabinet that he had fixed up for a student in a hospital: that it had chloral and some other kinds of drugs in it. Defendant said after he fixed it up for the student he found out what he wanted to use it for and would not give it to him; that his wife might have taken that. He said he did not know the name of the student nor where he lived. The witness testified that on the morning of June 9th he was in Capt. Kane's office. Defendant was also there, and Capt. Kane asked him what he could do for him. Witness said the defendant replied that Capt. Kane could do him a favor that would do him a lot of good and do the captain no harm. Capt. Kane asked him what it was, and defendant said, "I want you to eliminate that part of my statement that I made to you about my wife's unfaithfulness." The captain said he could not do it, and the defendant replied he could if he wanted to. Capt. Kane said he could not do it and asked defendant if he wanted him to perjure himself, and defendant said then that he did not want anything more to do with the captain.

Clifton R. Woolridge, a police officer and the man defendant expressed a desire or willingness to talk to, testified he went to the police station where defendant was detained about 8 o'clock the evening of June 1st, and there first talked to Capt. Kane about 10 minutes. Witness then went to the cell where defendant was, and asked him if he wanted to talk with him (witness). Defendant said he did. The cell was unlocked, and witness and the defendant went to Capt. Kane's office. Witness testified he told defendant the police had made an investigation of the burglary charge, and that there was nothing in it, and advised defendant to tell the truth and clear the matter up. They talked at considerable length, and defendant said he was innocent, but that the story about the burglary was not true. He said his wife attempted suicide about two weeks before her death, but that he discovered it and saved her. He said that they were not mated, but that she was a good housekeeper; that he told the burglary story to save the honor of his family. Witness advised defendant to talk to Capt. Kane, and he consented to do so. Shortly afterwards Capt. Kane came in and witness told him defendant had admitted the burglary charge

was not true, and the defendant then had a talk with Capt. Kane.

Capt. Kane testified he was captain of the Sheffield avenue police station; that on the night of May 31st he endeavored to talk with the defendant, but that the defendant refused to talk and said he had been advised by his counsel not to do so. He declined to tell who his counsel was or where his office was. Witness next saw defendant about 10 o'clock on June 1st, but had no talk with him. After the funeral he again saw defendant, with Woolridge, in the office. Witness left the room after having first talked with Woolridge before defendant was brought into the office. Woolridge and defendant were 'in the witness' office a little more than an hour, during which time the witness heard nothing that was said between them. Afterwards Woolridge called the witness in and said he pitied the defendant, and thought witness would when he heard his story. He started to tell the story, and defendant interrupted him by asking him if he thought that was the proper thing to do. Woolridge said he thought it was, that Capt. Kane was in charge of the district and it was his duty to make a thorough investigation, and he asked defendant to tell the captain what he had told him. Defendant asked Woolridge to tell the story, and in his presence Woolridge stated defendant told him that he and his wife had not lived as man and wife for over two years; that the unborn child she was pregnant with was not his; that she had attempted about two weeks before her death, to commit suicide on account of her shame, and defendant told the burglary story to save the honor of his children; that it was true defendant wanted his wife to get rid of the child, and said if she would do so he was willing to forgive her, but he could not bear the thought of raising another man's child with his own boys. Witness asked defendant if that was true, and he said it was. Witness then asked defendant what was the origin of the trouble between him and his wife, and defendant replied he had been out all of one night taking care of persons who were injured in the Northwestern L Road accident, and, when he arrived home next morning, tired, sleepy, and hungry, his wife asked him abruptly where he had been all night. He told her he was out with a lady friend. She said all right, if he was doing that kind of thing she could too. Defendant said he did not then believe she would do such a thing. He said he had no desire for sport; that his pleasure was with women; that he had a strong passion for them; that he and his wife were not mated; that their desires were not at all alike; that she was a good woman and a good housekeeper, but a man wanted something more than that. He said he was satisfied he had made a bad job of the burglary scheme. Defendant told wit-

ness not to say anything about what he had said about his wife. Witness then left for a short time, and when he returned the defendant was in his cell and several newspaper men were in the witness' office. Witness took them back to the cell house and told defendant they wanted to interview him on the burglary story. One of them asked him why he concocted that story, and he said to preserve the honor of his children. The reporter asked him what he meant by it, and he said: "I have told everything to Capt. Kane, and he can tell you if he wants to." They then asked the witness what he said, and witness told them to get defendant to tell the story. Later the witness had defendant brought to his office again, and asked him if there were any poisonous drugs in the medicine case that his wife could get hold of. He said he did not think there were, but there was a bottle of dope he put up for a student at Hahnemann Hospital, but, on learning the student wanted it for knockout drops in saloons and barrooms, he refused to give it to him. He said he did not know the name of the student nor his address. The next morning witness again talked to defendant, and told him he was not satisfied with the statement defendant made to him and Woolridge the night before. Witness told defendant nothing he had said would aid him more than his wife's infidelity. Defendant said he did not want that brought up; that he was sorry he had told Woolridge, and Woolridge had no right to mention it. Witness then went over some of the statements made the night before to witness and in the presence of the newspaper men, about defendant's relations with his wife, and stated that it seemed an unreasonable story, and that he should do all he could to clear it up. Witness called defendant's attention to his previous statement about his passion for women, and that, although he had slept with his wife nearly every night, they had had no sexual relations for two years, and told defendant the statement was unreasonable, to which defendant made no reply. Witness then asked the defendant how he accounted for his wife's death. He replied that about two weeks before her death her heavy breathing aroused him one night, and he first thought she had taken morphine; that he got up and gave her strychnine in small quantities to make her vomit. Witness asked defendant if he understood him correctly to say he gave his wife strychnine in small quantities to make her vomit, and defendant replied he did; that he gave her hot water to drink and walked her around the room until she had recovered sufficiently to let her go to bed and go to sleep. Defendant said he talked with his wife next morning, but she would not disclose what she had taken. He prescribed nothing further for his wife. He said they had together drank a bottle of Pluto water the night before her death.

Witness asked him whom he believed to be the father of the unborn child, and he said he was sure it was not his; that this was the reason he wanted his wife to get rid of it; that the thought of raising it with his own children almost wrecked his mind. Witness asked defendant if it affected his mind that way after he had agreed with his wife that she might go her way and he would go his, and inquired if she did not have as much right to go outside as he had. He said, "Yes," but he never thought she would do it. He said his wife had no life in her—had no passion—and would lie in bed like a log. Witness asked defendant if he slept with his wife the night before her death. He replied he did, and witness told him he did not think he was telling the truth; that his story did not sound reasonable, and again asked defendant if he slept with his wife the night before her death. Defendant said: "It is none of your damn business. I won't talk with you any more. You are trying to put a rope around my neck. I am through with you." Witness had another talk with defendant in his office June 9th. Defendant was brought into the office, and witness inquired what he could do for him. Defendant said witness could do him a favor that would do witness no harm and might do the defendant some good. Witness inquired what it was, and defendant asked him to eliminate all he had said about his wife's unfaithfulness in his conversation. Witness told the defendant he could not do so. Defendant replied he could if he wanted to. The witness said he could not without perjurying himself.

Dr. Fisher, defendant's partner in the medical practice, testified that defendant told him his wife knew that he was sometimes out in the company of ladies. Defendant said he was of a more active passionate disposition than his wife, and that for that reason he was sometimes forced to seek the company of other women, and that his wife was aware of that fact.

Cecilia Morgan, a sister of the deceased, boarded at the home of defendant's parents, and saw her sister every Sunday and frequently oftener than once a week. She last saw her sister alive on Saturday evening, May 29th, between 4 and 5 o'clock, with her two children, at the defendant's mother's. She seemed perfectly well and took home with her a tomato plant, and witness saw it planted in defendant's back yard the following day when she went there after her sister's death. Witness testified her sister had for three or four weeks before her death been sewing on the wardrobe of her expected child. When the witness last saw her sister she was happy and cheerful. She never saw any manifestation of love and affection between her sister and defendant, but testified to occasions when she observed defendant treat his wife coldly and indiffer-

ently. They never went out together. Deceased took care of her children and did her own housework.

Hilda Morgan, another sister of deceased, last saw her alive on Wednesday before her death at the home of deceased, where witness took supper. Her health was good. Witness saw her on an average of once a week. About a month before her death defendant told witness as soon as he could afford it his wife could go her way and he would go his, and she could have the children. Witness knew her sister was pregnant and had prepared a wardrobe for the expected child. Witness testified her sister was of a happy, cheerful frame of mind and disposition.

Mrs. Frank Bulow, a married sister of deceased, testified she saw deceased every two or three weeks the last year of her life, and that her health was good. The last time she saw her was about three weeks before her death. She testified about being at her sister's house on one occasion when the defendant treated his wife with coldness and indifference without any cause. Frank Bulow, husband of the last witness mentioned, testified that in February before the death of defendant's wife he had a talk with defendant, in which defendant said the children were the only thing that kept him and his wife together. Witness testified that defendant's treatment of his wife was cold and indifferent.

Defendant testified in his own behalf, and said when his wife was about two months advanced in pregnancy he advised her to submit to an abortion, but she declined to do it; that she said she thought it was not right; that where there was life to destroy it would be murder. Defendant testified his reason for wanting to produce an abortion was for the benefit of his wife's health.

The proof shows defendant's mother was very kind and helpful to the deceased. She testified in behalf of defendant that his relations with his wife were pleasant and agreeable, but, proper foundation being laid therefor, she was contradicted by Cecilia Morgan and Mrs. Bulow, who testified Mrs. Cleminson said to them that she hoped the child with which deceased was pregnant would not be born alive; that with no more love than there was between defendant and his wife they ought not to have another child; that she had prayed so long that they would live happily together she was almost ready to believe there was no God. Mrs. Bulow testified that on May 22d defendant's mother asked her to speak to defendant about treating his wife better. Frank Bulow testified that about a week before the death of defendant's wife his mother said she felt very sorry for the way her son treated his wife, and asked him to speak to her son about it, and witness replied that it usually did more harm than good to interfere in family af-

fairs. Mrs. Cleminson had previously denied making any of these statements. There were several other witnesses not referred to whose testimony, in a greater or less degree, corroborated the testimony of the witnesses whose names are mentioned.

Dr. Reinhardt, the coroner's physician, testified to the position and the appearance of the body when he arrived at defendant's house, about 9:45 in the morning of May 30th. He testified that there was a stain on the sheet about the size of his hand, of a greenish-brown color, that appeared to be vomit. Under the sheet was a pad which was not soiled, but the mattress under the pad had a stain about the same size as that on the sheet. He examined the body and found no injury of any kind. He caused the body to be placed on a board, and straightened the limbs by force. In his opinion deceased had been dead from 4 to 12 hours. The body had attained its maximum degree of stiffness. The doctor opened the body by an incision from the chin to the pubes, and described particularly how he laid bare the organs of the body and the manner of conducting the post mortem examination. The internal organs from the lungs to the bladder were acutely congested—filled with blood. He removed the brain and made an examination of all the vital organs, and found no diseased conditions. Deceased was about eight months advanced in pregnancy. The foetus was normal in every way and no injury or violence had been done to any of the private organs. There was no irritation or redness of the face. The doctor removed a portion of the lungs, the stomach, with its contents, the heart, kidneys, spleen, and nine or ten inches of intestine, to which was attached a part of the duodenum next to the stomach. They were placed in Mason fruit jars found in defendant's house by his mother and taken away by the doctor and by him delivered next day to Dr. Haines and Prof. Le Count at Rush Medical College laboratories. The brain was taken to the undertaker's by his assistant, where it was kept in a vessel containing formaldehyde and covered with absorbent cotton.

Drs. Le Count, Haines, Wesner, and Webster testified to examining the organs brought to the laboratory by Dr. Reinhardt. Some of them examined the organs microscopically and others made chemical analyses. Different tests were used for the discovery of poison, and one, at least, of the doctors making the chemical analysis subjected the stomach contents to tests for the discovery of chloral hydrate and morphine. No poison of any kind was found in any of the organs except chloroform. In the stomach there were found $2\frac{1}{2}$ grains of chloroform, in the lungs $2\frac{1}{2}$ grains, and in the brain $1\frac{1}{10}$ grain, which would be equal to about 18 drops. These doctors were all qualified, by education and experience, for making the exam-

ination of the organs for poisons and for determining whether the organs were in a healthy or diseased condition, and from the results of their examination to testify as experts as to what, in their opinion, was the cause of death. Their testimony is very voluminous, but it is only necessary to say that the result of it was that they found chloroform in sufficient quantities to produce death, and in their opinion the death was the result of chloroform and not of any other poison nor of any diseased or unhealthy condition of the organs. It was also their opinion from the appearance of the stomach that the chloroform was taken by inhalation. They found no free globules in the stomach and no irritation that would have resulted if the chloroform had been swallowed. Dr. Moorehead, an expert anæsthetist, and one or more of the other doctors referred to, testified that in their opinion death could not have resulted from saturation of the napkin placed under the face of deceased in the position testified to by witnesses who saw it after her death.

The proof for the prosecution shows that the defendant had little, if any, love and affection for his wife; that he had relations with other women; that he tried to persuade his wife to submit to an abortion, which she declined to do. It also shows satisfactorily, we think, that the death of Mrs. Cleminson resulted from chloroform taken by inhalation. There is no proof of any condition of mind or conduct of deceased that would lead to the suspicion of suicide or that she ever manifested any suicidal tendency, except the statement of defendant that he thought she attempted suicide about two weeks before her death. The testimony of other witnesses as to this illness of Mrs. Cleminson, her appearance and conduct, and recovery therefrom, and the actions and conduct of defendant immediately following it, was such in our judgment as to justify the jury in giving no credence to defendant's statements. The proof shows deceased was devotedly attached to her children; that she was an excellent mother; that she was not melancholy or despondent at the prospect of the coming of another child, and, except the statement of her husband referred to, there is no proof of any act or word of deceased to indicate that she was tired of life. The fact that the evening of the night she died she took from her mother-in-law's a tomato plant and planted it in her own back yard would seem to indicate she at that time entertained no thought of self-destruction. After defendant knew his wife was dead, according to his own story, he made elaborate preparations to corroborate the story invented by him that burglars had broken into the house, chloroformed himself and wife, and robbed them of money, property, and jewelry. After he had repeated the story of the burglary to a number of persons, he was told the investigation made by the police discredited the bur-

glary theory, and the property he said was stolen was found in the house, some of it in the places where it was usually kept and some of it where he had placed it in disarranging the house. He then repudiated the story of the burglary, and said he concocted it to save the honor of his family. It was then he advanced the theory of suicide. After defendant had talked with Woolridge, who had been brought to the police station at the express desire of defendant to talk with him, defendant and Woolridge repeated to Capt. Kane the story defendant had told Woolridge when the two were together alone in Capt. Kane's office. According to the testimony of Kane, defendant said the child with which his wife was pregnant was not his, and he attributed her suicide to her shame. He stated he had said to his wife if she would submit to getting rid of the child by an abortion he would continue to live with her, and he said the thought of raising another man's child with his own almost drove him wild. When Capt. Kane expressed surprise at the defendant's mental condition over his wife's conduct after he had told her, as he said he had, that he had been out with a woman and gave his consent to her doing the same thing with men, defendant said he did not believe she would do it. Capt. Kane testified, and in this he was corroborated by Parker, that subsequently defendant asked him to keep secret what he had said about his wife's unfaithfulness. Defendant testified in his own behalf and denied his guilt. He denied making any statement about his wife's unfaithfulness, but the testimony in the record of his statements and conduct following the death of his wife fully warranted the jury in regarding the defendant as unworthy of belief.

Many errors are assigned as grounds for a reversal of the judgment. Some of them are technical and not of sufficient importance, in our judgment, to justify a reference to or a discussion of them. Some of the errors are sufficient to deserve notice, but we regard them as not well assigned.

[1] It is very strongly argued that the post mortem was not a complete medico-legal post mortem, and did not show, beyond a reasonable doubt, that the death did not result from other causes than chloroform. It is urged that there was only a superficial examination of the pancreas and glottis, which were not removed from the body, and no examination was made of the spinal cord, blood, or urine. The small brain, or cerebellum, was not in the vessel containing the brain that was turned over to the doctors for examination. Doctors qualified by education and experience testified on behalf of the defendant that a complete medico-legal post mortem would require the removal and microscopic or chemical examination of the cerebellum, pancreas, glottis, spinal cord, blood, and urine; that there were several causes of sudden death, among which they mentioned ede-

ma of the brain, rupture of a blood vessel in some part of the brain, edema of the larynx, and acute hemorrhagic pancreatitis. Dr. Reinhardt testified that he examined the pancreas without removing it, and that he examined the glottis also with his fingers and found no evidence whatever of any disease or any condition that was unhealthy. We think the proof shows that the post mortem was made with sufficient thoroughness to establish the fact that the death of Mrs. Cleminson resulted from chloroform, and not from any of the other causes mentioned which may sometimes result in sudden death. Conceding that the post mortem was not as thorough as it was possible to make, it was sufficiently thorough under the circumstances of the case. At the outset, the doctor and others were told by defendant that his wife had been chloroformed. There was no indication of violence. None of the organs indicated any diseased or unhealthy condition or any condition from which death might have resulted. Defendant had given the information that chloroform had been used, and this was confirmed by the tests made by competent persons of the brain, stomach contents, and lungs. In those parts alone was found a sufficient quantity of chloroform to sometimes produce death. But the amount found in those organs could not have been all the chloroform that was taken, for all the medical proof shows that the drug diffuses itself quickly throughout the entire body, and that to determine the exact amount of it in a body it would be necessary to grind up the entire body, bones and all, and thoroughly mix the mass before examination. It is true the medical testimony shows that ordinarily it is difficult to anesthetize a person while asleep, but it also shows it to be quite as difficult, or more so, for a person to anesthetize himself by inhaling chloroform. The evidence excludes all reasonable hypothesis of death from any other cause than chloroform, and we think also excludes any reasonable hypothesis of it having been self-administered. No one was in the house during the evening and night preceding May 30th except defendant, his wife, and two little boys.

[2] We find no substantial error in the rulings of the court in the admission of expert testimony of medical witnesses. There was error, however, of a very grave and substantial character in other respects in the admission of testimony. At the request of counsel for the state, and over the objection and exception of counsel for defendant, the court called and examined as its witnesses, before the prosecution rested, Anna Kolb, George Brand, and Clifton R. Woolridge. The record shows counsel for the prosecution gave as the reason, for this request as to the witness Anna Kolb that the state did not wish to vouch for the truth of all she would testify to and desired the privilege of cross-examining her. The same reason was given

as to the witness George Brand, and as to him it was further stated by counsel that he was in the employ of defendant, and the state did not know until after the trial had begun what he knew about the case. As to the witness Woolridge, the only statement made by counsel was that the state desired to cross-examine him. The names of Anna Kolb and Brand were not on the indictment, but the name of Woolridge was.

In *Carle v. People*, 200 Ill. 494, 504, 66 N. E. 32, 36 (93 Am. St. Rep. 208), which was a murder case, the court, at the request of counsel for the state, called a witness who was present at the time of the homicide. Counsel based the request upon the ground that the witness was present when the homicide was committed and ought to be called, but counsel stated he did not wish to vouch for the truth of his testimony. The witness was called to the stand and examined by the court and cross-examined by counsel for the prosecution and the defense. The principal objection made by the defendant in that case appears to have been to the statement made by counsel for the prosecution as the reason why he desired the court to call the witness. This court said: "Where the state's attorney knows that a witness was present at the scene of the killing, but for some reason, either because he has no confidence in the witness or for any other reason, he may doubt his veracity or integrity, he is not obliged to call such witness. In such case the court may call the witness and leave him open for cross-examination by either side. The state's attorney is invested with a certain discretion in the matter of calling witnesses for the state. Inasmuch as the court made it necessary for the state's attorney to announce the ground upon which he exercised his discretion, the statement that the people would not vouch for the testimony of the witness or guarantee its truth was not improper and was not a challenge of the truth or veracity of the witness." The witnesses Anna Kolb and Brand did not come within the rule laid down in the above case. They were not eyewitnesses to the homicide, and it was not pretended that they knew the facts about the death of Mrs. Cleminson.

[3] After a brief examination of Anna Kolb by the court, in which she stated she became acquainted with the defendant in August, 1907, and met him on different occasions after that, and that he treated her in May, 1909, for two weeks when she was sick in a hospital, the state was permitted to give her a most searching and extended cross-examination, much of which related to matters that could have no possible tendency to throw any light upon the guilt or innocence of the accused. The witness' testimony showed that there was for some time, at least, after she became acquainted with defendant, a degree of intimacy between them that is unusual between a married man and an unmarried woman, although there

was no proof of criminal intimacy between them. The cross-examination tended to degrade the witness, and on account of the friendly relations that had existed between her and defendant would necessarily prejudice him. The witness had been in the state's attorney's office on more than one occasion, had been questioned extensively about her relations with defendant, and the questions asked of and answers made by her were taken down by a stenographer. A great many that were read to her on cross-examination were irrelevant to the issue involved, and she was asked if the questions were not asked her and if she did not make the answers read. The witness testified she was engaged to be married to a man by the name of Fowler, and counsel for the state asked her if she was not present in the state's attorney's office when a woman claiming to be Fowler's wife was also present, and if certain questions were not asked of the woman claiming to be Mrs. Fowler about her marriage to Fowler and about their living together, and if she did not make certain answers thereto. Before the trial the witness was sent to the Lexington Hotel by the state's attorney's office, and while there was under surveillance of detectives from that office. Counsel for the state asked her if Fowler did not stay all night at the hotel one night while she was there, and the witness answered that he did. For the purpose of impeaching the witness counsel was permitted to inquire of her if she did not make certain statements to a Mrs. Morey, Mrs. Raymond, and Mr. Faupel. The witness denied making such statements, and in rebuttal counsel for the state was permitted to call the witnesses named and impeach the witness Anna Kolb by proving that she did make said statements. The witness was asked if she did not on one occasion tell Mrs. Morey she was then Mrs. Cleminson, and if she did not at another time tell her defendant had performed two abortions upon her. The witness denied making the statements, and Mrs. Morey testified she did make them. Witness was also asked if she did not on one occasion tell Mrs. Raymond that defendant had performed two abortions on her. She denied it, and Mrs. Raymond was permitted to be called, and testified that she did make the statements.

George Brand, called by the court, testified in answer to inquiries made by the court that he was 23 years old and was a medical student; that he had known defendant for a year and at the time of the death of Mrs. Cleminson was an assistant in the office of Dr. Fisher and defendant; that he slept on a couch or davenport in the reception room of the office. On cross-examination he was permitted to testify that in May he sterilized a forceps, curette, and dilator at defendant's request; that a lady came to the office, and remained a short time, and left with defendant in a taxicab. The witness

testified he had a suit case in the office, and that after this occurrence the suit case had a notice on it, "Don't open." There is no pretense that the lady referred to by the witness was Anna Kolb. In many other respects, not necessary to refer to particularly, the cross-examination of these two witnesses, even if they had been called by the defense, went beyond all reasonable bounds. The practice of the court calling a witness at the request of either party in the trial of a criminal case should not be extended beyond the limits of the rule announced in *Carle v. People*, supra, and, when the circumstances justify a court in calling a witness, the cross-examination should be limited to the issues involved and kept within proper bounds.

The witness Woolridge was a friend of defendant, and is the first person to whom defendant admitted the untruthfulness of the burglary story. His being called by the court and cross-examined by the state was not so flagrantly erroneous as was the case of the witnesses Anna Kolb and Brand. His testimony showed him to be friendly to defendant and apparently desirous of doing him as little harm as possible, and he pretended to be unable to remember anything more than the merest outlines of the conversation he had with defendant when defendant admitted the burglary story was untrue and of the conversation Capt. Kane had with the defendant in his presence. If the prosecution had put him on the stand, his apparent friendliness to defendant and frequent lapses of memory were such that the court would have been justified in permitting, and undoubtedly would have permitted, the prosecution to ask him leading questions. No greater harm resulted to defendant or benefit to the prosecution than would have been the case if Woolridge had been called to testify by the prosecution in the regular and approved method of trying criminal cases. The same cannot be said of calling the witnesses Anna Kolb and Brand by the court, allowing the cross-examination of them that was permitted and the impeachment of Anna Kolb upon the points mentioned. This was palpably erroneous, and would not only justify, but would require, the reversal of a judgment in any case if there was any doubt whatever about the guilt of the accused.

[4] Policeman Jernigan was permitted to testify that he and Lieutenant Culnane found in defendant's house a pocketbook in which was a "cundrum," and it was permitted to be exhibited to the jury. This was palpable error, without any circumstance whatever to justify it. Criminal trials are instituted for the purpose of ascertaining whether the accused is guilty of the offense charged and the evidence should be confined to that issue. A defendant may be a bad and immoral man generally and his friends and associates may not be persons of admirable

character, but yet he may not be guilty of a particular crime charged. Whether defendant produced abortions on Anna Kolb and another woman could shed no possible light upon the issue whether on the night of May 29th he murdered his wife by administering to her chloroform. The same is true of the cross-examination of Anna Kolb for the purpose of showing that she was not an admirable character. It was not improper for the prosecution to show the relations and feelings of the defendant toward his wife, and, if it were true, that he had an affinity to whom he was much attached, but the cross-examination of Anna Kolb was not directed to that purpose.

We also feel it our duty to say that the record shows one of counsel for the state addressed certain remarks to one of counsel for the defense that deserved severe rebuke from the court, but no rebuke was administered. Such conduct should not occur on any trial, and lawyers owe it to their profession and to the courts to avoid language and conduct the only effect of which is to destroy respect for the profession and for the courts.

[5] The condition of this record is such that we have given its consideration much time and very serious thought. The competent evidence in the record, in our judgment, leaves no room for the slightest doubt of defendant's guilt. If this were not so, our duty to reverse this judgment would be most clear. The question then arises in a case where the competent proof in the record shows the guilt of the accused beyond any doubt but where the record also shows errors of so grave a character as those before referred to—errors that would require the reversal of a judgment in a case where the evidence left room for doubt of the guilt of the accused—whether it is the duty of this court to reverse the judgment or to affirm it on the ground that the guilt of the defendant was so conclusively established by competent proof that the judgment should be affirmed notwithstanding the errors committed. After much deliberation, we have concluded that, as we cannot say that upon the competent evidence there might be a doubt as to defendant's guilt, we would not be justified in reversing the judgment on account of the errors committed. *Wallace v. People*, 159 Ill. 446, 42 N. E. 771; *Jennings v. People*, 189 Ill. 320, 59 N. E. 515; *Barber v. People*, 203 Ill. 543, 68 N. E. 93; *Wistrand v. People*, 218 Ill. 323, 75 N. E. 891.

[6] Without further adverting to the testimony, which we have above set out in part only, it is sufficient to say that we have read it all with great care, and cannot escape the conclusion that the verdict could not have been otherwise than guilty even

if none of the errors referred to had been committed.

Complaint is made of the rulings of the court in giving instructions for the people and refusing instructions asked by the defense. One at least of the instructions given for the people was not strictly accurate, but we find no such error, either in giving or refusing instructions, as would justify a reversal of the case even if the proof was less conclusive than it is.

We have given the case the best consideration we are capable of. Some errors slighter in character than those referred to were undoubtedly committed during the progress of the trial, but this is almost unavoidable in the trial of a case lasting, as this one did, a month. Our conclusion is that the verdict was correct, and the judgment is affirmed.

Judgment affirmed.

VICKERS, C. J., and COOKE and DUNN, JJ. (dissenting). It is only under extraordinary circumstances that it becomes proper for the trial judge to call and examine a witness. It should never be done upon the mere request or suggestion of a party. If either party desires such action to be taken, a showing should be made sufficient to convince the court that the ends of justice would be defeated if it were not done. In this case no such showing was made or attempted and the calling and examining of witnesses by the court was wholly unjustified. The cross-examination by the state's attorney of the witnesses so called was highly improper. While the evidence tending to prove the guilt of the defendant was strong, the error on the part of the court in calling and examining the three witnesses named, and in permitting the state's attorney to cross-examine them in a manner grossly improper, is so grave and prejudicial that we are of the opinion the judgment should be reversed and the cause remanded for a new trial.

(250 Ill. 251.)

GEORGE et al. v. GEORGE et al.

(Supreme Court of Illinois. April 19, 1911.
Rehearing Denied June 7, 1911.)

1. APPEAL AND ERROR (§ 749*)—CONFESSION OF ERRORS—PLEA OF LIMITATIONS.

A plea of limitations to a writ of error confesses the errors assigned.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3065-3073; Dec. Dig. § 749.*]

2. COURTS (§ 219*)—APPELLATE JURISDICTION—ILLINOIS—FREEHOLD.

Under Const. art. 6, §§ 2, 8, authorizing appeals and writs of error to be taken to the Supreme Court, the parties to a decree for partition are entitled to prosecute error, as the case involves a freehold.

[Ed. Note.—For other cases, see *Courts*, Cent. Dig. §§ 557-573; Dec. Dig. § 219.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

3. COURTS (§ 219*)—APPELLATE JURISDICTION—LEGISLATIVE POWER.

The Legislature cannot defeat nor abridge the Supreme Court's jurisdiction of writs of error, under Const. art. 6, §§ 2, 8, but may regulate the practice and limit the time within which writs may be sued out.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 539-574; Dec. Dig. § 219.*]

4. COURTS (§ 203*)—STATUTORY PROVISIONS—CONSTRUCTION.

Practice Act (Laws 1907, p. 466) § 117, limiting the time within which writs of error may be sued out, is a statute of limitation, and hence is not invalid as abridging the constitutional jurisdiction of the Supreme Court.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 203.*]

5. APPEAL AND ERROR (§ 338*)—LIMITATIONS.

A writ of error is a suit, and the rules governing the application of statutes of limitations generally are applicable to proceedings for the issuance of a writ of error, under Practice Act (Laws 1907, p. 466) § 117.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1879-1882; Dec. Dig. § 338.*]

6. LIMITATION OF ACTIONS (§ 6*)—STATUTES—CONSTRUCTION.

Statutes of limitation will not be given retroactive effect, in the absence of clear legislative intention.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 16-31; Dec. Dig. § 6.*]

7. APPEAL AND ERROR (§ 347*)—RIGHT TO SUE OUT WRIT—ACCRUAL—TIME.

Right to sue out a writ of error to review a decree accrues when the decree is entered.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1897-1899; Dec. Dig. § 347.*]

8. APPEAL AND ERROR (§ 338*)—LIMITATIONS—STATUTORY PROVISIONS—RETROACTIVE EFFECT.

Practice Act (Laws 1907, p. 466) § 117, effective July 1, 1907, limiting the time within which a writ of error may be sued out to three years, does not apply to a writ to review a decree entered March 29, 1907; the former five-year statute being applicable.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 1882; Dec. Dig. § 338.*]

Carter, J., dissenting.

Error to Superior Court, Cook County; George A. Dupuy, Judge.

Action by Linville H. George and others against Samuel E. George and others. From a decree for plaintiffs, defendants bring error. Reversed and remanded.

Daniel S. Wentworth (Harvey J. Cavender, of counsel), for plaintiffs in error. Fred H. Atwood, Frank B. Pease, and Charles O. Loucks, for defendants in error.

COOKE, J. This is a writ of error sued out to review a decree for the partition of real estate, entered in the superior court of Cook county on March 29, 1907. The writ was issued on September 20, 1910, and the defendants in error have filed their plea of the statute of limitations, alleging that under section 117 of the practice act (Laws 1907, p. 466) the plaintiffs in error are barred

from suing out their writ of error; the same not having been done within three years, as provided by said section. To this plea plaintiffs in error have filed a demurrer, claiming that they are not governed by the act of 1907, limiting them to three years within which to prosecute their writ of error, but that their rights accrued under the former statute, and that they have five years time in which to prosecute their writ, as provided by the law at the date of the decree.

[1] The only question to be determined is whether the act of 1907 applies to writs of error sued out to review judgments or decrees rendered prior to the passage of that act. If it be held that it does apply, then this writ must be dismissed. If it be held that it does not apply, and the demurrer to the statute of limitations be sustained, then a reversal of the decree must necessarily follow, as the effect of the plea is to confess that there is error in the record for which the decree must be reversed. *Mahony v. Mahony*, 139 Ill. 14, 23 N. E. 915; *Peterson v. Manhattan Life Ins. Co.*, 244 Ill. 329, 91 N. E. 466.

[2] The jurisdiction of this court to review the judgments and decrees of trial courts in this class of cases by writs of error does not depend upon the statute. That jurisdiction is conferred by the Constitution, and the right to sue out a writ of error is a constitutional right, and must be allowed when claimed. *Schlattweiler v. St. Clair County*, 63 Ill. 449. Section 2 of article 6 of the Constitution provides that the Supreme Court shall have original jurisdiction in cases relating to the revenue, in mandamus and habeas corpus, and appellate jurisdiction in all other cases. Section 8 of the same article provides that appeals and writs of error may be taken to the Supreme Court. In this case a freehold is involved, and the parties to this decree have a constitutional right to sue out a writ of error in this court to review that decree.

[3] It is not within the power of the Legislature to deprive the Supreme Court of the jurisdiction to review such cases by writs of error, or in any manner to abridge that jurisdiction; but the Legislature may by proper enactment regulate the practice in respect to writs of error, and may limit the time within which writs of error may be sued out of this court.

[4] Section 117 of the practice act of 1907 does not attempt or pretend to confer jurisdiction upon the Supreme Court to review judgments and decrees by writs of error, but merely limits the time within which such writs may be sued out. It is strictly a statute of limitations, and must be construed as such.

[5] We have repeatedly held that the suing out of a writ of error is the beginning of a

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

new suit. *Ripley v. Morris*, 2 Gilman, 381; *Roberts v. Fahs*, 32 Ill. 474; *International Bank v. Jenkins*, 107 Ill. 291; *Singer & Talcott Stone Co. v. Hutchinson*, 176 Ill. 48, 51 N. E. 622. The rules which govern the application of statutes of limitations to other causes of action should therefore be applied here. In the early case of *Thompson v. Alexander*, 11 Ill. 54, it was held that the amendment of February 10, 1849 (Laws 1849, p. 132), to the limitation act, operated only in causes of action accruing after it took effect. That was an action in debt brought on a promissory note maturing May 11, 1838. The defendant pleaded the statute of limitations, and set up that the cause of action had accrued more than 5 years before the commencement of the suit. Prior to the amendment of February 10, 1849, actions in debt could be brought on promissory notes at any time within 16 years after the right of action accrued. That act limited the bringing of such actions to 5 years, and we held that a retrospective effect will not be given to such an act, unless it clearly appears that such was the intention of the Legislature, which intention must be manifested by clear and unequivocal expressions; and in the absence of any such intention of the Legislature having been so manifested, it was further held that the provisions of that act should only apply to causes of action arising after it went into operation, and the judgment of the trial court in sustaining a demurrer to the plea of the statute of limitations was affirmed.

Hathaway v. Merchants' Trust Co., 218 Ill. 580, 75 N. E. 1060, was a case where letters testamentary had been issued on January 13, 1903, and on May 2, 1904, the Merchants' Loan & Trust Company filed its claim against the estate, which was allowed on July 25, 1904. At the time the letters were issued, claims were allowed to be filed against estates within two years from the date of the granting of letters testamentary. On May 15, 1903 (Laws 1903, p. 3), the administration act was so amended as to require all claims against estates to be filed within one year from the date of granting of letters testamentary, and it was contended in that case that the claim of the Merchants' Loan & Trust Company should not have been allowed, because it was not filed in the probate court within one year from the granting of letters testamentary. In that case we held that the section of the administration act fixing the time for filing claims against an estate is not a statute conferring jurisdiction, but is a limitation act, which will not be given retroactive effect in the absence of clear legislative intention, and that that act, as amended by the act of 1903 reducing the time for filing claims to one year, does not apply to claims against an estate upon which letters testamentary had been granted before

the act took effect. There is nothing in section 117 of the practice act of 1907 which indicates that the Legislature meant it to be retroactive in its effect. Its provisions in that respect are similar to those of the amendment of May 15, 1903, to the administration act, which was construed in the *Hathaway Case*.

[6] In addition to the general rule that limitation acts will not be given a retroactive effect, in the absence of clear legislative intention, section 4 of the act to revise the law in relation to the construction of statutes provides that no law shall be construed to repeal a former law, whether such former law is expressly repealed or not, as to any right accruing or claim arising under the former law, or in any manner whatever to affect any right accruing or claim arising before the new law takes effect.

[7] The right of plaintiffs in error to sue out a writ of error from this court to review the decree of the superior court of Cook county, and thus begin a new suit, accrued at the time that decree was entered, and therefore was a right accruing under the law in effect at that time. The statute at that time provided that a writ of error should not be brought after the expiration of five years from the rendition of the decree or judgment complained of.

[8] Defendants in error insist, however, that as this decree was rendered on March 29, 1907, and the new practice act became effective on July 1, 1907, plaintiffs in error had almost three years within which to sue out this writ of error after that act became effective, and that, as this must be held to be a reasonable time, the new limitation should prevail in this case. This act must be applied generally to all causes of action accruing before the act of 1907 became effective. It cannot be said that the act will apply in one case and not in another. *Hathaway v. Merchants' Trust Co.*, supra. Applying the rule of uniformity, the question whether a reasonable time was left plaintiffs in error within which to sue out their writ of error is not open for our decision.

For the reasons given, the demurrer must be sustained, and a reversal of the decree must follow. The decree of the superior court is reversed, and the cause remanded.

Reversed and remanded.

CARTER, J., dissents.

(250 Ill. 214)

ELLGUTH v. ELLGUTH et al.

(Supreme Court of Illinois. April 19, 1911.
Rehearing Denied June 7, 1911.)

1. APPEAL AND ERROR (§§ 858, 859*)—REVIEW—SCOPE.

A writ of error sued out after final order of distribution in partition presents the entire record for review, but an appeal presents only

the order appealed from and so much of the record as is involved therein.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3439-3445; Dec. Dig. §§ 858, 859.*]

2. PARTITION (§ 107*)—SALE—REVIEW—PARTIES.

A purchaser at partition sale is an essential party to proceedings to vacate the sale.

[Ed. Note.—For other cases, see Partition, Cent. Dig. §§ 362-374; Dec. Dig. § 107.*]

3. PARTITION (§ 111*)—DECREE—EFFECT.

A former decree in partition approving a sale and providing for distribution of the proceeds was rendered ineffective by the purchaser's failure to comply with his bid, and a subsequent decree on resale directing distribution according to the former decree must be regarded as though the former decree had not been entered, and the court had embodied the same provisions in the later decree.

[Ed. Note.—For other cases, see Partition, Dec. Dig. § 111.*]

4. DOWER (§ 95*)—ASSIGNMENT—AWARD OF GROSS SUM—EFFECT OF STATUTE.

Under Dower Act (Hurd's Rev. St. 1909, c. 41) § 39, providing for assignment of dower where the estate cannot be divided without great injury thereto, a tenant cannot be compelled to accept a gross sum in lieu of dower.

[Ed. Note.—For other cases, see Dower, Cent. Dig. § 340; Dec. Dig. § 95.*]

5. PARTITION (§ 114*)—ACTION—FEES.

It was error in partition to allow solicitor's and stenographer's fees directly to the solicitor and stenographer.

[Ed. Note.—For other cases, see Partition, Cent. Dig. §§ 440-449; Dec. Dig. § 114.*]

6. PARTITION (§ 114*)—ACTION—FEES.

In partition, it was error to allow solicitor's and stenographer's fees without proof of reasonableness.

[Ed. Note.—For other cases, see Partition, Cent. Dig. §§ 440-449; Dec. Dig. § 114.*]

7. PARTITION (§ 114*)—ACTION—COSTS.

Costs in partition should be assessed against the parties in proportion to their interests.

[Ed. Note.—For other cases, see Partition, Cent. Dig. §§ 440-449; Dec. Dig. § 114.*]

Appeal from Circuit Court, Cook County; Thomas G. Windes, Judge.

Consolidated bills between Joseph Ellguth and Albert G. Ellguth and others. From the decree, Joseph Ellguth appeals. Partly affirmed and partly reversed and remanded.

Matthew J. Huss, for appellant. Frank Foster and Lyman M. Paine, for appellees.

COOKE, J. Appellees filed their bill in the superior court of Cook county to set off the dower of Joseph Ellguth, appellant, in the premises known as 8700 Erie street and the undivided one-half of the premises known as 8700 Commercial avenue, in the city of Chicago. Thereafter appellant filed his bill in the circuit court of Cook county for the partition of the premises known as 8700 Commercial avenue. These two suits were consolidated in the circuit court, and the superior court bill was ordered to stand as a cross-bill to the bill of appellant for partition. Appellant owned the undivided one-half of the premises known as 8700 Com-

mercial avenue, had a dower interest in the other undivided one-half and a homestead in the whole, and he also had a dower interest in the premises known as 8700 Erie street. A decree of partition was entered finding the interests of the parties in the real estate as stated and appointing commissioners to assign dower and homestead and make partition. The commissioners reported, finding the premises not susceptible of partition, and appraising the premises at 8700 Commercial avenue at \$7,000 and the premises at 8700 Erie street at \$5,250. Appellant filed his written assent to the sale of the premises at 8700 Commercial avenue free of his dower and homestead. Decree followed, whereby the master was ordered to sell the premises at 8700 Commercial avenue free and clear of the dower and homestead rights and interests of appellant, and that the dower interest of appellant in the premises at 8700 Erie street should be computed upon the valuation of \$5,250, as fixed by the commissioners. Pursuant to this decree the master sold the premises at 8700 Commercial avenue to appellant for the sum of \$8,050. Appellant having failed to pay to the master the sum bid for the premises, the sale was set aside and the premises ordered resold, appellant to pay the expense of the resale, and to be charged with any loss arising therefrom. Appellant prayed and perfected an appeal from this order to the Appellate Court for the First District, but that appeal was dismissed for failure of appellant to file a transcript of the record in time. Pursuant to the order for resale of the premises, the same were sold by the master to one Stanley Boguszewski for the sum of \$4,800. Appellant filed objections to the report of this sale by the master, and asked that the sale be set aside. The objections were overruled, report of the master approved, and the master directed to execute and deliver deed to the purchaser. This decree also contained an order for payment of costs and for distribution of the proceeds of the sale. From this decree appellant prayed and was allowed an appeal to this court.

Appellant assigns error on the whole of this record, and insists that this appeal brings up the whole record for review. Appellees contend, on the other hand, that the only matter presented for review by this appeal is the order of the court approving and confirming the sale by the master in chancery and directing the issuance of a deed and for distribution, and have confined their brief and argument to that question alone.

Appellant, in support of his contention that the whole record is here for review, cites the case of Carter v. Penn, 99 Ill. 390. That was a writ of error sued out of this court to bring up for review the record of the circuit court of St. Clair county.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

[1] A writ of error sued out after the final order of distribution in a partition case brings up the entire record for review, but an appeal taken from the order of distribution does not bring up the entire record for review, but presents for the consideration of the court to which the appeal is taken only the order appealed from and so much of the record as is involved in that order. *Drummer Creek Drainage District v. Roth*, 244 Ill. 68, 91 N. E. 63. A party dissatisfied with a decree in a partition suit which establishes and declares the right, title, and interest of the respective parties may not wait until the last order having reference to any of the proceedings in the case is entered and by an appeal therefrom bring the whole case up for review. That can only be done by writ of error. If he is dissatisfied with the decree of the court as to the extent of his interests or as to any other matter affecting the title to the land and has a right to appeal, he is required to exercise that right at that time, and he cannot, by appealing from a subsequent order, bring up for review a former decree which was final in its nature. *Rhodes v. Rhodes*, 172 Ill. 187, 50 N. E. 170; *Crowe v. Kennedy*, 224 Ill. 526, 79 N. E. 626; *Piper v. Piper*, 231 Ill. 75, 83 N. E. 100.

This appeal is from the decree confirming the master's report of sale and ordering distribution, and we are therefore necessarily limited to a consideration of the questions involved in the entry of that decree; and by reason of the fact that Stanley Boguszewski, the purchaser at the resale, was not made a party to the proceedings, or, so far as this record shows, notified of appellant's application to have the sale set aside, we are further limited to a consideration of questions which do not affect the validity or regularity of the sale to Boguszewski.

[2] If appellant desired to insist upon errors, not affecting the jurisdiction of the court, which could only be remedied by setting aside the sale, it was indispensable that Boguszewski, the purchaser, should be notified and made a party. *Schulz v. Hasse*, 227 Ill. 156, 81 N. E. 50. The action of the court in confirming the sale to Boguszewski must therefore be sustained.

[3] Appellant is, however, entitled to a review of all alleged errors in the decree which affect his interests in the proceeds of sale. The decree with reference to the distribution of such proceeds is exceedingly vague and uncertain. It provides that the master shall "distribute the proceeds of said sale according to the former orders and decrees of this court." The only former order or decree in the cause relating to distribution was the decree which was entered November 11, 1909, upon the approval of the sale to appellant. That decree was, however, rendered ineffective by appellant's failure to pay to the master the amount of his bid, and the provisions relating to the distribution of the proceeds of that sale could not control the distribution of

the proceeds derived from a subsequent sale of the premises. The action of the court in directing the master to distribute the proceeds derived from the resale "according to the former orders and decrees of this court" must be regarded in the same manner as though the former decree had never been entered, and the court had, instead of ordering distribution as provided in that decree, embodied the same provisions in the decree from which this appeal has been prosecuted as were contained in the decree of November 11, 1909.

The former decree, after finding that the sale to appellant had theretofore been made, reported, and confirmed, and that the master had in his possession \$5,050, being the proceeds of sale less an incumbrance of \$1,000 on the premises sold, directed the master to pay, first, to David Eichberg, solicitor for complainants, \$32.75, taxed as costs of suit; second, to the commissioners (naming them) \$20 each; third, to Frank Foster, solicitor for defendants, \$3 appearance fee; fourth, to I. H. Welner, reporter, \$30; fifth, to David Eichberg, solicitor for complainants, as solicitor's fee, \$400; sixth, that the master retain his fees, commissions, and disbursements, amounting to \$166.50; seventh, to Joseph Ellguth, as and for his dower interest in premises known as No. 8700 Erie avenue, \$904; eighth, to Joseph Ellguth, as and for his dower interest in the one-half of the premises known as No. 8700 Commercial avenue, \$375; ninth, to Joseph Ellguth, as and for his homestead estate in the one-half of premises known as No. 8700 Commercial avenue, \$262.50; tenth, to Joseph Ellguth, the owner of one-half of the premises sold, \$1,932.75; and eleventh, to the seven children of Mary Hermine Ellguth, deceased (naming them), each \$126.24. Appellant complains of the action of the court, first, in attempting by the decree of distribution to compel him to accept the sum of \$904 out of the proceeds derived from the sale of the premises at 8700 Commercial avenue in lieu of his dower interest in the premises at 8700 Erie avenue; second, in allowing solicitor's and stenographer's fees directly to the solicitor and stenographer and without proof of the reasonableness of the allowances; and, third, in assessing an unjust proportion of the costs against him.

[4] With reference to the first complaint the court, by the decree of partition, found that appellant was entitled to dower in the premises at 8700 Erie avenue and directed the commissioners appointed by that decree to assign such dower to him. The commissioners reported that the dower could not be assigned by metes and bounds, and fixed the value of the premises at \$5,250. After ordering a sale of the premises at 8700 Commercial avenue, the court by the same decree again found that appellant had a dower interest in the premises at 8700 Erie avenue and that the commissioners had appraised the value of

those premises at \$5,250, and "that said Joseph Ellguth's dower interest therein should be figured on said valuation." This finding of the court that appellant's dower interest in the premises at 8700 Erie avenue "should be figured" on the valuation of the premises as fixed by the commissioners does not amount to an adjudication that appellant should be awarded a gross sum in lieu of such dower interest, and as no further order was made with reference thereto until the entry of the order of distribution, by which the master was directed to pay to appellant, out of the proceeds derived from the sale of the premises at 8700 Commercial avenue, the sum of \$904 as and for his dower interest in the premises at 8700 Erie avenue appellant upon this appeal is in a position to complain of the action of the court in awarding him a gross sum in lieu of his dower in the premises at 8700 Erie avenue. Section 39 of the dower act provides that "in all cases where estate cannot be divided without great injury thereto, the dower may be assigned of the rents, issues and profits thereof, to be had and received by the person entitled thereto as tenant in common with the owners of the estate, or a jury may be empaneled to inquire of the yearly value of the dower therein, who shall assess the same accordingly, and the court shall thereupon enter a decree that there be paid to such person as an allowance in lieu of dower, on a day therein named, the sum so assessed as the yearly value of such dower, and the like sum on the same day of each year thereafter during his or her natural life." This statute is clear and unambiguous, and required the court in this case, when the commissioners reported that dower could not be assigned by metes and bounds, to decree that appellant's dower be assigned of the rents, issues, and profits from the premises, to be had and received by him as tenant in common with the owners of the estate, or to impanel a jury to fix the yearly value of such dower. The statute confers no authority upon a court to compel the person entitled to dower to accept a gross sum in lieu thereof. *Francisco v. Hendricks*, 28 Ill. 64. The decree of distribution is therefore erroneous in directing the master to pay to appellant the sum of \$904 as and for his dower interest in the premises at 8700 Erie avenue.

[5, 6] Appellant also complains of the action of the court in allowing solicitor's and stenographer's fees directly to the solicitor and stenographer, and also in allowing such fees without proof of the reasonableness of the allowance. Both of these objections are well taken (*McMullen v. Reynolds*, 209 Ill. 504, 70 N. E. 1041), and are properly presented upon appeal from the decree of distribution, as the court had not by any other order or decree made any allowance in favor of the solicitor or stenographer.

[7] It is next contended that the court assessed an unjust proportion of the costs against appellant. The amount of the costs assessed against him is not stated in the decree, and can only be determined from the distribution which the master was directed to make. It appears therefrom that the total costs directed to be paid out of the proceeds of sale amount to \$692.25, of which it is apparent \$592.25 has been assessed against appellant by directing the master to pay him \$592.25 less than the sum which he would have received from the proceeds of sale, as the owner of one-half of the premises, had no costs been assessed against him. This was error. The costs should be assessed against each of the parties in proportion to his interest.

That portion of the decree confirming the master's report of sale is affirmed and that portion providing for distribution is reversed, and the cause is remanded to the circuit court, with directions to charge Joseph Ellguth with the costs of the resale and the loss occasioned thereby, and to enter an order of distribution of the proceeds of that sale not inconsistent with the views herein expressed.

Reversed in part and remanded, with directions.

(250 Ill. 166)

CITY OF GENESEO v. BROWN.

SAME v. GUILD.

(Supreme Court of Illinois. April 19, 1911.
Rehearing Denied June 7, 1911.)

1. MUNICIPAL CORPORATIONS (§ 472*)—SPECIAL TAXES—UNEQUAL ASSESSMENTS.

That a higher tax shall be levied against one piece of property, that is benefited no more than another piece of property, which is taxed a lower sum, is not a valid objection in a special tax proceeding. If the special tax does not exceed the benefits to the property, its payment may be enforced; and that other property receiving greater benefits is taxed no higher affords no legal objection to the validity of the ordinance, or the proceeding thereunder for specially taxing property for local improvements.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1120; Dec. Dig. § 472.*]

2. MUNICIPAL CORPORATIONS (§ 304*)—IMPROVEMENTS—ORDINANCE.

An ordinance provided for the construction of catch-basins and for their connection to public sewers; but the length and depth of such drains were not mentioned, and no reference was made to the sewers to be connected. One item of the engineer's estimate was "90 lineal feet 12-in. sewer tile drain, at \$.50 per lineal foot, \$45." *Held*, that the ordinance was invalid.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 811-816; Dec. Dig. § 304.*]

Appeal from Henry County Court; Albert E. Bergland, Judge.

Actions by the City of Geneseo against Harry E. Brown and against John J. Guild. From judgments confirming a special tax,

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

each defendant separately appeals. Reversed and remanded.

Harry E. Brown, for appellants. Henry Waterman, City Atty., for appellee.

FARMER, J. These are appeals from a judgment of the county court of Henry county confirming a special tax against appellants' property, levied for the purpose of improving and paving Exchange street, in the city of Geneseo, within certain limits specified in the ordinance. With the petition filed by appellee for levying the special tax were also filed the ordinance providing for the improvement by special taxation of contiguous property, a recommendation of the board of local improvements, and an estimate of the cost of the work. A commissioner was appointed by the court to spread the tax. Said commissioner duly returned a tax roll against property abutting upon Exchange street, where it was proposed to pave it, fixing the tax at the uniform rate of \$4 per front foot. Appellant Brown owned property with a frontage on said Exchange street of 135.4 feet, and the total special tax against it was \$541.60. Appellant Guild owned property having a frontage on said street of 193 feet, and his property was taxed \$772. A day was fixed by the court for hearing objections to confirmation of the tax, and notice given to the property owners. Appellants filed numerous objections to the confirmation of the tax, and upon a hearing of the legal objections they were overruled as to the property involved in this record. The objections on the question of benefits were heard by a jury. The jury returned a verdict finding appellants' property was not specially taxed more than it would be benefited by the proposed improvement, and the court rendered judgment confirming the special tax roll. Both Brown and Guild have appealed from that judgment. As the same questions are involved in both appeals, and the same brief has been filed in both appeals, the cases were consolidated, and but one opinion will be filed.

Numerous grounds are urged for a reversal of the judgment. We have reached the conclusion that the judgment must be reversed for insufficiency of the ordinance in the respect hereinafter pointed out, and, with the exception of one other objection urged, the other questions raised are of a character not likely to arise again, if another proceeding shall be begun to make the improvement by special taxation. We therefore will discuss but two objections raised on this record.

[1] The ordinance provides for grading, draining, curbing, and paving Exchange street from the east line of College avenue east to the east line of Russell avenue extended southerly to the right of way of the Chicago, Rock Island & Pacific Railway Company. The distance between the termini of the improvement is five blocks. The

width of the pavement is not uniform. Certain portions of the street were required to be paved a width of 40 feet, and at other places varying widths down to 20 feet opposite the property of appellant Brown. All contiguous property was specially taxed at the rate of \$4 per front foot, and it is contended by appellants that for these reasons the ordinance is void, on the ground that it is unreasonable and oppressive. In making improvements by special taxation, it is not required that the cost shall be apportioned to the property benefited in the same manner that is required in case of a special assessment. That a higher tax shall be levied against one piece of property, that is benefited no more than another piece of property, which is taxed a lower sum, is not a valid objection in a special tax proceeding. If the special tax does not exceed the benefits to the property, its payment may be enforced; and that other property receiving greater benefits is taxed no higher affords no legal objection to the validity of the ordinance, or the proceeding thereunder for specially taxing property for local improvements.

[2] Section 10 of the ordinance provides for the construction of six catch-basins, and section 11 provides for their connection "by the most direct route to public sewers, by means of thoroughly vitrified salt-glazed stoneware sewer pipe twelve (12) inches in diameter." The length and depth of these drains are not mentioned in the ordinance, and there is no reference to the sewers with which they were required to be connected, from which it can be determined where the sewers are located, or the length of the drains from the catch-basins to the sewers. We have quoted from the ordinance the only reference to or description of these drains. Where the sewers are located, and their depths, is nowhere referred to in the ordinance, and no other description of the drains is given than in the quotation made from section 11. We do not think this a sufficient description of the improvement to comply with the statute. The ordinance should specify the nature, character, locality, and description of the proposed improvement. *Sanger v. City of Chicago*, 169 Ill. 286, 48 N. E. 309; *Wetmore v. City of Chicago*, 208 Ill. 367, 69 N. E. 234.

In *Illinois Central Railroad Co. v. City of Effingham*, 172 Ill. 607, 50 N. E. 103, it was said: "The description of the improvement to be made is an essential element of an ordinance of this kind; and, if there is a failure to comply with the statute, no judgment for a special tax can be rendered upon it. This ordinance provides for improving the street, among other things, by tiling it; but there is an entire failure to specify the nature, character, locality, or description of that part of the improvement. There is no intimation whether the tile is to be farm tile, vitrified pipe, iron, or wood, or what its size shall be. The ordinance does not speci-

fy its location, the depth to which it is to be laid, the number of lines or tile, or their inlets, outlets, or connections. In *Otis v. City of Chicago*, 161 Ill. 199, 43 N. E. 715, an ordinance which provided for 32 lamp posts and connections, but did not specify whether they were to be of wood or iron, or what material, was held insufficient to sustain a special assessment. In *Cass v. People*, 166 Ill. 126, 46 N. E. 729, an ordinance for laying water service pipes, which failed to specify the dimensions of the pipes or to designate of what material they were to be made, was held insufficient, since no intelligent estimate of their cost could be made from the description in the ordinance. In *People v. Hurford*, 167 Ill. 226, 47 N. E. 368, an ordinance for laying a water service pipe, which did not specify the material or dimensions, so that an intelligent estimate could be made of the cost, was held insufficient to sustain a judgment. It is plain that this ordinance is equally defective, and that no committee could make an intelligent estimate of the cost of this material part of the improvement, as to which there is an entire want of any specifications."

These drains were an essential part of the improvement, and should have been described with such certainty that an intelligent estimate of the cost of them could have been made.

Appellee answers this objection by referring to the engineer's estimate, one item of which is, "90 lineal feet 12-in. sewer tile drain, at \$.50 per lineal foot, \$45," and says this refers to the pipe for the drains from the catch-basins into the sewers, and shows the amount to be too trifling to be given any importance. The engineer's estimate is quite as indefinite and uncertain as the ordinance itself. Whether the item referred to is intended for the drains from the catch-basins to the sewers can only be conjectured, and there is no reference to the depth of the drains, nor to their length, unless it is to be inferred that the total length of the six drains is 90 feet. We are aware of no case where a description of an essential part of the work so indefinite as that of these drains from the catch-basins into the sewers has been sustained. In this respect we think the ordinance was invalid, and for that reason the judgments in both appeals must be reversed, and the cause remanded.

Reversed and remanded.

(250 Ill. 203.)

DEVINE v. FEDERAL LIFE INS. CO.

(Supreme Court of Illinois. April 19, 1911.
Rehearing Denied June 7, 1911.)

1. TRIAL (§ 359*)—SPECIAL FINDING AND GENERAL VERDICT—INCONSISTENCY.

Determination of whether a special finding is so inconsistent with the general verdict as to

control it must be without looking at the evidence.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 857-860; Dec. Dig. § 359.*]

2. TRIAL (§ 359*)—SPECIAL FINDING AND GENERAL VERDICT—INCONSISTENCY—PRESUMPTION.

On determination of the question of a special finding being so inconsistent with the general verdict as to control it, all reasonable presumptions in favor of the general verdict are to be entertained, while nothing is to be presumed in favor of the special finding.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 857-860; Dec. Dig. § 359.*]

3. TRIAL (§ 359*)—SPECIAL FINDING CONTROLLING GENERAL VERDICT—INCONSISTENCY.

That a special finding may control a general verdict through inconsistency with it, the inconsistency must be so irreconcilable as to be incapable of being removed by any evidence admissible under the issues.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 857-860; Dec. Dig. § 359.*]

4. INSURANCE (§ 136*)—LIFE INSURANCE—DELIVERY OF POLICY—NECESSITY.

Unless expressly made so by the contract, actual delivery to insured of a life policy is not necessary to validity of the contract.

[Ed. Note.—For other cases, see *Insurance*, Cent. Dig. § 219; Dec. Dig. § 136.*]

5. INSURANCE (§ 670*)—LIFE INSURANCE—ACTION—SPECIAL FINDING AND GENERAL VERDICT—INCONSISTENCY.

The special finding that the life policy sued on had never been delivered to insured not being the determination of any ultimate fact, or of a fact having a controlling effect on an ultimate fact, it is not so inconsistent with, as to control, the general verdict for plaintiff.

[Ed. Note.—For other cases, see *Insurance*, Cent. Dig. § 1787; Dec. Dig. § 670.*]

6. INSURANCE (§ 137*)—LIFE INSURANCE—PREMIUM—MANNER OF PAYMENT.

It is not necessary to the taking effect of a life policy that a premium thereon be paid in cash, but it may be paid by the giving of a note, or otherwise, if so agreed by the parties.

[Ed. Note.—For other cases, see *Insurance*, Cent. Dig. § 231; Dec. Dig. § 137.*]

7. INSURANCE (§ 349*)—LIFE INSURANCE—PREMIUMS—NOTES—NONPAYMENT.

That insured executed and delivered to the insurer's agent a note for the first year's premium, and at his death was in default thereon, did not if the agent took the note under such circumstances as to constitute an absolute payment of the premium invalidate the insurance, under the provision of the policy that failure to pay any premium or note when due will forfeit the policy.

[Ed. Note.—For other cases, see *Insurance*, Cent. Dig. § 897; Dec. Dig. § 349.*]

8. INSURANCE (§ 670*)—LIFE INSURANCE—FORFEITURE FOR NONPAYMENT OF PREMIUM NOTE—SPECIAL FINDINGS.

Special findings that insured executed and delivered to the agent of insurer a note for the first year's premium on the life policy and at his death was in default thereon, and that the policy provided that failure to pay any premium or note when due will forfeit the policy, "excepting as herein provided," do not show a forfeiture of the policy; there being no special finding showing what such exceptions are.

[Ed. Note.—For other cases, see *Insurance*, Cent. Dig. §§ 1785-1787; Dec. Dig. § 670.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

9. INSURANCE (§ 651*)—LIFE INSURANCE—CONTRACT BETWEEN INSURED AND INSURER'S AGENT—EVIDENCE.

While in an action on a policy on the life of C., application for which was taken by J., agent of insurer, they having been brought together by B., who acted as clerk or agent of J., representations made by B. to C. are not admissible on the theory that they were made by a subagent of insurer, and so were binding on it, its contract with J. authorizing him to hire such subagents only as it should approve, and it not having approved any employment of B. as a subagent, yet B.'s representations to C. having been only what J. had instructed him to make, namely, that, if C. would take out a policy through J., J. would lend him money, and would hold the policy as security till the notes given for the money loaned were paid, B.'s testimony to this effect, and that, in accordance with such representations, when the policy was issued, J. made a loan to C., and C. executed and delivered notes to J., one for the amount of the first year's premium, was admissible to show the nature of the contract between J. and C., whereby the notes were given to J., and the policy was held by him for C., and not for insurer, instead of being delivered into the manual possession of C.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1673; Dec. Dig. § 651.*]

10. INSURANCE (§ 651*)—LIFE INSURANCE—CONTRACT BETWEEN INSURED AND INSURER—AGENT—EVIDENCE—ADMISSION.

The admission of insurer in a letter to the attorney for plaintiff in an action on a policy on the life of C., in which the defense was that the policy had never been in force, as it had not been delivered to C., and he had paid none of the first premium, that notes, one of them for the first year's premium, testified to by another, were given by C., and delivered to J., insurer's agent, was a proper fact to be proven, in order to throw light on the transaction between J. and C. at the time of the issuance of the policy, which plaintiff contended was left by C. with J. as security for a loan to pay the premium.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 651.*]

11. INSURANCE (§ 651*)—LIFE INSURANCE—CONTRACT BETWEEN INSURED AND INSURER'S AGENT—EVIDENCE.

Though insurer was not connected with the loan business, evidence that J., the agent of insurer, who took the application for insurance on the life of C., was engaged in the business of loaning money, is admissible, in an action on the policy, defended against on the ground that the policy was never in force, because never delivered to C., and because he had not paid the first premium, in connection with testimony that J. made a loan to C. to pay the first premium, and took his note therefor, and held the policy as security.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1673; Dec. Dig. § 651.*]

12. INSURANCE (§ 136*)—LIFE INSURANCE—DELIVERY OF POLICY.

On the theory that delivery of a life policy was necessary, though neither it nor the application provided that it should not become operative till delivered to insured, the law is correctly stated by an instruction that if insurer sent the policy to J., its agent, to deliver to C., insured, and while it was still in the hands of J. he and C. agreed that it should be retained by J. as security for his indebtedness to J., this would amount to a delivery of the policy.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 220; Dec. Dig. § 136.*]

13. APPEAL AND ERROR (§ 1079*)—REVIEW—WAIVER OF ERROR.

Objection to an instruction that it does not state the law and is misleading and inapplicable to the facts will not be considered on appeal, authorities not being cited, no point being made as to why it is so objectionable, and no reference being made to it in argument.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4262; Dec. Dig. § 1079.*]

14. TRIAL (§ 192*)—INSTRUCTIONS—ASSUMING FACTS.

An instruction is not objectionable as assuming, without any evidence thereof, that defendant's agent had authority to indorse and deliver a note; the written contract between them showing such authority having been admitted without objection, and not having been contradicted.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 432-434; Dec. Dig. § 192.*]

15. TRIAL (§ 252*)—INSTRUCTIONS—EXCEPTIONS AS TO MATTERS NOT IN EVIDENCE.

An instruction declaring a certain effect to the indorsement and delivery to a third person of a note by defendant's authorized agent is not objectionable, though such would not be the effect had the indorsement been procured by fraud, participated in by the one under whom plaintiff claims; there having been no attempt to prove any such fraud.

[Ed. Note.—For other cases, see Trial, Dec. Dig. § 252.*]

Appeal from Appellate Court, First District, on Appeal from Municipal Court of Chicago; John W. Houston, Judge.

Action by John F. Devine, administrator de bonis, against the Federal Life Insurance Company. Judgment for plaintiff was affirmed by the Appellate Court, and defendant appeals on a certificate of importance. Affirmed.

C. A. Atkinson and H. C. Levinson, for appellant. Charles R. Napier, for appellee.

COOKE, J. This was an action brought in the municipal court of the city of Chicago by John F. Devine, as administrator of the estate of Ralph W. Chance, deceased, against the Federal Life Insurance Company to recover the sum of \$1,000 alleged to be due on a policy of insurance claimed to have been issued by the company to Chance in his lifetime. The policy was dated May 4, 1907. Chance was struck and killed by a train of the Illinois Central Railroad Company on the morning of May 30, 1907. The defense to the action was that the policy had never been in force, as it had not been delivered to Chance and he had never paid any part of the first premium. The claim of the administrator was that, by an arrangement with Robert J. Jeffs, the general agent for the insurance company and the person who secured the application of Chance, the policy was delivered by the company to Jeffs for Chance, and it was held by Jeffs to secure the payment of three notes given by Chance to Jeffs, one for the amount of the first premium, one for \$50 and one for \$10.14. After the death of Chance, and on June 3,

1907, Jeffs, who had held the policy from the time of its issuance until that date, returned it to the insurance company, indorsed "not taken." The jury found the issues for the plaintiff and returned a verdict for the full amount of the policy, \$1,000. Judgment was rendered on this verdict and an appeal was taken to the Appellate Court for the First District, where the judgment of the municipal court was affirmed. The case is brought here by appeal upon a certificate of importance.

[1-3] It is first contended that this judgment should be reversed for the reason that the general verdict is contrary to certain special findings of fact made by the jury. The jury were asked to answer 12 special interrogatories which were submitted to them. Of the 12, 3 were so framed that no answer was required by reason of the answers given to certain others of the interrogatories. By the first interrogatory the jury were asked, "Was the policy sued on in this action delivered by the Federal Life Insurance Company to Ralph W. Chance during his lifetime?" To this the jury answered "No," and it is claimed that this finding is so inconsistent with the general verdict that it must be held to control the same and that the court should have entered judgment for the appellant. In determining whether a special finding is so inconsistent with the general verdict that the latter must be held to be controlled by the former we cannot look at the evidence. All reasonable presumptions will be entertained in favor of the general verdict while nothing will be presumed in aid of the special finding of fact. The inconsistency must be so irreconcilable as to be incapable of being removed by any evidence admissible under the issues. *Chicago & Northwestern Railway Co. v. Dunleavy*, 129 Ill. 132, 22 N. E. 15. Applying this rule, we find that there is no irreconcilable inconsistency between this special finding of fact and the general verdict.

[4, 5] By its terms, the application for a policy of insurance may be made a part of the policy itself. The application may or may not provide that the insurance shall take effect only upon the delivery of the policy to the insured. Unless expressly made so by the contract itself, an actual delivery of a policy of insurance to the insured is not essential to the validity of the contract, and the rule under such circumstances is that a policy becomes binding upon the insurer when signed and forwarded to the insurance broker to whom the application for insurance was made, to be delivered to the insured. Where an application is made for insurance, there is no liability until the application is accepted, but the acceptance and issuing of the policy complete the contract. *Rose v. Mutual Life Ins. Co.*, 240 Ill. 45, 88 N. E. 204. The finding of the jury that the policy had never been delivered to Chance was not the determination of any ultimate

fact, or of a fact which had a controlling effect upon any ultimate fact. This finding is not so inconsistent with the general verdict that it should control, and the court did not err in ignoring this finding and entering judgment on the verdict.

It is urged that special findings numbered 3, 5, 6, 7, 8, 10, and 12 are also inconsistent with the general verdict. We do not so regard them. The third finding was that the deceased had not paid the premium on his policy in cash; the fifth, that he did execute a note for the amount of the premium; the sixth, that the note was executed on May 10, 1907, and delivered to Jeffs; the seventh, that the note was payable in installments of \$2.50 each, and that the first installment became due on May 29, 1907; the eighth, that Chance did not pay the installment falling due on May 29, 1907; the tenth, that none of the installments mentioned in said note were paid during the lifetime of Chance; and the twelfth, that the policy sued on contained the provision, "failure to pay any premium or note, or interest thereon, when due, will forfeit, without notice, the policy and all payments thereon, excepting as herein provided."

[6, 7] It is not necessary that a premium on a policy of life insurance should be paid in cash. It can be paid by the giving of a note, or otherwise, if so agreed by the parties. That Chance executed a note and delivered it to Jeffs, the agent, for the amount of the first year's premium, and that at the time of his death he was in default in the payment of this note, would not necessarily invalidate the insurance notwithstanding the provision found to have been contained in the policy, as Jeffs may have taken the note under such circumstances as would constitute an absolute payment of the premium.

[8] A further reason why these special findings do not show a forfeiture of the policy is that by the twelfth finding the policy contained a clause providing for a forfeiture under certain circumstances, "excepting as herein provided." What the exceptions are is not shown by any of the special findings. For anything that is disclosed by these findings, the circumstances may have been such that they come within some exception contained in the policy which would prevent a forfeiture. As we view the special findings of the jury, and testing them by the rule above referred to, we do not regard any of them as inconsistent with the general verdict.

The parties on both sides have argued the facts elaborately, and the appellant insists that under the facts as disclosed the judgment of the Appellate Court should be reversed. All questions of fact involved have been finally determined by the judgment of the Appellate Court. We will review only the questions of law presented.

[9] It is contended by appellant that the court erred in admitting the testimony of

one Baker, a witness for appellee. In order to dispose of this objection it will be necessary to state some of the facts.

The appellant company had its general offices in the city of Chicago. Robert J. Jeffs was its general agent and had a written contract with the appellant. Jeffs was also president of a corporation known as the Consolidated Agencies Company, with offices in the city of Chicago. The witness Baker was in the employ of the Consolidated Agencies Company and worked under the immediate direction of Jeffs. Baker testified that while his employment was nominally by the corporation, and he gave his receipts for his monthly salary to the corporation, he was, in fact, working for Jeffs. Under his employment with the Consolidated Agencies Company, Baker solicited insurance for Jeffs, and brought together Jeffs and those who desired to make applications for insurance to appellant. It was Baker who first solicited Chance to apply to appellant for a policy of insurance. He testified that he made certain representations to Chance under the direction of Jeffs, and that he stated to him only what Jeffs had instructed him to state. Those representations were, in substance, if Chance would take out a policy of insurance through Jeffs, that Jeffs would lend him money, and would hold the policy of insurance as collateral or security until the notes given for the money loaned should be paid. Baker did not take the application of Chance, but did succeed in bringing Jeffs and Chance together, and the application was taken by Jeffs and was sent by Jeffs to appellant. Baker further testified that, in accordance with the representations he had made to Chance under the direction of Jeffs, when the policy of insurance was issued by appellant Jeffs made a loan to Chance and Chance executed and delivered to Jeffs three promissory notes payable to Jeffs, one for the amount of one year's premium, being \$30.80, one for \$50 and one for \$10.14, and he explained that the latter note was composed of the following items: \$5, which was for a credit inspection fee, and \$5.14, being one year's interest in advance at the rate of 6 per cent. on the \$50 note, the note for \$30.80 and the \$5 inspection fee.

The basis of the objection to the admission of the testimony of Baker is that in its contract with Jeffs appellant authorized Jeffs to hire such subagents only as should be approved by appellant, and that it had never approved of the employment of Baker as a subagent, and therefore should not be bound by any representations which Baker made to the decedent at the time the insurance was solicited. The testimony of Baker was not admissible upon the theory that he was acting as a subagent of appellant, and could therefore bind appellant by such representations as he should make in securing an application for a policy of insurance. Baker did not act as the subagent of appellant in

this transaction. He did not secure the application of the deceased for the policy of insurance. He acted merely as the clerk or agent of Jeffs, making only such representations to Chance as he was authorized by Jeffs to make. Acting in this capacity, he brought the deceased and Jeffs together, and the application for the policy of insurance was made by the deceased, and, when the policy was issued and delivered to Jeffs, it was held by him in accordance with the arrangements made with Chance both by Jeffs personally and through the witness Baker. The testimony of this witness was admissible in order to show the nature of the contract between Jeffs and Chance whereby these three several notes were given to Jeffs, and the policy was held by him for Chance, and not for the appellant, instead of being delivered into the manual possession of Chance.

[10] It is next objected that the court erred in admitting in evidence a letter from the president of the insurance company to the attorney for appellee, written in October, 1907. That letter was written in response to one received by the president of appellant and simply detailed that Chance had given a note to Mr. Jeffs for the amount of the premium, together with the other notes mentioned; that he had before his death only paid the note for \$10.14, had paid no part of either of the other two notes and was in default at the time of his death, and for that reason, and for the further reason that the policy had never been delivered to him, the company was not liable. The letter further stated that the two notes for \$50 and \$30.80, respectively, were in the possession of appellant. This letter was properly admitted in evidence. The admission of the appellant that the three notes testified to by Baker were actually given by Chance and delivered to Jeffs was a proper fact to be proven in order to throw light upon the transaction between Jeffs and Chance at the time the policy was issued.

[11] It is also objected that the court erred in admitting testimony showing that Jeffs, acting for himself or for the Consolidated Agencies Company, was engaged in the business of loaning money, for the reason that appellant had nothing to do with the methods of business of Jeffs or the Consolidated Agencies Company in the loaning of money. This evidence was properly admitted. While it might be said that appellant had nothing to do with the business of loaning money carried on by Jeffs or by the Consolidated Agencies Company, it was a matter proper to be shown, in connection with the testimony of Baker as to the nature of the transaction between Chance and Jeffs, whether Jeffs was engaged generally in that line of business. The evidence discloses, however, that under the contract with Jeffs appellant did have some connection with the money-lending business carried on by Jeffs or the

Consolidated Agencies Company. Attached to the contract between Jeffs and appellant, and expressly made a part thereof, is an instrument marked "Exhibit A," whereby Jeffs is appointed general agent of appellant, with authority to solicit and write applications for life insurance for appellant, "in connection with the loaning of money by said second party [Jeffs] in any state or territory where said company is admitted," whereby Jeffs is given the exclusive right to secure applications for insurance in connection with the loaning of money to applicants for insurance, with certain limitations, and whereby it is agreed that appellant shall acknowledge and consent to the written assignment of all commissions and renewals and other profits accruing, under the terms of the contract, to the Consolidated Agencies Company, and shall consider applications for insurance, under the terms of the contract, which are secured by Jeffs by the Consolidated Agencies Company. This evidence was properly admitted.

[12] Appellant objects to the giving of instructions numbered 1, 2, and 12. Instruction No. 1 was proper. It told the jury, in substance, that if they believed, from the evidence, that appellant sent the policy to its agent, Jeffs, for the purpose of delivery to Chance, and while the policy was still in the hands of Jeffs an agreement was entered into between Chance and Jeffs that the policy should be retained by Jeffs as security for indebtedness due him from Chance, such arrangement would, in law, amount to a delivery of the policy. Appellee might complain, with some reason, of the giving of this instruction, for neither the application nor the policy provides that the policy shall not become operative until delivered to the insured. Upon the theory that a delivery was necessary this instruction correctly states the law.

[13] The objection to the second instruction is that it does not state the law, that it is misleading, and is not applicable to the facts. No authorities are cited and no point made as to why this instruction does not state the law, is misleading, or is not applicable to the facts. No reference whatever is made to the instruction in the argument. This objection will not be considered. As said in *Wickes v. Walden*, 228 Ill. 56, 81 N. E. 798: "We have repeatedly held that, if counsel in their brief and argument do not point out wherein an instruction is erroneous or make a statement by which this court can know upon what basis or for what reason the trial court's action was erroneous, it is no part of our duty to search for these errors or enter upon an independent investigation of the court's own motion in order to find material on which to base a judgment of reversal."

[14, 15] Objection is made to the giving of

the twelfth instruction. That instruction is, in substance, that under the provisions of the policy sued on the nonpayment, when due, of any installment of a note given by the insured for the premium, would render the policy void, and that if the jury found that any installment on the note given by the deceased was not paid, when due, to the defendant company or its agent, their verdict must be for the defendant, unless they believed from the evidence that the note was given to the agent of the defendant company, and by him indorsed and delivered to some person or corporation other than the defendant company. The note had been indorsed by Jeffs to the Consolidated Agencies Company. Appellant urges two objections to the giving of this instruction: First, that it assumes that some agent of appellant had authority to indorse and deliver the note, and that there is no evidence showing any authority in Jeffs, or any other agent of appellant, to indorse and deliver the note given by Chance; and, second, that under this instruction the jury might find the appellant liable, even though the indorsement had been procured by fraud in which Chance participated. The written contract entered into between appellant and Jeffs, admitted without objection and not contradicted, is a complete answer to the first objection raised.

As to the second objection, there was no attempt to prove that the indorsement was fraudulent or procured by any fraud in which Chance participated. The instruction is not subject to the criticisms made.

Appellant complains of other rulings by the trial court which it contends were erroneous. We have considered these alleged errors, but do not regard them of sufficient importance to require any discussion in this opinion.

We find no error in the record, and the judgment of the Appellate Court is therefore affirmed.

Judgment affirmed.

VICKERS, C. J., took no part in the consideration or decision of this case.

(250 Ill. 312)

STATE BANK OF CLINTON v. BARNETT.

(Supreme Court of Illinois. April 19, 1911.
Rehearing Denied June 7, 1911.)

1. APPEAL AND ERROR (§ 1009*)—REVIEW—FINDINGS OF MASTER IN CHANCERY.

In an action in equity, where, except for a small portion not material to the decision, the testimony taken before a master was reported by him without any conclusions as to the facts, the chancellor had no better means of judging of the credibility of the witnesses than the Supreme Court, and the appeal presents the case for a hearing de novo upon the same evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3970-3978; Dec. Dig. § 1009.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

2. WITNESSES (§ 188*)—CONFIDENTIAL COMMUNICATIONS—HUSBAND AND WIFE.

A wife is not a competent witness to testify to any conversations with her husband during coverture.*

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 734-743; Dec. Dig. § 188.*]

3. EVIDENCE (§ 317*)—HEARSAY—STATEMENTS MADE BY INSURED.

Statements made by insured as to his purpose in carrying a benefit certificate and who the real beneficiary was are incompetent as hearsay.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1174-1192; Dec. Dig. § 317.*]

4. TRUSTS (§ 41*)—PAROL TRUST—EVIDENCE—BENEFIT CERTIFICATE.

Where the proceeds of a benefit certificate were paid over by the society to the beneficiary named therein, and were turned over by her to defendant, and it was not claimed by the defendant that it was turned over for any other reason than that it belonged to her, and did not belong to the beneficiary, the burden was upon her to prove such contention.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 60; Dec. Dig. § 41.*]

5. FRAUDULENT CONVEYANCES (§ 300*)—FRAUD—EVIDENCE.

In an action by a creditor to reach the proceeds of a benefit certificate turned over by the beneficiary to her daughter, evidence held to show that since the payment the money was treated by the beneficiary and her daughter as the property of the daughter, and not to show active fraud in reference to the transfer, so that, if there was any fraud, it was only such as was presumed from the making of a voluntary gift.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Dec. Dig. § 300.*]

6. FRAUDULENT CONVEYANCES (§ 8*)—ELEMENTS OF "FRAUD"—VOLUNTARY GIFT.

In order to constitute presumptive fraud, or fraud in law, as against a creditor of a donor, three elements must be proved: A voluntary gift; a then existing or contemplated indebtedness against the donor; and that the donor did not retain sufficient property to pay his indebtedness.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. §§ 8-15; Dec. Dig. § 8.*]

For other definitions, see Words and Phrases, vol. 3, pp. 2943-2954; vol. 8, p. 7666.]

7. FRAUDULENT CONVEYANCES (§ 297*)—INSOLVENCY OF DONOR—EVIDENCE.

In an action by a judgment creditor of the beneficiary in a benefit certificate, to reach the proceeds which the beneficiary had given to her daughter, proof that plaintiff had recovered judgment against the beneficiary and issued execution, which was returned "nulla bona," is prima facie sufficient to show the insolvency of the beneficiary when the execution was returned, but not to show such insolvency at the time of the subsequent gift.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. § 891; Dec. Dig. § 297.*]

8. FRAUDULENT CONVEYANCES (§ 272*)—INSOLVENCY OF DONOR—BURDEN OF PROOF.

The burden is on a judgment creditor, suing to reach a gift by the debtor to her daughter, to prove the insolvency of the donor at the time of the gift.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. § 804; Dec. Dig. § 272.*]

Appeal from Appellate Court, Third District, on Appeal from Circuit Court, De Witt County; W. G. Cochran, Judge.

Action by the State Bank of Clinton against Sylvia Barnett. From a judgment of the Appellate Court (151 Ill. App. 79) affirming a decree for complainant, defendant appeals. Reversed and remanded, with directions.

Edward J. Sweeney and De Mange, Gillespie & De Mange, for appellant. Lemon & Lemon and Herrick & Herrick, for appellee.

COOKE, J. Appellee, the State Bank of Clinton, on September 30, 1907, filed its creditor's bill in the circuit court of De Witt county against Sylvia Barnett, the appellant here, Lucy J. Barnett, and others, alleging that on December 30, 1902, Lucy J. Barnett and W. A. Barnett, her husband (now deceased), executed and delivered to the appellee their two promissory notes for the sums of \$1,000 and \$1,394.89, respectively, to each of which notes was attached a power of attorney authorizing the confession of judgment thereon; that at the time of his death W. A. Barnett held a benefit certificate in the Modern Woodmen of America for the sum of \$3,000, payable to his wife; that his wife collected the amount of the benefit certificate and made a pretended gift of the same, without consideration, to her daughter, Sylvia Barnett, the appellant; that upon receiving the money Sylvia loaned the same to one B. C. Sprague, taking his promissory notes therefor; that she thereafter recovered judgments against Sprague aggregating \$3,125, upon which executions were issued, which were levied upon lands of Sprague; that on July 29, 1907, judgment by confession was entered upon the said notes given to appellee, in the circuit court of De Witt county, against Lucy J. Barnett for the sum of \$3,236.93; that execution was issued thereon and returned nulla bona; that appellant, aside from the judgments against Sprague, was insolvent, and, if permitted to collect said judgments, she would appropriate the money to her own use and appellee would be left without remedy, and that the money represented by said judgments was the property of Lucy J. Barnett, and not that of the appellant. Upon the filing of the bill, a temporary injunction was issued restraining the sheriff, who was made a defendant, from delivering to Sylvia Barnett a certificate of sale without receiving the money therefor, and commanding him to retain the proceeds of sale subject to the further order of the court. Lucy J. Barnett and appellant filed separate answers by which they each admitted that, upon the death of W. A. Barnett, the proceeds of his benefit certificate were paid to

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Mrs. Barnett and by her transferred to appellant, who loaned the same to Sprague. The answers each deny that Mrs. Barnett had any interest in the proceeds of the benefit certificate, or in the notes given by Sprague to appellant, or in the judgments obtained against Sprague, and aver that, although Mrs. Barnett was named in the benefit certificate as beneficiary, the insurance was procured by W. A. Barnett for the sole benefit of appellant, and that the proceeds of the benefit certificate were the property of appellant and not that of Mrs. Barnett. The cause was referred to a special master in chancery to take the evidence and report the same, without his conclusions, to the court. Upon the hearing, the court found the issues for appellee, and a decree was entered finding the facts substantially as alleged in the bill, ordering that the sheriff of De Witt county be perpetually enjoined from paying the money which had been secured on the execution against Sprague to appellant, and directing him to pay to appellee the money in his hands, to be applied on the judgment in its favor against Lucy J. Barnett. Upon an appeal to the Appellate Court for the Third District this decree was affirmed. 151 Ill. App. 79. The cause is now brought to this court by appeal, upon a certificate of importance.

[1] All the evidence in the case, with the exception of a small portion which is not material to this decision, was taken before the master and reported by him without any conclusions as to the facts. The chancellor had therefore no better means of judging the relative candor, fairness, and credibility of the respective witnesses than we have, so the appeal may be regarded substantially as presenting the case to us for a hearing de novo upon the same evidence. *Baker v. Rockabrand*, 118 Ill. 365, 8 N. E. 456; *McGinnis v. Jacobs*, 147 Ill. 24, 34 N. E. 214.

Barnett died October 14, 1904. The proceeds of the benefit certificate were paid to Mrs. Barnett December 23, 1904, and the amount was immediately turned over to appellant. The notes given appellee, and upon which judgment was secured by confession against Mrs. Barnett on July 29, 1907, were dated December 30, 1902, and were due on demand and six months after date, respectively, with powers of attorney attached authorizing confession of judgment at any time. The fund in question was loaned to Sprague by appellant February 11, 1905.

The contention of appellant in the trial court, and one of her contentions here, is that her mother, Mrs. Barnett, by parol agreement with her father, had been constituted a trustee to receive the proceeds of the benefit certificate and pay the same, upon his death, to appellant. To support her contention and to establish the existence of such parol trust, witnesses, including Mrs. Barnett, were called, who testified to statements made by W. A. Barnett, in

his lifetime, that appellant was the real beneficiary in his benefit certificate, that arrangement had been made whereby his wife was to receive the money, in case of his death, for appellant, and as to his reasons for having made his wife the nominal beneficiary instead of having the money paid directly to his daughter. All of this testimony was objected to on the ground that it was hearsay.

[2] Mrs. Barnett was not a competent witness to testify to any conversations with her husband during coverture. [3] All of the testimony in regard to statements made by W. A. Barnett in reference to his purpose in carrying a benefit certificate in the Modern Woodmen and in reference to who his real beneficiary was is clearly incompetent. It does not come within any of the well-known exceptions to the rule against hearsay evidence. Had appellant been able to establish by competent evidence the situation disclosed by the pretended statements of W. A. Barnett, she would have established the existence of a parol trust, as claimed.

[4] Mrs. Barnett was the beneficiary named in the benefit certificate, and the proceeds of that certificate were paid to her by the society of Modern Woodmen, and were turned over by her to appellant. It is not claimed by the appellant that this fund was turned over to her for any other reason than that it belonged to her, and did not belong to her mother. The burden was upon appellant to prove this contention, and there is no competent evidence in the record to sustain it.

[5, 6] Unless there was actual fraud in the transaction, the transfer of this fund from Mrs. Barnett must be held to be a voluntary gift. Appellee insists that this transaction was fraudulent in fact. In support of this contention, it produced two witnesses, B. C. Sprague and an attorney who had represented Sprague, and who had also represented appellee. Sprague testified that on February 11, 1905, when he executed the notes to appellant, Mrs. Barnett and appellant both treated this money as the property of Mrs. Barnett, and that Mrs. Barnett on that occasion told him she was indebted to the appellee bank and desired to loan the money in the name of her daughter, as she did not want appellee to know where the money was. This testimony is contradicted by appellant, Mrs. Barnett, and F. Y. Hamilton, an attorney of Bloomington, who was present assisting appellant in making the loan. Sprague's testimony is so contradictory and inconsistent that it is unworthy of consideration. His story is also improbable for the reason that he was then, and had been for years, a stockholder and a director of the appellee bank, which fact was a matter of public knowledge. The attorney who testified stated that Mrs. Barnett, Hamilton, and Sprague called at his office and discussed the matter of the loan to Sprague and the

giving of the notes, and detailed statements by Mrs. Barnett similar to those testified to by Sprague. Both Hamilton and Mrs. Barnett deny that they were in his office on the day the notes were given or that they ever had such a conversation with him, and Sprague did not testify at all to that incident. Hamilton and Mrs. Barnett both testified that they, in company with Sprague, were in this attorney's office on December 12, 1904, before the insurance money had been paid to Mrs. Barnett, and that on that occasion they discussed only a contract which had been made between Barnett, in his lifetime, and Sprague, who had been associated in business with him, and which this attorney had drawn, and that that was the only time they were ever in his office. The testimony of these two witnesses is clearly overcome by the evidence on the part of appellant. The whole evidence discloses that, so far as the actions of appellant and Mrs. Barnett are concerned since the payment of this fund to Mrs. Barnett by the society of Modern Woodmen, it was treated by them as the property of appellant, and not the property of Mrs. Barnett. The record does not disclose any fraud, in fact, in reference to the transfer of this fund from Mrs. Barnett to her daughter, and, if there is any fraud, it is only such fraud as is presumed by reason of the making of a voluntary gift. In order to constitute presumptive fraud, or fraud in law, in such a case, three elements must be proven: First, there must be a voluntary gift; second, there must be a then existing or contemplated indebtedness against the donor; and, third, it must appear that the donor did not retain sufficient property to pay her indebtedness.

[7] It is contended by appellant that the bill does not aver and the proof does not show the insolvency of Mrs. Barnett. The bill does aver, and the proof establishes, that appellee secured judgment against Mrs. Barnett, upon which execution was issued and returned nulla bona. This establishes *prima facie* the insolvency of Mrs. Barnett at the time of the return of the execution. There is no averment in the bill of the insolvency of Mrs. Barnett at the time of the gift to appellant, and there is no proof of that fact in the record. Appellee attempted to make such proof by calling appellant as a witness, but the substance of appellant's testimony on this subject is that she did not know what property her mother possessed or what her financial responsibility was at that time.

[8] Appellee having failed to prove fraud in fact, the burden of proof devolved upon it to show that Mrs. Barnett rendered herself insolvent by making this gift before it could establish presumptive or legal fraud. In passing upon this question in *Moritz v. Hoffman*, 35 Ill. 553, 556, we said: "No one will dispute the principle appellant seeks to establish that a voluntary conveyance, when the grantor is indebted at the time of its ex-

ecution, is presumptive evidence of fraud; and a fraudulent intent will be presumed from the fact that the party conveying was indebted at the time the conveyance was executed, and that as to pre-existing creditors every conveyance not made on a consideration valuable in law is void. The principle is thus broadly stated, but it is subject to some qualification—to this extent, at least, that the debtor retains in his possession property sufficient to discharge all debts existing at the time of making the conveyance alleged to be fraudulent. If this was not permitted, trade of every description would be very much crippled, and, instead of there being an active interchange of property, the whole business of the country would stagnate. No creditor without a lien has any right to complain that his debtor is giving away property to his wife or children, unless such creditor can establish the fact that he has not retained enough to satisfy existing debts. Such grantor must make himself insolvent by such gifts or conveyances, and, to impeach them, fraud must be charged and proved." And in the same case we also said (page 558 of 35 Ill.): "To impeach such a conveyance successfully it lies upon the complainant to aver and prove that he was a creditor at the time and that the grantor was then insolvent, or such facts and circumstances as would authorize a court or jury to presume insolvency, none of which have been established in this case."

This case was followed and approved in *Merrell v. Johnson*, 96 Ill. 224, *Bittinger v. Kasten*, 111 Ill. 260, and *Faloon v. McIntyre*, 118 Ill. 292, 8 N. E. 315. In the *Bittinger* Case it was said: "The owner of property may at any time give the same to any one he chooses, so long as he thereby injures no then existing creditor. * * * and the mere fact that he may be indebted is not alone sufficient to make a gift or voluntary conveyance by him inoperative." And it was held that, if the creditor failed to aver and prove insolvency of the debtor at the time the conveyance was made, he was entitled to no relief. In passing upon the same question in *Dimond v. Rogers*, 203 Ill. 464, 468, 67 N. E. 968, 970, we said: "In order to obtain relief, it was necessary to prove a transfer which, in fact or in law, was fraudulent as to creditors, or in case of a voluntary gift or conveyance to the husband, that the judgment debtor did not retain enough money or property to pay her debts."

It will thus be seen that it was necessary to both aver and prove the insolvency of Mrs. Barnett at the time the gift was made, in 1904. It might well be that in December, 1904, when the gift was made to her daughter, she retained abundant means to pay all of her indebtedness, and that she had become insolvent when the judgment was secured against her, in July, 1907. If such were the fact, it would be inequitable to compel appellant to now pay over to appellee

money which her mother had a perfect right to give her at the time the gift was made.

The decree of the circuit court and the judgment of the Appellate Court are reversed and the cause remanded to the circuit court, with directions to dismiss the bill for want of equity.

Reversed and remanded, with directions.

(250 Ill. 182.)

BENTLEY v. ROSS.

(Supreme Court of Illinois. April 19, 1911.
Rehearing Denied June 7, 1911.)

1. ASSIGNMENTS (§ 137*)—DURESS—EVIDENCE.

Evidence held to show that a municipal contractor agreed to share the profits of work with his superintendent, and that an assignment was given in execution of such agreement and not through duress.

[Ed. Note.—For other cases, see Assignments, Cent. Dig. § 234; Dec. Dig. § 137.*]

2. REFORMATION OF INSTRUMENTS (§ 23*)—ESTOPPEL.

The parties to an agreement, whereby a municipal contractor's superintendent became entitled to share in the profits of work, having treated the amount involved in a suit by the contractor against the city as representing the profits, the contractor is estopped to claim that the assignment of such share should be reformed so as to give a share of the profits and not in the judgment, or to claim that the work was done at a loss.

[Ed. Note.—For other cases, see Reformation of Instruments, Cent. Dig. § 82; Dec. Dig. § 23.*]

3. MASTER AND SERVANT (§ 72*)—AMOUNT OF WAGES—EXCESSIVENESS—RIGHT TO RELIEF.

An agreement by a municipal contractor to pay a superintendent one-third of the profits of work in addition to \$150 a month and board, under which he becomes entitled to \$5,500 as his share of the profits, for eight months' work, is not so inequitable as to deprive the superintendent of equitable remedies.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 87, 88; Dec. Dig. § 72.*]

4. RELEASE (§ 57*)—FORGERY—EVIDENCE—WEIGHT.

Evidence held to show that a purported release of claim of a share of profits of a municipal contract was forged.

[Ed. Note.—For other cases, see Release, Cent. Dig. §§ 106-108; Dec. Dig. § 57.*]

5. EQUITY (§ 394*)—MASTER'S FEES—PROOF.

A master's claim for fees should show the time he was necessarily employed in the examination of questions of law and fact and in preparing his report, and, if the parties who are called upon to pay the demands of the master object to the claim as presented, he should be required to support his claim with proof, and the proof so produced should show the services rendered, the time actually and necessarily devoted to the work, and such other facts as would enable the court to intelligently determine the rights of the parties.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 857-859; Dec. Dig. § 394.*]

6. APPEAL AND ERROR (§ 231*)—OBJECTIONS—PRESERVATION.

By objecting to the chancellor that fees proposed to be allowed a master were unreasonable and excessive, defendant did not waive his right to claim on appeal that the fees were not itemized as required by law; it appearing that

he objected generally to each provision of the decree which affected his interest, and a specific objection not being necessary.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1299, 1352; Dec. Dig. § 231.*]

7. EQUITY (§ 394*)—MASTER'S FEES—RIGHT TO.

A master who presents no claim for fees should be allowed statutory fees only.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 857-859; Dec. Dig. § 394.*]

Certiorari to Appellate Court, First District, on Appeal from Circuit Court, Cook County; M. W. Pinckney, Judge.

Action by John Bentley against William J. Ross. From a judgment of the Appellate Court, First District (154 Ill. App. 583), affirming a judgment for plaintiff, defendant brings certiorari. Modified and affirmed.

David K. Tone, for plaintiff in error.
Mann & Miller, for defendant in error.

COOKE, J. This suit was originally begun in the circuit court of Cook county by the filing of a bill for an injunction by John Bentley, the defendant in error, against the city of Chicago and certain of its officers, and William J. Ross and J. J. Ross, as partners, doing business under the firm name of Ross & Ross, to restrain the city and its said officers, from paying, and Ross & Ross from collecting or receiving, any money in settlement of a certain suit then pending in said circuit court wherein William J. Ross and J. J. Ross, partners as aforesaid, were plaintiffs, and the city of Chicago was defendant. A temporary injunction was issued in accordance with the prayer of the bill, and thereafter the bill was amended so as to include a prayer for an accounting and for a decree requiring the city of Chicago to pay to Bentley the amount found to be due him upon such accounting. Subsequently an amended and supplemental bill was filed, which substantially sets forth the facts claimed by Bentley to have been established upon the hearing of the cause. This amended and supplemental bill alleged that in May, 1897, the firm of Ross & Ross, being then engaged in the construction of a certain water tunnel under a contract with the city of Chicago, employed Bentley as superintendent of the work and agreed to pay him for his services a monthly salary of \$150, and to give him, in addition thereto, one-third of the net profits derived from the construction of the water tunnel under the contract with the city; that Bentley continued as such superintendent under that agreement until some time in January, 1898, when the city declared a forfeiture of the contract and took possession of the water tunnel; that thereafter Ross & Ross brought an action of assumpsit in the circuit court of Cook county against the city to recover the amount claimed to be due them under the contract for work, labor, and

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

services rendered and materials furnished in the construction of the water tunnel, which suit was placed on the court docket as No. 180,302; that when the original bill was filed herein a verdict had been rendered in that suit against the city and in favor of Ross & Ross for \$35,000 and a motion for a new trial was pending, but the parties to the suit had then agreed upon a settlement thereof; that afterwards, in accordance with the terms of such settlement, the motion for a new trial was withdrawn, and judgment was rendered upon the verdict against the city and in favor of Ross & Ross for \$35,000; that under the terms of his employment as superintendent Bentley had a one-third interest in the claim which was the subject-matter of the suit docketed as No. 180,302, but that the agreement under which his interest was acquired had not, up to November 11, 1901, been reduced to writing; that during the fore part of November, 1901, and while the trial of said cause was in progress, Bentley became dissatisfied because the evidence of his interest in said claim and suit rested only in parol, and requested Ross & Ross to assign or transfer to him, in writing, his interest in the claim involved in the suit then on trial; and that thereupon Ross & Ross executed and delivered to him the following written assignment:

"This memorandum of agreement, made this 11th day of November, A. D. 1901, between William J. Ross and J. J. Ross, composing the firm of Ross & Ross, contractors, of the city of Chicago, Cook county, Illinois, and John Bentley of the same place, witnesseth:

"Whereas, said Ross & Ross are the owners and holders of a claim against the city of Chicago for damages under a contract between said Ross & Ross and said city for the construction of the Sixty-Eighth street water tunnel, which said claim now in suit pending in the circuit court of Cook county, wherein said Ross & Ross are plaintiffs and the said city of Chicago is defendant, being case general No. 180,301.

"Now, therefore, the said Ross & Ross, for and in consideration of the sum of one dollar and other good and valuable consideration by them, the said Ross & Ross, received of and from the said Bentley, have assigned, transferred and set over, and do hereby assign, transfer and set over, to said Bentley one-third of their said claim in said suit and one-third of any final judgment which may be entered in their favor in said suit and one-third of any settlement or compromise of said claim, meaning and intending hereby that after payment of all court costs, attorney's and stenographer's fees and expert witness' fees, also printing of briefs and other necessary expenses and obligations, deducting the same from the amount of the final judgment in said suit or settlement thereof, one-third of the balance remaining shall belong to and be the property of said

Bentley, and he may receive and recover the same by suit or otherwise.

"Witness the hands and seals of the parties the day and year first above written.

"Ross & Ross,

"By W. J. Ross.

"Subscribed and sworn to before me this 21st day of November, 1901.

"[Seal.]

"Ellsworth J. Walton, Notary Public."

The bill further alleged that when this assignment was made there was also pending in said circuit court a suit in trover, the docket number of which was 180,301, wherein Ross & Ross sought to recover from the city the value of certain machinery, tools, and materials which it was claimed the city had converted to its use when it took possession of the water tunnel, and in which a judgment for \$5,000 against the city was thereafter rendered by agreement of the parties; that Bentley had no interest in this claim or suit; that the scrivener by whom the above assignment was drawn, through inadvertence or mistake, inserted in said instrument the number of the trover suit against the city, whereas it was intended by the parties to the assignment that it should relate to the suit in assumpsit; that Ross & Ross are insolvent and financially irresponsible; that they have refused to give Bentley an order on the city comptroller for the amount due him under said assignment and now fraudulently pretend that Bentley has no interest in the judgment for \$35,000, but that his interest, if any, under the said assignment, is in the judgment for \$5,000 which was rendered in the trover suit. The prayer of the amended and supplemental bill is that the said error or mistake in the assignment be corrected and the instrument reformed so as to truly describe the suit intended by the parties to be therein described; that an accounting be had of the amount due Bentley under the assignment as reformed and corrected; that the city of Chicago be ordered and directed to pay Bentley the amount found due him upon such accounting; and for general relief.

Upon the hearing before the master it developed that J. J. Ross, who was formerly a member of the firm of Ross & Ross, had been dead for a number of years, but that William J. Ross, the surviving partner, had continued to transact business under the firm name, and that the contracts and suits between the city of Chicago and Ross & Ross were really contracts and suits between the city and William J. Ross. The contention of William J. Ross, as disclosed by his answer, by the evidence produced before the master and by his brief and argument in this court, is that he never promised or agreed to give Bentley one-third of the net profits derived from the tunnel contract; that the assignment above set out was obtained from him without any consideration and solely by

means of a threat made by one John McKechney that unless such assignment was executed Bentley would testify for the city and against Ross in the assumpsit suit which was then on trial in the circuit court; that it was understood by McKechney, who obtained the assignment for Bentley, and by Ross, that the assignment was null and void because of the illegal consideration therefor and could not be enforced, and that it was agreed between them that McKechney should retain possession of the assignment and should never part with its possession; that it was also distinctly understood between McKechney and Ross, when the latter executed the assignment, that it referred to the trover suit and not to the suit in assumpsit; that no net profits had been derived from the construction of the water tunnel, but that the work thereon under the contract with the city had been carried on at a heavy loss. Defendant Ross also claimed that on November 27, 1901, Bentley, in consideration of the execution and delivery to him of a promissory note for \$300 by William J. Ross, released and discharged Ross & Ross from all liability on account of the said assignment. Bentley denied that he executed this release and claimed that the signature thereto was a forgery.

The master to whom the cause was referred to take the evidence and report the same, together with his conclusions upon the law and facts, filed his report, in which, after an elaborate discussion of the evidence, all the material issues of fact were found in favor of the complainant, Bentley. The master also found that the net amount of the judgment in the assumpsit suit, after paying all expenses incurred therein by Ross, was \$16,490.33, of which Bentley was, under his assignment, entitled to \$5,496.77, and recommended that a decree be entered in accordance with his findings and conclusions and with the prayer of the amended and supplemental bill. Upon this report the court entered a decree finding the facts as reported by the master, reforming and correcting the assignment by changing the figures 180,301 therein to 180,302, allowing \$1,016.50 to the master for his services, and providing that \$550 thereof, which had been paid to the master by Bentley, be taxed as costs and repaid to Bentley out of the moneys in the possession of the city of Chicago, and ordering the city of Chicago, in addition to the sums so taxed as costs, to pay to Bentley, out of the moneys in its possession, the sum of \$5,496.77 due him under the assignment of November 11, 1901. William J. Ross prosecuted an appeal to the Appellate Court for the First District, where the decree of the circuit court was affirmed. The cause has been brought to this court by writ of certiorari granted upon the petition of William J. Ross.

[1] It is first insisted on behalf of the plaintiff in error that the great weight of the evidence shows that plaintiff in error never promised to give defendant in error

one-third of the net profits of the tunnel contract, but that the assignment to Bentley was executed without any lawful consideration. At the hearing before the master a large number of witnesses were examined and a great mass of testimony taken, consisting, when transcribed, of 1,274 typewritten pages. The testimony on behalf of the respective parties was sharply conflicting and contradictory. To arrive at a correct determination of the questions involved, it is necessary to determine in whose favor the evidence preponderates on four or five different questions. It would be impossible within the scope of this opinion to discuss and analyze all the testimony bearing upon these various questions, and we will not attempt to do that. The master found with the defendant in error on every material issue in the case. The findings of the master were adopted by the chancellor upon the hearing of exceptions to the report of the master, and a decree was entered in accordance with those findings. This decree has been affirmed by the judgment of the Appellate Court. We have made a painstaking examination of the whole record and are of the opinion that a clear preponderance of the evidence supports the findings of the master in every particular.

As to whether the contract of May, 1897, which the defendant in error contends was made between himself and William J. Ross, was entered into as claimed, depends largely upon the testimony of the defendant in error and Ross, although other testimony was introduced by both parties as bearing upon the question. The master made two reports. By the first report, filed in October, 1904, he did not specifically find whether this oral contract had been made between the parties; consequently the matter was re-referred, with directions to "clearly find, from a consideration of all the evidence heretofore introduced before said master, that such an agreement between said Bentley and Ross was or was not made." The master thereupon filed a supplemental report, in which he found that in the month of May, 1897, the plaintiff in error agreed with the defendant in error that if the latter would continue to act as superintendent of the tunnel work he would give him \$150 a month and one-third of the net profits of the tunnel contract, and also reported that after a full consideration of all the evidence he was convinced that defendant in error's testimony was more reliable than that of plaintiff in error, and that the evidence in his behalf was more credible than that offered on behalf of the plaintiff in error. This conclusion is amply supported by the evidence.

The facts proven so thoroughly discredit the testimony of plaintiff in error that we feel warranted in disregarding it altogether, except where it is corroborated by other credible evidence. The facts which tend to discredit his testimony are many, but it will

only be necessary to refer to two circumstances to show the character of it.

During the progress of the trial of the assumpsit suit against the city, according to the testimony of defendant in error, he reminded plaintiff in error that their contract made in May, 1897, had never been reduced to writing and requested that the same be done, as the defendant in error was about to leave Chicago for the state of California on account of the failing health of some member of his family. Plaintiff in error agreed that the contract should be reduced to writing and requested McKechney to draw up an assignment to defendant in error of one-third interest in the assumpsit suit, giving to McKechney the substance of what the assignment was to contain. Plaintiff in error was a member of the Order of Elks, and, when McKechney informed him that he had the assignment prepared, plaintiff in error took him to a clubroom of the Elks lodge, where he inspected the assignment which McKechney had drawn. He was not satisfied with its terms, and, taking a sheet of the Elks stationery, he made a pencil memorandum of what he thought the assignment should contain. After reading the memorandum thus made by plaintiff in error, McKechney pointed out to him that it was substantially and in effect the same as the assignment which McKechney had prepared. After having McKechney interline one word in his draft of the assignment, plaintiff in error agreed that they were substantially the same and executed the assignment drawn by McKechney, thus interlined. McKechney, by agreement of the parties, was to hold the original assignment until the suit had been finally determined. Upon leaving the Elks clubroom on this occasion, McKechney took with him, together with the assignment, this pencil memorandum which had been made by the plaintiff in error. Upon the hearing of this cause this pencil memorandum was produced by the defendant in error, and upon its presentation to plaintiff in error while on the witness stand he denied that he had ever seen it before or that it was in his handwriting. As the consideration for the giving of this assignment was one of the questions in dispute, the authenticity of this pencil memorandum became highly important. The proof shows conclusively that this memorandum is in the handwriting of the plaintiff in error, Ross, and that it was drawn under the circumstances detailed by McKechney. A number of witnesses were produced by the defendant in error who were familiar with the handwriting of Ross, and they all testified that it was in his handwriting. Handwriting experts were called to the stand, who testified that from a comparison of the samples of the conceded handwriting of Ross this pencil memorandum was written by him. On the other hand, plaintiff in error produced witnesses who testified that they

were acquainted with his handwriting and that this memorandum was not written by him; but these witnesses also testified, when samples of the conceded handwriting of Ross were presented to them, that those were not in his handwriting. The nonexpert witnesses for defendant in error, on the other hand, recognized each specimen of handwriting conceded to be that of plaintiff in error unhesitatingly, and just as unhesitatingly declared every specimen which was not in the handwriting of Ross not to be his handwriting. Plaintiff in error also produced a handwriting expert who not only pronounced the memorandum not to be in the handwriting of plaintiff in error, but just as readily declared that certain conceded specimens of his handwriting were not written by him. The conclusion is inevitable that the plaintiff in error deliberately denied his own handwriting in order to escape the consequences of the effect of admitting that McKechney had drawn the assignment according to the instructions given him by the plaintiff in error.

Another instance of where the testimony of the plaintiff in error was wholly discredited on a material matter was in reference to the release which he claimed had been executed by defendant in error on the evening of the day the verdict was returned by the jury in the assumpsit suit. The assignment to the defendant in error of a one-third interest in that suit was dated November 11, 1901, and was executed about that time. The verdict was returned on November 27, 1901. On the hearing before the master the plaintiff in error produced and offered in evidence a pretended release which he claimed had been executed by the defendant in error, and which was as follows:

"Chicago, November 27th, 1902.

"In consideration of Ross & Ross giving me a promissory note for three hundred dollars at three months, the same being a cancellation of all claims of every kind which I may have against Ross & Ross, the said promissory note being dated 27th of November, 1902.

Jno. Bentley.

"Witnesses: W. J. Ross. Kenneth Ross."

The evidence shows that this release was dated November 27, 1902, but that at the time of the hearing the last figure "2" in the date line had become so obliterated by reason of a fold in the paper crossing that figure that it was impossible, without the aid of a magnifying glass, to determine whether it was a figure 1 or 2. In the body of the instrument, however, in describing the promissory note which is alleged to have been executed simultaneously with this release, the date is plainly 1902. The plaintiff in error and Kenneth Ross, his brother, who signed the release as a witness, both testified that they met Bentley at a saloon at the corner of Clark and Washington streets, in the city of Chicago, between 4:30 and 5 o'clock on the afternoon of November 27, 1901, and that shortly thereafter the three men went to the

saloon of Al Kuhns, at 273 Dearborn street, where Bentley executed the release about 6 o'clock. Welbasky, a saloon keeper, and Hicks, a bartender, testified that they also witnessed the execution of this release; all of the witnesses except Hicks testifying that Bentley was present and executed it. Hicks, at the time of the hearing, was not able to positively identify the defendant in error as the man who was there with plaintiff in error and his brother, Kenneth Ross. These witnesses testified that the release was drawn by plaintiff in error upon the polished surface of the saloon bar and was signed by the defendant in error and the two witnesses upon the bar. Upon cross-examination plaintiff in error, when asked specifically as to how the release was signed by Kenneth Ross, testified that he believed that instead of signing it upon the bar Kenneth Ross placed the paper upon the rough glass partition between the bar and the cigar counter in the room, and thus signed it. A very cursory inspection of this paper discloses that the signature of Kenneth Ross was signed while the paper was lying upon some rough surface. The handwriting experts, who were later called, testified that it appeared to have been written upon some such surface as the cloth covering of a book. It was apparent that it was not upon such a surface as a polished bar would present. Kuhns was called later by the defendant in error and testified that the glass partition between the saloon bar and the cigar stand in his saloon was composed of polished French mirror, and that there was no rough glass anywhere in his saloon except a panel in the front door. Handwriting experts testified that the pretended signature of defendant in error to this paper was not in his handwriting. Defendant in error himself testified that on the afternoon of November 27, 1901, he was working for the city, engaged in laying brick in a sewer between Thirty-Ninth and Fifty-First streets, in the city of Chicago; that he worked overtime that day and quit work at about half past 5 o'clock. The timekeeper for the city on this sewer work testified that he kept the time of Bentley on that day, and that he commenced work at 8 o'clock in the morning on November 27, 1901, and quit work at 5:30 p. m. Two of defendant in error's fellow workmen testified to the same facts, and testified further that they went home with defendant in error on the Illinois Central Railway; that they boarded the train shortly before 6 o'clock, rode to Randolph street, where they alighted, and accompanied the defendant in error to his hotel, at the corner of Michigan and Wells streets, where they arrived at about a quarter past 6 o'clock. Effort was made on the part of defendant in error to secure the presence of the witness Hicks after he had testified for plaintiff in error; but, although subpoena was served upon him, he did not respond, but instead absconded from the city

of Chicago. The master and the chancellor both found that this release was a forgery, and this finding is supported by a clear preponderance of the evidence.

Other facts shown might be cited which tend to discredit the testimony of the plaintiff in error; but we deem it unnecessary to refer but to these two, which concern very material features of the case.

Plaintiff in error insists that defendant in error is discredited by reason of the fact that his testimony in this cause differs from that given by him on the trial of the assumpsit suit of Ross & Ross against the city of Chicago, in which he was a witness. On the trial of the assumpsit suit defendant in error, who was called as a witness by the plaintiffs in that suit, was not asked, on his cross-examination, whether he had any interest in the event of the suit, although it is evident that he created the impression, without testifying directly to that fact, that he did not have an interest in the event of that suit. Upon his cross-examination he testified, as the records of that trial proven here disclose, that he was receiving from the plaintiff in error, as superintendent at the crib, a flat monthly salary, his board, and extra pay for all brick he should lay. He testified before the master in this cause that at that time he was receiving a flat monthly salary and his board, and nothing more. Defendant in error did not attempt to explain this discrepancy during his examination. This difference in the testimony of the defendant in error given in the assumpsit suit and given on the hearing of this cause is not sufficient to entirely discredit him, nor, assuming that the testimony on the trial in the assumpsit suit disclosed the true terms upon which defendant in error accepted the superintendency at the crib, is it sufficient to show that it is improbable that the contract was made which defendant in error claimed was entered into in the latter part of May, 1897, and within a month after he had been employed as superintendent.

Plaintiff in error also insists that there is such a discrepancy between the allegations of the original bill herein, which was sworn to by the defendant in error, and the amended and supplemental bill, as to discredit defendant in error and to disclose that the alleged contract of May, 1897, was an afterthought. We cannot give our assent to this proposition. The bill was originally filed for the sole purpose of enjoining the payment of the full amount of the judgment to plaintiff in error. The allegations relied upon by plaintiff in error as showing a fatal discrepancy between that and the supplemental bill were, in substance, that prior to November 11, 1901 (the date of the execution of the assignment), defendant in error had performed certain work, rendered certain services, and laid out and expended for and on account of Ross & Ross a large sum of money, which said work, services, and expendi-

tures of money were all performed and laid out by him in and about the business and at the request of Ross & Ross. It is upon the fact that this bill was sworn to and that it did not contain any reference to the alleged contract of May, 1897, but instead contained the allegations just referred to, that plaintiff in error relies in his contention that the defendant in error's testimony about the alleged agreement for one-third of the net profits of the tunnel contract was an afterthought, invented by him after he had filed his original bill. When it is borne in mind that the bill was one for injunction, only, and not for the reformation of the assignment, the allegations of the original bill will not bear the interpretation placed upon them by the plaintiff in error or warrant the deductions made. Those allegations, while not as specific as they might have been, are such as might have been drafted by any careful lawyer acquainted with all the facts, and they stated the facts with sufficient accuracy to warrant its being sworn to by the complainant.

Plaintiff in error does not deny the execution of the assignment which is sought to be corrected by this bill. He does claim, however, that he executed the assignment, not of his own free will, but as the result of threats made to him by McKechney that unless he did execute this assignment defendant in error would go over to the city and testify against him. At the time plaintiff in error claimed these threats were made, defendant in error had already testified in his behalf and had been on the stand for the greater part of three days. The case was almost finished at the time of the execution of the assignment, and the city had virtually closed its defense. Defendant in error testified that he requested plaintiff in error to reduce to writing their oral agreement made in May, 1897, and that he agreed to do so. McKechney testified to the same effect, and their testimony is that thereupon the plaintiff in error requested McKechney to draft an assignment for him and gave him the substance of the matter to be contained in the assignment. A preponderance of the evidence shows that the assignment was executed for the purpose of reducing the prior oral agreement to writing, and not for the purpose of preventing Bentley from testifying on behalf of the city and against Ross & Ross.

[2] Plaintiff in error contends, however, that if this assignment should be reformed, inasmuch as it was made to reduce to writing the prior oral agreement, it should be reformed so as to express that oral agreement and give defendant in error an interest in one-third of the net profits of the tunnel contract instead of an assignment of a one-third interest in the judgment obtained in the assumpsit suit. While it is true that as this assignment is drawn it does not state the prior oral agreement in the terms of that agreement and to that extent is not a reduc-

tion of that agreement to writing, it is apparent from all the circumstances surrounding this transaction that the parties elected to treat, and did treat, the amount involved in the assumpsit suit of Ross & Ross against the city as representing the net profits of the tunnel contract, or, at least, that they elected to substitute for the net profits of the tunnel contract whatever amount should be secured from the city as a result of that suit. That this is true is evidenced by the fact that the plaintiff in error himself stated to McKechney the matter which was to be contained in the assignment, and defendant in error accepted the assignment as satisfactory upon its execution. The existence of the pencil memorandum above referred to, drawn by plaintiff in error at the Elks clubroom, leaves no doubt as to the substance of the instructions given by the plaintiff in error to McKechney in reference to drafting the assignment. That pencil memorandum is as follows:

"We agree to pay John Bentley one-third of any amount which may be due Ross & Ross after final judgment in the final court of resort. Certain obligations and undertakings have already been entered into by Ross & Ross, and it may be found necessary to enter into further obligations and undertakings to carry the suit through to a final settlement, and after payment of said obligations and undertakings the remaining amount shall be divided, one-third John Bentley, two-thirds Ross & Ross. And it is further agreed that this agreement shall be held in the custody of Mr. John McKechney, of the city of Chicago, as trustee, until a final adjustment is had."

Having elected to treat the amount involved in the assumpsit suit against the city as representing or standing in lieu of the net profits of the tunnel contract, plaintiff in error cannot now be heard to contend that this assignment should be reformed in that respect.

In this connection plaintiff in error insists that the bill should have alleged that the tunnel contract was completed at a profit, and that the burden was upon the defendant in error to show the amount of such profits before he was entitled to a reformation of the assignment, and also that the court erred in excluding evidence offered by the plaintiff in error to the effect that he made no net profits out of the tunnel contract but said contract was completed at a great loss to him. For the reasons just above given the bill was not defective in the particulars pointed out, and no error was committed in excluding the offered testimony.

[3] Plaintiff in error contends that the claim of the defendant in error is so inequitable that he should not be afforded relief in a court of chancery, and points out that by the decree of the circuit court defendant in error, in addition to his wages of \$150 a month and board, is awarded the sum of

\$5,496.77 for eight months' work. At the time of his employment as superintendent at the crib, in May, 1897, defendant in error was employed by plaintiff in error in the capacity of a foreman of bricklayers. According to the letters of plaintiff in error found in the record, the work was progressing in a very unsatisfactory manner. On May 4, 1897, plaintiff in error wrote defendant in error offering him the position of superintendent of the crib and putting him in full charge of the work, and explaining to him how unsatisfactorily the work had been progressing theretofore, and expressing the hope and belief that the defendant in error would be able to get the work better organized and straighten out the difficulty. He offered him \$150 a month and his board, and suggested that this might lead to something better. On May 20th he again wrote defendant in error, telling him that he had not visited the crib since the defendant in error had been made superintendent, for the reason that he did not want it said that defendant in error had not handled the job wholly himself. In this letter he gave explicit directions as to how he would like to have the work carried on, and told him he would see him personally within a few days. Three or four days after receiving this letter, the plaintiff in error visited defendant in error at the crib, at which time he complimented him upon having gotten everything working in good shape. On that occasion defendant in error informed plaintiff in error that he did not desire to hold the position of superintendent any longer; that it meant a 24-hour day; that the responsibility was great; and that he could receive more wages by working at his trade. Thereupon the plaintiff in error urged him to continue, telling him he would give him \$150 a month toward his expenses and would give him one-third of the net profits of the work for his brains and labor. This proposition defendant in error testified he accepted. Under this arrangement he continued as superintendent at the crib until the following January, when the city took over the work. The consideration for this agreement was sufficient, and under the circumstances it cannot be said that it is so inequitable that a court of chancery will not afford relief.

[4] It is urged that, having in 1901 executed the release dated November 27, 1902, defendant in error is not entitled to the relief sought. As already pointed out, the evidence clearly discloses this release to be a forgery, and it is entitled to no weight or consideration whatever.

Plaintiff in error contends that at the time the assignment was executed by him the insertion of the number of the trover suit instead of the number of the assumpsit suit was deliberate, both on the part of himself and McKechney, and that it was done for the purpose of deceiving the defendant in error, who, according to the contention of the plaintiff in error, was by means of threats

compelling him to execute this assignment to prevent the defendant in error from testifying against him. This contention is not supported by the evidence. It is clear from a preponderance of the testimony that the parties intended to make the assignment apply to the assumpsit suit and not to the trover suit, and that the number of the trover suit was inserted in the assignment by mistake and under such circumstances as entitles defendant in error to have the instrument corrected in that respect. The instrument itself, aside from the recital of the case number, bears conclusive evidence that it relates to the matter involved in the assumpsit suit, for it recites that the interest assigned is in a claim against the city for damages under a contract for the construction of the water tunnel.

The five material questions of fact involved in this case: (1) Whether Ross agreed to give Bentley one-third of the net profits of the tunnel contract in consideration of Bentley continuing as superintendent; (2) whether the assignment in question was executed in order to reduce to writing the prior oral agreement; (3) whether the pencil memorandum of the assignment was written by W. J. Ross; (4) whether the general number of the trover suit was incorporated in said assignment instead of the general number of the assumpsit suit by a mistake of the parties; and (5) whether Bentley executed the release of November 27, 1901—were all resolved by the master in chancery in favor of the defendant in error, and the decree of the circuit court on each of those questions is supported by a preponderance of the evidence.

Plaintiff in error objects to the fees allowed the master. The original report of the master was filed October 12, 1904. With this report was filed no statement or note whatever of the master's fees; the report in that respect being simply a memorandum following the signature of the master, as follows: "Master's fees, \$....., paid by" It appears from a conversation had between the solicitors for the parties at the time the decree was submitted to the court, which is preserved in the record by a certificate of evidence, that prior to the filing of his report the master had required the defendant in error to advance to him the sum of \$550 and the plaintiff in error to advance the sum of \$466.50 to apply on his fees. It does not appear that the master's fees had been determined by the court prior to their payment; but these amounts seem to have been arbitrarily fixed by the master and payment required before the report would be filed. By its decree the court found that the sum of \$1,016.50, being the total of the amounts paid by the respective parties, was a fair and reasonable compensation for the services rendered by the master, and that sum was allowed to the master. The decree further ordered that the sum of \$550 paid to the mas-

ter by defendant in error be taxed as a part of the costs and be repaid to the defendant in error out of the moneys then in the possession of the city of Chicago. At the time the decree was submitted for entry, solicitor for plaintiff in error objected to the amount of the master's fees as being unreasonable and excessive. The court, being of the opinion that the fee was a reasonable and proper one, entered the decree accordingly. The plaintiff in error now urges that the master's fees were improperly allowed for the reason that they were not itemized as required by law. Defendant in error insists that, inasmuch as the plaintiff in error only objected to the master's fees in the trial court for the reason that they were unreasonable and excessive, he cannot be heard now to object on the sole ground that they were not itemized, and, inasmuch as the only ground urged in the Appellate Court was that the fees were not itemized, he cannot now be heard to say that they were unreasonable and excessive.

The master made no claim whatever for fees in connection with his report.

[5] The claim of the master for fees should show the time he was necessarily employed in the examination of questions of law and fact and in preparing his report, and, if the parties who are called upon to pay the demands of the master object to the claim as presented, he should be required to support his claim with proof, and the proof so produced should show the services rendered, the time actually and necessarily devoted to the work, and such other facts as would enable the court to intelligently determine the rights of the parties. *Fitchburg Steam Engine Co. v. Potter*, 211 Ill. 138, 71 N. E. 933. It would be impossible for the court to pass upon an objection that the fees claimed were unreasonable and excessive without having before it an itemized statement of the fees claimed. An objection, in a case where the master presents his claim in a lump sum, on the ground that it is unreasonable and excessive, would necessarily include an objection that the fees were not itemized. Under the facts in this case no formal objection can be considered to have been made to the fees of the master. The master had presented no claim for fees, and there was nothing before the court for decision or upon which a ruling was required. Counsel could not object to a mere announcement of the court as to what the decree should contain in the way of an allowance to the master. The solicitor for plaintiff in error was contending, in an informal way, to the court that the proposed fees were excessive. If that was to be treated as a formal objection, it became the duty of the court to require the master to prove up his fees, which would necessarily include itemizing them.

[6] There is no force in the contention that, by thus objecting to the chancellor that

the fees proposed to be allowed were unreasonable and excessive, plaintiff in error thereby waived his right in the Appellate Court, and in this court, to say that the fees were not itemized as required by law. It is apparent that plaintiff in error objected to each provision of the decree which was adverse to his interests, and it was not necessary that he make specific objection to the master's charge for fees in order to raise the question in the Appellate Court and in this court. *Wirzbicki v. Dranicki*, 235 Ill. 106, 85 N. E. 306; *Keuper v. Mette*, 239 Ill. 586, 88 N. E. 218.

[7] As the master presented no claim for fees, it was error for the court to allow anything except the statutory fees. The testimony reported consisted of 1,274 typewritten pages. At the statutory rate of 15 cents per 100 words, estimating 275 words per page, this would amount to \$525.52.

The decree of the circuit court will be modified by striking out the provision allowing and taxing the master's fees, and by inserting in said decree in lieu thereof the following language: "It is further ordered that the sum of \$525.52 be allowed the master in chancery for taking and reporting testimony at 15 cents per 100 words, upon which sum shall be credited \$486.50 heretofore paid the master by the defendant. The balance, being \$59.02, will be taxed as costs." In all other respects the judgment of the Appellate Court and the decree of the circuit court will be affirmed. The costs in this court shall be paid, two-thirds by plaintiff in error and one-third by defendant in error.

Decree modified and affirmed.

(250 Ill. 345.)

PEOPLE v. SCHREIBER.

(Supreme Court of Illinois. April 19, 1911.

Rehearing Denied June 7, 1911.)

1. STATUTES (§ 118*)—TITLE AND SUBJECT OF ACT.

Hurd's Rev. St. 1909, c. 38, § 118a, entitled "An act to prevent and punish frauds in the practice of law," makes it a misdemeanor for one not regularly licensed to practice law, to hold himself out as an attorney, etc. *Held*, that the title of the act is sufficient, and that the body of the act is within the title.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 158-160; Dec. Dig. § 118.*]

2. STATUTES (§ 109*)—TITLE AND SUBJECT OF ACT.

Any means reasonably adapted to secure the object indicated in the title may be included within the body of an act, and if by any fair intentment the provisions in the body have a necessary or proper connection with the title, such provisions are not objectionable.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 136-139; Dec. Dig. § 109.*]

3. CONSTITUTIONAL LAW (§ 230*)—EQUAL PROTECTION OF LAW.

Hurd's Rev. St. 1909, c. 38, § 118a, making it a misdemeanor for any person residing in the state, who has not been licensed to practice law, to hold himself out as an attorney,

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

etc., is not unconstitutional, as discriminating against residents of the state and in favor of residents of foreign states.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 687; Dec. Dig. § 230.*]

4. INDICTMENT AND INFORMATION (§ 110*)—REQUISITES—STATUTORY OFFENSE.

Where an offense is statutory, it suffices to allege it in the information in the language of the statute, provided the crime is sufficiently defined.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 289-294; Dec. Dig. § 110.*]

5. ATTORNEY AND CLIENT (§ 11*)—PRACTICING WITHOUT LICENSE—SUFFICIENCY OF EVIDENCE.

Under Hurd's Rev. St. 1909, c. 38, § 118a, making it a misdemeanor for one not licensed to practice law, to hold himself out as an attorney, etc., evidence that accused maintained an office, with a stenographer and law library, making collections, preparing conveyances, examining abstracts, performing such services for his clients as are usually rendered by attorneys, and stating to his clients that he was a lawyer, though he did not try cases in courts of record, sustained a conviction; that accused placed the word "collection" before the word "attorney" on his signs and advertisements being immaterial.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 15, 16; Dec. Dig. § 11.*]

Error to Winnebago County Court; Louis M. Reckhow, Judge.

Serenes T. Schreiber was convicted of an offense, and brings error. Affirmed.

B. A. Knight (G. E. Johnson, of counsel), for plaintiff in error. W. H. Stead, Atty. Gen., Harry B. North, State's Atty., and Fred H. Hand, for the People.

HAND, J. This was an information filed by the state's attorney of Winnebago county, in the county court of said county, charging Serenes T. Schreiber, the plaintiff in error, with having violated section 1 of an act entitled "An act to prevent and punish frauds in the practice of law," by holding himself out as an attorney at law, and by representing that he was authorized to practice law, when he had not been regularly licensed to practice law in the courts of this state, which section of the statute reads as follows: "That any person residing in this state, not being regularly licensed to practice law in the courts of this state, who shall in any manner hold himself out as an attorney at law or solicitor in chancery, or represent himself either verbally or in writing, directly or indirectly, as authorized to practice law, shall be deemed guilty of a misdemeanor and upon conviction shall be punished by a fine of not less than twenty-five (\$25) dollars, nor more than five hundred (\$500) dollars, or imprisonment in the county jail not exceeding one year, or by both fine and imprisonment, at the discretion of the court, for each and every offense, said misdemeanor

to be prosecuted and costs assessed as in other cases of misdemeanor under chapter 38 of the Revised Statutes of Illinois." Hurd's Stat. 1909, p. 775. A motion to quash the information was made and overruled, and the plea of not guilty was entered, and upon a trial before a jury plaintiff in error was found guilty, and the court, after overruling a motion for a new trial and in arrest of judgment, entered judgment on the verdict, sentencing the plaintiff in error to pay a fine of \$300 and the costs of prosecution, and that he be committed to the county jail of Winnebago county until the fine and costs were paid. This writ of error has been sued out to review that judgment.

[1] It is contended that the act under which the plaintiff in error was convicted is unconstitutional (1) on the ground that the title of the act is insufficient; and (2) that the act discriminates against residents of this state and in favor of residents of foreign states. We are of the opinion both contentions are without force. The act was designed to prevent persons who reside in this state, and who were not duly licensed to practice law in this state, from imposing upon the public by holding themselves out as duly licensed attorneys at law, or from representing to the public that they were authorized to practice law. For a person who has not been admitted to the bar in this state to hold himself out as a duly licensed attorney at law, or to represent that he is authorized to practice law in this state, would be a gross fraud, and such action would bring the offender clearly within the language of an act framed with the design to prevent and punish frauds in the practice of law.

[2] It has been held by this court that any means which are reasonably adapted to secure the object indicated in the title of an act may be included within the body of the act (*Larned v. Tiernan*, 110 Ill. 173), and if by any fair intentment the provisions in the body of an act have a necessary or proper connection with the title of the act, such provisions are not objectionable (*Hudnall v. Ham*, 172 Ill. 76, 49 N. E. 985). And it would seem too clear for argument that a statute which prohibits persons in this state from holding themselves out as attorneys at law, who have not been regularly admitted to the bar, and who have no right to practice law in this state, would reasonably tend to prevent fraud in the practice of law, and that such an enactment would have a necessary and proper connection with the title, which states the act which is to follow is one for the prevention and punishment of frauds in the practice of law. We are of the opinion the title of said act is sufficient, and that the body of the act is within the title.

[3] The contention that the act discriminates against persons residing in this state,

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

and in favor of persons residing outside the state, is based upon the view that, while the act prohibits persons that reside in the state from practicing law without having been admitted to the bar, the citizens of other states may come within this state and practice law in the courts of this state without being admitted to the bar of this state. Such is not the effect of the statute. The statute was not passed for the purpose of reaching all classes of citizens. It was a fact well known to the Legislature, when it passed the act, that within the state there were persons who had never been admitted to the bar, or who had been admitted to the bar and whose licenses authorizing them to practice law in this state had been revoked, who, in defiance of the law, were fraudulently holding themselves out as attorneys at law and authorized to practice law, and imposing upon and often defrauding the public, by leading it to believe that they were regularly licensed attorneys at law, and this class included the persons sought to be reached by the statute. The enforcement of this statute will have no effect upon a reputable lawyer residing in a foreign state who may temporarily desire to represent a client in this state, as he may rightfully do so as a matter of comity, and nonresident unlicensed attorneys will not come into this state to practice law, and if they should, by reason of their nonresidence and want of a permanent location and lack of acquaintances, they would be unable to find victims upon whom to practice their wiles. The unlicensed nonresident, therefore, who might desire to practice law in this state, differs from the nonresident drummer or peddler who goes into a state other than that in which he resides to sell his goods and wares, and the principles of law which apply to the latter classes have no application to the nonresident who has not been admitted to the bar, and who, possibly, might desire to practice law in this state. The statute applies to every resident of this state who holds himself out as an attorney at law, or who represents himself as authorized to practice law, and who has not been regularly licensed to practice law, or whose license has been revoked. The statute is not special or discriminatory legislation, but a valid constitutional enactment.

[4] It is next contended that the court erred in overruling the motion to quash. The information charged, in each count, the offense substantially in the language of the statute. It does not charge a common-law offense, and where the offense is statutory it is sufficient to allege it in the words of the statute, provided it sufficiently defines the crime. *Strohm v. People*, 160 Ill. 582, 43 N.

E. 622; *Meadowcroft v. People*, 163 Ill. 56, 45 N. E. 991, 35 L. R. A. 176, 54 Am. St. Rep. 447; *McCracken v. People*, 209 Ill. 215, 70 N. E. 749. The information was therefore sufficient.

It is further urged that the court misdirected the jury as to the law of the case. We have examined the instructions given on behalf of the people as well as the defense, and those refused which were offered by the defendant. The issues were simple, and the evidence of guilt was clear. We are of the opinion the jury were properly advised as to the law of the case.

[5] It is finally stated the verdict is not supported by the evidence. It appears that the plaintiff in error maintained an office in the city of Rockford; that it consisted of a main office and a consultation room; that he employed a stenographer; that he had quite a pretentious law library; that his business consisted of making collections, preparing conveyances, examining abstracts, negotiating loans, closing real estate deals, advising parties as to their legal rights, and generally performing such services for his clients as are usually performed by attorneys at law, and that he stated to his clients that he was a lawyer; that upon his office door and window and office stationery he had his name, followed by the words "Collection Attorney," and that he had formed a connection with attorneys and collection agencies throughout the United States and Canada, with whom he exchanged business; that he did all the law business he could get to do, with the exception that he says he did not try cases in courts of record. It is obvious the plaintiff in error was holding himself out as an attorney at law. He urges, however, that as he placed the word "collection" before the word "attorney" upon his signs and advertisements he is not guilty of a violation of the statute. Where an office and office force are maintained by a party who is engaged in the law business without having been duly admitted to the bar, he cannot escape the pains and penalties of the statute by placing after his name and before the word "attorney" some word or phrase which, at most, only shows to the ordinary observer that he is specializing in the practice of law. The evidence fully establishes that the plaintiff in error was holding himself out as authorized to practice law without being regularly licensed to practice law, and upon his own showing he was guilty of a violation of the statute.

Finding no reversible error in this record, the judgment of the county court will be affirmed.

Judgment affirmed.

(260 ILL 232)

PEOPLE ex rel. KIDD et al. v. CROWLEY et al.

(Supreme Court of Illinois. April 19, 1911.

Rehearing Denied June 8, 1911.)

1. ESTOPPEL (§ 90*)—EQUITABLE ESTOPPEL—DRAINAGE DISTRICTS—ORGANIZATION.

Persons who participated in meetings to organize a drainage district are estopped to question legality of the organization, because the meetings were held outside the district, after the work has been practically completed.

[Ed. Note.—For other cases, see Estoppel, Dec. Dig. § 90.*]

2. ESTOPPEL (§ 90*)—EQUITABLE ESTOPPEL—DRAINAGE DISTRICTS—ORGANIZATION.

Persons who participated in the organization of a drainage district are estopped from claiming, after the work has been practically completed, that the commissioners were elected under a repealed law.

[Ed. Note.—For other cases, see Estoppel, Dec. Dig. § 90.*]

3. DRAINS (§ 14*)—DRAINAGE DISTRICTS—ORGANIZATION—OBJECTIONS—TIME FOR MAKING.

An objection to the validity of the organization of a drainage district, because one of the highway commissioners signed the petition, made an affidavit that the petition was sufficiently signed, and thereafter found that the affidavit was made by a credible witness, comes too late, when first made after the work has been practically completed, and on appeal in quo warranto against the commissioners.

[Ed. Note.—For other cases, see Drains, Dec. Dig. § 14.*]

4. QUO WARRANTO (§ 6*)—RIGHT TO REMEDY—DISCRETION OF COURT.

Quo warranto is not a matter of absolute right.

[Ed. Note.—For other cases, see Quo Warranto, Cent. Dig. § 7; Dec. Dig. § 6.*]

Error to Circuit Court, La Salle County; Richard M. Skinner, Judge.

Quo warranto by the People, on the relation of William H. Kidd and others, against John E. Crowley and others. Judgment for plaintiffs, and defendants bring error. Reversed and remanded.

Craig & Craig and Butters & Armstrong, for plaintiffs in error. Charles S. Cullen, State's Atty. (Lester H. Strawn and L. W. Brewer, of counsel), for defendants in error.

CARTER, J. On leave granted by the circuit court the state's attorney of La Salle county filed an information in the nature of a quo warranto on August 22, 1905, alleging that the plaintiffs in error held and executed, without warrant, the offices of commissioners of an alleged drainage district of the town of Ophir, in that county. June 22, 1906, by leave of court, additional counts were filed to the information, in which it was charged that the said plaintiffs in error were usurping certain franchises. Various pleas, replications, demurrers, and certain motions were filed, and the cause was many times set for trial, and many times passed or continued when reached for trial. Finally, on April 6, 1910, by leave of court, plaintiffs

in error filed two pleas, which were substantially identical in form, except as to the conclusion. The trial court sustained demurrers to said pleas on said last-mentioned date, and entered an order finding that the plaintiffs in error were guilty of usurping, without authority, the franchises and offices described in said information, and that the supposed drainage district was without any franchise or legal existence; that plaintiffs in error be forthwith ousted from exercising the offices of drainage commissioners; and that each pay a fine of one dollar. This writ of error is sued out to reverse that judgment.

The pleas upon which the case was disposed of set out the steps taken in the organization of the drainage district, alleging that December 17, 1904, a petition was addressed to the drainage (highway) commissioners of the town of Ophir asking for the organization of the district; that at a meeting held in the town clerk's office December 28, 1904, by said highway commissioners, affidavits were filed stating that the majority of the adult landowners of the lands comprising the proposed district had signed the petition, representing more than one-third of the lands; that said meeting was adjourned by the said commissioners to meet January 11, 1905; that in the meantime the commissioners personally examined the proposed drainage district, and employed a civil engineer to make a survey and an estimate of the costs; that they met at said adjourned meeting January 11, 1905, and again adjourned to January 25, 1905, and that at said last-mentioned meeting they entered an order declaring said drainage district fully organized and describing its boundaries; that on February 23, 1905, the town clerk called an election to be held March 1, 1905, for the election of drainage commissioners, at which election William H. Kidd, one of the relators, received the same number of votes as the plaintiff in error John E. Crowley; that Kidd and Crowley cast lots, and Crowley drew the lot entitling him to be declared elected; that all of said relators were present, either in person or by attorney, at said meeting of December 28, 1904, and made no objections to the legal sufficiency of said petition; that in May, 1905, the right of way across the lands of Levi Carr, one of the relators, was condemned, and on May 9, 1905, the release for the right of way was procured across the lands of relators Marshall Wallace, Louis L. Wallace, and Charlotte Davis; that June 17, 1905, according to the statute, the commissioners made a classified roll of all lands in said district, and that thereafter, on July 10, 1905, pursuant to statutory notice, a meeting was held in said drainage district to hear objections to such classification, and that all of the relators were present, in person or by attorney; that all objections were then with-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

drawn, and all of said relators expressed themselves as being in favor of carrying out said improvement, and publicly announced that they had no objections to the classification, and ratified and approved the action of the commissioners; that thereafter an assessment of lands of said district was made by plaintiffs in error; that all of said assessments have been voluntarily paid, except by the relators, and that relators Charlotte Davis and Fred T. Davis have voluntarily paid a portion of their assessments, and Edward J. Brady the whole of his; that long prior to the commencement of this suit the respondents had duly advertised for bids for digging and constructing the ditch, and had publicly let a contract for the work at about \$27,000; that the contractor had given his bond, and expended in and about his work about \$10,000, prior to the commencement of this proceeding; that the plaintiffs in error had paid said contractor, prior to this suit, over \$3,000, and that prior to November 28, 1906 (when all of the relators in this suit, except Kidd, were added to the petition), $5\frac{1}{4}$ miles of the $7\frac{1}{4}$ miles of said ditch had been completed, and that the contractor had been paid on his contract upwards of \$14,639, leaving a balance due him of several thousand dollars; that all the lands in the district have been benefited to the extent of \$30 an acre by said drain; that the state's attorney of La Salle county has only taken a nominal part in these proceedings, the same being instituted at the sole request of the relators, and being prosecuted by them at their own expense and for their individual benefit in attempting to escape their just proportion of the cost of the improvement.

[1] In view of conclusions we have reached in this case, we shall not find it necessary to discuss the various points raised on the pleadings in this case. The existence of the district is disputed because the meetings of the highway commissioners held on January 11 and 25, 1905, to organize the district, were not held within the limits of the district. The title of the drainage commissioners is disputed, on the ground that they were chosen under the provisions of section 15a of the farm drainage act (Laws 1895, p. 166), which had been repealed. Conceding, for the purposes of this case, that these questions are raised by the pleadings, we are disposed to hold that the relators are estopped by their own acts from raising them. We think it is apparent from this record that the relators did not rely on either of these points until after they had filed their additional counts, in June, 1906. We think it is also apparent from the pleadings that these proceedings have been carried on largely in the interest of private parties, and that the interest of the public is little more than theoretical. Manifestly, from the facts set out in the pleas, the only relator who was such at the time the original petition was filed (William H. Kidd) was a candidate for

drainage commissioner at the first election for those officials in March, 1905. While the pleadings are not entirely satisfactory in form on that question, we conclude from them that all the relators took part in this election. The same conclusion must also be reached with reference to the relators attending the meetings held in July and stating that they were satisfied with all the proceedings up to that point. Obviously, all of the relators were acquainted with the entire proceedings that had been taken, and raised no objection of any kind up to that time, and none of them objected until the contract had been let for the entire work, and (except Kidd) until a substantial part of it was completed, and large sums of money paid thereon, and obligations assumed for the remaining portion. The relators knew, as well as did plaintiffs in error, that the meetings in January, 1905, were held outside of the district. We are compelled to conclude from the pleadings that that question was not raised until the work was practically completed, and then there was a difference of opinion as to whether such meetings were required to be held in the district, until this court decided the point in *People v. Carr*, 231 Ill. 502, 83 N. E. 269. At most, this objection does not in any way affect the substantial merits of the case. Sound public policy forbids that those who have participated in such meetings should thereafter be permitted to question the legality of the organization of a district of this kind. *People v. Walte*, 70 Ill. 25; *People v. Moore*, 73 Ill. 132.

[2] It is, however, insisted that under the decisions of this court in *Patton v. People*, 229 Ill. 512, 82 N. E. 386, and *People v. Morrell*, 234 Ill. 47, 84 N. E. 644, said section 15a, under which the election or drainage commissioners was held, was not in force at the time of this first election, and that the relators could not be estopped by participating in an illegal election. It was held in *People v. Maynard*, 15 Mich. 463, that the recognition, by parties interested, of a municipal corporation organized under an act of doubtful constitutionality, would not permit such parties to inquire, long after, into the regularity of such organization. See, also, *State v. Village of Harris*, 102 Minn. 340, 113 N. W. 887, 13 L. R. A. (N. S.) 533, and note; *Bannock County v. Bell*, 8 Idaho, 1, 65 Pac. 710, 101 Am. St. Rep. 140, and note. Regardless of whether there was any law for such an election, the recognition by all parties of the legality of the district was plainly shown by their taking part in its organization and subsequent proceedings. In this connection it may be noted that section 15a was re-enacted as an emergency law on February 27, 1907 (Laws 1907, p. 273), and that thereafter the present drainage commissioners have all been elected under said law.

[3] Counsel for defendants in error have urged, apparently for the first time in their

briefs in this case, that the organization of the district was void (*People v. Highway Com'rs*, 240 Ill. 399, 88 N. E. 977), because one of the highway commissioners signed the petition for the organization of the district, and also made an affidavit that the petition contained the required number of signers, and thereafter found that the affidavit was made by a credible witness. Without passing on the point whether this would be a valid objection, if raised in apt time, clearly, under the authorities, the relators cannot raise it at this late hour. *Drainage District v. Smith*, 233 Ill. 417, 84 N. E. 376, 16 L. R. A. (N. S.) 292; *Vandalla Drainage District v. Hutchins*, 234 Ill. 31, 84 N. E. 715, and cases cited, is in point here.

Many relations, both public and private, are so involved in a proceeding of this nature, that each case must be largely decided on its own special and particular facts. Not every departure from the law in the organization and conduct of the proceedings of the district or the use of its franchises will justify such an order as was entered by the trial court in this case. While the public authorities will not be barred, either by laches or the acquiescence of individuals, where it does not appear that the information is filed exclusively for the benefit of private interests, still this court has frequently held that unreasonable delay or acquiescence on the part of the persons complaining, as well as considerations of public interest or convenience, will justify the refusal of the court to proceed to judgment, although no statute of limitations has intervened. *People v. Lease*, 248 Ill. 187, 93 N. E. 783; *People v. Schnepf*, 179 Ill. 305, 53 N. E. 632; *People v. Hanker*, 197 Ill. 409, 64 N. E. 253; *People v. Anderson*, 239 Ill. 268, 87 N. E. 1019; *People v. Hepler*, 240 Ill. 196, 88 N. E. 491.

[4] The rule in quo warranto proceedings is the same as it is in certiorari. The remedy in either case is not a matter of absolute right. *People v. Schnepf*, supra; *People v. Hanker*, supra. In a certiorari case, wherein the facts as to laches or estoppel were no stronger than here, the court held that it would be an abuse of its sound legal discretion and of great public detriment to quash the proceedings, as the errors, at the most, were technical and harmless, and were not shown to be such as would cause substantial injustice to any one. *Deslaurles v. Soucie*, 222 Ill. 522, 78 N. E. 799, 113 Am. St. Rep. 432. Such is the situation here. After the participation of all the relators in the preliminary organization, assessments were levied, liabilities incurred, and contracts to large amounts were entered into before any steps were taken to inquire into the legality of the organization of this district. If the facts are as set out in these pleas, the acquiescence of the relators in the proceeding bars them from raising the questions of

which they now complain. On this record the public interest and convenience also compel the conclusion that the trial judge should have overruled the demurrer to the pleas.

The judgment of the circuit court will therefore be reversed, and the cause remanded to that court for further proceedings in harmony with the views herein expressed.

Reversed and remanded.

(250 Ill. 256.)

COMMISSIONERS OF LINCOLN PARK v. FAHRNEY.

(Supreme Court of Illinois. April 19, 1911.
Rehearing Denied June 7, 1911.)

1. STATUTES (§ 97*)—LOCAL OR SPECIAL LAWS—REGULATION OF PARKS—CONSTITUTIONAL PROVISIONS.

Since the Constitution does not prohibit the passage of any local or special act, but only local or special laws on any of the subjects mentioned in article 4, § 22, the Act of June 15, 1895 (Laws 1895, p. 282), enabling park commissioners having control of any park bordering on public waters in the state to enlarge the same, and granting submerged lands for the purpose of such enlargement, etc., not being violative of any of the provisions of such sections, is not unconstitutional as special or class legislation, though applicable in some respects to Lincoln Park only.

[Ed. Note.—For other cases, see Statutes, Dec. Dig. § 97.*]

2. CONSTITUTIONAL LAW (§ 280*)—DUE PROCESS OF LAW.

Act June 15, 1895 (Laws 1895, p. 283), section 2 whereof authorizes park commissioners to acquire by agreement with the owner or by condemnation riparian rights for park purposes, is not unconstitutional as permitting the commissioners to destroy riparian rights without compensation, and without due process of law.

[Ed. Note.—For other cases, see Constitution—Law, Dec. Dig. § 280.*]

3. STATUTES (§ 123*)—TITLE AND SUBJECT OF ACTS—CONSTITUTIONAL PROVISIONS.

Act June 15, 1895 (Laws 1895, p. 282), entitled, "An act to enable park commissioners having control of any park bordering on public waters in this state to enlarge the same from time to time and granting submerged lands for the purpose of such enlargements and to defray the cost thereof," and authorizing, in section 1, the commissioners to locate a boulevard and fix the termini thereof, and to fill and reclaim, etc., portions of the submerged land designated in the plan adopted as a public park, does not violate Const. art. 4, § 13, providing that no act shall embrace more than one subject, which shall be expressed in the title, the act embracing but one general subject, viz., the enlargement of parks bordering on public waters, and granting the submerged lands to the commissioners to enable this to be done, which subject is sufficiently embraced in the title, the Constitution not requiring that the title refer to every detail in the body of the act necessary to effectuate the purposes of the statute.

[Ed. Note.—For other cases, see Statutes, Dec. Dig. § 123.*]

4. NAVIGABLE WATERS (§ 45*)—AVULSION.

Where portions of lots bordering on a lake were torn away by violent avulsions of nature, title to the submerged parts of the lots was not

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

lost to the owner, and he might reclaim and reassert his title thereto.

[Ed. Note.—For other cases, see *Navigable Waters*, Cent. Dig. §§ 279, 280; Dec. Dig. § 45.*]

5. NAVIGABLE WATERS (§ 37*)—SUBMERGED LANDS—GRANT BY LEGISLATURE.

The Legislature had power to grant the title to the submerged lands of Lake Michigan to the park commissioners.

[Ed. Note.—For other cases, see *Navigable Waters*, Dec. Dig. § 37.*]

6. NAVIGABLE WATERS (§ 43*)—RIPARIAN RIGHTS.

The Lincoln Park commissioners may enjoin the erection by a shore owner of piers on the submerged lands of Lake Michigan, granted to such commissioners for park, etc., purposes.

[Ed. Note.—For other cases, see *Navigable Waters*, Dec. Dig. § 43.*]

Appeal from Circuit Court, Cook County; Thomas G. Windes, Judge.

Bills by the Commissioners of Lincoln Park against William H. Fahrney, who filed a cross-bill. From the decree, complainants appeal. Reversed and remanded, with directions.

This is an appeal from a decree entered by the circuit court of Cook county denying the relief prayed in the original and supplemental bills filed by the commissioners of Lincoln Park, appellants, and granting relief to appellee, Fahrney, upon his cross-bill. The original bill was filed by the appellants in 1897 against John Lewis Cochran, then the owner of blocks 1, 8, 9, 16, 17, and 21, in Cochran's addition to Edgewater, city of Chicago. The property described is a subdivision of the east fractional half of section 5, township 40 N., range 14 E., of the third principal meridian, in Cook county, and bordered on the waters of Lake Michigan. The bill averred that Cochran was constructing piers or bulkheads over the submerged lands of Lake Michigan without the consent of complainants; that complainants held the title to said submerged lands by virtue of an act of the Legislature of the state of Illinois approved June 15, 1895 (Laws 1895, p. 282), the terms of which act the complainants had fully complied with. The bill alleged that the said structures were purprestures, and would cause accretions to the adjoining shore and permanently and irreparably damage complainants. L. H. Brace, a contractor alleged to be engaged in doing the work, was made defendant. The bill prayed an injunction, and a temporary injunction was granted and issued on May 12, 1897, which remained in force until the hearing.

Cochran and Brace answered the bill in November, 1897, denying the effect of the further construction of piers and bulkheads would be to cause accretions, and denying the title of complainants to the submerged lands. The answer averred that the submerged lands upon which it was intended to construct piers belonged to Cochran, or to other private persons connected with him in title whose con-

sent he had to construct said piers. The answer further averred that prior to the passage of the act of 1895 Cochran's land extended 200 feet further east than any piers had been built or were proposed to be built, but by violent avulsions of nature the land was torn or wrenched away, carried and deposited upon other parts of the shore, and the waters of the lake spread over the premises from their original boundary line to their present shore line. The answer averred Cochran still owned the land to the original shore line, and had the right to construct piers thereon.

No step of any importance was taken after the filing of the answer, except a reference to the master to take proofs and report his conclusions of law and fact, until December, 1907, when appellee, Fahrney, who had purchased pendente lite lots 1 and 2 in block 9, filed a petition asking leave to become a party defendant. Leave was granted, and he filed an answer. In his answer appellee claimed the benefit of any defense set up by Cochran. Appellee alleged his property, lots 1 and 2, had a frontage west on Sheridan Road of 104 feet and a depth of 216 feet, more or less, to the shore line of Lake Michigan; that appellee had built a costly residence upon the western end of his lots, a garage for his automobile about the middle on the south line of his lots, and from the east side of the garage to the waters of the lake he had constructed a slip or harbor dug out of the high land on his own property, to be used as a harbor or haven for his boat. This slip was alleged to be less than 40 feet wide, and the answer alleged appellee had the right, and it was his purpose, to build two piers, 40 feet apart, from the west shore of the lake extending eastward 50 feet into the lake. The space between the piers was to be for entrance into the slip or harbor constructed by appellee. On the same day the answer was filed appellee filed a cross-bill, and in addition to the allegations contained in the answer the cross-bill alleged that since the passage of the act of 1895 the Legislature had passed two additional acts, one on May 14, 1903, amending section 2 of the act of 1895 (Laws 1903, p. 260), the other on May 2, 1907, entitled "An act authorizing park commissioners to acquire and improve submerged and shore lands for park purposes, providing for the payment therefor, and granting unto such commissioners certain rights and powers, and to riparian owners certain rights and titles." Laws 1907, p. 433. The cross-bill alleged that by these three acts the riparian rights of owners of land on the shore of the lake were recognized and provided for, but that they authorized the destruction of said riparian rights without making compensation and without due process of law, and are therefore unconstitu-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Kay No. Series & Rep'r indexes

tional and void. The cross-bill further alleged that the appellee obtained the qualified consent of the appellants to construct the piers in question under certain conditions, but that appellee was unwilling to comply with the conditions. The prayer of the cross-bill was that appellee be declared to have the right to construct the piers as proposed, and that appellants be enjoined from interfering with said construction. Amendments to the cross-bill set up with more detail that the east part of appellee's lots had been torn away by avulsions, and that previous to said avulsions his land extended 715 feet further east than the present shore line, and the submerged shallows were claimed by him.

Appellants answered the cross-bill, denying the allegations of avulsion and all other material facts alleged in the cross-bill. On June 28, 1909, the appellants filed a supplemental bill, wherein, among other things, it is alleged that since filing the original bill the Legislature passed the act of May 14, 1903, amending section 2 of the act of 1895, also another act of May 14, 1903, relating to the issuing of bonds for park extension purposes, and a third act of the same date providing for the construction of driveways or boulevards over the submerged shallows of Lake Michigan. These statutes are set out in the supplemental bill, and it is alleged that, under their authority and for the purpose of carrying out the general plan of park extension, the boundary line between the lots of shore owners and the submerged shallows have been settled by the park commissioners for long distances (specifically set forth and described) along the shore. The supplemental bill further avers that the town of Lake View, pursuant to the statutes, has issued bonds in the sum of \$1,000,000 for park extension purposes, that this fund is now being used for that purpose, and the extension includes the shallows opposite appellee's property, the title to which is claimed by the appellant commissioners. The supplemental bill prayed that appellee be perpetually enjoined. Leave was granted for appellee's answer to the original bill as amended to stand as his answer to the supplemental bill.

A great deal of evidence, oral and documentary, was heard by the master from time to time, at the conclusion of which he prepared a report, setting out and commenting upon the evidence at great length, and containing an elaborate discussion of the law. He found the title to the submerged land in question to be in the appellants, that the alleged avulsions had not been proven, and recommended that the cross-bill of the appellee be dismissed for want of equity and a decree entered upon the original and supplemental bills as prayed therein. Appellee filed objections to the report before the master. He overruled them, and they were renewed as exceptions before the court. The court sustained exceptions to the recommendation that the cross-bill be dismissed, and that the

relief prayed in the original and supplemental bills be granted, and entered a decree modifying the temporary injunction as to appellee's property, and authorizing him to construct two rows of piers built of piles upon and over the submerged lands of the park commissioners, each extending from appellee's land eastward a distance not to exceed 50 feet, for the sole purpose of an entrance to a harbor constructed by the appellee upon his lots and for no other purpose. The decree authorized appellee to construct and use the piers over the submerged lands without interference, hindrance, or restriction by the park commissioners until such time as the work of the extension of Lincoln Park now being carried on actually reaches the property owned by the appellee. The court found and decreed that the act of 1895 and subsequent acts were constitutional, and that by compliance with the provisions of the act of 1895 by the park commissioners the title to the submerged lands lying between the north line of Grace street extended and Devon avenue (between which points appellee's lots are situated) became vested in the commissioners of Lincoln Park in fee simple for park purposes; that the submerged land over which the appellee proposes to drive two lines of piles eastward from his shore line belongs to said park commissioners in fee simple, for park purposes. The decree further finds that the evidence does not show that an avulsion occurred immediately east of appellee's property, and finds that appellee's land extends to the edge of the waters of Lake Michigan when they are at rest. This appeal is prosecuted by the park commissioners from the decree, and appellee has assigned 49 cross-errors questioning the correctness of the decree in holding the acts of the Legislature referred to constitutional, that the title to the submerged lands is in appellants, and that the evidence did not sustain the allegations of the cross-bill as to avulsions.

Charles A. Churan and Hamlin & Boyden, for appellant. Abijah O. Cooper, Arthur R. Wolfe, and Henry C. Noyes, for appellee.

FARMER, J. (after stating the facts as above). The principal issues raised by the pleadings are: First. Whether the title to the submerged lands opposite appellee's lots is in appellants. That it is, is denied by appellee on the ground that the act of 1895 and subsequent acts are unconstitutional, and also because it is claimed that appellee's lots extended 715 feet further into the lake than the present shore line, and parts of them were wrenched and torn away by violent avulsions of nature between 1872 and 1877 or 1880. Second. Whether by reason of appellee's lots abutting upon Lake Michigan, he is thereby vested, as riparian owner, with the right to build piers over the submerged lands for the purpose of access to the navigable waters of the lake.

Appellee has by the assignment of cross-

errors challenged the constitutionality of the act of 1895, and subsequent park acts adopted in 1903 and 1907. The title of the act of 1895 is, "An act to enable park commissioners having control of any park bordering upon public waters in this state to enlarge the same from time to time and granting submerged lands for the purpose of such enlargements and to defray the cost thereof." The first section provides "that in all cases where lands within specified boundaries bordering on public waters in this state have been declared to be a public park, and where the commissioners of such park have been named in the act establishing the same, and their successors have since been appointed by the Governor of this state, the said commissioners of any such park shall have power from time to time in their discretion to enlarge the same by reclaiming submerged lands under said public waters in the following manner." Then follow directions to be complied with by the park commissioners in the enlargement of the park, the preparation and adoption of plans therefore, the location of a boulevard or driveway, etc., and authority is given the commissioners to fill in and reclaim all the submerged land lying between the boulevard and the shore line, and "thereupon the title of such submerged lands over which the said boulevard or driveway is located, and of the said submerged lands between said boulevard as located and the shore line shall become and be vested in and is hereby granted to the said board of commissioners, in fee simple for park purposes, as hereafter in this act set forth." The second section authorizes the park commissioners to acquire, by agreement with the owner or by condemnation, the riparian rights of the owners of lands along the shore so far as it may be deemed necessary and desirable by the commissioners.

The grounds upon which the validity of this act is assailed are: First, that it applies only to a park bordering on public waters where the commissioners have been named in the act establishing the same and their successors have since been appointed by the Governor, and it is asserted in the brief of counsel for appellee that Lincoln Park is the only park in the state bordering on public waters the commissioners of which were named in the act and their successors have since been appointed by the Governor, and that said act is for that reason special or class legislation; second, said act is unconstitutional, in that it permits the park commissioners to destroy riparian rights of shore owners without compensation and without due process of law; and, third, the act embraces more than one subject not contemplated in the title, in violation of section 13 of article 4 of the Constitution.

We do not think there is any merit in any of these contentions.

[1] As to the first point, the Constitution

does not prohibit the passage of any local or special act, but only prohibits the passage of local or special laws upon any of the subjects mentioned in section 22 of article 4. In *Pettibone v. West Chicago Park Com'rs*, 215 Ill. 304, 330, 74 N. E. 387, 396, the constitutionality of an act in relation to parks was attacked on the ground that it was in violation of the prohibition against any local or special law regulating township affairs. In discussing the question the court said: "The Constitution of 1870 does not prohibit the passage of all 'local or special laws,' as such. It only prohibits the passage of local or special laws in reference to the particular subjects mentioned in section 22 of article 4. * * * The first question, then, which arises is whether the act of 1901 is an act regulating township affairs. If it is not, it is not necessarily a local or special law, because section 22 of article 4 does not prohibit the passage of local or special laws in regard to parks or regulating the affairs of parks." The act of 1895 is not in violation of any of the prohibitions of section 22 of article 4.

[2] The second contention is refuted by section 2 of the act itself.

[3] As to the third point against the constitutionality of the act, it is said section 1 authorizes the park commissioners to locate a boulevard or driveway and fix the termini thereof; that said section grants the submerged lands to the commissioners for the purpose of enlargement of the park, and authorizes filling, reclaiming, improving, and holding portions of the submerged land designated in the plan adopted as a public park, and that these matters are not contemplated by or expressed in the title of the act. The act embraces but one general subject, viz., the enlargement of parks bordering upon public waters, and to enable this to be done the submerged lands are granted to the park commissioners. This subject is sufficiently embraced in the title. The Constitution does not require that the title shall refer to every detail in the body of the act necessary to effectuate the purposes of the statute. The rule was stated in *People v. McBride*, 234 Ill. 146, 84 N. E. 865, 123 Am. St. Rep. 82, in the following language: "The only purpose of the provision of the Constitution is to prevent the joining in one act of incongruous and unrelated matters, and the word 'subject' is not synonymous with 'provision.' Any number of provisions may be contained in an act, however diverse they may be, so long as they are not inconsistent with or foreign to the general subject, and may be considered in furtherance of such subject. The requirement that an act shall embrace but one subject is not intended to hamper the Legislature or embarrass honest legislation, but it is intended to prevent incorporating in an act matters not related to the subject of legislation and of which the title gives no hint. An act may contain many provisions

and details for the accomplishment of the legislative purpose, and, if they legitimately tend to effectuate that object, the act is not contrary to the constitutional provision."

Counsel has pointed out no valid objection to the validity of the park acts of 1903 and 1907, and we see none, and, as in our view they are not involved in the decision of this case, it is unnecessary to discuss them.

[4] A large part of the evidence heard by the master was devoted to the question whether appellee's lots formerly extended farther eastward than the present shore line and had been torn away by violent avulsions of nature. If this were the case, then title to the submerged parts of the lots was not lost to appellee, and he might reclaim and reassert his title thereto. In considering what is an avulsion, and the rule of law in such cases, this court, in *City of Chicago v. Ward*, 109 Ill. 392, 48 N. E. 927, 38 L. R. A. 849, 61 Am. St. Rep. 185, quoted with approval from Angell on Water Courses the following: "Where considerable quantities of soil are by a sudden action of the water taken from the land of one, this is called avulsion; but the ownership is not lost though the surface earth is thus transported elsewhere, and it may be reclaimed and the ownership reasserted." It would unduly lengthen this opinion to set out the substance of the evidence on this question. It consisted of oral testimony, documentary evidence, maps, and plats. Frank C. Taylor, formerly an owner of a portion of the east half of fractional section 5, of which the appellee's lots are a part, and who built a house on the property in 1872, James G. Wilson, agent for the property from 1872 to 1880, and Charles Ecklund, who was caretaker of and lived on the property from 1874 to 1882, testified on behalf of appellee, and their testimony, together with appellee's other evidence, including maps made by engineers purporting to show the former shore line, tended to show that prior to 1877 the shore of appellee's property was considerably farther east than it now is, and that between 1872 and 1877 or 1880 considerable portions of the land were torn and washed away by violent storms. Appellants' evidence tended to contradict this testimony, and show that there was no great difference between the shore line prior to 1877 or 1880 and the present shore line. The master found that prior to 1874 the property now owned by the appellee extended much farther east, but that the evidence was not sufficient to prove the alleged avulsion. The chancellor found and recited in the decree "that the evidence does not show an avulsion occurred immediately east of the defendant Fahrney's property, and further finds that the defendant Fahrney's land extends to the water's edge when the waters of Lake Michigan are at rest." After a careful examination of the record, we are of

the opinion the weight of the evidence tends to support this finding of the decree.

[5] While authority of the state to grant the title to the submerged lands of Lake Michigan to the park commissioners is denied by appellee, it was expressly decided in *People v. Kirk*, 162 Ill. 138,¹ that the Legislature did have such authority, and that a grant so made by it vested the title to the submerged lands in the park commissioners. Appellee does not, therefore, own the land over which he proposes to construct piers, but said land belongs to and is the property of the park commissioners.

[6] What, then, are his rights, as riparian owner, of access over his land to the waters of Lake Michigan? This question has heretofore been three times before this court (*Revell v. People*, 177 Ill. 468, 52 N. E. 1052, 43 L. R. A. 790, 69 Am. St. Rep. 257; *Gordon v. Winston*, 181 Ill. 338, 54 N. E. 1095; *Cobb v. Commissioners of Lincoln Park*, 202 Ill. 427, 67 N. E. 5, 63 L. R. A. 264, 95 Am. St. Rep. 258), and as these cases, in our view, are conclusive of the question here involved and as the law was elaborately discussed in two of them, we regard it as unnecessary at this time to enter upon any original discussion, but will merely refer to the manner in which the question arose in those cases and what the court decided the law to be.

In the *Revell Case* an information was filed in the name of the people, by the Attorney General, for an injunction to restrain Revell from building piers in the bed of Lake Michigan and to abate piers already built by him. Revell owned land bordering on Lake Michigan, and had constructed piers in the lake east from the shore of his land at right angles with the shore, and proposed to extend them still farther. The information alleged that Revell had by that means reclaimed land belonging to the state, and claimed the right, as riparian owner, to reclaim more of the submerged land and protect his land from erosion. In his answer Revell denied he built the piers to reclaim land in the lake, but alleged it was to protect his land from erosion, denied his piers were purprestures, and denied the right of the state to cause them to be removed. The circuit court decreed that the submerged lands belonged to the state, and that the piers built by Revell were purprestures, and he was enjoined from thereafter building any further structure upon the submerged lands. The decree found that the piers already built were not then detrimental to the public interest, and would not become so until the state desired to claim and use the submerged lands upon which they stood, and the piers already built were permitted by the decree to remain until the state chose to take possession and use the submerged lands to the water's edge, at which time it was authorized to abate and remove the piers. Cross-errors were assigned by the Attorney General, and the decree was reversed on the

¹ 45 N. E. 830, 53 Am. St. Rep. 272.

ground that, while it was in favor of the people, it did not go far enough, and the case was remanded, with directions to the circuit court to enter a decree according to the prayer of the information. The opinion is a lengthy one, and reviews the law on the subject from an early date to the present time, both in this country and in England. We quote excerpts from the opinion. On page 479 of 177 Ill., page 1055 of 52 N. E. (43 L. R. A. 790, 69 Am. St. Rep. 257), the court said: "The appellant here owned the premises bordering on the lake, but his title to the premises extended only to the water's edge, and the fee in and to the lands covered by the waters of the lake was vested in the state and held by the state in trust for the people. The fee being in the state, the important question presented is whether appellant without a grant or other authority from the state had the right to go upon the submerged lands and erect the structures complained of in the information. This state has adopted the common law as it existed prior to March 24, 1806—the fourth year of James I—and, in the absence of any statute of the state changing the common law in regard to rights of riparian or littoral owners, the common law as it then existed must control. Upon an examination of the authorities, we think it is clear that the act complained of in the information was a trespass upon the lands of the state; that the erection of the piers in the lake in front of the appellant's premises was a purpresture." On page 483 of 177 Ill., page 1057 of 52 N. E. (43 L. R. A. 790, 69 Am. St. Rep. 257), the court said: "The appellant had no right to build piers or 'wharf out' into the lake for the purpose of making land or increasing the boundary of his premises, nor had he the right to do any act which would produce that result. As has heretofore been said, the lands covered by the waters of the lake belong to the state, and appellant had no right, by any device whatever, to extend his boundary line beyond the water's edge, and, when he did so, an injury was inflicted on the rights of the state, which might be inquired into and abated in a court of equity on the application of the Attorney General."

In *Cobb v. Commissioners of Lincoln Park*, supra, the grant of the submerged land by the act of 1895 to the park commissioners was sustained. In that case Cobb owned a lot abutting on the west shore of Lake Michigan. He filed a bill against the Lincoln Park Commissioners, alleging that as riparian owner he had a right to erect wharves out in the waters of the lake to the point of navigability, that the park commissioners claimed title to the submerged land in front of his property, and refused to permit him to build a wharf out into the lake, and threatened to use their police force to prevent his doing so. The bill prayed an injunction restraining the park commissioners from interfering with complainant in the construc-

tion of his wharf. The bill was dismissed on the hearing for want of equity, and this court affirmed the decree. The court said: "The only question in this case, as stated by appellant, is whether the owner of land bordering on and adjacent to the waters of Lake Michigan has a right of access from his own property to a point in the lake where the waters are navigable, and whether, in the exercise of this right, he may erect a wharf or pier from his shore line over the submerged lands in the shallow water to the point of navigability in the lake. Appellant insists that the riparian owner has this right of access, and that it includes the right to wharf out—that is, to erect wharves and piers in front of his land." And again held, as had been previously held in the *Revell Case*, that the riparian owner's right of access from his land to the lake was the right to pass to and from the waters of the lake within the width of his premises as they bordered thereon, but he had no right, by virtue of being a shore owner, to construct piers on the submerged land without the consent of the owner. In the opinion the court cited and quoted from *Revell v. People*, supra, and other cases, and said (page 432 of 202 Ill., pages 6, 7 of 67 N. E. [63 L. R. A. 264, 95 Am. St. Rep. 258]): "The property in the dry land or upland being in one person and the property in the submerged land immediately in front thereof being in another, it would seem to be only consonant with legal principles that the consent of the latter must be obtained before any erections can be put on the submerged soil." And on page 437 of 202 Ill., page 8 of 67 N. E. (63 L. R. A. 264, 95 Am. St. Rep. 258), the court said: "After a careful reading of the authorities we see no reason to recede from the position taken in the *Revell Case*, and are satisfied that by the common law, unmodified by local usage, custom, or statute, a riparian owner had no right to build any structures on the submerged lands in front of his own land unless he owned such submerged lands or had a license to do so. The title of the owner of such submerged lands is not burdened with an easement in favor of the owner of the adjoining upland to build wharves out to navigable water. Such being the common law, it is the law of this state until altered by the Legislature." In both the *Revell* and *Cobb Cases* the court cited and quoted with approval from *Shively v. Bowlby*, 152 U. S. 1, 14 Sup. Ct. 548, 38 L. Ed. 331, which is in strict accord with those cases. In *Gordon v. Winston*, supra, the right of the Lincoln Park commissioners to enjoin the erection of piers upon the submerged lands of Lake Michigan by a shore owner was sustained in a short opinion, in which it was held *Revell v. People* was decisive of the question. Appellee insists the *Revell* and *Cobb Cases* are contrary to the current of authority elsewhere, and also that they are not directly in point upon the question here

involved. The case of Trustees of the Town of Brookhaven v. Smith, 188 N. Y. 74, 80 N. E. 605, 9 L. R. A. (N. S.) 326, is cited as laying down a different and correct rule. If, as contended, that case sustains the right of appellee to build piers over the submerged lands of Lake Michigan, it is in conflict with *Shively v. Bowlby*, supra, and the three decisions of this court referred to. We could not follow the Brookhaven Case without overruling those three decisions, which we are not convinced we would be justified in doing.

Appellee also quotes from *City of Peoria v. Central Nat. Bank*, 224 Ill. 43, 79 N. E. 296, the expression, "riparian owners upon navigable fresh water lakes may construct in the shore waters in front of their lands wharves, piers, landings and booms in aid of and not obstructing navigation," and argues this is the last expression of this court, and is in harmony with the correct rule. In that case the court was dealing with land bordering upon the Illinois river. In such cases a grant of land bordering on the stream carries title to the center thread of the stream unless the boundary is in some way otherwise determined. The passage quoted was used in view of that situation, and stated the law correctly as applicable to the case. It is in no wise in conflict with the *Revell*, *Cobb*, and *Gordon* Cases. Indeed, the *Revell* Case and *Gordon v. Winston* are cited in the opinion with approval. The rule applicable to lands bordering upon a stream was insisted upon by counsel as the proper rule to be applied in the *Revell* Case. Upon this question the court said in the *Revell* Case, 177 Ill. 486, 52 N. E. 1058, 43 L. R. A. 970, 69 Am. St. Rep. 257: "It is, however, suggested in the argument that this court in passing upon the rights of riparian owners upon the Mississippi and other rivers in the state navigable in fact but not navigable at law has held the shore owner may wharf out from the shore into the stream, and that the same doctrine should be extended to a shore owner on Lake Michigan. Those cases have no bearing here, for the reason that they all are predicated on the theory that the line of the riparian owner extends to the center thread of the stream. Being the owner of the soil under the water, he had the right to build such structures on his own land as he might desire, except such as might interfere with the navigation of the stream. Under the rule established in those cases, beginning with *Middleton v. Pritchard*, 3 Scam. 510, 38 Am. Dec. 112, it was held in *Enslinger v. People*, 47 Ill. 384, 95 Am. Dec. 495, that a riparian owner in the Ohio river having the title to the land between high and low water mark, and the right to the exclusive use thereof, had the right to establish a private wharf on his land and make reasonable charges for its use by those nav-

igating the river. The right, however, as is apparent from the rule established in the case, rests upon the ownership of the underlying soil."

Up to the present time appellants have not attempted to destroy appellee's riparian right to pass over his land, within the width of its boundaries, to the waters of the lake. That question, as was said in the *Revell* Case, will arise when the appellants undertake to condemn appellee's riparian rights or appropriate the submerged lands upon which appellee's lots abut. This proceeding does not affect or tend to destroy any of appellee's riparian rights.

We are of opinion the circuit court erred in authorizing the construction of the piers by appellee and in enjoining the appellants from interfering with their construction and maintenance by appellee until such time as the submerged land opposite appellee's property is desired to be used by appellants in the plan of park enlargement and extension. The decree is therefore reversed and the cause remanded to the circuit court, with directions to enter a decree dismissing the cross-bill and granting the relief prayed in the original and supplemental bills.

Reversed and remanded, with directions

(250 Ill. 278)

CITY OF LINCOLN v. HARTS et al.

(Supreme Court of Illinois. April 19, 1911.
Rehearing Denied June 8, 1911.)

1. MUNICIPAL CORPORATIONS (§ 507*)—LOCAL IMPROVEMENTS—CONCLUSIVENESS OF PROCEEDINGS.

A judgment of the county court under Local Improvement Act (Hurd's Rev. St. 1909 c. 24, § 590) § 84, approving a certificate of the board of local improvements, as to the cost of the improvement after confirmation of a special assessment, is conclusive only that the improvement conforms substantially to the requirements of the original ordinance.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1178, 1179; Dec. Dig. § 507.*]

2. MUNICIPAL CORPORATIONS (§ 120*)—VOID ORDINANCES—ATTACK.

A void ordinance is subject to direct or collateral attack whenever its authority is invoked in a judicial proceeding.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 274-280; Dec. Dig. § 120.*]

3. MUNICIPAL CORPORATIONS (§ 444*)—LOCAL IMPROVEMENTS—VALIDITY.

Strict pursuance of municipal authority in making a local improvement is essential to a valid assessment.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1064; Dec. Dig. § 444.*]

4. MUNICIPAL CORPORATIONS (§ 303*)—PAVING IMPROVEMENTS—VALIDITY OF PROCEEDINGS.

A recital in an ordinance for a paving improvement that a street railway right of way is required to be paved under the company's

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

franchise while unnecessary does not invalidate the ordinance.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 808-810; Dec. Dig. § 803.*]

5. MUNICIPAL CORPORATIONS (§§ 413, 962*)—IMPROVEMENTS—ASSESSMENTS—TAXATION.

Where a street railway franchise requires a company to pave the part of a street occupied by it, the city cannot provide for paving that part by special assessment or by general taxation.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1016, 2039; Dec. Dig. §§ 413, 962.*]

6. MUNICIPAL CORPORATIONS (§ 304*)—STREET IMPROVEMENTS—ORDINANCES—VALIDITY.

An ordinance for a street improvement which does not require a city to pave a strip occupied by a street railway company unless the company fails to pave is invalid, as providing for an uncertain and indefinite improvement.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 811-816; Dec. Dig. § 804.*]

7. MUNICIPAL CORPORATIONS (§ 811*)—LOCAL IMPROVEMENTS — CHANGE — MUNICIPAL POWER.

Municipal authorities cannot, by subsequent action, materially change the nature of an improvement provided for in an original ordinance as to grade, location, size, or character.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 823, 825; Dec. Dig. § 311.*]

Appeal from Logan County Court; James T. Hoblit, Judge.

Local improvement proceedings by the City of Lincoln. From a judgment overruling their objections, D. H. Harts and others appeal. Reversed.

Beach & Trapp, Peter Murphy, and Baldwin & Stringer, for appellants. Uri Kissinger, City Atty., and Blinn & Covey, for appellee.

CARTER, J. This is an appeal by certain property owners from a judgment of the county court of Logan county overruling their objections to the finding of that court, under section 84 of the local improvement act, as to the truth of the certificate of the board of local improvements of the city of Lincoln with reference to the paving of Kickapoo street, in that city, under a special assessment ordinance.

February 7, 1910, the city council of the city of Lincoln passed an ordinance for repaving the roadway of Kickapoo street from Broadway to Galena street. At the time this ordinance was passed, the Lincoln Railway & Light Company was occupying and using the central portion of the street with a single track of its street railway by virtue of an ordinance passed in March, 1891. The last-mentioned ordinance provided that, when the railway company laid its track upon any street or highway of said city that was paved, it should pave it in like manner and with like material as that in use, and

that, when the city should cause any such street to be repaved, the street railway company should repave its portion of the street in the same manner. The ordinance further provided that if the street railway company should fail or neglect, upon 60 days' written notice, to pave its right of way, the city might remove the tracks from the street, and pave that part also. The estimate as to the cost of this pavement in the local improvement ordinance was divided into two items, the first, \$18,623.20, the cost of the paving exclusive of the street railway right of way, and the second, \$4,705.10, the cost of paving said right of way. The ordinance further provided that the board of local improvements should give said street railway company 60 days' notice, in writing, of the time fixed for beginning the work of the improvement, and, if it should neglect or refuse to begin the work within the time fixed, then the city should remove the track from said street and improve said right of way at the same time and in the same manner as the remainder. The ordinance further provided that there should be assessed against and paid by said city of Lincoln, as public benefits, the cost of paving said right of way; that, if said railway company should elect to improve the right of way as specified, then said assessment against the city for said right of way should be abated. Under the petition filed in the county court, the president of said board of local improvements, as commissioner, spread the assessment, apportioning to private property \$14,872, and to the city, as public benefits, \$8,456.30, stating that of this last-named amount \$4,705.10 was the cost of paving the right of way of said railway company. Said special assessment was thereafter confirmed by the county court and a contract let for the work. The contract is not shown, but it seems to be conceded that it covered the work for the entire width of the street. There was no assessment against the railway company. Thereafter, June 6, 1910, the city council passed an ordinance wherein it recited the history of the granting of the franchise to said railway company in 1891, the passage of the local improvement ordinance for paving the street, and the giving of the notice to said company to pave the right of way; that said 60 days had expired and the company had refused and neglected to improve its right of way, but had stated to the city authorities that it was not financially able to do so and would be compelled to permit the city to remove its tracks on said street; that said street car line on said street, by reason of the fact that it connected with the railway stations, was believed by the public authorities to be of general public benefit; and that the earnings of said company were not sufficient to warrant the expense of paving said right of way. The ordinance then proceeded

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

to provide that if said railway company should at its own expense relay and reconstruct its track in said street between Broadway and Galena streets, using for the improvement new white oak ties and new rails weighing not less than 60 pounds to the yard, so constructed that the top should conform to the finished pavement of the street, then the city would waive the right to remove said track from said street by reason of the refusal and neglect of said company to pave its right of way, and that said track so relaid and reconstructed should remain in said street and the street car service be continued, and that the expense of grading and paving said right of way should be paid by the city of Lincoln from its general funds in installments and by bonds issued as provided by said local improvement ordinance. Before this last ordinance went into effect certain property owners abutting on said street, by written notice, protested to the city authorities against making the above arrangement with the street car company and served a copy of said protest on the contractor. After the last-mentioned ordinance was enacted, it was duly accepted by the railway company, said company relaying and reconstructing its track in accordance with the terms thereof and the pavement as to said right of way being laid by the contractor along with the rest of the pavement in the street. After the completion of the pavement as provided for in the contract, a petition was filed in said county court, together with a certificate of the board of local improvements that the paving had been completed in the manner and with the materials specified in the original ordinance. Said certificate stated that the actual cost of said pavement, exclusive of said right of way of the railway, including interest on bonds, was \$18,064.50, leaving an excess of the estimated cost over the actual cost of \$558.70; that the actual cost of improving the street railway right of way was \$4,485.56; that said last-named amount had been paid to the contractor out of the city's general funds; that the board asked that the original estimate for paving the railway right of way (\$4,705.10) should be deducted from the assessment against the city, and that the excess of assessment over the cost of said improvement (exclusive of cost of right of way), namely, \$558.70, be abated and the judgment reduced proportionately to the public and the private property owners; that said improvement was completed, as provided for in the ordinance and specifications, September 6, 1910. After notice fixed by the court certain property owners, including these appellants, filed 22 objections to the certificate and the application of said board of local improvements for its approval. These objections, in substance, urged that the original ordinance was void in providing for the improvement of the entire street, including the right of way, without assessing any part of the cost against

said company, and that the subsequent or supplemental ordinance was a fraud, in law, against the objectors and each of them. The objection was also made that the improvement had not been made in compliance with the original ordinance and specifications.

[1] Counsel for appellee insist that this appeal should be dismissed; that the judgment of the court approving the certificate was conclusive on all parties, no appeal or writ of error being provided for under the statute. If the sole question here were whether the improvement had been completed in accordance with the contract, the decision of the lower court on that point would be final (*People v. Martin*, 243 Ill. 284, 90 N. E. 699). but this court has held in *City of Peoria v. Smith*, 232 Ill. 561, 83 N. E. 1061, that the finality of the court's order under said section 84 referred only to the court's finding that the improvement conforms substantially to the requirements of the original ordinance (*City of Chicago v. Smale*, 248 Ill. 414, 94 N. E. 32). In this case the objectors offered no evidence that the improvement did not correspond to the requirements of the original ordinance, except that the railway was still in the street, and that the pavement as to its right of way had been put down by the city and not by the company.

It is, however, urged that both the original and subsequent ordinances are void. If the original ordinance is void, the court had no jurisdiction, and all the proceedings based upon the ordinance are consequently void. A legal and sufficient ordinance is the foundation of a valid assessment. The question of the validity of an ordinance is jurisdictional. *O'Neil v. People*, 166 Ill. 561, 46 N. E. 1096; *Culver v. People*, 161 Ill. 89, 43 N. E. 812.

[2] A void ordinance is subject to a direct or collateral attack whenever its authority is invoked in a judicial proceeding. Municipal authorities must be able to show a warrant to tax which will justify their action.

[3] The authority must be followed strictly when seeking to levy an assessment. The power must be clearly given. It cannot be found in a general grant, but must be conferred specially. "The mischief of a strict construction is easily obviated by the Legislature, but the mischief of a liberal construction may be irremediable before it can be reached." 1 *Cooley on Taxation* (3d Ed.) 469; *Burroughs on Taxation*, 472; 1 *Page & Jones on Taxation by Assessment*, § 234; 2 *Desty on Taxation*, 1234. Special assessment proceedings in this state are purely statutory, and, unless authorized by the statute, are void. *Davis v. City of Litchfield*, 145 Ill. 313, 33 N. E. 888, 21 L. R. A. 563; *Waite v. Green River Drainage District*, 226 Ill. 207, 80 N. E. 725. The original ordinance provided for paving the entire street, including the right of way of the railway. That the estimate was separated into two items does not change this fact. It is manifest from this record that the city authorities

anticipated that the city railway company would not comply with the original franchise ordinance and pave the right of way. The company was obligated by its franchise ordinance to do this paving, and the city authorities could not by the local improvement ordinance make that obligation more binding. The usual practice in this state is to make no provision as to paving the right of way of street railways which are under contracts similar to this. *Billings v. City of Chicago*, 167 Ill. 337, 47 N. E. 731; *Chicago & Northern Pacific Railroad Co. v. City of Chicago*, 172 Ill. 66, 49 N. E. 1006; *Kuehner v. City of Freeport*, 143 Ill. 92, 32 N. E. 372, 17 L. R. A. 774.

[4] The practice in other jurisdictions differs on this question (1 Page & Jones on Taxation by Assessment, §§ 603, 604), but a recitation in the local improvement ordinance to the effect that the street railway right of way is required to be paved under the original franchise ordinance by the street railway company, while unnecessary, would not invalidate the ordinance.

[5] While the contract with the railway company as to paving this strip remains in force the city could not provide for paving it by special assessment. *City of Chicago v. Newberry Library*, 224 Ill. 330, 79 N. E. 666.

Counsel for appellee admit that the property owners could not have their assessments increased to pay for paving this strip, but argue that the rule does not apply when the cost of paving such strip is paid for by the city as a part of the public benefit. We cannot agree with this contention. This court held in *City of Chicago v. Cummings*, 144 Ill. 446, 33 N. E. 34, that, if an ordinance provided that a railway company should grade, pave, and keep in repair a portion of the street occupied by it, only the cost of grading and paving the part outside of the 16 feet occupied by the railway should have been assessed against the property benefited "or required to be paid by general taxation." The contract requiring the street railway company to pave the portion of the street occupied by it is regarded in the decisions as an equivalent for the assessment. *West Chicago Street Railroad Co. v. City of Chicago*, 178 Ill. 339, 53 N. E. 112. The contract is upon a good consideration. As long as the railway was operated or the company not released from its obligations, the cost of paving the strip in question should have been left out of the assessment. *Sawyer v. City of Chicago*, 183 Ill. 57, 60, 55 N. E. 645, 646. In this last case the street railway company constructed its tracks in a certain street as authorized by its franchise ordinance and operated thereon for several years. Thereafter a sewer was built in the street, at which time the tracks were taken up. Later a local improvement ordinance was passed for paving the street, the entire cost of improving being levied against the adjoining property owners, as at that time the tracks of the

street car company had not been relaid. It was argued that the street car company had abandoned its franchise. The court said: "For aught that appears the street railway company has all the rights in the avenue that it ever had and may relay its tracks at any time. * * * It would be a manifest wrong to the property owners to compel them to pay for this improvement and after its completion have the street railway company relay its tracks and take the benefits." *City of Chicago v. Ayers*, 212 Ill. 59, 72 N. E. 32.

On principle and authority, so long as a contract of this kind is in force, we can see no distinction as to relieving the street railway company from carrying out its contract, whether the payment for the paving of the right of way is to be by special assessment on private property or from public benefits. Either plan would be a grave injustice, and contrary to sound public policy. When the local improvement ordinance was passed, the contract with the street railway company was still in force. This being so, the city had no authority to provide in this ordinance that this strip should be paved and charged to the city as a part of the public benefits. The assessment, including the private benefits, the cost of this strip, and the remaining portion of the public benefits, was divided into 10 installments in the assessment roll, and while the supplemental or subsequent ordinance provided that it should be paid out of the general funds in installments and by bonds, as were the remaining costs of the improvement, it is apparent from this record that for some reason not shown the contractor was paid the entire amount for paving this strip on or before September 7, 1910, and was not paid by bonds and installments, as he was for the rest of the improvement. The total public benefits must necessarily be considered as a part of the entire cost of the improvement in ascertaining the amount to be abated proportionately to the public and the private property owners. It follows that, if the original ordinance was valid, the amounts abated to the property owners by the certificate were too small.

[6] If it be argued that the ordinance was conditional in its terms and did not provide that the city should make this improvement unless the street railway company failed to do it, the answer then must be that the description of the improvement in the ordinance is uncertain and indefinite.

[7] Moreover, the decision as to whether the work should be done by the city or the railway company could not be made after the passage of the original ordinance. The municipal authorities cannot by subsequent action change materially the nature of the improvement provided for in the original ordinance, as to its grade, location, size or character. *Whaples v. City of Waukegan*, 179 Ill. 310, 53 N. E. 618; *Church v. People*, 174 Ill. 366, 51 N. E. 747; *City of Paxton v.*

Bogardus, 201 Ill. 628, 66 N. E. 853; *Boyn-ton v. People*, 159 Ill. 553, 42 N. E. 842.

Under the supplemental ordinance appellee was without authority to relieve from taxation any property benefited by assessing against a part of the property benefited and the general public the entire cost of the improvement. *Spring Creek Drainage District v. Elgin, Joliet and Eastern Railway Co.*, 249 Ill. 260, 94 N. E. 529.

It must be held that the original ordinance was void in providing for the paving of this strip by special assessment and charging the same as a part of the public benefits, while the contract with the railway was still in force. *Village of Madison v. Alton Traction Co.*, 235 Ill. 346, 85 N. E. 596; *American Hide and Leather Co. v. City of Chicago*, 203 Ill. 451, 67 N. E. 979; *City of Chicago v. Nodeck*, 202 Ill. 257, 67 N. E. 39; *City of Chicago v. Newberry Library*, supra.

The county court was without jurisdiction to confirm the assessment or enter the order herein appealed from.

The judgment of the county court will be reversed.

Judgment reversed.

(250 Ill. 303)

BEAUCHAMP v. STURGES & BURN MFG. CO.

(Supreme Court of Illinois. April 19, 1911.
Rehearing Denied June 8, 1911.)

1. MASTER AND SERVANT (§ 95*)—REGULATION OF EMPLOYMENT—VIOLATION OF STATUTE—LIABILITY.

A violation by an employer of Act May 15, 1903 (Laws 1903, p. 178), prohibiting the employment of children under a specified age, gives a child under age a cause of action for injuries received while at work under his employment.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 160; Dec. Dig. § 95.*]

2. MASTER AND SERVANT (§ 95*)—INJURY TO SERVANT—ESTOPPEL.

A child under the age fixed by Act May 15, 1903 (Laws 1903, p. 187), prohibiting the employment of children under a specified age, is not estopped from recovering for a personal injury received while at work merely because he misrepresented his age at the time he was employed.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 160; Dec. Dig. § 95.*]

3. INFANTS (§ 14*)—REGULATION OF EMPLOYMENT—STATUTES—VALIDITY.

Act May 15, 1903 (Laws 1903, p. 191) § 11, prohibiting the employment of children under 16 years to operate enumerated machinery, is not an unreasonable exercise of the police power on the ground that the age limit is too high.

[Ed. Note.—For other cases, see *Infants*, Cent. Dig. § 15; Dec. Dig. § 14.*]

4. STATUTES (§ 114*)—TITLE—SUFFICIENCY.

Under the Constitution providing that no act shall embrace more than one subject expressed in the title, the title of Act May 15, 1903 (Laws 1903, p. 187), entitled "An act to regulate employment of children * * * and to provide for the enforcement thereof," is suf-

ficiently broad to embrace a provision prohibiting the employment of children under 16 years to operate enumerated machinery, when construed to give, by implication, a right to sue an employer employing a child under age who receives a personal injury.

[Ed. Note.—For other cases, see *Statutes*, Cent. Dig. §§ 145-149; Dec. Dig. § 114.*]

5. STATUTES (§ 105*)—TITLE—SUFFICIENCY.

The constitutional provision that no act shall embrace more than one subject, expressed in the title, must receive a reasonable construction, and must be liberally construed in favor of the validity of a statute, and any means which are reasonably adapted to secure the object indicated in the title may be included in the body of the act.

[Ed. Note.—For other cases, see *Statutes*, Cent. Dig. § 118; Dec. Dig. § 105.*]

Appeal from Superior Court, Cook County; Marcus Kavanagh, Judge.

Action by Arthur Beauchamp, by his next friend, against the Sturges & Burn Manufacturing Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Bulkley, Gray & More, for appellant. George E. Gorman and William Bigane, for appellee.

HAND, J. This was an action on the case commenced by Arthur Beauchamp, by his next friend, in the superior court of Cook county, against the Sturges & Burn Manufacturing Company, to recover damages for a personal injury sustained by the plaintiff while in the employ of the defendant. The case was submitted to a jury upon a declaration consisting of one count, which averred that the plaintiff was under the age of 16 years at the time of his employment; that he was employed by the defendant as a presshand in its factory, to operate a punch press, which employment was prohibited by section 11 of an act entitled "An act to regulate the employment of children in the state of Illinois, and to provide for the enforcement thereof," approved May 15, 1903, in force July 1, 1903 (Hurd's St. 1909, p. 1082); that on the 26th day of April, 1907, and while plaintiff was operating said punch press, without fault on his part his right hand was caught in said punch press, and was so crushed and mangled that it was necessary to amputate three of the fingers on said hand, and that the employment of the plaintiff, as aforesaid, in violation of the statute, was the proximate cause of his injury. The plea of the general issue and a plea setting up the unconstitutionality of the section of the statute upon which said action was based were filed, and upon a trial a verdict was returned in favor of the plaintiff for the sum of \$4,500, upon which the court, after overruling a motion for a new trial and in arrest of judgment, rendered judgment in favor of the plaintiff. The defendant has brought the case direct to this court by appeal, on the ground that the

section of the statute upon which the action was based is unconstitutional.

At the close of all the evidence, the defendant moved the court for a directed verdict on the grounds (1) that the violation of the statute by the defendant did not give the plaintiff a cause of action; (2) that the plaintiff was estopped from maintaining his action because he represented to the defendant, at the time he was employed, that he was more than 16 years of age; (3) that the section of the statute upon which the plaintiff's cause of action was based is unconstitutional. The court overruled the motion and the action of the court in so doing has been assigned as error, and the three propositions contained in said motion have been elaborately argued by counsel in the briefs filed in this court and orally before the court.

The facts, in brief, are as follows: Plaintiff, at the time of his injury, lacked seven days of being sixteen years of age, and he had been in the employ of the defendant, when injured, about two weeks. That two employes of the defendant testified that at the time the plaintiff was employed by the defendant he represented to the agent of the defendant who employed him that he was past 17 years of age, but this was denied by the plaintiff. That the plaintiff was set to work upon a punch press by the defendant in its factory. That the punch press, while plaintiff was at work therewith, repeated, and caught the right hand of the plaintiff and crushed and mangled it so that three fingers of that hand were necessarily amputated.

[1] The first contention of the appellant is that the employment of the appellee in violation of the statute, and his injury, did not give to the appellee a cause of action against appellant, as the statute does not in express terms provide that a child who is employed in violation of the statute, and while so employed is injured, shall have a right of action against his employer for the recovery of damages for such injury. We do not agree with this contention. The precise question here presented for decision was before this court in *Stratford v. Republic Iron Co.*, 238 Ill. 371, 87 N. E. 358, 20 L. R. A. (N. S.) 876, 128 Am. St. Rep. 129, and was in that case decided adversely to the contention of the appellant. That was an action to recover for a personal injury by a boy 13 years, 11 months, and 8 days old, who was injured in feeding angle irons into a straightening machine, in violation of the statute which prohibits the employment of a child in a hazardous business under the age of 14 years. The court, in deciding that case, on page 378 of the opinion in 238 Ill., on page 360 in 87 N. E. (20 L. R. A. [N. S.] 876, 128 Am. St. Rep. 129), said: "The fact that the statute under consideration does not in express terms provide a liability in damages for its violation, as is done by certain statutes relating to mines and miners, can make no difference

under the construction given the statute in *American Car Co. v. Armentraut*, 214 Ill. 509 [73 N. E. 766]. The statute was enacted for the protection of the health and safety of children, and a liability for damages resulting from its violation is created whether it is expressly so declared in the statute or not." This decision accords with logic and reason and is supported by what we believe to be the weight of authority, and we do not feel justified in receding from the holding announced therein.

It is next contended that the appellee is estopped from maintaining this action because, it is said, he represented to the appellant at the time he was employed that he was over 17 years of age.

[2] If the appellee did misrepresent his age at the time he was employed, we are of the opinion he was not estopped from maintaining this action by reason of such representation. The law is that, if the appellant employed the appellee in violation of the statute, it is liable if he was injured while in such employment. The case of *American Car Co. v. Armentraut*, supra, was an action on the case to recover damages by a boy who had been employed in violation of the statute prohibiting the employment of a child under 14 years of age and who was injured while in such employment. Evidence was offered tending to show that at the time the boy was employed he stated he was 16 years of age. The evidence so offered was excluded, and thereafter the defendant asked an instruction to the effect that if the boy falsely represented, at the time of his employment, that he was 16 years of age, and that he obtained his employment by reason of such false statement, there could be no recovery. The instruction was refused, and it was held that the fact that the child falsely represented himself to be over 14 years of age did not preclude him from maintaining an action to recover for an injury sustained while he was engaged in such employment or furnish a defense to his employer against such action, and that the evidence was properly excluded and the instruction was properly refused. That case is directly in point and controls this case, and it is not necessary to cite other cases to show that a child under the prohibited age cannot, by a false statement as to his age, make his employment in violation of the statute lawful and authorize the employer to do that which the statute in express terms says he shall not do. To so hold would be to hold a child by his false statement could, in effect, repeal the statute.

[3] It is finally contended that section 11 of the statute is unconstitutional. It is conceded by the appellant that the Legislature, under the police power, has the right to pass legislation which will prohibit the employment of children of tender years in hazardous occupations, but it is said that a boy 16 years of age should be held to have arrived at the age of discretion, and

that a statute which prohibits his employment in such occupations is an unlawful interference with his right of contract, and is unconstitutional. The argument of the appellant is therefore that the statute is unconstitutional because it is unreasonable to prohibit a boy 16 years of age from engaging in any class of employment, but it is not contended it is unconstitutional by reason of the lack of power in the Legislature to legislate upon the subject—in other words, while the statute as applied to a boy 14 years of age might be constitutional, as applied to a boy 16 years of age it is unconstitutional. The question is therefore reduced to the proposition that the statute is an unreasonable exercise of the police power, and not a usurpation of that power. While it might be conceded that in a very flagrant case (which question we do not decide) the courts could hold a statute unconstitutional on the ground that it was an unreasonable exercise of the police power, still here it is only claimed that the age limit is fixed too high at which children may be lawfully employed in hazardous employments. Before the courts would assume to interfere and hold a statute unconstitutional, the age limit would necessarily have to be fixed so high as to show, clearly, and beyond all question, that the age at which it was fixed was unlawful. We do not think the statute in question is unconstitutional as an unreasonable exercise of the police power.

In *Strafford v. Republic Iron Co.*, supra, on page 375 of 238 Ill., on page 359 of 87 N. E. (20 L. R. A. [N. S.] 876, 128 Am. St. Rep. 120), it was said: "The statute in express and positive language forbade the employment of appellee in the business appellant was engaged in, in any capacity, and in the *Armentraut Case* it was said such construction should be given the act as to effectuate its purpose, if it can be done without violence to the letter of the statute. The validity of such statutes has been sustained as an exercise of the police power of the state upon the ground that the state is interested in the protection of children, and to that end may pass laws preventing their employment at a tender age, when they should be in school, in occupations that expose them to danger of being crippled and maimed for life, and thereby rendered less capable of taking care of themselves and discharging the duties of citizenship on arriving at maturity. The wisdom and humanity of the statute cannot be questioned, and in the *Armentraut Case* we held that an employer must know, at his peril, that children employed by him are of an age that he may lawfully employ them."

In *Starnes v. Albion Manf. Co.*, 147 N. C. 556, 61 S. E. 525, 17 L. R. A. (N. S.) 602, the Supreme Court of North Carolina said in a case where a similar question was at

issue: "Child labor laws have been adopted in nearly all the states of this Union and Canada and are in force in nearly all the governments of Europe and of the Australian continent. They are founded upon the principle that the supreme right of the state to the guardianship of children controls the natural rights of the parent when the welfare of society or of the children themselves conflicts with parental rights. In this country their constitutionality, so far as we can ascertain, has never been successfully assailed. The supervision and control of minors is a subject which has always been regarded as within the province of the legislative authority. How far it shall be exercised is a question of expediency, which it is the province of the Legislature to determine."

In *City of New York v. Chelsea Jute Mills*, 43 Misc. Rep. 266, 88 N. Y. Supp. 1085, in a case growing out of the violation of the statute prohibiting the employment of children under 14 years of age, the court said: "This statute is assailed for unconstitutionality. No particular provision of the state or federal Constitution is assigned. It is claimed to be 'an unwarranted, illegal, and unconstitutional deprivation of the liberties of the defendant.' * * * The integrity of the statute is upheld under the police power of the state. A statute should not be declared unconstitutional unless required by the most cogent reasons or compelled by unanswerable grounds. Every presumption is in favor of the constitutionality of a statute. It is difficult to satisfactorily define the police power to cover every case, but it includes such legislative measures as promote the health, safety, or morals of the community. It is true that the Legislature must respect freedom of contract and the right to live and work where and how one will, yet the weal of the people is the supreme law. The Legislature may not disregard it. Private interests are subordinated to the public good, and even a statute opposed to natural justice and equity, requiring vigilance or causing vexation or annoyance will be upheld if within constitutional limitations. Much more potent, if possible, is a statute seeking the protection of children. They are the wards of the state, which is particularly interested in their well-being as future members of the body politic, and has an inherent right to protect itself and them against the baneful effects of ignorance, infirmity or danger to life and limb."

In *Inland Steel Co. v. Yedinak*, 172 Ind. 423, 87 N. E. 229, a similar statute was before the Supreme Court of Indiana. In answering the charge that the appellant was denied the equal protection of the laws and was deprived of property without due process of law, that court said: "Children under 16 years of age are wards of the state

and are pre-eminently fit subjects for the protecting care of its police power. This power is an inherent attribute of sovereignty, and may be exercised to conserve and promote the safety, health, morals, and general welfare of the public. The liberty and property of the individual citizens are held subject to such reasonable conditions as the state may deem necessary to impose in the exercise of this power. Such regulations and conditions will not fall within the inhibitions of the fourteenth amendment unless they are palpably arbitrary, extravagant and unreasonably hurtful and unnecessarily and unjustly interfere with private rights."

[4] It is also urged that section 11 of the act is unconstitutional because the subject-matter in that section is not expressed in the title of the act. In *Maule Coal Co. v. Parthenheimer*, 155 Ind. 100, 55 N. E. 751, 57 N. E. 710, it was said: "To express the subject of a statute in the title, in compliance with the requirement of the Constitution, no particular form or terms are exacted, nor is it essential that such subjects be expressed with precision. The title will sufficiently conform to the command of the Constitution if it be so framed and worded as fairly to apprise the legislators, and the public in general, of the subject-matter of the legislation, so as to reasonably lead to an inquiry into the body of the bill. The constitutional requirement may be interpreted to mean that the act and its title must correspond—not literally, but substantially; and such correspondence is to be determined in view of the subject-matter to which the legislation relates." The last clause of the title is, we think, broad enough to cover any reasonable regulation which would tend to insure the enforcement of the main object of the act, which was to protect children from engaging in employments where their immaturity, inexperience, and heedlessness might cause them to be injured, which object, we think, would be materially advanced by a provision imposing a personal liability upon an employer to a child, who should employ a child in violation of the statute.

[5] The constitutional provision that "no act hereafter passed shall embrace more than one subject and that shall be expressed in the title" must have a reasonable construction and be liberally construed in favor of the validity of the enactment (*Blake v. People*, 109 Ill. 504), and any means which are reasonably adapted to secure the object indicated in the title may be included in the body of the act. *Larned v. Tiernan*, 110 Ill. 173. The right to maintain a civil action against the employer arises under the statute by implication, and a construction which authorizes the maintenance of such action does not render section 11 of the act unconstitutional by reason of the fact that

a new liability has been created by that section of the statute which is beyond the scope of the title of said act.

Finding no reversible error in this record, the judgment of the superior court will be affirmed.

Judgment affirmed.

(200 Mass. 65)

O'BRIEN v. BOSTON & M. R. R.

(Supreme Judicial Court of Massachusetts.

Suffolk. May 18, 1911.)

1. MASTER AND SERVANT (§ 285*)—INJURIES —JURY QUESTION—CAUSE OF ACCIDENT.

In a freight brakeman's action for personal injuries by falling while setting a hand brake, because of an alleged defect in the ratchet, whether the accident was caused by the defect or some other cause held a jury question.

[Ed. Note.—For other cases, see *Master and Servant*, Dec. Dig. § 285.*]

2. MASTER AND SERVANT (§ 286*)—INJURIES —JURY QUESTION—EXISTENCE OF DEFECT.

In a freight brakeman's action for personal injuries by falling while setting a hand brake, claimed to have been caused by a defective ratchet, whether a short tooth in the ratchet constituted a defect for which defendant was liable held a jury question.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 1010-1050; Dec. Dig. § 286.*]

3. MASTER AND SERVANT (§ 107*)—INJURIES —NEGLIGENCE.

If an appliance was defective, the fact that it was in common use would not relieve the employer from liability for injuries resulting therefrom.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 199-202, 212, 254, 255; Dec. Dig. § 107.*]

4. MASTER AND SERVANT (§ 286*)—INJURIES —NEGLIGENCE.

In a freight brakeman's action for personal injuries by falling while setting a hand brake, claimed to have been caused by a short tooth in the brake ratchet, whether defendant should, in the exercise of reasonable care, have discovered and remedied the defect, held a jury question.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 1010-1050; Dec. Dig. § 286.*]

5. MASTER AND SERVANT (§ 289*)—INJURIES —JURY QUESTION—CONTRIBUTORY NEGLIGENCE.

In an action for personal injuries to a freight brakeman by falling while setting a hand brake, claimed to have been caused by a defective ratchet, whether plaintiff was himself negligent held a jury question.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 1089-1132; Dec. Dig. § 289.*]

Report from Superior Court, Suffolk County; John F. Brown, Judge.

Action by William C. E. O'Brien against the Boston & Maine Railroad. Verdict for defendant, and case reported from superior court. Judgment for plaintiff.

Samuel A. Fuller and John W. Vaughan, for plaintiff. Henry F. Hurlburt and Henry F. Hurlburt, Jr., for defendant.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

MORTON, J. This is an action of tort to recover damages for personal injuries received by the plaintiff on June 14, 1906, while in the employ of the defendant as a freight brakeman. At the close of the plaintiff's evidence the court directed a verdict for the defendant and reported the case to this court. If the court was wrong in directing a verdict for the defendant, it is agreed that judgment may be entered for the plaintiff in the amount stipulated in writing by the parties; otherwise judgment is to be entered upon the verdict.

[1-4] We think that the ruling was wrong. There was evidence tending to show that there was a defect in the ratchet so that the dog which held the brake as it was wound up was liable to slip, and did slip, thereby causing the accident complained of. One witness called by the plaintiff testified that the ratchet was defective, and that it had a tendency to throw the dog out, and that it would not hold under pressure. The plaintiff's description of the manner in which the accident happened also could have been found to be more consistent with the presence of a defective tooth in the ratchet than with any other cause. He testified, amongst other things, that he was winding up the brake and had his foot against the dog, meaning, it could be fairly inferred, that he was pressing the dog into the ratchet, and had got the brake "pretty well tightened up," "pretty near up to the limit," and looked round over his shoulder to see where the cars ahead of him were, when "the dog gave away from me, and as the dog gave away from me the brake went off, it unwound, and down I went, it went off just as quick as that," illustrating by clapping his hands. The defendant contends that the plaintiff, as he turned to look at the cars that were ahead of him, may have moved his foot and thereby released the dog, or the joggling of the car as it went over the switch may have thrown out the dog, or that in winding up the brake chain one part of the chain wound upon another and then may have slipped off, causing the sudden unwinding; and that it is impossible therefore to tell what the cause of the accident was. All these things were matters proper for the consideration of the jury in passing upon the question whether the accident was due, as claimed by the plaintiff, to a defect in the ratchet or to some other cause for which the defendant was not liable; but they did not justify a ruling that there was no defect in the ratchet, and that the accident was not due to that. It was for the jury to say whether, in view of the way in which ratchets such as this were made and of their common use on other railroads, the short tooth complained of, if there was one, constituted a defect for which the defendant was liable. If it was a defect, the fact that such ratchets were in common use

would not excuse the defendant, if it did not appear that the plaintiff had assumed the risk. So also it was a question for the jury whether, if it were a defect, it ought in the exercise of the care and diligence required of it to have been discovered and remedied by the defendant.

[5] It could not have been ruled as matter of law that the plaintiff was not in the exercise of due care, or that he assumed the risk. It was for the jury to say whether, taking into account the nature of his duties and of the business in which he was engaged, he exercised the degree of care which under the circumstances was required of him. So as to assumption of the risk, it was for the jury to say whether he knew that the ratchet was or might be defective and so assumed the risk of it, and whether a defective ratchet was so common and well known as to constitute one of the obvious risks of the employment, or whether in the performance of his duties he could properly rely upon the assumption that the brake was in a condition to enable him to do his work in safety, and if so to what extent he was justified in acting upon such reliance. Even if in the instant of stepping down upon the platform to wind up the brake he had discovered the defect and had before him the alternative of attempting to wind up the brake, using such care as he was able to use under the circumstances, or of abandoning the car to its fate with the certainty that it would collide with the cars ahead, it is doubtful, to say the least, whether it could have been ruled as matter of law that he would have assumed the risk arising from the defective brake. That question however is not now before us.

We have not found it necessary to consider the questions of evidence. In accordance with the report the entry must be: Judgment for the plaintiff in the amount agreed upon in writing by the parties.

So ordered.

(208 Mass. 537)

BURR v. CITY OF BOSTON.

(Supreme Judicial Court of Massachusetts.
Suffolk. May 16, 1911.)

1. CHARITIES (§ 24*)—ACCEPTANCE—EFFECT.

Where testator gave his residuary estate to a city, to constitute a fund the income of which should be applied to the maintenance and improvement of the common and the parks of the city, the city accepted the gift by adopting an order reciting the gift and the conditions thereof, and the acceptance thereof, though the order authorized the treasurer to receive and hold the gift for the purposes specified.

[Ed. Note.—For other cases, see Charities, Cent. Dig. § 8; Dec. Dig. § 24.*]

2. TAXATION (§ 217*)—PROPERTY SUBJECT TO—PROPERTY OF MUNICIPALITIES.

Land held by one municipality within the territorial limits of another for a public use is exempt from taxation, and land of a city, situated within its limits, available for a public use.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

is also exempt; but property, while not actually put to a public use, but availed of for purposes of revenue merely, is taxable by the city or town in which it is situated.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. §§ 355, 356; Dec. Dig. § 217.*]

3. CHARITIES (§ 14*)—PUBLIC CHARITABLE TRUST.

A testamentary gift to a city, in trust to apply the income to the maintenance and improvement of its common and parks, is a valid public charitable trust.

[Ed. Note.—For other cases, see *Charities*, Cent. Dig. § 88; Dec. Dig. § 14.*]

4. TAXATION (§ 217*)—REAL PROPERTY OF PUBLIC SERVICE CORPORATION—EXEMPTIONS.

The real property of a public service corporation, so far as appropriated and used within authorized limitations, but no further, is exempt from taxation.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. §§ 355, 356; Dec. Dig. § 217.*]

5. TAXATION (§§ 317, 550*)—PUBLIC OFFICERS—ASSESSORS—COLLECTORS.

Assessors and collectors are public officers, and not representatives of the municipalities; and they must, as required by Rev. Laws, c. 12, § 13, discharge faithfully their duty, by assessing all taxable property, and by enforcing payment of all taxes duly assessed and committed for collection.

[Ed. Note.—For other cases, see *Taxation*, Dec. Dig. §§ 317, 550.*]

6. TAXATION (§§ 241, 242, 244*)—EXEMPTIONS—STATUTES.

Under Rev. Laws, c. 12, § 5, cls. 3, 7, the real estate of educational, charitable, or religious institutions is not exempt from taxation, unless used and appropriated for their distinctive purposes.

[Ed. Note.—For other cases, see *Taxation*, Dec. Dig. §§ 241, 242, 244.*]

7. TAXATION (§ 183*)—EXEMPTIONS—STATUTES.

The real estate situated within the limits of a city, and owned by it as a beneficiary under a will devising the same to it, in trust to apply the income to the maintenance and improvement of the common and parks of the city, is not subject to taxation.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. § 205; Dec. Dig. § 183.*]

Report from Superior Court, Suffolk County; Henry A. King, Judge.

Action by Herman M. Burr against the City of Boston. The court found for plaintiff, and at the request of the parties reported the case for the determination of the Supreme Judicial Court. Judgment affirmed.

George F. Parkman, of Boston, by his will and codicils devised the residue of his estate to the city of Boston, to constitute a fund the income of which should be applied to the maintenance and improvement of the common and parks. The gift was accepted by the city by an order reciting that the gift of testator, to constitute a fund the income of which was to be applied to the maintenance and improvement of the common and certain other parks, should be accepted, and authorizing the city treasurer, in behalf of the city, to receive and receipt for the gift, convert the same into money, and invest and reinvest it in proper securities, and

hold the same for the purposes named in the gift.

Roger F. Sturgis, for plaintiff. T. M. Babson and Karl Adams, for defendant.

SHELDON, J. [1] We assume, in accordance with the contention of the defendant, that this bequest to the city of Boston did not vest absolutely in the city until its acceptance thereof (*Dalley v. New Haven*, 60 Conn. 314, 22 Atl. 945, 14 L. R. A. 69), and that as the city might elect either to accept or to decline the proposed benefaction, so it might make a conditional acceptance thereof, and then would be bound only by the terms of the bequest and its own conditional acceptance. But it did unconditionally accept this bequest on the terms on which it was made; and the provisions of its order of acceptance, authorizing its treasurer to receive and hold the bequest, were added merely to designate the officer who should receive it and have charge thereof. As all the debts and legacies had been paid or funds set apart for their payment when the order of acceptance was passed in March, 1900, it follows that the title to all the real estate covered by the bequest vested at least then in the city as its property, and this included the Chestnut street estate here spoken of. The case presents no question of equitable conversion. On the 1st day of May this was the property of the city, though held in trust for a public use. On that day, the board of assessors assessed a tax thereon to "the devisees of George F. Parkman"; and the question is whether the tax was valid.

It is not claimed that the property was exempt from taxation under any of the provisions of Rev. Laws, c. 12, § 5 et seq., but the plaintiff contends that it could not be legally taxed because of the fact that the title to it was in the city itself upon the trust stated.

[2] There is no doubt that land held by one municipal corporation within the territorial limits of another for a public or governmental use is exempt from taxation, not by reason of any specific statutory exemption, but upon what always has been assumed to be the intention of the Legislature in the statutes relating to taxation. *Milford Water Co. v. Hopkinton*, 192 Mass. 491, 78 N. E. 451, and cases cited. A fortiori this is so if the land is situated in the city which owns it. On the other hand such property while not actually put to any public use, but availed of for purposes of revenue merely, is taxable by the city or town in which it is situated. *Essex County v. Salem*, 153 Mass. 141, 26 N. E. 431. In that case the court said: "The property of counties is held exempt from taxation when appropriated to public uses, because courts infer that it is not the intention of the Legislature to tax

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

property so used, in the absence of any express declaration that it should be taxed. This implication is made on account of the nature of the uses to which the property is appropriated. It is not to be presumed that the Legislature intended to tax the instrumentalities of government. *Worcester v. Mayor and Aldermen of Worcester*, 116 Mass. 193." And farther on the court added: "In the absence of any express exemption of the property of counties from taxation, an exemption can be implied only when the property is actually appropriated to public uses. This is the principle which underlies all our decisions in cases analogous to the present, and we see no ground on which it ought to be extended to the property of a county actually devoted to private uses which are not incidental to the performance of public duties."

[3] In the case at bar the property was held by the city in trust to apply the income thereof to the maintenance and improvement of its common and parks. This is a valid public charitable trust. *Bartlett*, petitioner, 163 Mass. 509, 514, 40 N. E. 899. It supplies funds for a purpose which otherwise must be provided for by taxation, and so far tends to lighten the public burdens. This is strictly a public use.

We need not consider whether the city collector could maintain an action to recover this tax under *Rev. Laws*, c. 12, § 32. Such a suit of course must be brought against the city itself, since that alone is properly described by the language of the assessment, which can be applied to no other natural or artificial person. For such a tax the primary liability is upon the person taxed and not upon the property for which the tax is assessed (*Dunham v. Lowell*, 200 Mass. 468, 86 N. E. 951); and it might be a serious question whether the Legislature intended in any case to cast such primary liability upon the city or town to which that tax is to be paid. But, as we have said, that question is not raised.

This land, however, was not used directly for a public purpose, as if, for example, it were itself made into a public park, or were used as the site of a city hall or library building. It was held in trust to apply the income to the specific public charitable purpose stated in Mr. Parkman's will. The land which was decided to be taxable in *Essex County v. Salem*, *ubi supra*, was held and could be held by the county, until it should be applied to the contemplated public use and so should become exempt from taxation, strictly for the application of any income derived therefrom, like all other revenue of the county, to the general public purposes for which alone the money of the county could be spent. The case at bar differs from that case in two respects: First, that here the land sought to be taxed is within the territorial limits of the city which owns it; and secondly, that this land is held

in trust to apply the income thereof to a specific public charity and not to the general public purposes of the city.

The general rule laid down by our decisions is that real estate situated in one city or town but owned and used by another for a specific public purpose is exempt from taxation, but that this exemption is limited to property which is directly appropriated to such a specific purpose. *Wayland v. County Commissioners*, 4 Gray, 500, in which it was held that land in Wayland owned and appropriated by the city of Boston under St. 1846, c. 167, for the sole purpose of supplying that city with water, was exempt from taxation; but it was expressly stated by the court that "if the land was valuable for and used for purposes other and distinct from those of the aqueduct, the property so used, to the extent it was so used, would be liable to taxation." The same doctrine is affirmed in later cases. *Worcester County v. Worcester*, 116 Mass. 193; *Somerville v. Waltham*, 170 Mass. 160, 48 N. E. 1092; *Miller v. Fitchburg*, 180 Mass. 32, 61 N. E. 277.

[4] On the same principle, the real property of a public service corporation, so far as appropriated and used within authorized limitations but no farther, is exempt from taxation. *Worcester v. Western Railroad*, 4 Metc. 564. Many later cases are collected and both the general principle and its limitation are stated in *Milford Water Co. v. Hopkinton*, 192 Mass. 491, 78 N. E. 451. *Hammond, J.*, said in that case: "The true test is whether it [the corporation owning the land] is engaged in the administration of a public trust with power to take land for that purpose. It is the character of the use to which the property is put, and not of the party who uses it, that settles the question of exemption from taxation."

But none of these cases, and indeed no case to which our attention has been called, except *Lancy v. Boston*, 186 Mass. 128, 71 N. E. 302, dealt with the exemption of land owned or appropriated for a public use by the city or town in which the land was located. It was held in that case that land in which an easement had been taken by right of eminent domain either for a highway or for railroad purposes was not taxable to the owner of the fee. The general question of the right or duty of a city to tax land owned by itself within its own limits, though not appropriated or used for a public purpose, was not considered. Nor have we found any case which considers the manifest distinction between such land held upon an express trust for a specific public charitable use to which alone its income can be applied, and land which is held merely in the general ownership of the city and of which both the corpus and the income may be applied to its general purposes.

[5] If taxes can be lawfully assessed by cities and towns upon their own lands, then it is the duty of the assessors to lay such as-

assessments and of the collectors to enforce the payment thereof. These officers are strictly public officers and in no sense the agents or representatives of the municipalities. *Rossire v. Boston*, 4 Allen, 57, 58; *Dunbar v. Boston*, 112 Mass. 75; *Alger v. Easton*, 119 Mass. 77, 78; *Welch v. Emerson*, 206 Mass. 129, 130, 91 N. E. 1021; *Cox v. Segee*, 206 Mass. 380, 382, 92 N. E. 620; *Gile v. Perkins*, 207 Mass. 172, 93 N. E. 580. They are bound to discharge faithfully their duty by assessing all taxable property and by enforcing payment of all taxes duly assessed and committed to them for collection. *Rev. Laws*, c. 12, §§ 2, 15, 37, 51, 67; c. 13, § 2; c. 25, § 68. *Boston v. Turner*, 201 Mass. 191, 196, 87 N. E. 634. Their duty to assess and collect taxes upon all the real estate which passed to the defendant by Mr. Parkman's will, if that estate is liable to taxation, is absolute, and does not at all depend, as to any particular parcel, upon whether it has or has not been conveyed by the city. But there are serious practical difficulties in such assessment and collection. Some of them already have been mentioned. The rate of taxation for city purposes is limited by statute to the amount which the Legislature has regarded as sufficient. *Rev. Laws*, c. 12, § 54; *Id.*, c. 27, § 26. The value of the real estate received under this devise was nearly a million of dollars. If this is taxable, as the tax must be paid by the city itself, its net income will so far be diminished beyond the amount contemplated by the Legislature, or either the corpus or the income of the trust fund will so far be reduced. If the city owns other land, which is unimproved and yields no income, this will become a liability instead of an asset. But we know that this has been the case in the past, not only in Boston but in other municipalities. See *Keening v. Ayling*, 126 Mass. 404; *Dingley v. Boston*, 100 Mass. 544; *Page v. O'Toole*, 144 Mass. 303, 10 N. E. 851; *Commonwealth v. Roxbury*, 9 Gray, 451; *Cleaveland v. Norton*, 6 Cush. 380, 384; *Brigham v. Shattuck*, 10 Pick. 306, where there was a devise somewhat like the one before us; *Hayden v. Stoughton*, 5 Pick. 528, where land devised to a town for a public use was accepted and held by the town, but the condition was not complied with. *Rawson v. Uxbridge School District*, 7 Allen, 125, 83 Am. Dec. 67, resembles *Hayden v. Stoughton*, the town having ceased to hold the land for public purpose to which it had been appropriated and having afterwards sold it to the tenant to be used for a wholly different public purpose. It is believed that at least a large portion of that thickly settled part of the city of Boston now called the South End was, while vacant and unimproved, the private property of that city, as appeared in *Keening v. Ayling*, *ubi supra*. It does not appear that in any of these cases, or in any of the other cases of similar ownership, which probably have been numerous, any question was raised as to the pay-

ment of taxes upon the property while so owned; a circumstance which would tend to show the general opinion that under such circumstances there was no liability to taxation.

But we do not deem it necessary to pass upon this broad question. This estate was held by the city in trust for a specific public purpose. In this respect it resembles somewhat the sinking funds which in some cases cities are required by *Rev. Laws*, c. 27, § 12 et seq., to provide and maintain for the extinguishment of their indebtedness. Under section 15 these funds may be and doubtless sometimes are invested in mortgages upon real estate. It sometimes must be necessary to foreclose such mortgages and to take title to the land therein described. If the income of the fund is to be diminished and its accumulation checked and delayed by the payment of taxes upon the land while so held as an investment, the purpose of the statute to which we have referred, to provide sufficient means for the payment of the debt at its maturity, is so far frustrated. Accordingly real estate so held has been decided to be exempt from taxation. *Commonwealth v. Sinking Fund Commissioners, Lebanon Water Works*, 130 Ky. 61, 112 S. W. 1128. And yet the land in such a case is not directly appropriated and used for a public purpose. Like that involved in the case at bar, it is held merely as an investment, part of a fund whose income is to be applied to a specific purpose, such as properly comes within the definition of a public charity. The income of this fund is directly applicable to such a public use; neither directly nor indirectly can the city of Boston divert it therefrom. The income must forever be applied to this specific purpose. It can in no way and by no artifice be applied to the general purposes of the city. The case in this respect differs materially from *Essex County v. Salem*, 153 Mass. 141, 26 N. E. 431, and the other cases heretofore cited in which the actual use of the property was made the test of its liability to taxation.

[6] Real estate held by educational, charitable or religious institutions is not exempted from taxation unless used and appropriated for their distinctive purposes. *Rev. Laws*, c. 12, § 5, cls. 3, 7. *Amherst College v. Amherst*, 193 Mass. 168, 79 N. E. 243; *Evangelical Baptist Society v. Boston*, 204 Mass. 28, 90 N. E. 572. But this is by the express words of the statutes. In such cases the income of the property which was held not to be exempt went into the general funds of its owners, and a case like that now before us was not presented. And any inference that might be drawn against our conclusion from the language of this statutory exemption is largely met by the fact that upon the reasoning in *Davis v. Stevens*, 208 Mass. 343, 94 N. E. 556, Mr. Parkman's devise would be exempt from the succession tax imposed by St. 1900, c. 490, part 4, and chapter 527.

This circumstance is of course not decisive; but it is to be considered in determining what is a just and consistent mode of taxation under our statutes and decisions. The specific provision in St. 1909, c. 490, pt. 2, § 67, for taxation by a city or town of land taken or purchased by it for nonpayment of prior taxes, unless wholly superfluous, tends to indicate the legislative opinion that such land would not otherwise be taxable.

It is said, however, that in fixing the basis of state and county taxation an injustice will be done by taxing disproportionately other cities and towns if property like this is not to be assessed. We do not know what property is held by other municipalities that would be exempt under our view. It may be that some slight inequality would result, but looking at the total assessed valuation of the Commonwealth, we cannot regard this as more than a negligible quantity. See *Natick & Cochituate Street Railway v. Wellesley*, 207 Mass. 514, 523, 524, 93 N. E. 834.

[7] We are of opinion that this estate, owned by the defendant not for its own benefit but strictly in trust to apply the income to a particular specified charitable use, is not legally liable to assessment and taxation. The judgment for the plaintiff must be affirmed.

So ordered.

(208 Mass. 583)

MARTIN v. STEWART et al.

(Supreme Judicial Court of Massachusetts.
Suffolk. May 18, 1911.)

1. WITNESSES (§ 397*)—IMPEACHMENT—EFFECT—WEIGHT OF EVIDENCE.

Positive statements of witnesses as to the terms of a contract should not be disregarded, though inconsistent with their testimony on a former trial and with an auditor's report.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. §§ 1265, 1266; Dec. Dig. § 397.*]

2. APPEAL AND ERROR (§ 1001*)—QUESTIONS OF FACT—REVIEW.

The determination of questions of fact, warranted by the evidence, will not be reversed on exceptions.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3922-3934; Dec. Dig. § 1001.*]

3. MECHANICS' LIENS (§ 139*)—STATEMENT—LABOR—TIME—SPECIFICATION.

Under Rev. Laws, c. 197, § 6, stating the allegations required in a mechanic's lien statement, it is not necessary, in a statement for a lien, based on a contract to perform labor, without materials, for a specified price, that the number of days consumed in performing the work should be stated.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. § 234; Dec. Dig. § 139.*]

Exceptions from Superior Court, Suffolk County; Charles U. Bell, Judge.

Action by Thomas J. Martin against Joseph I. Stewart and others. Judgment for plaintiff, and defendants bring exceptions. Overruled.

John E. Crowley, for petitioner. Wm. R. Bigelow, for respondents.

BRALEY, J. [1, 2] It appeared in *Martin v. Stewart*, 204 Mass. 122, 90 N. E. 587, upon the auditor's report, which with a copy of the petitioner's statement of lien was all the evidence introduced at the trial, that the petitioner contracted with the respondent, Stewart, to perform all the carpenter work on the buildings except the laying of floors, and to furnish the lumber for the stair carriages for an entire price. The petitioner performed the contract, and did certain extra work, but as the statement of lien contained no reference to anything except labor, it was decided that no lien attached to the land, and the petition could not be maintained. But the evidence at the second trial was materially different. It tended to show that the original contract instead of being for labor and materials, was for labor only, and the jury found in answer to the sixth issue, that the lumber for the stair carriages was not included. If the testimony was conflicting, the credibility of the witnesses was for the jury, and the positive statements of the petitioner, and of Stewart, who each testified as to the terms of the contract, cannot be disregarded, even if inconsistent with their former testimony, and the auditor's report. It was a question of fact which has been determined against the respondents, and the answer, which settles the principal questions raised by the exceptions, having been warranted by the evidence, must stand.

[3] The third issue called for an answer as to the amount due for labor, and the statement of lien not having set forth the number of days, although giving the dates, the respondents asked for a ruling that this question could not properly be answered by the jury. But it is only where labor is performed or furnished under an entire contract, which includes both labor and materials, that the number of days must be specified in the statement. Rev. Laws, c. 197, § 6. If as in the present case the lien is for the contract price, for which the parties agreed that the work should be done, it is not necessary to particularize by stating the number of days taken in its performance. *Patrick v. Smith*, 120 Mass. 510, 513. We find no error of law at the trial.

Exceptions overruled.

(209 Mass. 133)

COTTING et al. v. MURRAY et al.

(Supreme Judicial Court of Massachusetts.
Suffolk. May 18, 1911.)

1. EASEMENTS (§ 44*)—PRIVATE WAYS—WIDTH.

When an indefinite way, e. g., one "not less than five feet wide," has been granted, and is by common consent located and determined, and used and acquiesced in by all parties interested for many years, it will be treated as the way granted.

[Ed. Note.—For other cases, see *Easements*, Cent. Dig. § 99; Dec. Dig. § 44.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes

2. EASEMENTS (§ 29*) — PRIVATE WAYS — WIDTH.

Maintenance of a post in a private passageway did not affect the rights of abutters to have the way open to vehicle traffic under their deeds, on withdrawing their consent to maintenance of the post.

[Ed. Note.—For other cases, see Easements, Cent. Dig. § 76; Dec. Dig. § 29*.]

Appeal from Superior Court, Suffolk County; William Cushing Wait, Judge.

Action by C. U. Cotting and another against Lawrence Murray and others. Decree for plaintiffs, and defendants appeal. Affirmed.

Roger S. Warner, for appellants. Putnam & Putnam, for appellees.

MORTON, J. The plaintiffs are the owners of a lot of land in Boston, bounded northerly on Boylston street and southerly on a way called Townsend Place. Townsend Place extends easterly and southerly from Carver street, and forms at its easterly and southerly ends a cul de sac. That part on which the plaintiffs' premises abut is 12 feet wide. From a short distance beyond the plaintiffs' premises to the easterly end it is 5 feet wide. The southerly portion is 15 feet wide. This is a bill to restrain the defendants from obstructing the plaintiffs in the use of the way by maintaining a gate or post or any other obstruction therein. A cross-bill was filed by certain of the defendants to restrain the plaintiffs from using said way for teams and carriages and to enjoin them from making any use of said Townsend Place except to the extent of a 5-foot passageway. The case was sent to a master, who found in favor of the plaintiffs in the original bill and against the plaintiffs in the cross-bill. Exceptions to the report were filed by certain parties who were defendants to the original bill and plaintiffs in the cross-bill. The exceptions were overruled and a decree was entered in favor of the plaintiffs in the original bill with costs against certain defendants, and dismissing it with costs as to other defendants and dismissing the cross-bill with costs. The plaintiffs in the cross-bill and the defendants in the original bill against whom the decree ran appealed. The appellants are owners of lots abutting on the southerly extension of Townsend Place and henceforth we shall speak of them as the defendants and of the plaintiffs in the original bill as the plaintiffs.

The lots belonging to the plaintiffs and defendants respectively, as well as Townsend Place itself, originally constituted a part of a tract of land belonging to certain persons called the Townsend heirs. On July 12, 1842, they conveyed to the plaintiffs' predecessor in title, one Williams, a lot bounded on the south by other land of the grantors, "with a free and uninterrupted right of passing and repassing in, upon and over a five feet pas-

sageway to be laid out by us to and from Carver street in common with us, our heirs and assigns, and of draining under the same, subject to payment of a proportionate part of the cost of keeping in repair said passageway and drain." Subsequently on October 19, 1842, another lot of land was conveyed to the plaintiffs' predecessor in title by the same grantors, which lot of land was described as bounding northerly on the lot previously conveyed and "southerly by a passageway not less than five feet wide leading to Carver street." The deed then proceeded as follows: "Said parcel of land being designed as an enlargement of the tract of land conveyed to said Williams by our said former deed, with a free and uninterrupted right of passing and repassing in, upon and over said passageway not less than five feet wide laid out by us to and from said Carver street in common with us, our heirs and assigns, and of draining under the same, subject to payment of a proportionate part of the expense of keeping in repair said passageway and drain, said easements to be enjoyed as appurtenant to the land conveyed to said Williams both by these presents and by our said former deed." Like conveyances of the two lots easterly of that thus conveyed to the plaintiffs' predecessor in title were made to the two parties to whom the two lots easterly of that originally conveyed to Mr. Williams had been deeded. At the time when these last conveyances were made the passageway in question on which they bounded was laid out 12 feet wide from Carver street to a point about half way along the southerly line of the plaintiffs' lot and 5 feet wide for the rest of the distance. Subsequently the passageway was widened by the grantors to 12 feet to a point beyond the lot conveyed to Mr. Williams remaining 5 feet wide for the rest of the distance easterly, and was extended southerly with a width of 15 feet. This was in 1844 or thereabouts, and the way has remained ever since as thus laid out. At the time when the southerly extension of the way was laid out, posts were set across the northerly end of it where it joined the 12-foot way running east and west and have been maintained there ever since. The southerly extension has thus been rendered inaccessible to teams and carriages. A brick sidewalk 3 or 4 feet wide was built by abutters along the northerly side of the way from Carver street to its easterly end, and Mr. Williams caused a post to be set in the passageway a little easterly of the west line of his lot projected southerly, and midway between the edge of the sidewalk and the southerly line of the way. From the time when this post was set until 1892 when the premises occupied by Mr. Williams were altered over for business purposes a post has been maintained by Mr. Williams and others by common consent, for the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes

purpose of preventing teams and carriages from using the way beyond the point where it was set. Mr. Williams and others caused the way to be paved with cobble stones from Carver street to the post, and later beyond that, and since the post was placed there the way has been used at all times from Carver street to the post for teams and carriages by and with the consent of every owner and occupant of premises abutting on Townsend Place. In 1892 Mr. Williams removed the post. Thereupon another post was put there by one of the plaintiffs in the cross-bill, which was also removed. A gate was then erected which also was removed, with another gate that was erected in its place. Then this bill was brought by the plaintiffs in November, 1892.

The plaintiffs contend first that they and the other parties to this litigation have under their respective deeds from the Townsend heirs the right to use the passageway from Carver street to its easterly end on foot and with teams and vehicles; secondly, if that is not so, then they contend that as owners of the fee of that part of Townsend Place which runs easterly from Carver street, to which they have acquired title since this suit was begun, they have a right to use it for teams and vehicles in connection with their adjoining premises fronting on Boylston street, and to enjoin the defendants from making such use of it. The defendants contend that the plaintiffs have a right of way only 5 feet wide for foot travel, and they seek to limit the plaintiffs to that and to enjoin them from using the way for teams and vehicles, it appearing that such use has materially interfered with the letting of houses on the southerly extension of Townsend Place for residences, or rooms, and has caused a diminution of the rents.

[1] We think that the decree was right and should be affirmed. The lot is described as bounded "southerly by a passageway not less than five feet wide leading to Carver street." The way is described, not as 5 feet wide and no more, as in the previous conveyances, but as "not less than five feet wide," thus limiting the minimum but not the maximum width. The same language occurs later in the deed. If the grantors had intended to limit the grantees to a passageway 5 feet wide and no more it is difficult to understand why in view of the apt language of the previous conveyances they did not do so. On the other hand, the indefiniteness of the way granted in the deed is accounted for by the fact that although a portion of the way was already indicated on the surface of the earth as 12 feet wide, the grantors had not finished laying out and disposing of the rest of their land, and might well prefer to leave the final width of the way undetermined while guaranteeing that in any event it should not be less than 5 feet wide. More-

over the right of passing and repassing over and upon the passageway is given to the plaintiffs "in common with us [the grantors], our heirs and assigns." This can mean nothing else, it seems to us, than that the plaintiffs are to have the right of passing and repassing over the way as finally located by the grantors whatever the width might be. While in a sense no doubt the way in question was intended as a substitute for the way contemplated in the previous conveyances, it is plain, we think, that it was not intended that it should be limited to the same width. Moreover it could not have been intended as a substitute in the case of Mr. Williams, since the 5-foot way was left open from his premises to Carver street and no release was required from him as there was in the case of the grantors of the two lots easterly. [2] The setting out and maintenance of the post cannot be held, we think, to have affected the rights of the parties. It was maintained by common consent on the part of the abutters, and when such consent was withdrawn by one or more of them the parties were left to their rights under their deeds.

We think that the case comes within the principle that where an indefinite way has been granted, and is either at the time or afterwards by the common consent of the grantor and grantee practically located and determined, and as thus located is used and acquiesced in by all parties interested for a long term of years, it will be regarded as the way intended to be granted by the deed. *Bannon v. Angier*, 2 Allen, 128. The case differs from that of *Stetson v. Curtis*, 119 Mass. 266, relied on by the defendants, for the reason that in the present case it is manifest that the whole width of the passageway was intended by the grantors to be used as a way.

Whether the plaintiffs acquired any greater or different rights in regard to their use and the use by others of the passageway by their purchase of the fee of it from what they had before, it is not necessary to consider.

Decree affirmed with costs.

(209 Mass. 24)

COMMONWEALTH v. CASSIDY.

(Supreme Judicial Court of Massachusetts.
Suffolk. May 18, 1911.)

1. CRIMINAL LAW (§ 327*) — BURDEN OF PROOF.

The burden is upon the commonwealth to prove guilt.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 720; Dec. Dig. § 327.*]

2. MUNICIPAL CORPORATIONS (§ 707*) — USE OF STREETS — CRIMINAL RESPONSIBILITY — AUTOMOBILE SPEEDING — PROSECUTION — BURDEN OF PROOF.

St. 1909, c. 534, § 16, makes it an offense to operate an automobile at a speed greater than is reasonable and proper, having regard to

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes

the traffic and the use of the way and safety of the public, and provides that in certain localities a speed exceeding 20 miles an hour for the distance of one-quarter of a mile shall be prima facie evidence of a rate of speed greater than is reasonable and proper, and contains a similar provision as to a speed in certain other localities exceeding 15 miles an hour for one-eighth of a mile. *Held*, that the burden is on the commonwealth, in a prosecution for violating the statute, to show that the speed was greater than was reasonable and proper, having regard to the traffic, etc., and that the speed was such as to make a prima facie case under the statute did not change the burden; but the jury should give due weight to the prima facie case in connection with the other circumstances, and should convict, if satisfied that the speed was greater than was reasonable and proper.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1518; Dec. Dig. § 707.*]

3. MUNICIPAL CORPORATIONS (§ 707*)—USE OF STREETS — CRIMINAL RESPONSIBILITY — PROSECUTION—INSTRUCTIONS.

In a prosecution for running an automobile in a thickly settled part of a city at a rate of speed greater than was reasonable and proper, having regard to the traffic and safety of the public, contrary to statute, which made a speed greater than 15 miles an hour prima facie negligence, the court instructed that, if a speed greater than 15 miles an hour is maintained in a thickly settled part of the city, accused was guilty of an offense, unless the conditions required a greater speed, and that a rate of speed might be maintained under certain circumstances which would be essential to the safety of persons in the automobile or people in the street, and unless that were shown a rate higher than 15 miles an hour was an offense. Defendant requested instructions that there was no absolute speed limit, and that if the rate was reasonable or proper, having regard to the traffic, the use of the way, and safety of the public, the jury should find for defendant, at whatever speed he went, and if he operated the automobile at a speed of 15 miles an hour for one-eighth of a mile in a thickly settled part of the city, the jury should find for defendant, if such speed was not greater than was reasonable or proper, having regard to the traffic, the use of the way, and the public safety. *Held*, that the requested instructions should have been given; those given not being in accordance with the requests and being erroneous.

[Ed. Note.—For other cases, see *Municipal Corporations*, Dec. Dig. § 707.*]

4. MUNICIPAL CORPORATIONS (§ 707*)—HIGHWAYS—"INTERSECTING WAY."

St. 1909, c. 534, § 1, which defines the meaning of various terms used in the subsequent sections, providing that "intersecting way" shall mean any way which joins another at an angle, whether or not it crosses the other, is applicable to section 16, which makes it an offense to operate an automobile at a greater rate of speed on certain streets than is reasonable and proper, having regard to traffic, etc., notwithstanding section 33, providing that section 16, etc., shall take effect July 1, 1909, and that the act, except as otherwise provided, shall take effect on December 1, 1909.

[Ed. Note.—For other cases, see *Municipal Corporations*, Dec. Dig. § 707.*]

For other definitions, see *Words and Phrases*, vol. 4, p. 3724.]

Exceptions from Superior Court, Suffolk County; William Cushing Wait, Judge.

Daniel Cassidy was convicted of running his automobile in violation of statute, and he excepts. Exceptions sustained.

The defendant requested the court to make the following rulings:

"1. There is no absolute or fixed speed limit at which automobiles may be operated in this commonwealth; and if the jury find that the rate of speed was reasonable and proper, having regard to the traffic, use of the way and safety of the public, they should find for the defendant, no matter at what particular rate of speed they find he operated.

"2. There is no evidence in this case of more than one intersecting way or intersection of ways at the time the alleged offense was committed.

"3. If the jury find that the defendant operated an automobile at a rate of speed in excess of 15 miles an hour for one-eighth mile within the thickly settled part of the city, the jury should find for the defendant if they find that the rate of speed was not greater than was reasonable and proper having regard to the traffic, the use of the way and the safety of the public."

A. C. Webber, Asst. Dist. Atty., for the Commonwealth. Thibodeau & Ellsworth, for defendant.

HAMMOND, J. [1] The offense described in St. 1909, c. 534, § 16, and charged in the complaint against the defendant, was that of operating an automobile "at a rate of speed greater than was reasonable and proper, having regard to traffic and the use of the way and the safety of the public"; and this was the only offense. Of course the burden was upon the commonwealth to prove his guilt.

The section in question, after creating the offense, goes on to provide that in certain localities therein described "a speed exceeding twenty miles per hour for the distance of a quarter of a mile" shall be "prima facie evidence of a rate of speed greater than is reasonable and proper," and contains a similar provision as to a rate of speed "exceeding fifteen miles per hour for the distance of one-eighth of a mile" in certain other localities. Shortly stated the statute forbids the running of an automobile at a rate of speed greater than is reasonable and proper, and declares what rates of speed shall be prima facie evidence of the rate forbidden. It may be remarked in passing that the earlier statutes expressly prohibited the running of an automobile at a rate of speed exceeding a certain number of miles per hour therein specified (St. 1902, c. 315, § 1; St. 1903, c. 473, § 8); but a different standard of speed was adopted in St. 1906, c. 412, re-enacted in the present statute.

[2] The real question in all these cases now is whether the speed is greater than was reasonable and proper, having regard to traffic and the use of the way and the safety of the public, the burden being on the common-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

wealth to show that it was. If the speed was such as to make out a prima facie case for the prosecution, still the burden does not change. The jury are to give due weight to the prima facie case taken in connection with the other circumstances disclosed by the testimony whether coming from witnesses called by the government or by the defendant, and if they are satisfied that the speed is greater than was reasonable and proper, having regard to traffic and the use of the way and the safety of the public, they should convict the defendant; otherwise they should acquit him. And hence in some cases a defendant may be convicted even if he has not exceeded the rate named in the prima facie clauses of the statute, and in some he may be acquitted even though he may have exceeded it.

[3] The first and third instructions requested by the defendant contained a correct statement of the law so far as respected the offense with which he was charged, and the defendant was entitled to have them given in substance. The court refused to give them, but upon this point, after stating that there was no controversy but that the place where the accident occurred was in the thickly settled portion of the city of Boston, instructed the jury as follows: "If speed greater than 15 miles an hour is maintained in such a part of the city, then the person is guilty of an offense—unless what? That is to say, if the government has made that out, it has made out its case—unless what? Unless the condition at the time required a greater speed. Now is there any evidence here showing that a greater speed would be required? You can see that a rate of speed might be maintained under certain circumstances which would be essential for the safety of the people in the automobile, or for the safety of other people in the street. Conditions might arise under which a very high rate of speed would necessarily be maintained for a short time, or short distance, to avoid danger. Unless something of that kind appears, a rate higher than 15 miles an hour under this statute is an offense. If you are satisfied from the evidence that the speed exceeded 15 miles an hour, you must find a verdict for the government, unless you are satisfied there were special reasons existing at the time which required a greater speed." And again, near the end of the charge, the following language is used: "The question is essentially this simple thing: Are you satisfied by this evidence beyond a reasonable doubt that the defendant was driving his car at a rate of speed exceeding 15 miles per hour in a thickly settled part of the city of Boston where there were intersecting ways and for a distance of an eighth of a mile? If he was, and there were no circumstances for the safety of the public or traffic in the road, or special conditions requiring a greater rate of

speed, you should return a verdict of guilty. If you are not satisfied of that beyond a reasonable doubt, or are satisfied that there were special circumstances requiring a higher rate of speed, then he is entitled to a verdict of not guilty."

It is manifest that these instructions are not in accordance with the rulings requested by the defendant, which, as we have said, correctly stated the law. Upon this point the defendant's exceptions must be sustained.

[4] The second instruction was rightly refused. The first section of St. 1909, c. 534, contains this provision: "Intersecting way" shall mean any way which joins another at an angle, whether or not it crosses the other." This provision is found in the section which defines the meanings of various terms thereafter used in the subsequent parts of the statute and, notwithstanding the provisions of the thirty-third section of the statute, must be held to be applicable to the sixteenth section whenever the latter went into effect.

Exceptions sustained.

(209 Mass. 217.)

RIVERBANK IMPROVEMENT CO. et al. v.
BANCROFT et al.

(Supreme Judicial Court of Massachusetts.
Suffolk. May 22, 1911.)

1. DEEDS (§ 170*)—RESTRICTIONS—CONSTRUCTION—STATUTES CONSTRUED AS A PART.

A restriction as to the use of real property, contained in a deed dated after Rev. Laws, c. 134, § 20, is to be construed as if the limitation of restrictions as to the use of real property to a term of 30 years had been expressly made a part thereof.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 535, 536; Dec. Dig. § 170.*]

2. DEEDS (§ 171*)—RESTRICTIONS—CONSTRUCTION WITH REFERENCE TO TIME WHEN IMPOSED.

The restrictions in a deed as to the use of real property in a fine residence district, limiting buildings to dwellings and the usual outbuildings appurtenant thereto, and prohibiting the construction of any stable, are to be construed as including only such buildings as were fairly indicated by the respective words at that time.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 537-542; Dec. Dig. § 171.*]

3. DEEDS (§ 171*)—RESTRICTION—CONTRACTS—"STABLE"—GARAGE.

A restriction in a deed of property in a fine improved residence district, intended for the benefit of the grantor and his grantees, declared that "no stable of any kind, private or otherwise, shall be erected or maintained on any portion of said land," and that no building erected on the land should be used for any manufacturing or mechanical purpose. Held, that a building on such property, used by defendants as a garage for their own automobiles, was not a "stable," within the restriction.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 537-542; Dec. Dig. § 171.*]

For other definitions, see Words and Phrases, vol. 7, p. 6620.]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes

4. DEEDS (§ 171*)—RESTRICTIONS—"USUAL OUTBUILDINGS APPURTENANT THERETO"—GARAGE.

A deed of property intended for an improved residence district contained a restriction, for the benefit of the grantor and his grantees, that "no buildings, other than dwelling houses * * * with the usual outbuildings appurtenant thereto," should be erected or used upon said land. *Held* that, construing the restriction with reference to the meaning of the language at the date of the deed, a garage or storehouse for automobiles was not of the kind described as the "usual outbuildings appurtenant thereto," and that its erection was a violation of the restriction.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 537-542; Dec. Dig. § 171.*]

5. DEEDS (§ 171*)—RESTRICTIONS—VALIDITY.

Restrictions in a deed of property intended for an improved residence district, that "no buildings other than dwelling houses, * * * with the usual outbuildings appurtenant thereto, shall be erected, placed or used upon the said land," and that no stable of any kind, private or otherwise, shall be erected or maintained on any portion of said land, are not invalid as against public policy.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 537-542; Dec. Dig. § 171.*]

6. DEEDS (§ 173*)—RESTRICTIONS—PERSONS ENTITLED TO BENEFIT OF RESTRICTION.

Where deeds of land intended for a fine residence district contained a restriction as to the use thereof, declared to be for the benefit of the grantor and his grantees, the owners, an owner of land governed by such restriction, and his grantor, aiding their enforcement for the benefit of the grantees, are entitled to maintain a bill for relief from a violation of such restriction.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. § 543; Dec. Dig. § 173.*]

7. DEEDS (§ 176*)—PLEADING—EVIDENCE—BREACH OF RESTRICTION.

Under a bill for relief from a violation of restrictions as to the use of land by maintaining a garage, evidence that it had been used as a place to keep vegetables, windows, etc., and to freeze ice cream, and as a storeroom for barrels, etc., whether contradictory to the pleading or not, may be properly considered on the question of the kind of relief.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. § 546; Dec. Dig. § 176.*]

8. INJUNCTION (§ 62*)—RESTRICTION AS TO USE OF PROPERTY—PLEADINGS—RELIEF FROM VIOLATION.

Where defendant, in violation of a restriction contained in a deed, has used property in an improved residence district for a garage, he may be enjoined, at the suit of those entitled to the benefits of the restriction, from continuing the illegal use and ordered to remove the building so used, unless it be used for a purpose not inconsistent with the restriction.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 124-127; Dec. Dig. § 62.*]

Bill by the Riverbank Improvement Company and others against Charles F. Bancroft and others to restrain a violation of a restriction contained in a deed. Decree for plaintiffs, forbidding the use of a building as a garage in violation of the restriction, and for its removal unless used for a purpose not inconsistent with the restriction.

H. M. Williams and Theo. E. Stevenson, for plaintiffs. Currier, Rollins, Young & Pillsbury and R. Y. Fitzgerald, for defendants.

HAMMOND, J. The physical facts as to the size, situation and construction of the building in question are not in dispute, and the defendants admit that the building is being used by them as a garage for their own automobiles and that unless restrained by legal process they intend to continue such use. The main question on the merits is whether in the building itself or in such a use of it there is anything inconsistent with any of the restrictions to which the land is subject.

Those restrictions were imposed in the deed of the Riverbank Improvement Company, hereinafter called the company, to George Wheatland (under whom the defendants claim by mesne conveyances), dated August 11, 1899, and duly recorded; and so far as material to the question before us they are as follows:

"First. No buildings other than dwelling houses (which word shall include club houses), with the usual outbuildings appurtenant thereto, shall be erected, placed, or used upon the said land. Such outbuildings shall be erected only on the southerly side of said twenty-foot street or way, and no portion of said outbuildings shall be higher than eight feet above the grade of the street in front of the premises hereby conveyed. No stable of any kind, private or otherwise, shall be erected or maintained on any portions of said land. * * *

"Second. No building erected on said land shall be used for any manufacturing * * * or mechanical purposes.

"Third. No building, except the customary outhouses to dwellings, shall be erected or placed upon the said land, the exterior walls of which shall be composed of any other material than brick, stone or iron. * * *

"Fifth. No buildings, other than the usual outbuildings appurtenant to dwelling houses, shall be erected or placed on said land northerly of a line parallel with and distant seventy feet north from the building line established in the [fourth] restriction."

The plaintiffs contend that the first restriction has been violated in two respects, namely, first, that the building is not of the kind described as the "usual outbuildings appurtenant" to a dwelling house, and, second, that it is a stable within the meaning of that word as used in the restriction.

It becomes necessary to look into the deed and the circumstances under which it was made. About 1890 the plaintiff company acquired title to a large parcel of land and laid it out in building lots. Block B, of which the land conveyed in the above mentioned deed to Wheatland was a part, contained 28

lots. Restrictions like those in this deed had been imposed by the company in the deeds of these lots except that in the deed of lot No. 1, which was the first lot conveyed, the clause prohibiting the erection or maintenance of a stable does not appear. The deeds were all in one standard form, and each contained a recital that the restrictions "are intended and shall be for the benefit of the grantor and of the owner or owners from time to time of all the land aforesaid constituting said Block B shown on said plan, and none other." It is apparent from the form of the deeds and from the other facts shown, that the company intended that this territory, situated upon the south bank of the Charles river and at some distance from the business section of the city, should be a fine residential district, and that it took great pains to frame the deeds in a manner calculated to make this intent effectual not only for the present but also for the future. This was to be a place for dwelling houses and the "usual outbuildings appurtenant" thereto, and (with the exception of club houses) for them alone.

[1, 2] Under the law existing at the time those restrictions were imposed they were to have force only for 30 years. Rev. Laws, c. 134, § 20. We are dealing therefore not with restrictions unlimited as to use, but limited to 30 years, and the deed is to be construed as if the term of 30 years had been expressly inserted therein. The restrictions are to be interpreted in the light of the circumstances existing at the time they were imposed; and the words "usual outbuildings appurtenant" (to dwelling houses) as well as the word "stable" are to be construed as including only such buildings as were fairly indicated by the respective words at that time.

Under this rule of interpretation is this building a stable? In Webster's Dictionary, edition of 1864, a stable is defined as "a house or building for horses or other beasts"; in Webster's edition of 1903, as "a house, shed or building for beasts to lodge and feed in, especially, a building or apartment with stalls for horses, as a horse stable or cow stable"; and in the edition of 1910 in practically the same language; in the Century Dictionary, as "a building or an inclosure in which horses, cattle, and other domestic animals are lodged, and which is furnished with stalls, troughs, racks, and bins to contain their food and necessary equipments; in a restricted sense, such a building for horses and cows only; on a still narrower and now the most usual sense, such a building for horses only"; in the Standard Dictionary, edition of 1895, as a "building or part of a building set apart for lodging and feeding horses or cattle, especially one fitted with stalls, fastenings, etc., also often for storing hay or putting up vehicles; sometimes specifically carriage-stable, cow-stable, etc." In

36 Cyc. 812, and in 26 Am. & Eng. Encyc. of Law, page 154, it is defined as "a house, shed or building for beasts to lodge and feed in." See also Dugle v. State, 100 Ind. 259.

[3] While it is true, as stated by the plaintiffs, that in the Standard Dictionary, editions of 1895 and 1908, a stable is defined as a building often used for putting up vehicles, and that in the Standard and Century Dictionaries a garage is defined as "a stable for motor cars" and "a building, as a stable, for the storing of automobiles or other horseless vehicles," we nevertheless think that the word "stable" as commonly used and understood at the time of the imposition of those restrictions, especially when contrasted with other buildings usually appurtenant to a dwelling house, carried the idea not only of a building but also the presence of domestic animals like horses or cattle as its occupants, and that such is the meaning of this word in the restriction. Accordingly it must be held that the building is not a stable within the meaning of the restriction. And this is so even if, as argued by the plaintiffs, a garage is as objectionable as a stable.

[4] The next question is whether the building is of the kind which was usually appurtenant to dwelling houses at the time the restriction was imposed. If it is not, then its erection was in violation of the restriction. It is to be borne in mind that we are dealing with a proposed residential district of a high grade, and that this district is not in a country town, but in a city, a district to be divided into building lots and to be covered substantially with dwelling houses. Whatever buildings were usually needed and occupied as aids to the use of the dwelling houses might be erected and occupied as such aids. At the time these restrictions were put on, the garage was not the kind of building usually appurtenant to a dwelling house. Its erection was a violation of the restriction.

[5] It is urged by the defendants that the restriction is against public policy, and that consequently a court of equity will not lend its aid in its enforcement; and they cite some cases where, because the restrictions have been against public policy or were whimsical and tended to place an unreasonable hindrance to the use of land, equity has refused to interfere. But this case is clearly distinguishable. The automobile is a large machine, and it is noisy, especially when starting. The odor of gasoline by which many of them are propelled is penetrating and disagreeable; and there can be no doubt that the noises and odors attendant upon the care and action of such machines, especially when stored so near to dwelling houses as in this case, may be annoying to a person desiring a quiet home. If, in these days of noise and bulging, intrusive activities, a man who has been in confusion all day desires to have a home where, awake or asleep, he can pass

his hours in quiet and repose, there is no reason of public policy why, if he can get it, he should not have it. Nor is there any reason why provision should not be made for a collection of such homes in close proximity to each other. No citation of authorities is needed to show that in this commonwealth such a restriction is reasonable and not against public policy.

[6] It is further urged that the plaintiffs have shown no right to prosecute this bill. But this position is untenable. Pillsbury, one of the plaintiffs, is an owner of land for the benefit of which the restrictions were imposed, and the company which imposed the restrictions may, even if no longer an owner, appear to aid in their enforcement for the benefit of their grantees.

[7] The final question respects the relief to be granted. It is urged by the defendants that the building itself does not in any way conflict with the restrictions; that neither in size, location nor in the materials of which it is constructed does it violate the restrictions, and that the only violation consists in its use. And hence they say that the decree should not order the removal of the building, but only forbid its use as a garage. While it appeared that the building was erected principally for the automobile, yet it also appeared that it has been "used as a place to keep vegetables, double windows, blinds, and other minor household things, and was so intended to be used at the time of its erection"; that "it has also been used as a place [in which] to freeze ice cream and do other small household things"; and that "during the summer barrels and other things about the yard are locked up there." Whether or not, as claimed by the plaintiffs, these facts are contradictory of the pleadings, there can be no doubt that they may be properly taken into consideration on the question of the kind of relief. It further appears that the building is not a nuisance and does not obstruct the view from the windows of the houses in Block B.

[8] Even if the defendants should be ordered to take this building down upon the ground that it was originally constructed for a use inconsistent with the restriction, it is manifest that they might immediately erect one exactly its duplicate for the purposes for which, as above stated, it was intended to be used in part and has been so used. But it is to be noted that the restriction forbade the erection of the building for a garage as well as its use for that purpose.

Under these circumstances we think justice will be done by a decree which will simply compel the defendants to cease the illegal use, and further to remove the building unless it be used for a purpose not inconsistent with the restriction. There should be a decree for the plaintiffs forbidding the use of this building as a garage or a store-

house for an automobile, and for its removal unless it be used for a purpose not inconsistent with the restriction; and for costs. So ordered.

(209 Mass. 8)

LAVIN v. JONES et al.

(Supreme Judicial Court of Massachusetts.
Suffolk. May 18, 1911.)MASTER AND SERVANT (§ 114*)—INJURY TO
SERVANT—DEFECTIVE PREMISES.

An employé was called on to use a plank as a way of entrance into and exit from a house. The employer took no pains to see whether the plank was suitable, and the employé, while in the exercise of due care, was injured by defects in it. *Held*, that the employer was guilty of actionable negligence.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 200; Dec. Dig. § 114.*]

Exceptions from Superior Court, Suffolk County; Edgar J. Sherman, Judge.

Action by James Lavin against Leander E. H. Jones and another. There was a verdict for plaintiff, and defendants bring exceptions. Overruled.

J. P. Magenis and J. Wentworth, for plaintiff. J. J. Mansfield and J. J. Gearin, for defendants.

HAMMOND, J. This case is close; but on the evidence we think the jury might legally find that the defendants hired the plaintiff to work in or about the house, that in the course of his employment he would be called upon to use the plank in question as a way of entrance into and exit from the house and that the defendants had impliedly adopted the plank as fit for that purpose and expected and intended that the plaintiff should so use it. They might further find that the defendants so expecting and intending took no pains whatever to see whether the plank was suitable for that purpose; that the plank was not suitable, and in failing to take proper care in this respect the defendants were negligent in the performance of a duty they owed to the plaintiff, that the plaintiff was in the exercise of due care, and that the accident was attributable solely to this negligence of the defendants.

Upon such findings there was a case for the plaintiff.

Exceptions overruled.

(209 Mass. 199)

SHAWMUT COMMERCIAL PAPER CO. v.
BRIGHAM et al.(Supreme Judicial Court of Massachusetts.
Suffolk. May 18, 1911.)

EXCEPTIONS, BILL OF (§ 48*)—NOTICE OF FILING—SUFFICIENCY.

Under Superior Court Rules 1906, rules 27, 44, providing that a notice required by the rules shall be in writing, and that exceptions shall be filed and notice thereof given to the ad-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes

verse party, the giving of an oral notice to counsel of the adverse party on the day of the filing of a bill of exceptions, and the furnishing him on the same day of an unsigned copy of the bill, do not amount to a written notice, and the bill is properly dismissed.

[Ed. Note.—For other cases, see *Exceptions*, Bill of, Cent. Dig. § 77; Dec. Dig. § 48.*]

Exceptions from Superior Court, Suffolk County; J. B. Richardson, Judge.

Action by the Shawmut Commercial Paper Company against Percy H. Brigham and another. There was a verdict for plaintiff, and defendants brought exceptions, and the court dismissed the bill of exceptions, because not filed in time, and defendants except. Exceptions overruled.

C. W. Ford and E. M. Schwarzenberg, for plaintiff. R. B. Young and E. I. Smith, for defendants.

MORTON, J. This is an action to recover upon a promissory note. The plaintiff had a verdict and the defendant alleged exceptions. The time for filing the exceptions was extended and on the last day a bill of exceptions was duly filed. Two days after the plaintiff moved to dismiss them on the ground that the defendants had given it no sufficient notice of the filing of the same. The court ruled as matter of law that the motion should be allowed and dismissed the exceptions. The defendants duly excepted, and the question is whether as matter of law the motion was rightly allowed.

Rule 44 of the Superior Court Rules, established 1906, provides that "exceptions alleged * * * in a civil case shall be reduced to writing and filed, and notice thereof given to the adverse party. * * * Rule 27 provides that "a notice required by or given in pursuance of these rules shall be in writing. * * * The only notice given of the filing of the exceptions was an oral notice to counsel for the plaintiff on the day of the filing and the furnishing him on the same day with an unsigned copy of the bill of exceptions. This plainly did not constitute a written notice. *Broomfield v. Sheehan*, 190 Mass. 585, 77 N. E. 525. There was nothing which constituted a waiver or could be found to constitute a waiver of the written notice.

Exceptions overruled.

(209 Mass. 208)

BERENSON v. BUTCHER et al.

(Supreme Judicial Court of Massachusetts. Suffolk. May 19, 1911.)

1. MASTER AND SERVANT (§ 278*)—ACTIONS FOR INJURIES—VERDICT AND FINDINGS—SUFFICIENCY.

In an action for injuries to a servant, evidence held sufficient to support a finding that a horse furnished by the defendants for use by the servant was vicious, and that its viciousness was known to defendants.

[Ed. Note.—For other cases, see *Master and Servant*, Dec. Dig. § 278.*]

2. MASTER AND SERVANT (§ 109*)—MASTER'S LIABILITY—HORSES AND VEHICLES.

Where a master furnishes to a servant for use in his employment a horse known to be vicious, without any warning to the servant as to the character of horse, there is negligence on the part of the master, and for an injury to the servant proximately caused thereby he is liable.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 204; Dec. Dig. § 109.*]

3. MASTER AND SERVANT (§ 289*)—ACTION FOR INJURIES—QUESTION FOR JURY—CONTRIBUTORY NEGLIGENCE OF SERVANT INJURED.

In an action against a master for injuries to a servant, resulting in death, held, that the question whether the deceased was in the exercise of due care was for the jury.

[Ed. Note.—For other cases, see *Master and Servant*, Dec. Dig. § 289.*]

4. MASTER AND SERVANT (§ 288*)—ACTION FOR INJURIES—QUESTION FOR JURY—ASSUMPTION OF RISK.

In an action against a master for injuries to a servant, resulting in death, held, that the question whether the deceased had assumed the risk was for the jury.

[Ed. Note.—For other cases, see *Master and Servant*, Dec. Dig. § 288.*]

5. MASTER AND SERVANT (§ 129*)—PROXIMATE CAUSE—NEGLECT OF THIRD PERSON—JOINT LIABILITY.

A master, liable for an injury to a servant, in consequence of having furnished to the servant a vicious horse for use in his employment, is not relieved from negligence because the negligence of another contributed to the servant's injury; that being a case of joint liability.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 257; Dec. Dig. § 129.*]

Exceptions from Superior Court, Suffolk County; Robert O. Harris, Judge.

Action by Pauline Berenson, administratrix, against Frank Butcher and others, executors. Judgment for plaintiff, and defendants bring exceptions. Exceptions overruled.

Daniel H. Coakley, Bernard Berenson, and Francis P. Garland, for plaintiff. Nathaniel N. Jones, for defendants.

MORTON, J. [1] There was evidence tending to show that the horse was vicious and was known to the defendants to be so. It could have been found that the horse had run away at least twice before while the defendants had it, under circumstances similar to those in this case; that it was nervous and liable to jump; and that the stableman had had to hold it for men to get into the team. One of the witnesses testified, without objection, that he was afraid of it, and another, with whom the horse ran away, testified that he told Mr. Brereton, one of the defendants, since deceased, that it had run away and he wanted to change it. The same witness also testified that he did not regard the horse as safe. In addition to this the administratrix, the widow of the deceased, testified that in an interview with Mr. Brereton after the accident he spoke of the horse as "a bad horse; a crazy horse;" and said that he had told Mr. Butcher, another

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes

one of the defendants, also since deceased, that they "ought to get rid of the horse." This evidence warranted a finding that the horse was vicious and that the defendants knew it.

[2] It was undisputed that the plaintiffs' intestate was in the employ of the defendants and that the horse was furnished to him by them to be used in their business. There was evidence tending to show that he did not know that the horse was vicious and that the defendants gave him no warning or information as to the character of the horse. Their failure to do so could have been found to constitute negligence on their part (*Lynch v. Richardson*, 163 Mass. 160, 39 N. E. 801, 47 Am. St. Rep. 444), and to have been the proximate cause of the accident.

[3.4] Whether, taking all of the circumstances into account, the deceased was in the exercise of due care, and whether he assumed the risk of jumping from the wagon as he did were plainly questions for the jury. *Warren v. Boston & Maine R. R.*, 163 Mass. 484, 40 N. E. 895; *Nisbet v. Wells*, 76 S. W. 120, 25 Ky. Law Rep. 511.

[5] There was nothing to show that Appleton knew that it was dangerous to attempt to feed the horse on the road by taking the bridle off, and even if he did know it and his negligence contributed to the accident the defendants would not be relieved thereby. It would be simply a case of joint tort-feasors.

Exceptions overruled.

(209 Mass. 184)

LOUGEE et al. v. WILKIE et al.

(Supreme Judicial Court of Massachusetts.
Suffolk. May 19, 1911.)

1. WILLS (§ 712*)—RIGHTS OF LEGATEES—DEVISE TO ATTESTING WITNESS—"BENEFICIAL LEGACY."

Under Rev. Laws, c. 135, § 3, which provides that a beneficial devise or legacy to a subscribing witness shall be void, unless there are three other competent subscribing witnesses to such will, a legacy to one of the three witnesses to a codicil of all money left by testatrix to another legatee, after the death of that legatee and the payment of her funeral expenses, etc., is a "beneficial legacy," and void.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1693; Dec. Dig. § 712.*]

For other definitions, see Words and Phrases, vol. 1, p. 748.]

2. WILLS (§ 712*)—RIGHTS OF LEGATEE—DEVISE TO ATTESTING WITNESS—DEVISE FOR MAINTENANCE—BENEFICIAL LEGACY.

Under Rev. Laws, c. 135, § 3, a legacy of money to one of three subscribing witnesses to a codicil, to be "held in trust by my executors, the income to be paid her as they think best for her support, the principal not to be used unless necessary," is a "beneficial legacy," and void.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1694; Dec. Dig. § 712.*]

3. WILLS (§ 476*)—CONSTRUCTION—WILL AND CODICIL.

In a construction of a codicil, to determine whether a legacy therein is invalid as a bene-

ficial legacy, the legacy is to be considered by itself, without reference to the fact that it might be of less value than that contained in the original will would be, should such will go into effect unchanged.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 997; Dec. Dig. § 476.*]

Petition by Amanda M. Lougee and others, as executors, against Annie E. H. Wilkie and others, for instructions as to the disposition of personal property under a will. Property ordered to be equally divided between the defendant legatees.

Henry A. Smith, for appellants. Samuel H. Hollis, for respondents.

KNOWLTON, C. J. This is a petition filed in the probate court for instructions as to the disposition of the property now remaining in the hands of the petitioners as executors of the will of Martha J. Webster, late of Boston, deceased. By the ninth clause of the will all the residue of the estate is given to such of four persons named, as shall be living at the time of the probate of the will. Of these persons, Katie J. Gerry and Annie E. H. Wilkie were the only ones living at the time referred to. If there were no other provision appearing upon the subject, the residue would be divided equally between them.

[1] The second codicil of the will of the testatrix contains this clause: "All money left by me to my sister, Annie E. H. Wilkie, shall be held in trust by my executors, the income to be paid her as they think best, for her support, the principal not to be used unless necessary. All money left her by me, after her death shall go to Katherine J. Gerry, after her funeral expenses are paid and her name carved on the monument and a marker placed on her grave." Two of the three witnesses to this codicil were Annie E. H. Wilkie and Katherine J. Gerry. R. L. c. 135, § 3, is as follows: "A beneficial device or legacy which is made in a will to a subscribing witness thereto, or to the husband or wife of such witness, shall be void unless there are three other competent subscribing witnesses to such will." The question is as to each of the two legacies in this clause, whether it is a beneficial legacy within the meaning of the statute. As to the legacy to Katherine J. Gerry, no question is made. It is beneficial, and therefore void.

[2] The legacy to Annie E. H. Wilkie is beneficial in its character. It provides for her an income for her support, in the discretion of the executors, including, if need be, the principal sum which it was intended that she should take under the residuary clause when the original will was made. [3] The question arises whether this falls short of being a beneficial legacy because it may be of less value to her than that contained in the original will would be, if that were left to go into effect unchanged. We are of opinion that this legacy is to be con-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes

sidered by itself, without reference to the fact that the testatrix had contemplated her receiving another legacy under a will which had not taken effect, but was revocable at any time prior to the death of the testatrix. This provision purported to give and secure to the legatee, something valuable. Whether it was less valuable or more valuable than something else that she might have received if a former will was left unchanged, was immaterial. It was a beneficial legacy which came within the terms of the statute, and was void.

The result is that the provision of the original will remains unchanged by this provision, and the property in the hands of the executors is to be divided between these two legatees in equal shares.

So ordered.

(209 Mass. 13)

MONAHAN v. WILLIAM W. BABCOCK CO.

(Supreme Judicial Court of Massachusetts.
Suffolk. May 18, 1911.)

CONTRACTS (§ 221*)—BUILDING CONTRACTS—CONSTRUCTION—LIABILITY OF PARTIES—PAYMENT.

A contract between a lender of money on building construction mortgages and a builder provided that the plaster payment should be due when the building should be plastered and skimmed and all windows in and blinds hung. The lender accepted an order to pay for plastering and skimming, and agreed to pay it when the plaster payment should become due, as per construction agreement. The lender refused to pay, on the ground that only general window frames without sashes or glass had been put in, and that windows fitted with sashes and glass ready for use were intended by the phrase "all windows in." Held, that the lender was not liable on his conditional acceptance, because the plaster payment was not due under the contract.

[Ed. Note.—For other cases, see Contracts, Dec. Dig. § 221.*]

Exceptions from Superior Court, Suffolk County; Marcus Morton, Judge.

Action by Michael J. Monahan against the William W. Babcock Company. There was a verdict for defendant, and plaintiff brings exceptions. Overruled.

This is an action of contract, in which plaintiff seeks to recover \$496 and interest on an order drawn on defendant, a corporation engaged in lending money on construction mortgages. The order read as follows: "Please pay to Michael J. Monahan \$496 for plastering and skimming house on lot A * * * out of the plaster payment on your mortgage loan * * * when the same shall become due." The acceptance of the order was as follows: "We accept the above order and agree to pay the same on the following conditions only: When the plaster payment shall become due on lot A * * * as per construction mortgage agreement * * * we will pay Michael J. Monahan the sum of \$496."

Jos. F., Jas. E. & D. T. O'Connell, for plaintiff. Bates, Nay & Abbott, for defendant.

HAMMOND, J. The acceptance of the draft was conditional and the condition was that the plaster payment should be due. Did that payment ever become due? By the contract between the builder and the defendant it was to be due "when said building shall be plastered and skimmed and all windows in and blinds hung."

All that the builder ever did as to the windows was to make the openings and put in the general frames without the sashes or glass. The plaintiff contended and introduced evidence in support of the contention that windows were "in" when the holes were made and the general frames were inserted. But there was some conflict in the evidence. The defendant did not seem to rely upon the fact that the blinds were not hung, because awnings were to be used and blinds in such case would not be needed, but insisted that the part of the contract which related to the windows had not been performed.

The court before whom the case was tried without a jury found as a fact that the specified contract had not been complied with, and found generally for the defendant; and the case is before us upon the plaintiff's exceptions to those findings.

The house to be constructed was situated in Brookline, and we understand was to be a dwelling house. It is unnecessary to recite the evidence in detail. It is sufficient to say that, whatever may be the meaning of the word "window" in certain connections, the evidence warranted a finding that the phrase "all windows in," when taken in connection with the phrase "blinds hung," and all being a part of a clause in the contract for the erection and completion of a dwelling house, meant windows fitted with sashes and glass ready for use as completed windows.

Exceptions overruled.

(309 Mass. 152)

BUCKLEY v. DOW PORTABLE ELECTRIC CO.

(Supreme Judicial Court of Massachusetts.
Norfolk. May 19, 1911.)

MASTER AND SERVANT (§ 190*)—INJURIES TO SERVANT—SUPERINTENDENT.

Where plaintiff's intestate asked defendant's superintendent, D., if he was going over to the old factory, and, on receiving an affirmative reply, said he would go along, and D. assented, and drove the automobile, and as it was passing around a curve plaintiff's intestate was thrown out and injured, assuming that D. might have been found to be a superintendent, within the meaning of the employer's liability act (Rev. Laws, c. 106, § 71; St. 1909, c. 514, § 127), the negligent act complained of must have been performed in exercise of the superintendence, in order that defendant may be liable, and the act

of driving the car was not superintendence, but manual labor, the causal negligence not lying in determining to take the automobile, but in the way it was run, and this resting on the personal volition of the driver; and in doing this D. was merely a fellow servant with intestate, and not one in authority over him, and the defendant is not liable, under St. 1909, c. 236.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 190.*]

Exceptions from Superior Court, Norfolk County.

Action by Dinah Buckley, administratrix, against the Dow Portable Electric Company. Case transferred from the superior court on plaintiff's exceptions. Judgment for defendant.

Chas. H. Sprague and Everett W. Crawford, for plaintiff. John W. McAnarney, for defendant.

RUGG, J. This is an action under the employer's liability act (Rev. Laws, c. 106, § 71; St. 1909, c. 514, § 127) to recover for the death of the plaintiff's intestate while at work for the defendant alleged to have been caused by the negligence of Alvah Dow, a superintendent of the defendant. The only negligence claimed was the careless operation and overspeeding of an automobile.

The circumstances of the accident were these: The defendant was moving from one factory to another, and for this purpose had used an automobile truck. The plaintiff's intestate, being at the new factory and desiring to go to the old, asked Alvah Dow if he was going over, and on receiving an affirmative reply said he would go along too. Dow assented. Four persons, so far as appears without direction from anybody, got on the car, although there were only two seats, and some baskets were in it, upon one of which the plaintiff's intestate seated himself. Dow drove the automobile. As it was passing rapidly around a curve on the journey to the old factory over a rough, bad place in the highway near a railroad track, one wheel struck a projecting water gate, the plaintiff's intestate was thrown and received mortal injuries. Either the speed of the automobile, or the failure to avoid obstructions in the way, or both, contributed to the accident. Assuming that Dow might have been found to be a superintendent within the meaning of the employer's liability act, the negligent act complained of must have been performed in the exercise of superintendence in order that the defendant may be liable. The driving of the car was not superintendence, but manual labor. Although requiring a considerable degree of skill, discretion and alertness, it involved no element of supervision or overseeing of others. If the direction, which Dow gave to himself to run the machine from one factory to the other, be treated as an act of superintendence, the details of the execution of the order as

to speed from moment to moment, precise course upon the roadway and avoidance of projections or other obstacles were necessarily within the control of the operator of the car in the performance of his duty as operator. The causal negligence was not in determining to take the automobile, but in the way and place in which it was run. This rested upon the independent personal volition of the driver. In doing this Dow was merely a fellow servant with the plaintiff's intestate, and not one in authority over him or any one else. Under the law the defendant is not responsible in damages for this conduct so far as it affects a fellow laborer. The case falls within the class illustrated by *Sarrisin v. S. Slater & Son Co.*, 203 Mass. 258, 89 N. E. 529; *Brittain v. West End St. Ry.*, 168 Mass. 10, 46 N. E. 111; *Riou v. Rockport Granite Co.*, 171 Mass. 162, 50 N. E. 525; *Flemming v. Elston*, 171 Mass. 187, 50 N. E. 531; *Fitzgerald v. Boston & Albany R. R.*, 156 Mass. 293, 31 N. E. 7; *Whitaker v. Bent*, 167 Mass. 588, 46 N. E. 121; *McPhee v. New Eng. Structural Co.*, 188 Mass. 141-144, 74 N. E. 303; *Hoffman v. Holt*, 186 Mass. 572, 72 N. E. 87; and *Joseph v. Geo. O. Whitney Co.*, 177 Mass. 176, 58 N. E. 639. *Mooney v. B. F. Smith Co.*, 206 Mass. 270, 91 N. E. 125, is distinguishable in its facts.

There appears to have been a full and fair trial, and, as no ground of liability on the part of the defendant is shown, under the terms of the exceptions and St. 1909, c. 236, judgment is to be entered for the defendant.

So ordered.

(209 Mass. 131)

PARNALL v. PAINE et al.

(Supreme Judicial Court of Massachusetts.
Norfolk. May 19, 1911.)

BROKERS (§ 38*)—CORPORATE STOCK—CONVERSION.

The court found that plaintiff, having a substantial balance to his credit in the hands of B. & Co., stockbrokers in New York, directed them to subscribe for 500 shares of the stock of a copper company at \$8 per share; that B. & Co., having an arrangement for the exchange of business with defendants, brokers in Boston, the accounts being separately kept, directed them to make the subscription, which they did, charging B. & Co.'s account with \$4,000 and crediting the same with the subscription, receiving temporary receipts for the money paid, to be surrendered in exchange for the stock when issued; and that thereafter B. & Co. directed their Boston bankers to pay defendants \$5,000 on account, which was done, this being more than the value of plaintiff's stock so purchased, but much less than the debit balance of defendants' account with B. & Co., who charged plaintiff's account with the price of the stock and closed the account by sending him a check for the balance due; and, becoming insolvent before receiving the stock from defendants, the latter sold the stock as the property of B. & Co. and credited the proceeds against their account. Held that, the evidence authorizing a finding of such facts in an action by plaintiff against defendants for

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes

conversion of the stock, a finding for plaintiff was justified.

[Ed. Note.—For other cases, see *Brokers*, Dec. Dig. § 38.*]

Report from Superior Court, Norfolk County; John H. Hardy, Judge.

Action by Christopher G. Parnall against William A. Paine and others. On report to the Supreme Judicial Court. Judgment for plaintiff.

Bates, Nay & Abbott, for plaintiff. C. E. Hellier and W. P. Everts, for defendants Paine, Webber & Co.

KNOWLTON, C. J. This case was heard by a judge without a jury and there was a finding for the plaintiff upon a count for the conversion of 500 shares of stock of the North Lake Copper Company. It is reported upon the question whether there was any evidence to warrant the finding.

The plaintiff, a resident of Jackson, Mich., had an account with A. O. Brown & Co., stockbrokers, doing business in New York City, upon which there was a substantial balance to his credit. Through their branch office in Detroit, Mich., where he had been accustomed to do business with them, he ordered them to subscribe for 500 shares of the capital stock of the North Lake Mining Company on his account. There was an arrangement between this firm and the defendants, who were stockbrokers in Boston, that the defendants should do all the business of A. O. Brown & Co. in Boston, and A. O. Brown & Co. should do all the defendants' business in New York. A. O. Brown & Co. sent an order to the defendants to make this subscription at the office of the corporation in Boston, and after getting a response that the subscription had been made and that the account of A. O. Brown & Co. had been charged \$4,000 on account of it, they charged this amount to the plaintiff and credited his account with the 400 shares of stock, and closed the account by sending him a check for the balance due him. Previously, on the same day, they had sent a telegram to the defendants, which was duly received, but not answered, inquiring whether the \$4,000 paid for the stock in full. Later, on the same day, they sent another telegram to the defendants, asking to have the stock transferred to the plaintiff and shipped. The stock was subscribed for at \$8 per share and was paid for in full by the defendants, who received temporary receipts for their payment, which were to be surrendered and exchanged for stock certificates; but this exchange could not be made until September 8th. Under the custom of brokers, no

commission was charged by the defendants for this service.

The findings of the judge were made upon a statement of agreed facts which included long extracts from the book accounts between the parties, from which inferences might be drawn in regard to their course of dealing and the effect of their transactions. Two separate accounts were kept by each party, one relating to the transactions of the defendants in Boston on the order of A. O. Brown & Co., and the other relating to the transactions of A. O. Brown & Co. in New York, on the order of the defendants.

The judge was warranted in finding that these accounts, and the transactions referred to in them, were intended to be dealt with independently, as each party would deal with such an account for any other party who was not a broker, for whom he was doing business and who had no other account with him. The two accounts were to be considered together at the close of their transactions. The judge might also find that there was a substantial balance in favor of A. O. Brown & Co. on August 19th, and immediately before and after that date, upon the account to which this transaction belonged. In the agreement under which the two firms of brokers were acting, there was an arrangement for providing margins as security for liabilities, and it was stipulated that payment should be made in cash for purchases of stock at less than \$10 per share. On August 20th, the day after this order was given, A. O. Brown & Co. caused their bankers in Boston to pay the defendants \$5,000 on account, and the judge might find that this payment was understood by the parties as covering the price of this stock. He might find that the defendants, after the last telegram from A. O. Brown & Co. relating to the transaction, and especially after the payment of the \$5,000 in cash, were holding this stock as fully paid for and belonging to the plaintiff, although there had been no formal transfer to him and the regular certificates of stock could not be issued until September 8th.

The controversy arises from the fact that A. O. Brown & Co. failed a few days later, having in their hands a large amount of property that had been advanced by the defendants as margins on their transactions in New York. The defendants then sold the 500 shares of stock in the North Lake Copper Company and retained the proceeds and applied them in part payment of their claim against A. O. Brown & Co. We are of opinion that there was ample evidence to warrant a finding for the plaintiff.

Judgment on the finding.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

(176 Ind. 4)

RUPEL et al. v. OHIO OIL CO. et al.¹
(No. 21,873.)

(Supreme Court of Indiana. May 23, 1911.
On Petition to Recall Opinion, June 2,
1911.)

1. APPEAL AND ERROR (§ 1078*)—WAIVER OF ASSIGNMENTS.

The assignment of error to the sustaining of certain demurrers is under the rules of the Supreme Court deemed waived; appellant's brief neither stating any proposition or point or citing authority in support thereof.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4256-4261; Dec. Dig. § 1078.*]

2. MINES AND MINERALS (§ 47*)—LIFE ESTATES (§ 12*)—OIL AND GAS—RIGHTS OF REVERSIONER AND LIFE TENANT.

Though oil and gas, which may underlie real estate, do not become the absolute property of the owner of the land till he has discovered them by exploration and mining his land, and reduced them to his possession, this does not modify the general common law that the ownership of the fee of the surface of the land carries with it the right to the minerals' beneath, and the consequent right to extract them, which right is exclusively in the owner of the fee, to the exclusion of the life tenant in possession, who consequently can grant no such right to another.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. § 133; Dec. Dig. § 47;* Life Estates, Cent. Dig. §§ 31, 42; Dec. Dig. § 12.*]

3. WASTE (§ 8*)—OIL—ACTION FOR WASTE.

Not only may the owner of the fee of land enjoin one to whom he has given no right from taking oil from land, but, such an one having taken it without his knowledge, he may sue him for damages for waste.

[Ed. Note.—For other cases, see Waste, Cent. Dig. § 11; Dec. Dig. § 8.*]

4. WASTE (§ 12*)—ACTION BY REVERSIONER.

Action for damages for waste may be maintained by the reversioner against a stranger.

[Ed. Note.—For other cases, see Waste, Cent. Dig. §§ 12, 21-23; Dec. Dig. § 12.*]

5. WASTE (§ 15*)—NATURE OF REMEDY—ACCOUNT.

If past waste be of such a character that an action at law for damages will not give adequate relief, equity will give the remedy of account, even if an injunction may not be had.

[Ed. Note.—For other cases, see Waste, Cent. Dig. §§ 16-18; Dec. Dig. § 15.*]

6. APPEAL AND ERROR (§ 824*)—ORAL ARGUMENT—APPLICATION.

Under Supreme Court rule 26 (55 N. E. vi), oral argument should be requested by written application within the time allowed for filing briefs, otherwise the court, in its discretion, will refuse the application.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 824.*]

Appeal from Circuit Court, Jay County;
J. F. La Follette, Judge.

Action by Martin L. Rupel and others against the Ohio Oil Company and others. From an adverse judgment, plaintiffs appeal. Reversed, with instructions.

See, also, 172 Ind. 300, 88 N. E. 508.

S. A. Whipple and Emerson McGriff, for appellants. Simmons & Dailey, for appellees.

COX, J. The appellants, Martin L. Rupel, Isaac Rupel, Jacob Rupel, and Sarah Fields, are, together with appellees James Rupel and Rachel Artwine, the owners in remainder as tenants in common, each owning a one-sixth interest, of certain lands in Jay county. Appellee Mary Rupel, their mother, is the owner in possession of the life estate in these lands. As such life tenant in possession, she, without the remaindermen joining therein, sought to grant to the assignor of the appellee the Ohio Oil Company, by contract in writing executed January 20, 1891, the exclusive right to enter upon these lands and explore for, and to remove therefrom, the oil and gas found. Their contract contained the usual stipulations for cash payments and for royalties, to be paid by the explorer to Mary Rupel, the life tenant, the right to lay pipes for oil and gas lines and the obligation to bury them, and to pay damages for injuries to timber and crops, to leave the fences and drains in as good condition as found, and to so locate wells as to protect buildings on the premises. The appellee the Ohio Oil Company, as the assignee of this contract, entered upon the lands thereunder January 1, 1902; drilled wells, and removed large quantities of oil up to the time this action was brought September 5, 1905. The appellants brought this action by complaint in two paragraphs against appellee oil company to recover damages in the nature of waste of their inheritance. They joined Mary Rupel, the life tenant, and James Rupel and Rachel Artwine, their cotenants, as defendants to answer as to their interests, if any, in and to the oil removed or to the proceeds from the sale of it. The first paragraph set out in substance, amongst other things, the source of the appellants' title at length, the status of Mary Rupel as life tenant, that of James Rupel and Rachel Artwine as that of cotenants of plaintiffs, the execution of the contract by the life tenant granting the right to one Wolf to explore the lands for oil and gas, the assignment of the same to the Ohio Oil Company, the knowledge of the Oil Company of the status of Mary Rupel and of appellants when the contract was executed by her and at the time of their entry, the entry upon the premises by the oil company, the drilling of wells thereon, and removal by it therefrom of many thousands of barrels of oil; that the execution of the contract, the assignment, and the entry by the oil company and removal of the oil were without the knowledge or consent of appellants; that the oil company had not accounted to or paid appellants for the oil or any part of it, but converted and appropriated it; that, by reason of the wrongful taking of the oil from the land, the reversion of appellants was greatly injured and reduced in value, and great waste thereof committed by the oil

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes
95 N.E.—15

¹ Rehearing denied.

company. There was in conclusion a prayer for judgment against the oil company in the sum of \$100,000.

The second paragraph was similar in its allegations of facts, except that the source of title was not set out in full, nor was the contract, and the conclusion was that appellants had demanded an accounting, settlement, and payment of the oil company for the oil so taken before the bringing of the action, which was refused, and that, by reason of the appropriation of the oil as alleged, appellants had been damaged by the oil company, and by reason thereof it was indebted to appellants in the sum of \$100,000, for which judgment was demanded. A separate demurrer for want of facts by the oil company was sustained to each paragraph of the complaint, as were joint demurrers for the same cause by the other three defendants, and plaintiffs, refusing to plead further, appeal from the judgment thereupon rendered against them. Errors are properly assigned on the rulings of the trial court on these demurrers.

[1] Appellants' counsel have not stated in their brief any proposition or point or cited authority in support of their assignment of error that the court erred in sustaining the demurrers of Mary Rupel, James Rupel, and Rachel Artwine, and therefore, under the rules and decisions of this court, this assignment is deemed waived, and will not be considered.

[2] It remains only to determine whether the complaint or either paragraph stated a cause of action against the Ohio Oil Company. It is the contention of counsel for appellees that it is within the rights of a life tenant to make a valid contract to permit the search of the substance of the estate for oil and to profit therefrom when found. This contention is based on what seems to be the settled rule in this state that oil and gas which may underlie the real estate do not become the absolute property of the owner of the land until he has discovered them by exploration and mining his land and reduced them to his dominion. This is so because of their supposed wandering and vagrant character. But this rule of property does not in any way modify the general common law that the ownership of the fee of the surface of the earth carries with it the right to the minerals beneath, and the consequent right to extract them. This right is exclusive in the owner of the fee. The life tenant in possession has no such right, and, not having it, he cannot, of course, grant it to another. 16 Cyc. 625; *Ohio Oil Company v. Indiana*, 177 U. S. 190, 20 Sup. Ct. 576, 44 L. Ed. 729.

[3] Where oil underlies the surface of land, it cannot be denied that for the time it is physically a part of it. To recover it from the earth requires an assault on the integrity of the estate like, if different in degree, to the taking of other minerals, and when recovered from the earth, it is as much

property as any other mineral in, or on, or underlying the land when severed from its physical connection with the earth it becomes personal property as other minerals do. The owner of the fee alone, or one to whom he has granted the right, may invade the substance of the inheritance to take one as well as the other. He may prevent one not entitled from taking one from the estate as well as the other, or, where the waste or trespass has been committed, he has his remedy in the one case as well as the other. 27 Cyc. 629, 630. In the case of *Richmond Natural Gas Co. v. Davenport* (1905) 37 Ind. App. 25, 76 N. E. 525, it was held that the owner of the fee might enjoin the life tenant in possession and her lessee from drilling for and removing oil and gas from the estate as waste. In that case it was said: "It is settled by numerous decisions that the natural gas or the petroleum which may be under the surface, and not reduced to the actual possession of any person, constitutes a part of the land, and belongs to the owner thereof in such a sense that he has the exclusive right by operations upon his land to reduce such mineral substance to possession and use and enjoyment and to grant the privilege of doing so to other persons, though, until so reduced to possession, the mineral substance is subject to be taken by any other person by proper operations upon his own land, and that a person in possession who has such exclusive right in particular land, as owner of the land or as lessee or grantee with the privilege of extracting such minerals, may by injunction prevent operations for such purpose by others who have not rightfully acquired the privilege from the owner of the land in fee. The taking of these minerals by a stranger by means of wells made without right for such purpose constitutes a trespass, damages for which cannot be definitely measured. And the taking by one lawfully in possession of the surface, with right to enjoy the income and profits, but not the owner of the fee and not having received from such owner the privilege so to take the minerals—that is, by a tenant of the land for years or for life—constitutes waste." It has been held in this state that one who has been granted by the owner of the fee the exclusive right to take oil and gas from the land may enjoin the invasion of the right by a stranger. *Indianapolis Natural Gas Co. v. Kibbey* (1893) 135 Ind. 357, 35 N. E. 392; *Consumers' Gas Co. v. American, etc., Co.* (1903) 162 Ind. 393, 68 N. E. 1020; *American, etc., Co. v. Tate* (1904) 33 Ind. App. 504, 71 N. E. 189. It must necessarily follow that a like remedy would be available to the owner himself.

It is practically conceded by counsel for appellee that every owner of the fee has such a right in and control over the oil and gas underlying his land that the preventive remedy of injunction is his, but contend that, if he fails to deny access by the use

of it, he cannot assert a right to compensation after the oil and gas has been wrongfully removed. This must lead to a position unmaintainable: That an owner who is present and has knowledge of a threatened injury to his estate may prevent the injury, while an owner absent with no knowledge of a threatened injury until after it has been fully accomplished is remediless. The statement of the proposition is in itself a refutation of its soundness. The law is otherwise, and has long been so. Anciently in England by the common-law and early statutes the remedies for waste were the writ *estrepement* and prohibition of waste to prevent a threatened waste, and the writ of waste for the recovery of the estate and of damages for waste committed. The ancient preventive remedies have given way to the more modern remedy of injunction now available in our practice. The writ of waste to recover damages for waste committed was succeeded by the common-law action on the case in the nature of waste, which, in turn, has become our code action for damages for waste or trespass in the nature of waste. 30 Am. & Eng. Encyc. of Law (2d Ed.) pp. 272-274; 22 Encyc. of Pl. & Pr. 1095 et seq.; Burns' Statutes 1908, §§ 288, 289.

[4] At common law the reversioner might sue the life tenant for damages for waste, but, as privity of estate between the parties was necessary to the maintenance of an action for waste, he might not sue one claiming under the life tenant or a stranger. This rule, however, no longer prevails, and the modern action to recover damages may be maintained against the life tenant or a subtenant or a stranger. 22 Encyc. of Pl. & Pr. pp. 1095, 1107, 1108, and notes. In harmony with the rule that has always prevailed, it is held in this state that the reversioner may not only enjoin the commission of waste by the life tenant, but may recover damages for that already committed. *Miller v. Shields* (1876) 55 Ind. 71; *Stout v. Dunning* (1880) 72 Ind. 343; *Robertson v. Meadors* (1880) 73 Ind. 43. Indeed, the statute so provides specifically as to the action for damages. Burns, §§ 288, 289.

[5] Equity will give an account for past waste, and, if it be of such a character that an action at law for damages will not give adequate relief, equity will give the remedy of account, even if an injunction may not be had. 30 Am. & Eng. Encyc. of Law (2d Ed.) p. 300; 16 Cyc. 644; 22 Encyc. of Pl. & Pr. 1135. A comparatively late case, that of *Bender v. Brooks* (Tex. 1910) 127 S. W. 168, was an action to recover the possession of a tract of land and for damages for oil taken therefrom, and the same rule of property in oil in the earth that prevails generally in this state and elsewhere was recognized. In the course of the opinion of the court it was said "It is true that appellants, as owners of the land, had no specific

title to the oil therein until it has been removed from the earth. * * * Appellants had the exclusive right as owners of the soil to take the oil therefrom; and the appellee by an invasion of their right and removal of the oil, no matter how innocently, could not acquire title thereto. It follows logically that since appellants owned this land from which appellee extracted the oil the oil so removed became and was the property of appellants so soon as it reached the surface. Therefore they had a right to recover their property or its value." It was further held in that case that an account should be taken to ascertain the damages. In the case of *Marshall v. Mellon*, 179 Pa. 371, 38 Atl. 201, 35 L. R. A. 816, 57 Am. St. Rep. 601, while recognizing the inherent difference between oil and other minerals in the earth which prevents an absolute ownership in the former until it is taken possession of, it was held that with respect to the rights and interests of life tenants and remaindermen there is no departure from the common-law rule that tenants for life only may not open new mines, or take minerals from the premises except in case of mines opened by the former owner, and that a life tenant could neither open oil and gas wells or grant the right to another. The case of *Williamson v. Jones*, 39 W. Va. 231, 19 S. E. 436, 25 L. R. A. 222, is to the same effect, that a life tenant or one claiming under him may not drill wells and take oil from the estate, and, when it is done, that the owner of the fee may enjoin the waste or trespass, and have an account for that committed. See, also, the further exhaustive consideration of the same case, 43 W. Va. 562, 27 S. E. 411, 38 L. R. A. 694, 64 Am. St. Rep. 891; *Gerkins v. Kentucky Salt Co.*, 100 Ky. 734, 39 S. W. 444, 66 Am. St. Rep. 370. We believe the cases and books cited indicate the law applicable to the case made by the two paragraphs of the complaint under consideration in this case, and it follows that the trial court erred in sustaining the demurrer of appellee oil company to each of them.

We are asked to determine a question of estoppel of appellants by knowledge of the operations of the oil company on the land in question. This we decline to do. No such question is presented, but the contrary, for both paragraphs disavow knowledge on the part of appellants of the fact.

For the error above indicated, the cause is reversed, with instructions to the trial court to overrule the demurrers of the Ohio Oil Company to each paragraph of the complaint.

On Petition to Recall Opinion.

[6] The appellee the Ohio Oil Company has filed its petition asking that the opinion rendered in the cause be recalled, and that its petition for an oral argument filed while the cause was pending in the Appellate Court

and addressed to that court not be ruled on, be granted, and that oral argument, on the questions of law involved be heard. This petition has been given due consideration. The cause was ably and exhaustively briefed by the learned counsel for appellee. All of the briefs contemplated by law and the rules of this court were in March 12, 1909, and appellee's petition for oral argument was not filed until July 19, 1909, more than nine months after submission of the cause. Oral arguments should be requested by written application within the time allowed for filing briefs; otherwise the court in its discretion will refuse the application. This is the provision of rule 26 (55 N. E. vi) of the rules of this court.

Petition to recall opinion and grant an oral argument is therefore overruled.

(176 Ind. 1)

MACBETH-EVANS GLASS CO. v. AMAMA.
(No. 21,877.)

(Supreme Court of Indiana. June 2, 1911.)

1. MASTER AND SERVANT (§ 80*)—CONTRACT OF EMPLOYMENT—LIABILITY OF MASTER.

A written contract of employment as paste mold gatherer in glass works provided that it should not be effective until accepted by the master, notice of which should be given to the employé within five days. The employé worked for three days as paste mold gatherer, and was then set to work at blowing, which was a different trade, and he did not subsequently work as paste mold gatherer. The master did not within five days from the date of the contract of afterwards give any notice of the acceptance of the contract. *Held* that the employé was entitled to recover for the services rendered without reference to the contract, together with attorney's fees, pursuant to Burns' Ann. St. 1908, §§ 7996, 7999, requiring employers to pay their employes once every two weeks the amount due for labor, and authorizing reasonable attorney's fees for failure so to do.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 80.*]

2. CONSTITUTIONAL LAW (§ 205*)—REGULATING PAYMENT OF WAGES—LIABILITY FOR ATTORNEY'S FEES.

Burns' Ann. St. 1908, §§ 7996, 7999, requiring employers engaged in mining or manufacturing enumerated articles of merchandise to pay their employes at least once every two weeks the amount due for labor, and authorizing the assessment of a reasonable attorney's fee as a part of the damages in an action by an employé to recover wages due him on the employer failing for ten days after demand to pay the wages, are not violative of Bill of Rights, § 23, prohibiting the Legislature from granting to any citizen or class, privileges which on the same terms shall not equally belong to all citizens.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 591-624; Dec. Dig. § 205.*]

Appeal from Circuit Court, Grant County; H. J. Paulus, Judge.

Action by Louis Amama against the Macbeth-Evans Glass Company. From a judgment for plaintiff, defendant appealed to the Appellate Court, and under Burns' Ann. St.

1908, § 1405, transferred the cause to the Supreme Court. Affirmed.

Campbell & Call, Joseph F. Cowern, and Frederick E. Matson, for appellant. Stephen McSwiggan, for appellee.

MORRIS, J. Appellee sued appellant on account for the performance of labor. The complaint alleged that defendant was a corporation engaged in manufacturing and selling glassware, and was indebted to plaintiff for work and labor performed for defendant by plaintiff as a glass worker, in the sum of \$85.85, which was due and unpaid; that demand therefor was made on November 2, 1907, and refused. The complaint was filed November 19, 1907. It is further alleged in the complaint that plaintiff was compelled to employ an attorney to prosecute this action and the value of his services was \$35, for which plaintiff also prays judgment. The defendant filed an answer, in which it alleged that plaintiff and defendant executed a written contract, filed as an exhibit to the answer, by the terms of which, it is alleged, plaintiff agreed to work for defendant for a term of five years for certain wages, and it was provided therein that the company should retain in its hands 5 per cent. of the wages earned as a guaranty for the faithful performance of the contract, and for any breach of the same by plaintiff the money so retained should be paid to the company as liquidated damages for the breach. The defendant further alleges that plaintiff commenced work under the provisions of the contract in October, 1906, and afterwards, without the consent of the company, quit defendant's service, and has since refused to work for the company; that the account sued on is for the sum retained by the defendant under the terms of the contract; that plaintiff had broken the same, as above set out, by voluntarily quitting defendant's service, and was not entitled to recover. The exhibit is dated October 10, 1906, and recites that defendant is a Pennsylvania corporation, having its principal office in the city of Pittsburgh, Pa. The instrument contains the following provisions: "The workman (plaintiff) does hereby agree to enter the employ of the company on the terms mentioned below, as paste mold gatherer, at Marion, Indiana, and to perform his duties in a faithful and workmanlike manner, and, in consideration thereof, the company, provided, the workman is competent, does hereby agree to employ and keep the workman in its employ for a period of five years, while the factory of the company is in operation, on the following terms: [Here follows a schedule of wages and the provision for retaining 5 per cent. of the workman's wages, the substance of which is given above.]" The instrument concludes with the following clause: "This agreement not to be effective until accepted by the com-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

pany, and if accepted, notice shall be given to the workman within five days after this date." Appellant in its answer alleges that within five days from the date of the contract written notice was given plaintiff of its acceptance by defendant.

Appellee contends that the contract did not bind appellee to work for appellant for a period of five years, or any definite period; while appellant maintains that, when appellee voluntarily quit its service within the five-year period, he forfeited any right to the 5 per cent. of wages retained. It is not necessary for the court to decide this matter, because there was no evidence that appellant within five days from the date of the contract or afterward in any manner gave any notice to plaintiff of its acceptance of the contract, nor was there any evidence that the contract was accepted by appellant. The undisputed evidence shows that, after signing the written instrument, appellee worked for three days as paste mold gatherer, and was then set to work at "blowing," which the evidence shows is a different trade, and did not afterwards work as paste mold gatherer. There is no evidence which would warrant the court in considering the written instrument as applicable to the facts.

At the trial it is admitted by the parties that plaintiff earned during his employment with defendant \$990.45, and had been paid only \$907.35. The judgment was for this amount and the additional sum of \$25 allowed for plaintiff's attorney's fees. This allowance of attorney's fees was made pursuant to Burns' Ann. St. 1908, §§ 7996, 7999; Acts 1787, p. 13.

[1] Appellant contends that the statute providing for the allowance of attorney's fees does not apply because of the written contract, and, further, that the statute is invalid because it violates clause 23 of article one of the Constitution of Indiana. The first contention has already been disposed of in this opinion.

[2] In Seelyville Coal, etc., Co. v. McGlosson (1906) 166 Ind. 561, 77 N. E. 1044, 117 Am. St. Rep. 396, it was held that this statute was not in violation of the above provision of our Constitution. We adhere to that decision.

There is no error in the record. Judgment affirmed.

(175 Ind. 706)

O'NEIL v. JOHNSON. (No. 21,912.)

(Supreme Court of Indiana. June 1, 1911.)

1. APPEAL AND ERROR (§ 78*)—FINAL JUDGMENT — SUSTAINING DEMURRER TO COMPLAINT.

Sustaining a demurrer to a complaint is not a final judgment from which an appeal lies.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 426, 464-483; Dec. Dig. § 78.*]

2. APPEAL AND ERROR (§ 66*)—JUDGMENTS APPEALABLE—FINAL JUDGMENT.

Except as otherwise provided by statute, appeals lie only from final judgments.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 329-343; Dec. Dig. § 66.*]

3. APPEAL AND ERROR (§ 78*)—JUDGMENT ON SUSTAINING DEMURRER TO COMPLAINT—FINAL JUDGMENT.

A final entry of proceedings of the trial court reciting that the demurrer to the amended complaint is sustained, to which ruling plaintiff excepts, and that 60 days' time is allowed plaintiff in which to prepare and file a bill of exceptions, and adjudging that defendant recover of plaintiff costs taxed at \$—, and failing to show that plaintiff failed to plead further or that he otherwise elected to stand on the sufficiency of the complaint, and that defendant recovered all the costs made in the action, is not a final judgment and appealable.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 464-483; Dec. Dig. § 78.*]

Appeal from Circuit Court, St. Joseph County; Walter A. Funk, Judge.

Action by Sarah O'Neil against Harry D. Johnson. From a judgment sustaining a demurrer to the complaint, plaintiff appealed to the Appellate Court, and it, under Burns' Ann. St. 1908, § 1405, transferred the cause to the Supreme Court. Appeal dismissed.

Charles F. Holler, for appellant. George Ford, for appellee.

MONKS, J. Appellant brought this action against appellee to recover damages for personal injuries alleged to have been caused by the negligence of appellee. A demurrer to the amended complaint for want of facts was sustained by the court. The only error assigned in this court calls in question the action of the court in sustaining said demurrer. Appellee has filed a motion to dismiss this appeal for the reason that it does not appear from the record that final judgment has been rendered.

[1, 2] It is settled that sustaining a demurrer to a complaint is not a final judgment from which an appeal will lie, and that appeals only lie from final judgments except as otherwise provided by statute. James v. Lake Erie, etc., R. Co., 144 Ind. 631, 43 N. E. 876, and cases cited. Ernest v. Grand Trunk, etc., R. Co., 34 Ind. App. 409, 72 N. E. 1136, and cases cited.

[3] The final entry of the proceedings of the court below as shown by the transcript is as follows: "Now again come the parties by counsel, and the demurrer to the amended complaint is now sustained by the court, to which ruling of the court the plaintiff excepts, and sixty days' time is allowed the plaintiff in which to prepare and file her bill of exceptions herein. It is therefore considered and adjudged by the court that the defendant recover of the plaintiff his costs herein laid out and expended, taxed at \$—." There is nothing in the entry to show that appellant "failed and refused to plead further" or that she otherwise elected to stand

upon the sufficiency of her complaint and that appellee recovered all the cost made in the action as in *State v. Lung*, 168 Ind. 553, 80 N. E. 541, or as in *Kelley v. Augsperger*, 171 Ind. 155, 85 N. E. 1004.

As the transcript does not show that a final judgment was rendered the appeal was prematurely taken. Appellee's motion to dismiss the appeal is therefore sustained and the appeal dismissed.

(176 Ind. 308)

ORIENT INS. CO. OF HARTFORD, CONN.,
v. KAPTUR. (No. 21,882).¹

(Supreme Court of Indiana. June 1, 1911.)

1. TRIAL (§ 210*)—INSTRUCTIONS—"PARTY IN INTEREST."

Where a fire policy sued on provided that it should be void in case of fraud or false swearing by the insured, whether before or after a loss, insured's husband was not a "party in interest" within an instruction that while the law permits a party in interest to testify in his own behalf, the jury in weighing the evidence of parties so testifying should "consider the fact that such party is interested in the matter in controversy," etc.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 490-494; Dec. Dig. § 210.*]

For other definitions, see Words and Phrases, vol. 4, pp. 3692-3709; vol. 8, p. 7691.]

2. INSURANCE (§ 640*)—FALSE SWEARING—FRAUD—PLEADING.

In an action on a fire policy, an answer consisting solely of a general denial, was insufficient to raise an issue of fraud or false swearing under the rule that fraud is never presumed, and in order to entitle a party to relief, either at law or in equity on that ground, the facts constituting the fraud must be specially pleaded.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 640.*]

3. INSURANCE (§ 612*)—ARBITRATION—NECESSITY.

Where before suit on a policy, defendant after proper notice of loss, denied all liability and refused to pay anything, the court properly charged that such denial, if true, relieved plaintiff from the obligation of complying with provisions requiring an arbitration before suit.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1520-1528; Dec. Dig. § 612.*]

4. INSURANCE (§ 648*)—EVIDENCE.

In an action on a fire policy, evidence that plaintiff could not read or write English, was admissible to explain a delay with reference to a letter received by plaintiff from defendant in her husband's absence, and was not objectionable because such inability would not excuse plaintiff from abiding by the terms of the policy.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 648.*]

5. APPEAL AND ERROR (§ 757*)—BRIEF—REQUISITES—COURT RULES.

Where appellant's brief did not contain a concise statement of so much of the record as fully presented an exception to the admission of certain testimony referring to the pages and lines of the transcript where the testimony could be found, as required by Supreme Court Rule 22, 55 N. E. vi, its admission would not be reviewed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3092; Dec. Dig. § 757.*]

6. APPEAL AND ERROR (§ 882*)—INVITED ERROR—REVIEW.

Where the portion of an instruction complained of was copied by the court from an instruction tendered by appellant and properly refused because of other objectionable statements therein, appellant could not object thereto, under the rule that if a party succeeds in leading the trial court into error, he cannot complain thereof.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3591-3610; Dec. Dig. § 882.*]

Appeal from Superior Court, Lake County; N. B. Tuthill, Judge.

Action by Magdalena Kaptur against the Orient Insurance Company of Hartford, Conn. Judgment for plaintiff, and defendant appeals. Case transferred from Appellate Court. Affirmed.

D. J. & D. J. Schuyler, Jr., and L. L. Bomberger, for appellant.

MORRIS, J. Appellee sued appellant on a fire insurance policy. There was an answer of general denial. The cause was tried by jury, resulting in a verdict for plaintiff. Defendant filed a motion for a new trial, which was overruled. Judgment for appellee. The errors assigned are the overruling of the motion for a new trial, and that appellee's amended complaint does not state facts sufficient to constitute a cause of action. The latter is waived by failure to present it in the propositions or points, in appellant's brief. *Baltimore, etc., R. Co. v. Evans* (1907) 169 Ind. 410, 82 N. E. 773. Thirteen reasons were assigned in appellant's motion for a new trial. Those not waived will be considered in their order.

[1] Appellant requested the trial court to instruct the jury as follows: "The court instructs the jury that while the law permits a party in interest to testify in his own behalf, nevertheless the jury *should*, in weighing the evidence of the parties so testifying and in determining how much credence is to be given to the same, take into consideration the fact that such party is interested in the matter in controversy in the suit and in the result of the suit." The court struck out the word "should" from the requested instruction, and substituted therefor the word "may," and, as thus modified, gave it. Appellant maintains that this was erroneous, under the ruling in *Southern Railway v. State*, 165 Ind. 613, 75 N. E. 272. The appellee did not testify to any fact controverted by appellant, and therefore, so far as her testimony was concerned, if erroneous, the instruction was harmless. The appellee's husband, however, did testify to some matters about which there was a sharp controversy, and appellant contends the evidence shows that the husband was acting as the wife's agent, and was "a party in interest," and the instruction was applicable to his evidence, and for that reason should have

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes
1 Rehearing denied.

been given. Instructions requested should be succinct and free from ambiguity. The husband was not a party to the record, and was not a real party in interest.

[2] The policy in suit contains the following provision: "This entire policy shall be void * * * in case of any fraud or false swearing by the insured touching any matter relating to this insurance, or the subject thereof, whether before or after a loss." Appellant contends that in making the proof of loss, submitted by appellee to appellant, after the fire, under the provisions of the policy, appellee was guilty of fraud and false swearing, and thereby forfeited her right to recover. Error is predicated on the court's action in refusing to give a number of appellant's requested instructions on this subject. Fraud is never presumed, and in order to entitle a party to relief, either at law or in equity, on that ground, it is necessary that the facts constituting the fraud be distinctly alleged in the pleadings, so that it may be put in issue, and evidence thereon given. *Ray v. Baker* (1905) 165 Ind. 74, 74 N. E. 619, and cases cited; *Bennett v. McIntire* (1889) 121 Ind. 231, 23 N. E. 78, 6 L. R. A. 36; 9 Ency. Pl. & Pr. 684. The appellant's answer consisted solely of a general denial. There was no issue of fraud in the case, and consequently evidence of fraud was not relevant to the issues, and all instructions relating to this subject were correctly refused. There is a provision in the policy that, in the event of disagreement as to the amount of loss, the same shall be ascertained by two disinterested appraisers, and that no action shall be brought unless this requirement shall have been complied with.

[3] The court instructed the jury that if it found from the evidence that defendant denied liability under the policy and refused to pay plaintiff anything for her loss, then it was not necessary for plaintiff to demand or request an appraisal or arbitration, before bringing suit. Appellant claims this instruction was erroneous. There was evidence given showing that before suit was instituted, defendant after proper notice of loss denied all liability under the policy and refused to pay anything. The instruction was proper. *Ohio, etc., Co. v. Vogel* (1906) 166 Ind. 239, 76 N. E. 977, 3 L. R. A. (N. S.) 966, 117 Am. St. Rep. 382, and cases cited.

[4] Complaint is made that the lower court erred in admitting testimony to prove that plaintiff could not read nor write English, because such inability would not excuse plaintiff from abiding by the terms of the policy. The evidence was not admitted by the court on that theory, but to explain delay with reference to a letter received by plaintiff from defendant, in her husband's absence. There was no error in this.

[5] Appellant further contends that the court erred in admitting in evidence certain testimony of plaintiff's husband. Rule 22 of this court (55 N. E. vi) requires an appellant's brief to contain "a concise statement of so much of the record as fully presents every error and exception relied on, referring to the pages and lines of the transcript." Appellant's counsel, in preparing his brief has failed to comply with the above quoted provision of rule 22, in respect to this alleged error, and, for that reason, the court cannot consider the point urged.

Appellant also claims the court erred in refusing to permit defendant, on surrebuttal, to prove by Peter W. Meyer, its agent, that it never refused to pay anything on the claim, but refused to pay for total loss. How important this point might be, if supported by the record, it is not necessary to consider, for the witness did testify, in surrebuttal, as shown by page 280 of the transcript as follows: "We never refused to pay the loss. We only objected to the amount."

[6] In the eighth point, under appellant's propositions and authorities, of its brief, it claims the court erred in instructing the jury by the second instruction, given on its own motion, that four or five witnesses testifying to a fact might be outweighed by one witness testifying to the same fact, provided the one had the opportunity of knowing the facts testified and had the appearance of truth and candor. Counsel says this was misleading, because the court did not present to the jury the element of knowledge or candor on the part of the four or five witnesses. The portion of instruction No. 2 complained of was copied by the court from instruction No. 9 tendered by appellant, and properly refused, by reason of other objectionable statements therein. Neither in instruction 9, nor in any other instruction tendered, did appellant seek to have the court present to the jury the alleged lacking element of knowledge or candor on the part of the four or five witnesses. If a party to an action succeeds in leading the trial court into error, he cannot be heard to complain of the success of his efforts. *Gordon v. Kaufman* (1909) 44 Ind. App. 603, 89 N. E. 898. There is no error in the record.

Judgment affirmed.

(175 Ind. 686)

MITCHELL et al. v. KOCH. (No. 21,883.)

(Supreme Court of Indiana. May 31, 1911.)

MORTGAGES (§ 257*)—ASSIGNMENTS—PRIORITIES—NOTICE OF EQUITY.

Where the assignor of a mortgage had no notice of an equitable lien on the property claimed by the wife of the mortgagor, though she had joined in the mortgage, and is not affected thereby, the assignee, although he has actual notice of the prior equity, will take the

same title as that held by his assignor at the time of the assignment.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. §§ 682-687; Dec. Dig. § 257.*]

Appeal from Circuit Court, Huntington County; S. E. Cook, Judge.

Action by John L. Koch against Samuel P. Mitchell and others. Judgment for plaintiff, and defendants Mitchell and wife appeal. Transferred from Appellate Court under Burns' Ann. St. 1908, § 1405. Affirmed.

O. W. Watkins and T. G. Smith, for appellants. W. D. Hamer, for appellee.

MORRIS, J. On July 8, 1879, appellant, Samuel P. Mitchell, acquired title to lot No. 55, in the town of Mt. Etna, in Huntington county, by warranty deed, which was duly recorded. On August 23, 1880, Mitchell received from his wife, Jennie M. Mitchell, appellant, the sum of \$600, which he used in paying on a lien for the purchase price of the lot, and, as a part of the transaction, delivered to his wife the following instrument: "Mt. Etna, Ind., Aug. 23, 1880. Received of Mrs. Jennie M. Mitchell six hundred dollars (\$600) to invest in lot 55 town of Mt. Etna, Ind., and it is understood that if the said property is sold that Mrs. Jennie M. Mitchell is to receive six hundred dollars, as it is considered she holds it as her undivided interest in the property. [Signed] S. P. Mitchell." On January 30, 1899, Samuel P. Mitchell borrowed of one James Frame \$400, for which he executed his promissory note, due two years after date, and to secure the payment of which he executed a mortgage, in which his wife joined, on the above-described lot. This mortgage was recorded December 28, 1901. James Frame died testate in August, 1902, and, by his will, bequeathed the note to his wife, Jennie Frame. On October 28, 1905, after a final settlement of her husband's estate, she sold, for a full and valuable consideration, the Mitchell note, to appellee, Koch, and assigned to him the mortgage given to secure it. Neither James nor Jennie Frame ever had any knowledge of the written agreement between the Mitchells, above set out, nor did either of them ever have any knowledge that any sum of money had ever been received by Samuel P. Mitchell from his wife, and applied on the payment of any lien for the purchase price of the lot, nor did either of said Frames ever know that Mrs. Mitchell claimed to hold any interest in the lot, or lien thereon. When appellee Koch purchased the note and mortgage from Mrs. Frame, he knew that Mrs. Mitchell had furnished the \$600 received by her husband on August 23, 1880, and that this money had been used on the payment of a purchase debt for the lot, and he further knew that Mrs. Mitchell was claiming an equitable lien on the lot. In December, 1907, appellee Koch filed his complaint in the

Huntington circuit court against the Mitchells on the \$400 note, and to foreclose the mortgage. Mrs. Mitchell filed a cross-complaint, in which she set out the facts concerning the \$600 transaction of August 23, 1880, and prayed that she be decreed the owner of a lien on the lot, superior to that of plaintiff's mortgage, for \$600 and interest thereon since August 23, 1880.

The court made a special finding of facts, and stated its conclusions of law thereon. The only controversy in this appeal is on the lower court's third conclusion of law, which was, in effect, that appellee Koch, although when he purchased the Frame note and mortgage, knew that Mrs. Mitchell had an equitable lien on the lot, he nevertheless took the same right under the Frame mortgage as was held by the mortgagee at the time of its execution. The judgment follows the conclusion of law. Counsel for Mrs. Mitchell contend she is, in equity, the holder of a vendor's lien on the lot, which, by reason of appellee's knowledge of the facts, is superior to the lien of his mortgage. This proposition cannot be sustained.

One who has notice of a prior equity will acquire the same title which was held by his vendor at the time of the purchase. Unquestionably, when the mortgage was executed to Frame, it was not affected by the secret lien of Mrs. Mitchell. His wife, as his legatee, acquired the same title which was held by him, and Koch acquired the same title. This principle is upheld by all our authorities. *Buck v. Foster* (1897) 147 Ind. 530, 46 N. E. 920, 62 Am. St. Rep. 427, and cases cited; *Brown v. Cody*, 115 Ind. 484, 18 N. E. 9; *Evans v. Neallis*, 69 Ind. 148; *Arnold v. Smith*, 80 Ind. 417; *Pugh v. Highley*, 152 Ind. 252, 53 N. E. 171, 44 L. R. A. 392, 71 Am. St. Rep. 327.

This doctrine exists, not because of any consideration for one who purchases with notice of prior equities, but by reason of the merit in the claim of the original purchaser who acquired valuable property rights, in good faith, without notice. If the latter could not sell the same title, which he innocently purchased, he might thereby be deprived of his property without any fault of his own. There was no error in the court's conclusion of law.

Judgment affirmed.

(175 Ind. 709)

CITY OF HUNTINGTON v. BROWN. (No. 21,915.)

(Supreme Court of Indiana. May 31, 1911.)

MUNICIPAL CORPORATIONS (§ 514*)—APPEAL—REASSESSMENT OF BENEFITS FOR STREET IMPROVEMENTS.

No appeal lies in proceedings to reassess the benefits to real estate for street improvements, resulting in the reduction of the assessment.

[Ed. Note.—For other cases, see *Municipal Corporations*, Dec. Dig. § 514.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes

Appeal from Circuit Court, Huntington County; S. E. Cook, Judge.

Petition by Mary Brown for the reassessment of benefits to her real estate for the improvement of a street of the city of Huntington. From a judgment reducing the assessment, the city appeals to the Appellate Court. Transferred to Supreme Court. Dismissed.

Emmett O. King, for appellant. Kenner & Kenner, for appellee.

MONKS, J. Appellee filed a verified petition under the second proviso of section 3, Acts of 1905, p. 292, being section 8716, Burns Ann. St. 1908, asking the appointment of three appraisers to reassess the benefits to her real estate on the ground that the amount assessed against the same for the improvement of a street of the city "was excessive," etc. Appraisers were appointed who reduced the amount of appellee's assessment. Judgment for cost was rendered against appellant. It has been held by this court that no appeal lies in such proceeding. *City of Seymour v. Jordan*, 173 Ind. 717, 80 N. E. 367; *Randolph v. City of Indianapolis*, 172 Ind. 510, 512, 88 N. E. 949; *Wilson v. City of Indianapolis*, 172 Ind. 719, 720, 88 N. E. 950; *City of Indianapolis v. Barnett*, 172 Ind. 720, 88 N. E. 950; *Cook v. City of Butler*, 172 Ind. 720, 89 N. E. 319.

Upon the authority of the cases cited, the appeal is dismissed.

(175 Ind. 603)

DAUGHERTY et al. v. PAYNE et al.
(No. 21,723.)

(Supreme Court of Indiana. May 23, 1911.)

1. APPEAL AND ERROR (§ 71*)—INTERLOCUTORY ORDERS—APPOINTMENT OF RECEIVER—STATUTES—APPLICABILITY.

Provision being made by Burns' Ann. St. 1908, § 1289, for appeal from an order appointing or refusing to appoint a receiver, section 688, relating to appeals from interlocutory orders generally, is inapplicable to such an appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 400; Dec. Dig. § 71.*]

2. APPEAL AND ERROR (§ 396*)—NOTICE OF APPEAL—NECESSITY.

Notice must be given of an appeal from an order made in vacation appointing a receiver, if taken in vacation, and in the absence of the other party.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2099; Dec. Dig. § 396.*]

3. APPEAL AND ERROR (§ 2*)—CONSTRUCTION OF STATUTE—APPOINTMENT OF RECEIVER.

Burns' Ann. St. 1908, § 1289, authorizing appeal from an order appointing or refusing to appoint a receiver, must be strictly followed.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 2.*]

4. APPEAL AND ERROR (§ 386*)—BOND—APPROVAL—APPOINTMENT OF RECEIVER.

A bond on appeal under Burns' Ann. St. 1908, §§ 679, 1289, from an order appointing a receiver, must be approved by the court, and not

by the clerk when the order was made, and the appeal allowed in term time.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2059-2063; Dec. Dig. § 386.*]

5. APPEAL AND ERROR (§ 791*)—DISMISSAL—IRREGULARITIES—ESTOPPEL.

An appellee waives no irregularities in the proceedings to perfect an appeal by mere silence, unless required to speak.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3133-3136; Dec. Dig. § 791.*]

6. APPEAL AND ERROR (§ 425*)—DISMISSAL.

Under the express terms of Supreme Court rule 36 (55 N. E. vii), an appeal taken in vacation must be dismissed where the cause has been docketed more than 90 days, and no steps have been taken to give notice of appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2155-2161; Dec. Dig. § 425.*]

Appeal from Circuit Court, Grant County; H. J. Paulus, Judge.

Action between Lawrence L. Daugherty and another and Samuel J. Payne and others. From an order appointing a receiver, Daugherty and another appeal. Appeal dismissed.

Brownlee & Kline and D. F. Brooks, for appellants. Alvah H. Taylor, Henry C. Pettit, and Walter S. Bent, for appellees.

MYERS, J. This is an attempted appeal from an order appointing a receiver in a controversy between appellants and appellee Payne as to the title to, and right of possession of, real estate. Payne alone appears and files brief.

A receiver was appointed by the Grant circuit court July 2, 1910, which was the last day of the April term of that court. The record following the order appointing a receiver recites: "And the defendants herein now separately except to the order of the court herein, and ten days time is given to file all bills of exception, and an appeal is now prayed and granted to the Supreme Court of Indiana and bond is fixed in the sum of \$500.00 to be filed within ten days, to the approval of the clerk of this court." On the 6th day of July, 1910, in vacation, appellants filed with the clerk of the Grant circuit court an appeal bond in the usual form, in the penal sum of \$500, with a surety, which bond was approved by the clerk, and a præcipe filed for a transcript July 7, 1910. On July 11, 1910, the bill of exceptions containing the evidence heard on the petition for the appointment of the receiver was filed with the clerk of the court. The præcipe did not call for a transcript of the appeal bond. Upon this state of the record, appellee Payne on November 5, 1910, entered a special appearance, and filed a motion to dismiss the appeal, upon the grounds: First. That no appeal bond was filed during the term. The transcript was filed in this court July 12, 1910, and no notice of appeal was given, and

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes.

appellee did not appear or waive notice, and that at the time the motion was filed more than 90 days had expired since the transcript was filed. Second. That the record falls to show and certify the filing and approval of an appeal bond within 10 days from the date of the appointment of a receiver.

Appellees' contention is based upon the theory that, if the appeal is sought to be perfected as a term appeal, it has failed by reason of the surety not being approved by the court, which as to a term appeal is necessary. *Michigan Ins. Co. v. Frankel*, 151 Ind. 534, 50 N. E. 304; *Thompson v. Connecticut Co.*, 139 Ind. 325, 38 N. E. 796; *Hartlep v. Cole*, 120 Ind. 247, 22 N. E. 130; *June v. Payne*, 107 Ind. 307, 7 N. E. 370, 8 N. E. 556; *Mitchell v. Gregory*, 94 Ind. 363; *McCloskey v. Indianapolis, etc., Union*, 87 Ind. 20; *Ashley v. Henderson*, 32 Ind. App. 242, 69 N. E. 469. The appeal appears to have been sought to be taken under the provisions of both sections 679 and 1289, Burns' 1908. Appeals from orders appointing or refusing to appoint receivers are authorized by section 1289, which in some respects changes the ordinary rules with respect to appeals. That section provides, among other things, that "the party aggrieved may within ten days thereafter (the order appointing a receiver) appeal from the decision of the court to the Supreme Court without awaiting the final determination of such case; and in case where a receiver shall be, or has been appointed upon the appellant filing an appeal bond with sufficient surety in such sum as may have been required of such receiver * * * the authority of such receiver shall be suspended," etc. The statute is special, and it has been held under it that not only must the bond be filed, but the transcript must be filed within the ten days, and that the time cannot be extended by agreement. *Hursh v. Hursh*, 99 Ind. 500; *Flory v. Wilson*, 83 Ind. 391; *Vance v. Schayer*, 76 Ind. 194.

[1] The general statute with respect to appeals from interlocutory orders (section 688, Burns' 1908) does not apply in this class of cases by reason of a different statute. Under section 688 even a term time interlocutory order cannot be appealed from after the term. The bond must be filed during the term. *Terre Haute, etc., Co. v. Indianapolis, etc., Co.*, 167 Ind. 193, 78 N. E. 681; *Barney v. Elkhart, etc., Co.*, 167 Ind. 505, 79 N. E. 492; *Natcher v. Natcher*, 153 Ind. 368, 55 N. E. 86; *Zimmerman v. Makepeace*, 152 Ind. 190, 52 N. E. 992.

[2] And, in case an appeal is taken from an interlocutory order made in vacation appointing a receiver, and the appeal is taken in vacation, in the absence of the other party, notice of the appeal must be given. *Cole et al. v. Frank et al.*, 147 Ind. 281, 46 N. E. 532. It has been held under the general statute that, if the order is made in term, the

bond must be filed in term, and the transcript filed in this court within 10 days of the date of the order, and that if the order is made in vacation, the bond must be filed at the time of the order being made, or at the next term. *Barney v. Elkhart, etc., Co.*, supra; *Terre Haute, etc., Co. v. Indianapolis, etc., Co.*, supra; *Vance v. Schayer*, supra. Also, that an appeal is taken when all the steps pointed out by the statute to confer jurisdiction upon the Supreme Court have been taken. *Terre Haute, etc., Co. v. Indianapolis, etc., Co.*, supra, and cases cited.

[3] Except for section 1289, there could be no appeal from an interlocutory order appointing or refusing to appoint a receiver. It is a special statute conferring a statutory right, and must be strictly followed by one who would avail himself of its provisions.

[4] If the court had fixed both the penalty and the surety upon the bond, and approved it, its subsequent filing would have been but the ministerial act of the clerk in analogy to the general statute respecting appeals from final judgments, but the failure to have the court approve the bond was a failure to do one of the things which is a condition precedent to perfecting an appeal. In this case the court did not require a bond of the receiver, but approved an undertaking, and, as the statute requires a bond in the sum required of the receiver, it could not, of course, be complied with even by the clerk, but, even though that should be regarded as an informality, the failure to have the court approve the bond as a failure to perfect a term appeal upon appellants' own theory under the General Statute (section 679), and there has been no attempt to appeal under section 681, even if it were applicable. There is an apparent contradiction in some of the cases as to the question of leaving appeal bonds to be approved by clerks. In *Jones v. Droneberger*, 23 Ind. 74, there was a suit upon an appeal bond, where a different surety than the one approved by the court executed the bond, and he was held estopped. In *Smock v. Harrison*, 74 Ind. 348, and *Easton v. Acklemire*, 81 Ind. 163, the approval of the security was left to the clerk by the express assent of the parties, and approval by the court was held to be waived. The same thing is true as to *Small v. Kennedy*, 12 Ind. App. 155, 39 N. E. 901. In *Buchanan v. Milligan*, 125 Ind. 332, 25 N. E. 849, there was an express agreement between the parties to substitute another for the surety approved by the court. *Miller v. Burket*, 132 Ind. 469, 32 N. E. 309, was a case where an injunction was granted in vacation, and the penalty of the bond fixed, but the approval of the sureties left to the clerk. That case is grounded upon the express provision of the statute that upon appeals from orders granting or dissolving injunctions appeals shall be taken "as in other cases of appeal." Section 646, Rev. St. 1881; Burns' 1908, § 688. And in "other cases" of vacation ap-

peals the clerk may approve the bond (Burns' 1908, § 681), so that no order of the court was necessary. The same statutes under which *Cole v. Franks*, 147 Ind. 281, 46 N. E. 532, was decided were in force when *Miller v. Burket* was decided, but, when this case was tried, section 646, supra, had been repealed. In the *Cole Case* the court failed to note the part in referring to the *Miller Case* that under section 647 of 1881 (688 Burns' 1908), even in cases arising under section 646 of the act of 1881, which did not include appeals from orders appointing or refusing to appoint receivers, the appeal in term must be taken at the time the order is made or at the next term, and could not be taken after the term. *Natcher v. Natcher*, supra; *Zimmerman v. Makepeace*, supra; *Ham v. Greve*, 41 Ind. 531. In vacation appeals, as to the cases provided by the statute, *Miller v. Burket* was correct, but was misapplied in *Cole v. Franks*, as applied to appeals in receiverships in vacation, though correct upon the requirement for notice, because, if section 688 could apply, there must be notice. *Pierce v. Banta*, 9 Ind. App. 376, 81 N. E. 812, was an action on an appeal bond. The question arose on a demurrer to the complaint, which did show by whom the bond was approved. In *Price v. Huddleston*, 86 Ind. App. 450, 75 N. E. 972, the appeal was from a final judgment, the penalty of the bond was fixed, but the approval of the sureties left to the clerk. The parties were present when the order was made, and made no objections and were held to have waived the statutory requirement. In *Yanthis v. Kemp*, 40 Ind. App. 649, 82 N. E. 926, the appeal was from a final judgment, the penalty of the bond was fixed, in term, 30 days given to file the bond to the approval of the court, and the court approved it within the 30 days. This was held to constitute a term appeal. *Price v. Huddleston* would seem to lend support to appellants' contention that this is a term appeal, but the distinction lies in the fact that that was a final judgment, and a general appeal, while here we have a special statutory proceeding, except for which there could be no appeal. In analogy to the general statute with respect to appeals from interlocutory orders, if the appeal is in term, the bond must be approved by the court in term. If in vacation, the bond must be approved at the time the order is made, or at the next term, showing approval as necessary by the court, so that under no view of the case could it be a term appeal, unless we follow *Price v. Huddleston* to the point that the parties waived the approval of the court, by not objecting, the doctrine of which case we think is erroneous.

[6] A different question may arise when sureties seek to defend against the bond upon which they have procured a stay of execution on the ground of estoppel, but a par-

ty is not required to assist his adversary in perfecting an appeal, and waives nothing on that question by mere silence, unless he is required to speak. Clearly, then, appellants have not perfected a term appeal, and, if section 681 could be appealed to, as to approval by clerks in vacation appeals, there must be notice. Under this statute as we have seen, the approval and filing of a bond does not perfect the appeal. It requires also that the transcript shall be filed in this court within the 10 days.

[8] The transcript was filed July 12, 1910, the cause submitted August 1, 1910, appellants' briefs filed October 8, 1910, and appellees' notice and motion November 5, 1910, to dismiss, without any steps taken by appellants to give notice, and under rule 36 (55 N. E. vii) the appeal must be dismissed; and it is so ordered.

(177 Ind. 301)

SEYBOLD et al. v. REHWALD et al.

(No. 21,664.)¹

(Supreme Court of Indiana. May 23, 1911.)

1. DRAINS (§ 32*)—ESTABLISHMENT—COMPETENCY OF DRAINAGE COMMISSIONERS—OBJECTIONS.

Drainage Act (Acts 1907, c. 252), § 4, authorizing a remonstrance against the report of drainage commissioners on the ground that the report is not according to law, and providing that the court on sustaining the remonstrance, may direct the commissioners to perfect their report, etc., does not expressly or impliedly grant to remonstrators the right to question the competency of drainage commissioners.

[Ed. Note.—For other cases, see *Drains*, Dec. Dig. § 32.*]

2. DRAINS (§ 32*)—ESTABLISHMENT—COMPETENCY OF DRAINAGE COMMISSIONERS—OBJECTIONS.

Parties to a drainage proceeding whose lands are affected by the proposed work may in a proper case at the first available opportunity question the competency of the drainage commissioners.

[Ed. Note.—For other cases, see *Drains*, Dec. Dig. § 32.*]

3. DRAINS (§ 32*)—ESTABLISHMENT—RIGHT TO QUESTION COMPETENCY OF DRAINAGE COMMISSIONERS—WAIVER.

Remonstrators in drainage proceedings were original parties, and were in court when the proposed drain was referred to commissioners, on December 18, 1908, with instructions to report on January 28th following. The terms of office of two of the commissioners expired before the time fixed for the report, and their successors had qualified and entered on the discharge of their duties before such time. The time for the commissioners "heretofore appointed" to make their report was extended without objection from the remonstrators, who waited until the work was completed and the report filed before questioning the competency of the original commissioners to act after the termination of their terms of office. Held, that the right to object to the competency of the commissioners was waived.

[Ed. Note.—For other cases, see *Drains*, Dec. Dig. § 32.*]

4. DRAINS (§ 28*)—ESTABLISHMENT—PETITION.

The allegation in a verified petition for the establishment of a drain, that described lands

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Ran's Indexes
1 Rehearing denied.

owned by one of the petitioners stood in the name of a decedent, must be taken as true in the absence of anything to show that the petitioner was not in fact the owner of such lands.

[Ed. Note.—For other cases, see Drains, Dec. Dig. § 28.*]

5. DRAINS (§ 32*)—ESTABLISHMENT—REPORT OF DRAINAGE COMMISSIONERS—AMENDMENT BY COURT.

Under Burns' Ann. St. 1908, § 6143, authorizing the court to direct the drainage commissioners to amend and perfect their report, the court may order a change in the report of the commissioners showing an assessment against land described in the petition made in the name of a decedent, by making the assessment in the name of the person alleged to be the owner in the verified petition.

[Ed. Note.—For other cases, see Drains, Dec. Dig. § 32.*]

6. DRAINS (§ 78*)—ESTABLISHMENT—ASSESSMENTS.

Under Burns' Ann. St. 1908, § 6141, providing that a petition describing the lands as belonging to the persons appearing to be owners, according to the last tax duplicate or record of transfer is sufficient to give the court jurisdiction over the lands described, with power to fix a lien for the assessment, an assessment of lands of one alleged in the verified petition to be the owner, but standing in the name of a decedent, made in the name of decedent is good as against the owner.

[Ed. Note.—For other cases, see Drains, Dec. Dig. § 78.*]

7. DRAINS (§ 74*)—ESTABLISHMENT—ASSESSMENT—OBJECTIONS.

A remonstrator appearing in proceedings for the establishment of a drain may not complain of the manner of the making of an assessment against the lands of one of the petitioners for the drain.

[Ed. Note.—For other cases, see Drains, Cent. Dig. § 82; Dec. Dig. § 74.*]

8. APPEAL AND ERROR (§ 1011*)—REVIEW—QUESTION OF FACT.

Under Burns' Ann. St. 1908, § 698, requiring the court to review the evidence and to award proper judgment, where the judgment rendered is clearly against the weight of the evidence, the Supreme Court in proceedings to establish a drain will not disturb findings based on oral and conflicting evidence, where it cannot say that the trial court erred in determining the preponderance of the evidence against the party complaining.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3979-3982; Dec. Dig. § 1011.*]

Appeal from Circuit Court, Cass County; James P. Wasson, Special Judge.

Proceedings by Mary J. Brophy and another for the establishment of a drain, in which Frederick Seybold and others filed remonstrances. From a judgment establishing the drain, the remonstrators appeal. Affirmed.

M. Winfield, McConnell, Jenkins, Jenkins & Stuart, for appellants. Frank V. Guthrie and Kistler & Kistler, for appellees.

COX, J. On the 7th day of September, 1908, the appellees, Mary J. Brophy and John C. Behwald, filed a petition in the Cass circuit court to establish a drain, alleging therein, together with other things neces-

sary to be averred, that they were respectively the owners of certain tracts of land therein described which would be benefited by the drain; and also alleging that the land of others therein described would be affected by the proposed drainage and among these were certain lands of appellants. After due notice and an appearance by the appellants in response thereto, the proceeding was docketed as a cause, and on December 18, 1908, was referred to the drainage commissioners, A. J. Beal, county surveyor of Cass county, and Alonzo Cover; and Thomas Flinn, a reputable freeholder of the township through which the proposed ditch was to be constructed, as the third commissioner to act in the matter. These commissioners were ordered to meet at the county surveyor's office on December 23, 1908, and to proceed with their duties and to report on January 28, 1909. On this last date the commissioners named in the order of reference appeared in court by their attorney and secured an extension of time for making their report to February 20, 1909, and in that month they asked and were granted another extension of time to March 28, 1909, on which date they filed their report.

This statement, of the chronology of the proceeding has an important bearing on the most vital question presented for decision. On April 6, 1909, appellants and others filed separate remonstrances against the report of the commissioners, and upon the issue formed thereby the cause was tried and resulted in a judgment establishing the drain from which judgment appellants appeal, other landowners affected not joining. As a ground of remonstrance each of the appellants named the first statutory cause, "that the report of the commissioners is not according to law," and thereunder made objections that two of the drainage commissioners were not competent and qualified to act in that capacity at the time of making their report. It appears that the term of office of Beal as county surveyor expired on January 1, 1909, following his designation as drainage commissioner in this proceeding, and that his successor who was elected at the preceding general election in November, qualified and took office at the expiration of Beal's term. It also appears that the term of Cover as drainage commissioner expired and his successor was elected and qualified on January 6, 1909. That, at the time the matter of the establishment of the drain involved in this proceeding was referred to them by the court December 18, 1908, both Beal and Cover were qualified, competent, and acting drainage commissioners of Cass county, and competent to act in this particular proceeding, is not questioned by appellants. But it is urged that upon their successors being elected and qualified in January following such reference, all of their

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes

powers and authority as such commissioners ended, and therewith ended their right to further proceed in those matters confided to them to aid in the establishment of the drain involved in this proceeding. We do not decide that appellants are wholly wrong in this contention, but reason manifestly exists why the Legislature might have intended that where commissioners are once intrusted with duties in establishing a particular drain, and they are competent and qualified at the time of entering upon the work, they should complete that work notwithstanding the fact that the term for which they were authorized to act generally as such officers expired in the meantime. The inherent nature of the work and the provision of the drainage statute that all objections to the acting of any drainage commissioner not made within the time fixed should be waived, suggest such an intent. It is not always that the ending of the term of office renders the officer powerless to complete some of his official duties begun before the expiration of his term. At common law a sheriff whose term of office had ended was required to complete all the acts necessary to be done under an execution which he had received and levied. He might after his term of office had expired receive redemption money upon land sold by him while in office and his bond covered it; or he might make a deed to the purchaser. He might after the expiration of his term or removal from office retain possession of property, previously attached by him, and await the judgment. *Purl v. Duvall*, 5 Har. & J. (Md.) 69, 9 Am. Dec. 490; *Elkin v. People*, 3 Scam. (Ill.) 207, 36 Am. Dec. 541; *Tukey v. Smith*, 18 Me. 125, 36 Am. Dec. 704, and note; *State v. Roberts*, 12 N. J. Law, 114, 21 Am. Dec. 62; *Allen v. Trimble*, 4 Bibb (Ky.) 21, 7 Am. Dec. 723. It is also held that the administration of an estate commenced by a public administrator, sometimes a county officer *ex officio* discharging such duty, and not completed within his term of office, is nevertheless to be completed by him and not his successor in office. 11 Am. & Eng. Encyc. of Law (2d Ed.) p. 808, and cases cited in note 4; 18 Cyc. 118, and cases cited, note 77.

[1] But if there was ground for objection to the competency of Beal and Cover to act, such objection was not properly made nor timely. Section 4 of the drainage act of 1907 under which this proceeding was taken grants the right to property owners aggrieved, to remonstrate against the report of the commissioners for the causes therein named and no others. The first of these causes is that under cover of which appellants sought to question the competency of the commissioners; that is, "that the report of the commissioners is not according to law." The question therefore confronts us whether under this cause remonstrators may attack the legal qualifications of the commissioners. This section provides that, "If upon the

hearing, the court shall decide that the first of the above causes of remonstrance is true, the court may direct the commissioners to amend and perfect their report, or the court may in its discretion set aside said report, and refer the matter anew back to said commissioners for a new report. In making such order for a new report, the court shall fix the time and place of their meeting, and when they shall report; and when said new report is made and filed, any person whose lands are reported as affected may remonstrate within the same time therefrom and for the same cause as is hereby allowed to remonstrate against this first report, but such second remonstrance shall only be as to new matters contained in the second, or amended report."

This language measures the right to remonstrate against the report under the first cause of remonstrance on the ground that it is not according to law. It contains neither expressly nor impliedly any grant of right to remonstrators to question under it the competency of the commissioners. The very terms of the provision in fact would seem to exclude such right and surely this must be so when considered with reference to the terms of the act that it shall be so construed as to promote the drainage and reclamation of wet and overflowed lands. Enlarging the scope of a remonstrance, under the cause that the report is not in accordance with law, beyond the limitations of the language of the section above quoted so as to give the right to attack the competency of the commissioners at this stage of the proceedings would be construing the statute so as to put a weapon of obstruction into the hands of the landowners, neither expressly nor impliedly given by it.

[2] We have no doubt that parties to a drainage proceeding whose lands are affected by the proposed work, may, in a proper case, at the first available opportunity raise the question of the competency of the drainage commissioners by motion. As to those who are made parties by the petition the statute fixes the first opportunity for objecting to the commissioners at a time within 10 days after the docketing of the proceeding as a cause and the reference to the commissioners after which time the right to question their competency is deemed waived. As to additional parties who are brought in by the assessment of their lands by the commissioners in their report, who were not original parties, it is held that they may raise the question of the competency of the commissioners by a timely and proper motion to reject the report made within ten days after they are brought in by notice as parties. *Small v. Buchanan* (1905) 165 Ind. 549, 76 N. E. 167.

[3] We are not, however, required to decide whether a proper and timely objection to Beal and Cover acting in this proceeding should have been sustained, for it was not

made. Appellants were original parties and were in court when this drain was referred to these commissioners. They were chargeable with knowledge then that Beal's term would expire on January 1, 1909, and that his successor had been elected. They were also bound to know that Cover's term would expire the first Monday of the same month. They were bound to know that the successors of both had qualified and entered upon the discharge of their duties as drainage commissioners of Cass county before the time fixed for the report on this drain January 28, 1909. The record shows that on January 26th and in February extensions of time were granted to the commissioners "heretofore appointed" for filing their report. During all of this time no question was raised by appellants of the right of the commissioners to do the work they were bound to know they were engaged in. They waited until the work was completed; until, presumably, they could determine from the report whether the nature of the drain and the amount of their assessments would be satisfactory. Conceding that a valid objection to the further acting of these commissioners had arisen, appellants waived it by their quiescence when they might have presented the question to the court and had it determined at any time after the alleged incompetency arose.

In *City of Valparaiso v. Parker* (1897) 148 Ind. 379, 383, 47 N. E. 330, 332, it was said by this court in speaking of objections to the competency of similar officials: "It is the general rule that such objections must be made at the earliest opportunity, so that the proceeding shall not be allowed to proceed to a fruitless result with accumulation of cost; and if not so made they will be deemed to be waived." See, also, *Bradley v. City of Frankfort* (1884) 99 Ind. 417; *Osborn v. Sutton* (1886) 108 Ind. 443, 9 N. E. 410; *Carr v. Duhme* (1906) 167 Ind. 76, 82, 78 N. E. 322; *City of Huntington v. Amiss* (1906) 167 Ind. 375, 380, 79 N. E. 199; *Lewis on Eminent Domain* (3d Ed.) § 625.

[4, 5] Under the first statutory cause appellants also remonstrated against the report of the commissioners on the ground that no assessment of benefits was made against the lands of Mary J. Brophy described in the petition, and alleged therein to be owned by her but recorded in the name of J. C. Brophy, deceased. The report showed the assessment against the lands described to have been made in the name of J. C. Brophy; and the court found Mary J. Brophy to be the owner and among other amendments and corrections of the report which were required by the court was the change of this assessment to the name of Mary J. Brophy. Appellants complain in their motion for a new trial that the finding in this respect is not sustained by sufficient evidence and is contrary to law.

[6, 7] It is not claimed by appellants that

Mary J. Brophy was not in fact the owner of the land described, but they insist that such finding was wholly unsupported by any evidence given in the cause and therefore erroneous. It seems to us that the contention is technical. It was alleged in the petition that the lands were owned by the petitioner Mary J. Brophy but that they stood in the name of J. C. Brophy, deceased. The petition was verified by oath. No evidence was presented and no claim is made that Mary J. Brophy was not the owner, nor that J. C. Brophy was the owner and living. We suppose it to be elementary that the allegation of ownership under the circumstances should be taken as true, and the correction in the report is one which the drainage statute expressly authorizes the court to order made. *Burns* 1908, § 6143. And moreover, under the liberal provisions of section 6141, *Burns* 1908, being section 2 of the drainage act of 1907, it is sufficient to give the court jurisdiction over all of the lands described and the power to fix a lien for the assessment, if they are described as belonging to the person who appears to be the owner according to the last tax duplicate or record of transfer, and the assessment of the lands of Mary J. Brophy made in the name of J. C. Brophy would have been good against her as the owner, without the change in the report directed by the court. *Kelser v. Mills* (1903) 162 Ind. 366, 370, 69 N. E. 142. Nor can we see in what manner the rights of appellants were prejudicially involved in the action of the court.

It is earnestly insisted that the evidence fails to show that the proposed ditch will be practicable in draining the lands intended to be drained; but that, on the contrary, it shows that the plan is impracticable and will result in greater overflow and damage. And it is further claimed that there is a lack of evidence sufficient to show that the lands of appellant Seybold will be benefited in a sum equal to the cost of the assessment against them or in any sum. It may be conceded that the cold inanimate words of the record contain evidence which would clearly have sustained a finding in favor of the appellants on both of these questions, but it does not stand alone—there is evidence to the contrary in each instance. The report of the drainage commissioners, which was competent and admitted in evidence, is *prima facie* evidence against appellants' contentions, and this was sustained by the testimony of a number of witnesses in itself sufficient to sustain the court's findings on these questions. *Section 6151, Burns 1908; Zehner v. Milner*, 172 Ind. 493, 87 N. E. 209, 24 L. R. A. (N. S.) 383.

[8] But the appellants urge upon us as a duty, under the provisions of section 698, *Burns 1908*, that we weigh the evidence and determine these questions in their favor should the preponderance be found with them. This we cannot do. The evidence

was largely oral and conflicting, and we cannot say that the trial court erred in determining the preponderance against appellants. *Parkison v. Thompson* (1905) 164 Ind. 609, 73 N. E. 109; *Seiberling v. Porter* (1905) 165 Ind. 7, 74 N. E. 516; *Clarkson v. Wood* (1907) 168 Ind. 582, 81 N. E. 572; *Glendenning v. Stahley* (1909) 173 Ind. 674, 91 N. E. 234.

Finding no error in the record the cause is affirmed.

MEYERS, C. J., did not participate in the decision of this cause.

(176 Ind. 448)

LESEUER v. STATE. (No. 21,755.)¹

(Supreme Court of Indiana. May 23, 1911.)

1. CRIMINAL LAW (§ 278*)—ABATEMENT—GROUNDS.

Any fraud in procuring the return of accused from a sister state, owing to his lack of knowledge that he was not required to return in obedience to a warrant, is not a ground for the abatement of an indictment against him.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 638; Dec. Dig. § 278.*]

2. CRIMINAL LAW (§ 278*)—ABATEMENT—GROUNDS.

That an indictment was returned on insufficient evidence is not ground for abatement.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 641; Dec. Dig. § 278.*]

3. BIGAMY (§ 13*)—EVIDENCE.

One charged with bigamy admitted his former marriage, and that a few months before the alleged bigamous marriage he had seen his former wife, and knew that she had not obtained a divorce. About 10 days before such marriage he received a letter from his former wife, stating that she had procured a divorce, but made no inquiry as to such fact. *Held*, that whether accused made such inquiries as would justify the belief that his former wife had obtained a divorce, was for the jury.

[Ed. Note.—For other cases, see *Bigamy*, Dec. Dig. § 13.*]

4. BIGAMY (§ 7*)—EVIDENCE—PRESUMPTIONS.

Such evidence justified a conviction as against the objection that it was not shown that accused had not been divorced; the presumption in civil cases as to the regularity of marriages being inapplicable in a prosecution for bigamy.

[Ed. Note.—For other cases, see *Bigamy*, Cent. Dig. §§ 34-40; Dec. Dig. § 7.*]

5. CRIMINAL LAW (§ 804*)—TRIAL—INSTRUCTIONS—NECESSITY OF WRITING.

Under *Burns' Ann. St. 1908*, § 2136, subd. 5, accused, on requesting the court to charge in writing, has the absolute right to written instructions.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 1948; Dec. Dig. § 804.*]

6. CRIMINAL LAW (§ 804*)—TRIAL—WRITTEN INSTRUCTIONS.

The act of the court reporter in taking down the oral instructions does not convert them into written instructions within *Burns' Ann. St. 1908*, § 2136, subd. 5, requiring the court to charge in writing on request.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 1953; Dec. Dig. § 804.*]

7. CRIMINAL LAW (§ 804*)—RIGHT TO WRITTEN INSTRUCTIONS—WAIVER.

Where accused consented, on the jury coming in for further instructions, to the reading

by the reporter of the oral instructions given, he waived his right to written instructions.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 1949; Dec. Dig. § 804.*]

8. CRIMINAL LAW (§ 766*)—INSTRUCTIONS—INVADING PROVINCE OF JURY.

A charge that the jury are the sole judges of the facts and may determine the law as enacted by the Legislature and interpreted by the courts, is not objectionable as invading the province of the jury, empowered under *Const.* § 64, and *Burns' Ann. St. 1908*, § 2136, subd. 5, to determine the law and the facts.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 1794; Dec. Dig. § 766.*]

9. CRIMINAL LAW (§ 829*)—INSTRUCTIONS.

It is not error to refuse requested instructions fully covered by others given.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 2011; Dec. Dig. § 829.*]

10. CRIMINAL LAW (§ 811*)—REQUESTED INSTRUCTIONS—PRESUMPTIONS.

Instructions that the presumption of innocence attaches to accused, coupled in each instance with a specific phase of the case, give undue prominence to the question of presumptions, and are properly refused, though accused is entitled to a charge on the presumption of innocence.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 1969-1972; Dec. Dig. § 811.*]

11. CRIMINAL LAW (§ 811*)—INSTRUCTIONS—CREDIBILITY OF PARTICULAR WITNESSES.

Where two witnesses from a sister state testified that the former wife of accused was alive, the refusal to charge as to the care the jury should take in weighing the testimony of such witnesses was not erroneous; it not being proper to single out such witnesses.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 1971; Dec. Dig. § 811.*]

12. WITNESSES (§ 360*)—IMPEACHMENT.

Where accused attacked the moral character of prosecutrix, his wife in the alleged bigamous marriage, it was not error to permit her to call witnesses as to her character.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. § 1165; Dec. Dig. § 360.*]

13. CRIMINAL LAW (§ 804*)—TRIAL—INSTRUCTIONS.

Where accused and his attorneys were present when the jury returned into court asking for an instruction on a question of law, and no objection was made to the court answering the inquiry, accused could not complain that the court orally responded to the inquiry, though it should have drawn an instruction and reinstructed the jury.

[Ed. Note.—For other cases, see *Criminal Law*, Dec. Dig. § 804.*]

14. BIGAMY (§ 7*)—BURDEN OF PROOF.

The state, on a trial for bigamy, must prove that accused was married to another spouse living at the time of the bigamous marriage, and accused, to escape conviction, must then show a divorce from the prior spouse.

[Ed. Note.—For other cases, see *Bigamy*, Cent. Dig. §§ 34-40; Dec. Dig. § 7.*]

15. CRIMINAL LAW (§ 1172*)—HARMLESS ERROR—ERRONEOUS INSTRUCTIONS.

Where, on a trial for bigamy, there was no pretense that accused had obtained a divorce from his former wife, and the evidence of his guilt was overwhelming, the error, if any, in an instruction that accused had the burden of

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

¹ Rehearing denied and opinion modified.

showing a divorce from his former wife, was not reversible.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3154-3163; Dec. Dig. § 1172.*]

16. CRIMINAL LAW (§ 1088*)—INSTRUCTIONS—EXCEPTIONS.

Exceptions to instructions in criminal cases cannot be reserved by their being dated and signed by the judge, or by the party or attorneys, though the exceptions are otherwise properly reserved by the bill of exceptions.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 1088.*]

Appeal from Circuit Court, Pike County; John L. Bretz, Judge.

James E. Lesueur was convicted of bigamy, and he appeals. Affirmed.

Lindsey & Bock and J. L. Sumner, for appellant. Thomas M. Honan, Harry W. Carpenter, Oscar R. Luhring, Wm. B. Le Masters, Durre & Curry, Edw. M. White, James E. McCullough, and Thos. H. Branaman, for the State.

MYERS, J. Appellant was indicted in Vanderburgh county, from which the venue was changed to Pike county, where he was convicted and sentenced for bigamy.

The first alleged error assigned is in sustaining a demurrer to his plea in abatement. The substance of that plea was that the defendant is now, and has been continuously for the past five years, a resident of the state of Missouri, and never was a resident of the state of Indiana; that, after his marriage to the prosecuting witness, she filed an affidavit in the city court of Evansville, Vanderburgh county, Ind., charging him with bigamy, procured a warrant for his arrest, and he was arrested in the city of St. Louis, Mo., and the officer from the city court of Evansville presented this warrant to him, and demanded that he return to the state of Indiana to answer the charge, and that, in ignorance of his rights and believing the proceeding legal, he returned to the city of Evansville with the officer; that he was bound over to the grand jury, and, pending his being in jail, sued out a writ of habeas corpus, but, before the case could be heard, he was indicted by the grand jury of Vanderburgh county.

The plea presents the fact of the city judge of Evansville being the attorney of the prosecuting witness to procure an annulment of the marriage, and as having prepared and issued the warrant for his arrest, and having appointed a special judge, and then presented the case before the special judge by whom he was bound over to the grand jury, and upon his request and the request of the prosecuting attorney procured the indictment of appellant without sufficient evidence to warrant an indictment.

[1] This plea is based upon alleged fraud of these officers in procuring his return, owing to his lack of knowledge that he was not required to return in obedience to the warrant. It is manifest that these facts, if true, could not abate the indictment. This was an action by the state, and he had come voluntarily within its jurisdiction.

[2] His allegation that the indictment was

returned upon insufficient evidence cannot be interposed to abate the indictment. *State v. Comer* (1902) 157 Ind. 611, 62 N. E. 452, and cases cited; *Stewart v. State*, 24 Ind. 142; *Creek v. State*, 24 Ind. 151; *State v. Fasset*, 16 Conn. 457; *State v. Fowler*, 52 Iowa, 103, 2 N. W. 983.

If he is guilty of the offense of bigamy, it was an offense committed in Indiana, and against the state of Indiana. The plea alleged that he was not a resident or citizen of the state of Indiana. That he could not therefore avail himself of the laws of this state upon the subject of extradition of fugitives from justice, and we are not informed as to what the laws of Missouri were upon the subject, or whether there were any applicable to the subject as applied to a crime alleged to have been committed in this state. But, assuming that there were statutes of the state of Missouri to which he might have appealed, his pleading shows that he returned to the state of Indiana voluntarily, but under a misapprehension of his rights, if he had any, to be heard in Missouri, and from his ignorance of the law.

It is urged that the method employed to obtain possession of his person was against public policy, and that it is against public policy that one who is a city judge shall practice law, and that the facts alleged show a conspiracy and an unlawful act in procuring his return. Whether the practice of law by city judges should or should not be permitted is a subject for legislative intervention, and is not the concern of the courts. Whether the alleged acts by which his return was procured were wrongful upon the part of the participants, or would authorize an action for damages, they clearly cannot be claimed to abate the indictment, and the demurrer was properly sustained.

[3] The next alleged error is in overruling the motion for a new trial, and primarily that the verdict is not sustained by sufficient evidence. The evidence shows: That appellant was married in Carroll county, Mo., on May 1, 1899, to a Miss Wallace; that he was then upwards of 21 years of age, and she upwards of 18 years of age; that they lived together until November, 1906. He was 27 years of age at the time of the trial. By the first marriage he had one child, and his first wife procured a divorce from him. He was again married July 10, 1909, to Rowena Rogers in Omaha, Neb., and left her after a few days. That on February 26, 1910, he was married to Jeanne H. Kelley, in Vanderburgh county, Ind. His verified application for a marriage license stated that this was his first marriage. Jeanne H. Kelley was 21 years of age, and this was her first marriage. He stated to the minister who performed the marriage ceremony that he had never been married. He stated to a policeman that he had received a letter from Rowena Rogers some two weeks before his marriage to Miss Kelley that she had obtained a divorce, but he had destroyed the letter. He first met Miss Kelley February 3, 1910, and they were married on February 26, 1910. They were employed in the same office, she as a stenographer, and he as a cartoonist. He represented to the prosecuting witness that he was a bachelor. Soon after the marriage they

went to St. Louis, and she returned to her father March 28, 1910, and instituted an action for a divorce April 28, 1910. He claimed to have received a letter from his last wife ten days or two weeks before he married Miss Kelley in which she stated that she had gotten a divorce. His reliance and defense is based upon that claim of fact. He claims to have written her inquiring whether she had gotten a divorce, and that he believed what she said, and made no further inquiry. There is some evidence by one party as to having seen a letter such as appellee claimed to have received, but it was of such character that the jury may well have disbelieved it. It then resolves itself into this proposition: Supposing that he received such a letter, was he justified in relying upon it? In *Squire v. State*, 46 Ind. 459, an instruction was asked by the defendant "that, if the jury believe from all the evidence in the case that the defendant married the second time in the honest belief that his former wife had been divorced from him, they should find him not guilty," and it was held not error to refuse it, and it was also held that, if it had been asked so to do, the court should have charged the jury that if they believed from the evidence that the defendant had been informed that his wife had been divorced, and that he had used due care and made due inquiry to ascertain the truth, and, had, considering all the circumstances, reason to believe, and did believe, at the time of his second marriage that his former wife had been divorced from him, they should find him not guilty. In that case the defendant had been separated from the former wife two years, and had received letters from his parents and his brothers informing him that his wife had procured a divorce from him, and, relying upon that information, had remarried. Appellant's claim is not so well founded in this case, as was the defendant's claim in that case.

In this case appellant admits that the relations between himself and the last wife were strained, and that he had seen her as late as November, 1909, and knew she had not then procured a divorce. He knew that she lived in Douglass county and in the city of Omaha, Neb., where she had relatives whom he knew, as he did the places of residence of other relatives whom he knew, but he made no inquiry whatever except as he claimed of his wife. This information he claimed to have received within ten days or two weeks of the marriage for which he was prosecuted. It is not sufficient that he should merely have had a belief upon the subject. He must show such care and inquiry as would justify the belief under all the evidence and circumstances in evidence, and whether he did so was a question for the jury.

[4] It is next contended that the evidence is not sufficient for the reason that it was not shown that appellant had not been divorced from the former wife. This proposition has been held adversely to appellant. *Fletcher v. State* (1907) 169 Ind. 77, 81 N. E. 1063, 124 Am. St. Rep. 219. The presumptions which obtain in civil cases with respect to marriage entered into according to the forms of law that there is no impediment to such marriage, where the rights or the hap-

piness of the innocent party to the supposed marriage or the legitimacy of offspring of the marriage is involved in collateral proceedings, find no place in a prosecution for bigamy. *Fletcher v. State*, supra.

[5] Before the commencement of the argument to the jury, appellant requested the court to give all instructions to the jury in writing. This was not done, and the court instructed the jury orally, and the instructions were taken in shorthand by the court reporter. If the case stood in this condition of the record, this judgment would have to be reversed, as it is a positive right of a defendant. *Burns* 1908, § 2136, subd. 5; *Littel v. State*, 133 Ind. 577, 33 N. E. 417; *Stephenson v. State*, 110 Ind. 358, 11 N. E. 360, 59 Am. Rep. 216; *Smurr v. State*, 88 Ind. 504.

[6] But, after the jury had retired and been some four hours in deliberation, they requested to be reinstructed. They were brought in and by consent of appellant the instructions were read by the reporter. The taking down by the reporter of the oral instructions did not constitute them written instructions. *Shafer v. Stinson*, 76 Ind. 374.

[7] The right to written instructions might be waived, and, when appellant consented to the reinstruction of the jury in the manner shown, he waived the right to written instructions. *Voght v. State*, 145 Ind. 12, 43 N. E. 1049.

[8] The court was requested by one instruction to instruct the jury that they were "the judges of the law and the evidence." This request was refused, and the jury were instructed that they were "the exclusive and sole judges of what facts have been proven. * * * You may also determine the law for yourselves, and by that is not meant that you have a right to set aside the law, and make your own law. You determine the law as it is enacted by the Legislature of this state, and considered and interpreted by the higher courts of record, and in that way you have a right to determine the law for yourselves, but not to make your 'own law.'" Each of these instructions was coupled with the usual instructions in regard to the credibility of witnesses, etc. This instruction is no more than advisory to the jury as to the manner of determining the law. They are charged with determining the law as applied to a particular case. That is what the law is upon a specific point or question. The law exists, or it does not. Innocence or guilt depends upon what the law is upon a given state of facts. How is a jury to determine what the law is? It must be from the statute and the judicial determinations, but not from the statute alone, but the substantive law that the law is to be known and the jury are given no more than the rules to guide them in coming to their determination as to what the law is, and it must be true that they cannot make the law, but both by the Constitution (article 1, § 64, *Burns* 1908), and section 2136, subd. 5, they have the right to determine it as it is, so that the instruction was not erroneous, and the province of the jury was not invaded, and fairly covered the question presented by appellant's second requested instruction. *Anderson v. State*, 104 Ind. 467, 4 N. E. 63, 5 N. E. 711; *Hudelson v. State*, 94 Ind. 426, 48 Am. Rep. 171;

Nuzum v. State, 88 Ind. 599; Powers v. State, 87 Ind. 144; Rubricht v. State, 11 Ind. 540; Williams v. State, 10 Ind. 503.

[9] Appellant's requested instructions upon the question of reasonable doubt were fully covered by the instructions given, and are quite as favorable to the appellant as he could ask.

[10] Appellant requested five separate instructions to the point that the presumption of innocence attaches to a defendant charged with crime step by step until the close of the trial, but in each instance was coupled with some specific question or phase of the case. The court instructed the jury that "the defendant is presumed to be innocent until the contrary is proved. When there is a reasonable doubt as to whether his guilt is satisfactorily shown, he must be acquitted"; and that "if there is a reasonable doubt in your minds, or in the mind of any one of you, as to his guilt, you cannot find him guilty as long as that remains, but, on the contrary, you must find him not guilty." The instructions requested gave undue prominence to the question of presumptions with respect to specific matters, and while appellant would have been entitled to an instruction which presented the question of the presumption attaching to a defendant from the beginning to the close of a trial, and step by step in its progress, he is not entitled to have it repeated with respect to specific matters. It must be unobjectionable in the form he requested it. Goodwin v. State, 96 Ind. 550.

Appellant requested two instructions which were refused upon the subject of reasonable doubt as to whether appellant exercised due care to ascertain whether his former marriage had been dissolved, and whether he honestly believed that it had been. The points were fully covered by an instruction given, and by a full instruction upon the subject of reasonable doubt.

[11] Two witnesses were brought from Omaha, Neb., to testify as to the former wife of appellant being alive, and he himself testified on the trial that he had had a letter from her within ten days or two weeks of his last marriage. This was the only fact these witnesses were called to testify to, and it could not have been known to the state that appellant would even testify, or that he would testify that the former wife was still alive, but he tendered instructions upon the subject of the care the jury should take in weighing the testimony of these particular witnesses. He was not harmed by it, and, in fact, predicates his defense on the fact that, as late as 10 days before his marriage, he had had a letter from her upon the faith of which he married, and the matter of weighing the credibility of witnesses was fully covered by another instruction. It is insisted, however, that he was entitled to an instruction singling out these witnesses, and the reason for extra caution in weighing their testimony. It is not proper to single out part of the witnesses in a case—for, if a part may be, all may—and attempt an analysis as affecting the question of credibility. Appellant would certainly justly complain if his own testimony were subjected to that rule. McIntosh v. State, 151 Ind. 251, 51 N. E. 354; Deal v. State, 140 Ind. 354, 39 N. E. 930. The specific objection is based upon the

cases of Parker v. State, 136 Ind. 284, 35 N. E. 1105, Fleming v. State, 136 Ind. 149, 36 N. E. 154, and Carpenter v. State, 43 Ind. 371. It will be noted, however, that in neither of those cases was this question presented, but in each was involved a specific question in controversy which went to the very marrow of the case, viz., in two cases an alibi, and in the third the question of self-defense, and in each it was held that a defendant is entitled to a specific charge as to the law upon evidence in the case, and especially upon a controverted question upon which innocence or guilt depends, but that is very far from the question here presented.

[12] Appellant sought to attack the moral character of the prosecuting witness, and on rebuttal she was allowed to call witnesses as to her moral character. There was no error in this. Commonwealth v. Gray, 129 Mass. 474, 37 Am. Rep. 378; Warren v. Commonwealth, 99 Ky. 370, 35 S. W. 1028.

[13] After the jury had been in deliberation some four hours, they requested to be reinstructed, and it was in this connection that appellant consented that the instructions as originally given by the court and taken down in shorthand be read to the jury. At the close of their reading, one of the jurors inquired, "I do not know whether it would be a point of evidence. The question bothering us is, Was it necessary for the state to bring a deposition from this Rowena Rogers [the former wife] to this court, and was it necessary for the state to prove that the marriage of this defendant to Rowena Rogers was not annulled by divorce prior to his marriage to this Kelley girl, was or was not annulled by divorce?" The court in answer to this inquiry stated to the jury: "On the law question you inquired about, it is incumbent on the state to show that the defendant was married to the Rogers woman, and that she was still living at the time of the marriage to the Kelley woman. It is then incumbent on the defendant to show a divorce from his former wife, the Rogers woman, if you find he was married to her. What is the other point?" The juror answered, "That is all." Appellant and his attorneys were present and made no objection to the court answering the inquiry. There had been no specific instruction given upon the direct question asked. To have reread the instructions would not have enlightened the jury upon the question. It was a question of law, as to which the jury were entitled to be instructed. The practice here followed is far from commendable, and is condemned. The court should have drawn an instruction covering the point, and reinstructed the jury; otherwise, a defendant's rights might be seriously prejudiced without opportunity for redress, if the statements of a court are not preserved.

[14] The answer or instruction is treated as instruction 13 of the sequence. The form of the exception as shown by the alleged bill of exceptions is: "And the defendant, at the time said thirteenth oral instruction was given to the jury, excepted to the action of the court in giving said thirteenth oral instruction to the jury, and after said thirteenth oral instruction so given to the jury was transcribed by the reporter, the defendant entered on the margin of the said thirteenth

instruction his written exception to the action of the court in giving to the jury said thirteenth instruction, which written exception was dated and signed by the attorneys for the defendant and by the judge of said court." It is then recited that the "thirteenth oral instruction" was correctly transcribed, and signed by the judge, and filed with the clerk, and said "thirteenth oral instruction," with the 12 other preceding instructions given, "and the exceptions taken by the defendant to each of them, and written on the margin thereof, and dated and signed by the judge and attorneys for the defendant, * * * are in words and figures following." Here followed the 13 instructions seriatim, on the margin of each of which is the statement: "Given by the court of its own motion, and excepted to at the time by the defendant, the 22d day of July, 1910. John L. Bretz, Judge. Lindsey & Bock, Attorneys for Defendant." And it is then recited that these instructions from 1 to 13, inclusive, were all the instructions given to the jury. We were at first of the opinion that this does not show an exception to the substance of the instruction, and so treated it; but in that there may be room for doubt. There had been no specific instruction as to whom the burden was placed upon, to show a divorce; but the jury had been properly instructed upon the question of the duty of the defendant to make such reasonable inquiry, and exercise such care as would reasonably lead one to believe that a divorce had been granted. Taking the inquiry by the juror, and the answer, it seems to have been directed to the proposition whether the state was required to prove that no divorce had been granted, and whether, if divorce was claimed as a defense, it should be shown by the defendant. The one proposition is the corollary of the other; that is, the state was not bound to prove the negative, but appellant was required to prove the affirmative. One is the necessary sequence of the other, and was a correct statement of the law. *Fletcher v. State*, supra.

[16] But, if we are in error both as to the exception and the substance of the thirteenth instruction, appellant could not have been harmed by it; for there is no pretense of a divorce, and the evidence is so overwhelming as to his guilt that we would not be warranted in reversing the judgment, because his substantial rights were not prejudiced upon the merits. *Musser v. State*, 157 Ind. 423, 61 N. E. 1; *Stalcup v. State*, 146 Ind. 271, 45 N. E. 334; *Reed v. State*, 141 Ind. 116, 40 N. E. 525.

[18] We desire again to point out to the profession that exceptions to instructions in criminal cases cannot be reserved by their being dated and signed by the judge, or by the party or attorneys, as done in this case, though the exceptions are otherwise properly reserved by the bill of exceptions. *Stucker v. State*, 171 Ind. 441, 443, 84 N. E. 971; *Donovan v. State*, 170 Ind. 123, 131, 83 N. E. 744; *State v. Thomson*, 167 Ind. 96, 78 N. E. 328; *Hannan v. State*, 149 Ind. 81, 47 N. E. 628.

The judgment is affirmed.

(175 Ind. 673)

SKINNER et al. v. SPANN. (No. 21,583.)

(Supreme Court of Indiana. June 1, 1911.)

WILLS (§ 597*)—ESTATES DEVISED—FEE-SIMPLE ESTATES.

Under Burns' Ann. St. 1908, § 3123, providing that every devise in terms denoting the testator's intention to devise his entire interest in all his real or personal property, shall be construed to pass all the estate in such property, where a testator bequeathed his wife the rents and profits arising from his real estate not otherwise disposed of, with a power of sale, and provided that upon her death all of the property remaining shall be divided in eight parts and distributed among certain persons, the last devisees are not restricted to a life estate, for that would create a partial intestacy.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1319-1326; Dec. Dig. § 597.*]

On petition for rehearing. Petition overruled.

For former opinion, see 93 N. E. 1061.

E. D. Salsbury, Philip Wilkinson, Jameson & Hay, W. A. Bastian, and Robert W. McBride, for appellants. Miller, Shirley, Miller & Thompson, Stafford & Arthur, Walter S. Bent, Gavin, Gavin & Davis, and Lewis C. Walker, for appellee.

JORDAN, C. J. Appellants have filed a petition for rehearing in this appeal, wherein they assign numerous reasons and in support thereof they present an extended argument. Their counsel still appear to be impressed with the view that all that passed to the wife of the testator was merely the rents and profits of the land, and all which he intended to give to his nieces and nephews (appellees herein) was the mere unconsumed portion of these rents and profits remaining at the death of his wife. It is claimed that in reaching the conclusion which we did at the former hearing, we overlooked, ignored, and overthrew well-settled rules of law. Upon this feature they especially argue and contend that we ignored the old rule of the common law which they advanced, which is to the effect that a general devise of real estate, which does not define the interest to be taken by the devisee, passes only a life estate, unless it affirmatively appears from the will that a greater estate was intended. They insist that this is a rule of law and not of construction, and seemingly insist that it is an inflexible rule and one to which all other rules pertaining to the interpretation of wills must bend or become subordinate. Therefore, it is argued that we erred in overlooking the fact, as they claim, that the devise in the will to appellees is a general one containing no words of inheritance or limitation and no words defining the extent of the interest to be taken by them, therefore, it is said that the common-law rule for

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

which they contend must prevail and therefore it must be held that the devise to appellees passed to them only a life estate.

Upon the proposition that a devise of the rents and profits or the income of land is in effect a devise of the land itself, we, in addition to the authorities cited in the original opinion, refer to the following: *Merrill v. American Baptist, etc., Union*, 73 N. H. 414, 62 Atl. 647, 3 L. R. A. (N. S.) 1143, 111 Am. St. Rep. 632; *Reed v. Reed*, 9 Mass. 372; *Sampson v. Randall*, 72 Me. 109; *Diamant v. Lore*, 31 N. J. Law, 220. It is certainly immaterial what language or terms the testator employed to express his intention that his wife was to be invested with a life estate in his lands. That he carried out his intention by the use of language or terms well recognized by law is sufficient. We have, therefore, the settled or given fact that his wife took a life estate in all his land other than that which he devised to his sister, Mrs. Sprole. The inquiry then arises, what disposition, if any, did he make of the fee simple interest which he held? This fee interest, as shown, amounted to about 95 per cent. of his entire estate. Counsel for appellants in their brief on petition for rehearing still continue to assert that as to his fee interest in his lands the testator intended to and did die intestate, and therefore at his death the lands devised to his wife for life passed or descended to her in fee simple as his heir, and at her death they descended to appellants as her heirs under the law.

At the former hearing we did not ignore the common-law rule, but were convinced by the consideration of the will in its entirety, as well as certain parts or portions thereof, that the intention of the testator to invest appellees with the fee simple in the lands devised to them was plainly shown. Therefore, according to the decisions, to which we will hereafter refer, there was no room for the application of this rule. The principle is well-settled that in a testamentary devise of land the term "heirs" or any other legal word of inheritance is not necessary to pass the fee to the devisee. As appellants now seem to rest their case upon the common-law rule, which they apparently insist must absolutely control in the construction of the will in this case, we will give this rule a full consideration. While it is true that it is still in force in this state, nevertheless it has been materially modified by our Legislature, and as now recognized by this court it will not be permitted to defeat the intention of a testator where his intention can reasonably be discovered from the will itself. Or, in other words, the rule in question is not, as appellants insist, an inflexible one of law, but is one of construction, and cannot be permitted to prevail over the intention of the testator, but is subordinate to such intention, and can operate only and along and in connection with other well-settled rules or canons applicable to the con-

struction or interpretation of wills. It is certainly true that a court in construing a will is not to be guided or controlled alone by the bare provision therein devising the lands which does not name the interest intended to be taken by the devisee, and hold that such devise must be limited or confined to a life estate only without regard to or consideration of other provisions, clauses or terms of such instrument. Wills are not to be so construed.

Section 3123, Burns' Statute 1908, which is a part of the statutes of this state pertaining to wills, provides that "every devise, in terms denoting the testator's intention to devise his entire interest in all his real or personal property, shall be construed to pass all of the estate in such property, including estates for the life of another, which he was entitled to devise at his death. * * *". This section provides a rule of construction, and appellant's counsel apparently overlook the fact that the common-law rule for which they contend has been thereby modified, and that the intention of the testator, when ascertained, must prevail, notwithstanding the said rule. *Korf v. Gerichs*, 145 Ind. 134, 43 N. E. 24; *Mills v. Franklin*, 128 Ind. 444, 28 N. E. 60.

In *Korf v. Gerichs*, supra, the court speaking by Hackney, J., after referring to and quoting from the above section said: "While this statute does not defeat the common-law rule it implies that that rule shall not prevail as against the intention of the testator 'to devise his entire interest.' The rule that the testator's intention shall prevail notwithstanding the common law, has been applied in this state. *Ross v. Ross*, 135 Ind. 367, 35 N. E. 9; *Mills v. Franklin*, 128 Ind. 444, 28 N. E. 60; *Morgan v. McNeeley*, 126 Ind. 537, 26 N. E. 395; *Patterson v. Nixon*, 79 Ind. 251. That it is the general rule for the construction of wills that the intention of the testator is of first importance is without question. One rule of intention is that a testator will not be presumed to have intended partial intestacy, unless the language of the will compels such construction. [Citing cases.] This rule has been applied to defeat that of the common law, above referred to, in *Morgan v. McNeeley*, supra, and *Mills v. Franklin*, supra. Partial intestacy would be written upon each of the three devises to the appellee, if the appellant's contention should control. * * *. In speaking of the rule of the common law, this court said in *Roy v. Rowe*, 90 Ind. 54: 'This rule often operates in contradiction of the rule that the testator's intention shall prevail, especially in the case of wills made by persons unskilled in the law; for the common mind will usually suppose that a general devise, without limitation, carries the whole estate of the testator. Therefore, if the will contain any expression, in addition to the general devise, indicating an intention to pass a fee simple, the court will use this to bear out

the intention; though it must, in some way affirmatively appear, courts are easily satisfied that an estate of inheritance was intended. *Cleveland v. Spillman*, 25 Ind. 95. They are always ready to adopt any plausible excuse for rescuing particular cases from the wrong direction, which the general rule would give them. 2 Redf. Wills 327. We think, in view of the statute above quoted, that this proposition could have been made even stronger by stating that the common-law rule will not be allowed to defeat the testator's intention, where that intention can be otherwise reasonably ascertained. The common-law rule at most is but a guide to the ascertainment of the testator's intention, and it must take its place in connection with the other established rules for like purpose. To give that rule the control of the question made by the appellant, would set at naught the rule against partial intestacy."

The argument of appellants' counsel that the rule in question is one of law and not of construction is certainly refuted by the holding of this court in *Korf v. Gerichs*, supra. As there said, it is "at most but a guide to the ascertainment of the testator's intention and must take its place in connection with other established rules for like purpose."

In *Mills v. Franklin*, supra, this court also considered the rule as one of construction, for it is there said that: "Admitting that this rule of construction is in force, as stated in *Roy v. Rowe*, 90 Ind. 54, yet it is a somewhat technical rule of construction, and is not applied where the other expressions and language of the will indicate an intention of the testator to pass a fee simple, and due consideration must be given to other well-settled rules of construction."

One of the infirmities which impresses the argument of appellants' counsel is their effort or endeavor to make a will for the testator according to their own views instead of properly construing the one which he actually made. Turning again to the provisions of the will of James W. Brown, and it will be seen that after making a devise of the life estate to his wife under item 1, he then, in item 2, positively directs that upon her death "all of the property" devised to her for her own use and benefit during her life, which shall be remaining, shall be divided into eight equal parts, etc., and to go to the beneficiaries therein named—kindred of his own blood. Evidently what he meant by the word "remaining" was the remainder over of the lands devised to his wife which she had not sold and used the proceeds thereof for her maintenance and support under the power with which she was invested. By the language "all which shall be remaining shall be divided into eight equal parts" and one-eighth given to the devisees as therein mentioned, the intention of the testator to vest the fee is evident,

and therefore may be said to affirmatively appear.

To reassert, the fact that he made a will creates a strong presumption of his intention to devise his entire interest in all of his property, both real and personal, which he was entitled to devise at the time of his death. This fact, coupled with the further fact that he made no provision or gave no direction that the part of his estate which he devised to appellees—the kindred of his own blood—should at any time pass beyond them, indicates that he intended for them to enjoy the property given to them absolutely as their own. *Roy v. Rowe*, 90 Ind. 60; *Mills v. Franklin*, supra.

Under the circumstances, it is unreasonable to argue that he in the disposition of his property intended to create two life estates—one in favor of his wife, and the other in favor of the appellees—making no testamentary disposition whatever of the fee of his valuable real property; or, in other words, leaving it to be controlled by the law of descent.

Referring again to the introductory clause of this will, and it will be observed that the testator thereby declares his intention to dispose of his property; not merely a portion thereof, but as he declares "my property," manifestly meaning and intending all of his property. According to the meaning of the term "disposition" it was his purpose to distribute all of his property under and by the written instrument which immediately followed this introductory clause, which instrument or document he declared to be his last will.

In *Pattison v. Doe*, 7 Ind. 282, the will there involved was executed by Edward Pattison in 1827, when the common-law rule was in force in this state. By this will the testator devised to each of his seven sons a tract of land, reserving a life estate out of one tract to his wife. He also gave specific and pecuniary legacies to his two daughters. The will contained a residuary clause disposing of the remainder of his property. By the fourth item of his will the testator in that case devised to his son, James Pattison, the southeast quarter, etc., describing a certain tract of land devised to said son, without naming the interest intended to be passed. In an action involving this will the lower court held that James Pattison took a life estate only under the devise in question. On appeal, the judgment below was held to be erroneous and a reversal followed. In that case this court said: "The will disposed of the entire estate of the testator; and it would be subversive of the first and most obvious rule of construction—that is, the intention of the testator—to hold that a life estate only passed by the devise. [Citing authorities.] If, upon examining the will, the intention to pass a fee is apparent, a fee will pass, although the word 'heirs'

is not used. *Doe v. Harter*, 7 Blackf. 488. That such was the intention of the testator appears from the fact already adverted to—that he disposed of all his property; and from the fact that the devisees are all alike, the word 'heirs' not occurring in the entire will. * * *

Without any further comment, we are satisfied that the conclusion which we reached in the former hearing that appellees took a fee in the property devised to them by the will of James W. Brown was correct. We again affirm, for the reasons stated in our original opinion, that no question for the taxation of costs is presented.

Appellants in their petition also request a rehearing in this cause in respect to the will of Agnes C. Brown. Under our holding, however, we are fully satisfied that her will was properly construed, and that no reasons are presented for a rehearing upon the construction of her will.

Appellants' petition for rehearing is in all things overruled.

(177 Ind. 396)

CITY OF INDIANAPOLIS et al. v. INDIANAPOLIS LIGHT & HEAT CO.
(No. 21,544).¹

(Supreme Court of Indiana. May 23, 1911.)

1. APPEAL AND ERROR (§ 167*)—RIGHT TO APPEAL—EFFECT OF STIPULATION.

By paying money to plaintiff under a judgment against it and several other defendants, a city did not preclude itself from appealing where it was stipulated that, if any of the parties should appeal, and, upon final adjudication, it should appear that the city should not have made such payment, the city should be repaid.

[Ed. Note.—For other cases, see *Appeal and Error*, Dec. Dig. § 167.*]

2. RAILROADS (§ 99*)—TRACK ELEVATION PROCEEDINGS—ASSESSMENT OF DAMAGES—AUTHORITY.

One affected by an improvement under the track elevation statute of March 3, 1905 (Acts 1905, c. 82), cannot base right of action on an assessment of damages made by the board of public works without showing that the board was authorized to make it.

[Ed. Note.—For other cases, see *Railroads*, Dec. Dig. § 99.*]

3. RAILROADS (§ 99*)—TRACK ELEVATION PROCEEDINGS—ASSESSMENT OF DAMAGES—AUTHORITY.

Under the express terms of Track Elevation Statute March 3, 1905 (Acts 1905, c. 82) §§ 2, 5, the board of public works can determine and assess in favor of an owner only such damages as are recoverable at law on account of an improvement.

[Ed. Note.—For other cases, see *Railroads*, Dec. Dig. § 99.*]

4. RAILROADS (§ 99*)—TRACK ELEVATION PROCEEDINGS—ASSESSMENT OF DAMAGES.

A light and heating company is not entitled to an award for damage caused its property by a change of the grades of streets made by a city in making an improvement under the track elevation statute of March 3, 1905 (Acts

1905, c. 82), thus invalidating an assessment of such damages by the board of public works.

[Ed. Note.—For other cases, see *Railroads*, Dec. Dig. § 99.*]

5. RAILROADS (§ 99*)—STREETS—TRACK ELEVATION PROCEEDINGS—ASSESSMENT OF DAMAGES.

Under a light and heating company's franchise, reserving to the city right to require a change in the company's conduits, etc., the company was not entitled to an award to cover changes the company was required to make in its conduits, etc., on account of an improvement under the track elevation statute of March 3, 1905 (Acts 1905, c. 82), thus invalidating an assessment of such damages by the board of public works.

[Ed. Note.—For other cases, see *Railroads*, Dec. Dig. § 99.*]

6. RAILROADS (§ 99*)—STREETS—TRACK ELEVATION PROCEEDINGS—DAMAGES.

Track Elevation Statute March 3, 1905 (Acts 1905, c. 82) § 6, prescribing the method of apportioning damages caused by an improvement under the act, does not contemplate suit against a city or the railroad companies affected to recover personal judgment for cost or expense incurred in an improvement.

[Ed. Note.—For other cases, see *Railroads*, Dec. Dig. § 99.*]

Appeal from Superior Court, Marion County; J. G. Leffler, Judge.

Action by the Indianapolis Light & Heat Company against the City of Indianapolis and others. Judgment for plaintiff, and defendants appeal. Reversed.

Samuel O. Pickens, Baker & Daniels, Elam, Feiler & Elam, Walker & McGuire, Ferdinand Winter, Hackney & Littleton, Bowen & Watson, John W. Kern, John C. Ruckelshaus, W. W. Lowney, and Jos. B. Kealing, for appellants. John E. Scott, E. E. Scott, Addison C. Harris, Pickens, Cox & Conder, and Harvey & Harvey, for appellee.

JORDAN, C. J. Appellee, as plaintiff in the lower court, originally instituted this action against the city of Indianapolis as sole defendant to recover the sum of \$25,000, that being the amount of an assessment made in favor of the plaintiff by the board of public works of the city of Indianapolis on account of damages claimed to have been suffered by it on account of changes made in the grades of certain streets in the city of Indianapolis by work performed under and in pursuance of a resolution adopted by the said board as authorized by an act of the Legislature known and denominated as "The Track Elevation Statute," passed on March 3, 1905. Acts 1905, p. 144. A demurrer by the city to the original complaint on account of defect of parties defendants was sustained. Thereupon plaintiff filed an amended complaint, whereby it made the following parties codefendants in the action along with the city of Indianapolis: Vandalla Railroad Company; Cleveland, Cincinnati, Chicago & St. Louis Railway Company; Cincinnati, Indianapolis & Western Railroad Company; the

¹For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes
1 Rehearing denied.

Indianapolis Union Railway Company; the Indianapolis Traction & Terminal Company; the Indianapolis Street Railway Company; the board of commissioners of the county of Marion; and the town of Woodruff Place, of Marion county, Ind.

Briefly stated, it may be said that this amended complaint discloses the character and nature of the several corporations, defendants, and the business in which they were engaged, together with the plaintiff's and defendants' ownership of certain property, the situation of the real estate and property, and the use to which it was applied, etc. It alleged the adoption by the board of public works of the city of Indianapolis of track elevation resolution No. 1 under and pursuant to the aforesaid statute. The complaint disclosed that said resolution was adopted by the board of public works for the alteration of grade of crossing or crossings of steam railroad track or tracks, and for the elevation or depression of such tracks where they crossed any street or highway in said city. The pleading alleged that notice of the adoption of this resolution was published once each week for two consecutive weeks in the Indianapolis Sentinel, a daily newspaper of general circulation published in said city, etc.; that in said notice the 29th day of May, 1905, was fixed as the time at which the board of public works would receive and hear remonstrances from persons interested in and affected by such improvement; that, in addition to the publication aforesaid, the board caused 10 days written notice of such hearing to be served on a resident officer of the steam railroad and street railway companies whose tracks are affected by the proceedings, and upon the board of county commissioners of Marion county, Ind., and upon the town clerk of the town of Woodruff Place, an incorporated town within and surrounded by the city of Indianapolis. It further shows that, upon plaintiff's (appellee herein) remonstrance, such proceedings were had before the board of public works that said board assessed damages in favor of appellee in the sum of \$25,000, which damages the board stated were recoverable under existing laws on account of such elevation of tracks, etc. The board adopted and approved the list of assessment of damages as modified, and declared that said assessment of damages so awarded to the Indianapolis Light & Heat Company shall be deemed a part of the expense of the improvement ordered and directed by the track elevation resolution, and that said expense shall be borne by the proper parties in interest mentioned in the said track resolution as therein and by law provided, and that the same shall be included in an equitable settlement or settlements to be hereinafter adjusted by said board of public works between the parties in interest as contemplated by said track elevation resolution and as provided by law. The assessment in question

was filed in the office of the board of public works, etc. This amended complaint demands judgment in favor of the plaintiff against each and all of the defendants for \$30,000 and all proper relief. Each of the defendants separately demurred to the amended complaint for want of facts. These demurrers were overruled, and exceptions reserved. Separate answers by way of general denial and by setting up affirmative matter were then filed by the several defendants. On the issues as joined there was a trial by court and a finding in favor of plaintiff.

The court found: That on the 24th day of August, 1906, the board of public works of the city of Indianapolis, acting under elevated track resolution No. 1 and at the time having jurisdiction of the cause and the parties affected by said elevated track resolution, held that the plaintiff had suffered damages by the proceedings under said elevated track resolution in the sum of \$25,000, and that such damages were damages recoverable under existing law, and upon such decision said board made a final assessment, fixing plaintiff's damages at the said sum of \$25,000. That there was no appeal from such decision and assessment by any of the defendants to this action. That by reason of such assessment and failure to appeal, said assessment has become and is now adjudicated as against the defendants herein, both as to the amount thereof, and that the same is for damages recoverable under existing law. "And the court now finds that the plaintiff has sustained damages in the sum of \$25,000, and the same are damages recoverable under existing law. That there is due to the plaintiff from the defendant city of Indianapolis on said assessment of damages as the proportion of said damages to be paid by it, as apportioned by law, sums as follows." Here the percentage to be paid by the city is set out with the interest, etc., making a total of \$4,296.83, and that the plaintiff is entitled to a judgment herein against the defendant for the amount.

The court further found: That as to the remainder of the plaintiff's damages, assessed as aforesaid in the sum of \$21,180.59, the defendant city of Indianapolis may, if it desires, advance the money and pay the same as a part of its portion of the expense of the improvement and work ordered and completed under said elevated track resolution, and, in the event of such advancement and payment, it will be entitled to credit therefor in the equitable settlement or settlements between the parties as provided by law, but it is not required to make such advancement. That it is the duty of the board of public works of the city of Indianapolis to at once make and adjust equitable settlement between the defendants interested in the improvement and work ordered and completed under said elevated track resolution in such manner as that the total cost of the alterations ordered by and completed under said

resolution, including as a part of said cost the plaintiff's said damages, shall be apportioned between the parties as theretofore decided by said board and as provided by law, fixing in said settlement the amount due from each of the defendants, steam railroad, and street railroad companies and board of commissioners of Marion county, and upon such adjustment, or in case of appeal by any party, upon the decree, each of the parties defendant should pay its proportion of such cost as directed by such settlement or decree, and, in default in the payment aforesaid by any party, the amount assessed against such party by such settlement or decree remaining unpaid should be certified by said board of public works, etc. On its finding, the court adjudged and ordered that the plaintiff recover of defendant the city of Indianapolis the sum of \$3,819.41, together with interest thereon, making a total upon this item of damages of \$4,296.83, together with its costs and charges laid out and expended. The court further ordered that the defendants other than the city of Indianapolis each pay their own costs made by them, respectively.

It was further adjudged by the court that as to the balance of the plaintiff's damages assessed as aforesaid, "if the defendant city of Indianapolis shall advance and pay to the plaintiff the whole or any part thereof, as a part of its portion of the expense of said improvement and work, it shall be entitled to credit therefor in the equitable settlement or settlements between the parties defendant to be made as provided by law, and that, upon payment to or collection by said city of any portion of said plaintiff's damages by or from any of the defendants liable therefor, not theretofore advanced and paid by the city to the plaintiff as aforesaid, if the city shall fail or refuse at once to pay the same to the plaintiff when so received or collected, the plaintiff will then have its action therefor against the defendant city," etc. It was further considered and adjudged that the finding and judgment of the court in this cause shall not in any manner affect the power of the board of public works of the city of Indianapolis to adjust an equitable settlement or settlements among the parties interested in said work and parts thereof, etc. The several and separate motions of each of the defendants for a new trial, assigning various reasons therefor were overruled by the court, to which ruling proper exceptions were reserved.

The proceedings had before the board of public works were filed as exhibits and made a part of the complaint. In its remonstrance filed before the board appellee claimed damages on account of the change of the street grades, which, as alleged, affected its easement of access to its property and to the light and air which it enjoyed. Upon this point or feature of the case, it appears from the proceedings had before the board that the latter assessed damages in favor of ap-

pellee, including interest, in the sum of \$4,296.83; and a further sum of \$21,180.59 was assessed by the board in favor of appellee, as the proceedings disclose, on account of the changes which appellee was required to make in its conduits, cables, wires, etc., these being a part of its lighting and heating plant which it was operating under and pursuant to a franchise granted by the city of Indianapolis. The damages assessed by the board in favor of appellee on account of these changes amounted to the sum of \$25,477.42, which damages, as stated by the board of public works in its record, were recoverable by appellee under existing laws as provided by the track elevation statute. No direct judgment for the recovery of any part of the damages assessed by the board of public works as set up in the complaint was rendered against any of appellants other than the city of Indianapolis. Nevertheless, if the judgment can be sustained, each of them will be very materially affected and bound thereby. Consequently each of them has the right to appeal therefrom. The judgment at least professes to bind all of the appellants, for the court therein adjudged and decreed that, if the city of Indianapolis elected, it might pay the damages in question, and, in that event, it should have the right to collect the amount so paid by it from its codefendants (coappellants herein) as a part of the cost and expense arising out of the work in making the improvement. In passing, however, it may be said that it does not appear that there was any cross-pleading upon the part of any of the defendants in the case, and appellants' counsel therefore advance the contention that a portion of the judgment is outside of the issues tendered by the complaint, and hence is invalid and of no avail. On account of the conclusion which we have reached, it is not essential that we consider appellants' contention in this respect.

[1] Separate assignments of error by each appellant have been filed. Appellee has filed a special plea or answer in bar of the separate assignment of errors filed by appellant the city of Indianapolis. Under this plea or answer, it contends that the appeal of the city should be dismissed. It appears that, after the rendition of the judgment in the lower court, an agreement was entered into between appellee and the city of Indianapolis, the latter acting through its board of public works. Under this agreement, it appears that the city turned over conditionally to appellee the sum of \$25,000. It was provided and stipulated in the agreement that, in the event any of the parties in this cause should appeal from the judgment rendered by the Marion Superior Court, then if said judgment should be reversed, modified, or a new trial ordered, and "if upon final adjudication in said cause, following such appeal or appeals, it shall appear that the city of Indianapolis ought not to have paid the company (appellee herein) the whole or any part of its said damages, in

that event, the company, upon demand, covenants, and agrees to repay and refund to the city so much of said damages as it shall appear the city ought not to have paid to the company, and final settlement, upon such final adjudication, shall be made between the parties hereto in all respects pursuant to the rights and liabilities of the parties as found and determined by such final adjudication." For the full and faithful performance of its agreement, appellee gave a bond in the sum of \$25,000. It is manifest, we think, that the city of Indianapolis by its action under this agreement is not barred or precluded from prosecuting this appeal. By turning the money over to appellee as shown, the city cannot be said to have thereby affirmed the validity of the judgment rendered in the lower court. It accepted no benefits under the judgment. All that it did was to turn the money over to appellee on the condition that it should be returned to it by appellee in the event upon a final adjudication after an appeal the city was held not to be liable to appellee for any part of the damages in question. See sections 151 and 152 of Elliott's Appellate Procedure. In section 152, supra, it is said: "It is obvious that there is an essential difference between one who pays a judgment against him and one who accepts payment of the sum awarded him by a judgment. Payment by a party against whom a judgment is rendered may often be necessary to protect his property from sacrifice. * * * Our cases holding that payment by the defendant does not estop him from prosecuting an appeal rest on solid ground, and are sustained by the decisions of other courts." In fact, it appears that appellee, under the agreement in question, did not intend to cut off or bar the city's right to appeal, for it is provided by the agreement that in the event any of the parties in the case should appeal and the judgment should be reversed, etc. The evident theory of the complaint and the one accorded to it by the lower court was that the assessment made by the board of public works and the one upon which this action is based was the equivalent of a judgment of a court against the city of Indianapolis and its codefendants; that, inasmuch as no appeal had been taken, the assessment as made by the board was conclusive and binding against all of the parties, and was not subject to collateral attack in this action. In fact, it appears that this theory was entertained by the trial court throughout the trial of the cause, as appellants were not permitted to introduce any evidence to show that appellee was not entitled to recover.

[2] Appellant's counsel earnestly insist that the trial court was wrong in holding that the board of public works in assessing the damages in question acted within its jurisdiction, and that its decision in the matter, whether right or wrong, is binding and conclusive upon all of the parties in this cause. This board is nothing more than a mere ad-

ministrative or ministerial tribunal with limited powers or jurisdiction. It has only such power as is expressly or impliedly conferred upon it by statute. Under and by the track elevation statute, supra, this board was selected to perform certain administrative duties or functions. Therefore its authority or power to act in the premises as it did must be found in and limited only by the provisions of that statute. It must, therefore, necessarily follow that, if the board had no power under this law to make the particular assessment and award of damages in favor of appellee, then, under the circumstances, its act in so doing was a nullity and in no sense binding or conclusive upon any of the appellants. *Senour v. Ruth*, 140 Ind. 318, 39 N. E. 946; *State Board, etc., v. Holliday*, 150 Ind. 216, 49 N. E. 14, 42 L. R. A. 826; *Hart v. Smith*, 159 Ind. 182, 64 N. E. 661, 58 L. R. A. 949, 95 Am. St. Rep. 280; *Klein v. Nugent Gravel Co.*, 162 Ind. 509, 70 N. E. 901, and authorities there cited; *Cain v. Allen*, 168 Ind. 8, 23, 79 N. E. 201, 896. Appellee could not base any right of action upon the assessment in question as against any of the appellants without showing that the board of public works under the provisions of the statute was empowered or authorized to make it. *Klein v. Nugent Gravel Co.*, supra.

[3] The question arises, What damages had the board of public works the power or authority under the law to determine and assess in favor of appellee? Section 5 of the track elevation act of 1905, supra, specifically answers this question by the provision therein that "said board (i. e., the board of public works) shall likewise determine the damage, if any, which may be recoverable under existing law by any person, firm or corporation on account of such elevation or depression of tracks." Again, in section 2 of the same statute, it is declared that the damages, if any, recoverable under existing law by any person, firm, or corporation, shall be included as a part of the expense to be borne by all of the parties interested. It will be noted that, under the provisions of the statute the board is tied down to and empowered to determine only such damages, if any, which may be recoverable under existing law.

[4] As shown upon the face of the proceedings of the board of public works, the assessment in controversy consisted of two parts, the first being, in round numbers, \$4,000, assessed and awarded on account of the changes of the grades of certain public streets, which changes were made by the city of Indianapolis in making the improvement in question; the second being, in round numbers, \$21,000, arising out of changes which the city required appellee to make in its conduits, cables, wires, and poles, and other appliances connected with its lighting and heating plant, on Kentucky avenue, Louisiana, Missouri, and West streets. In Mor-

ris v. City of Indianapolis (at last term), 94 N. E. 705, which appeal arose out of the same public improvement as does the case at bar, we held that there was no law under which the plaintiff in that case had a right to recover against the city on account of consequential damages suffered by reason of the changes made in the grades of certain public streets. In that case, in considering what the statute contemplated by the term or word "recoverable," we said: "The meaning of the term 'recoverable' is well understood. Its plain, ordinary, and natural meaning is that which is capable of being recovered; 'obtainable from a debtor or possessor as by legal process.' Or, in other words, it means that which can be recovered as a matter of legal right"—citing authorities. This latter decision, under the circumstances, must rule the question, and warrants the holding in this appeal that there was no existing law under which appellee in this case had the right to recover consequential damages which it claimed to have sustained as abutting property owner by reason of the changes which the city of Indianapolis made or required to be made in furtherance of the public improvement of elevating the tracks of the several railroads operating within the city.

[5] The next question is, Was the item of \$21,000 assessed by the board recoverable of the city as damages claimed to have been sustained by appellee in removing its conduits, pipes, etc., as required by the city from beneath the surface of the public streets, and placing them deeper thereunder, in order that they might not interfere with the public improvement which the city was engaged in making under the authority of the track elevation statute. Appellee used and occupied the public streets of the city in question with its conduits, wires, poles, etc., under a franchise granted to it by the city of Indianapolis. Under this franchise, it was subject to the right of the city in the proper and lawful exercise of the police power to require the temporary removal or change of its conduits, pipes, etc., although no such reservation had been made by the city in the franchise under which it granted the right to appellee to occupy public streets. However, in the ordinance adopted by the city of Indianapolis under which appellee was granted the right to use and occupy the streets with its pipes, conduits, poles, etc., in the operation of its lighting and heating plant, it was expressly stipulated that "the right is hereby reserved by the board of public works to order any change or changes made from time to time in any part of said company's plant located in the streets, alleys, and public places when in the way of any public improvement of said city, and to change the location of individual posts and guy stubs when necessitated by any private convenience, within the judgment of the board of public works, all such changes to

be made by said company without expense to said city." It is further stated in this ordinance that: "It is agreed by the parties hereto that by fixing the area within which the conduits, ducts and wires of said plant shall be placed underground, the right of the common council to hereafter exercise any of the police powers of said city shall not be in any wise restricted or abridged. Nothing contained herein shall preclude the city from prosecuting or authorizing any public work of any character, but in the prosecution of any public work, or improvement hereafter, the said board of public works shall have the right, if it deem the same necessary, to require the temporary removal of any wire, pipe, conduit, duct or appliance authorized by this contract to be laid, and the same shall be removed or necessary changes made therein by said company so as to conform according to the terms of this contract with the surface grade of any unimproved street, avenue, alley or public place ordered to be improved on the order and requirement of the board, and in case of failure on the part of said company to comply with any such order or requirement, then the said board may make such removal or change, and the necessary cost thereof shall be paid by said company to the city comptroller upon proper demand being made therefor. The board of public works of said city shall at all times have the right to inspect, superintend and reasonably control * * * and to order any change made from time to time for city purposes, all such changes to be made by said company without expense to the city. * * * It shall be understood that the city of Indianapolis shall not be precluded from prosecuting or authorizing any future public work of any character by reason of the underground work of said company, and the board of public works shall have the right to order the temporary removal of any conduit or appurtenance or the reconstruction of the same, whenever deemed necessary to the successful prosecution of any public work; and all such work or removing and reconstructing any underground structure of said company shall be done by the latter at its own expense and shall be done promptly when ordered by the board of public works," etc. It will be noted, therefore, that the city in the contractual franchise with appellee, expressly reserved its right, under the police power, to require appellee to make just such changes in its conduits, wires, ducts, underground work, and poles at its own expense, as it was required and ordered to do by the city in carrying out the improvement in question.

It follows that the item of \$21,000 assessed by the board was not, under the facts, recoverable by appellee under any existing law. Such damages, if any, merely resulted by the act of the city in making the improvement in question, which was made by it, as we held in the Morris Case, supra, in the lawful and proper exercise of the police pow-

er. In granting the franchise to appellee, the city could not bargain away its police powers. This it did not profess to do, but, upon the contrary, by the provisions of the ordinance it expressly reserved the exercise of such power. In support of our holding that these alleged damages were not recoverable by appellee, see *Vandalla R. R. Co. v. State ex rel.*, 166 Ind. 219, 76 N. E. 980, 117 Am. St. Rep. 370; *City of New Albany v. New Albany St. Ry. Co.*, 172 Ind. 487, 87 N. E. 1084; *Grand Trunk, etc., Ry. Co. v. City of South Bend*, 89 N. E. 885; *New Orleans Gas Co. v. Drainage Com'rs*, 197 U. S. 453, 25 Sup. Ct. 471, 49 L. Ed. 831; *Scranton Gas Co. v. Scranton*, 214 Pa. 586, 64 Atl. 84, 6 L. R. A. (N. S.) 1033; *Anderson v. Fuller*, 51 Fla. 380, 41 South. 684, 6 L. R. A. (N. S.) 1026, and note, 120 Am. St. Rep. 170; *Home Bldg. Co. v. City of Roanoke*, 91 Va. 52, 20 S. E. 895, 27 L. R. A. 551; *Chicago, etc., Ry. Co. v. Drainage Com'rs*, 200 U. S. 561, 26 Sup. Ct. 341, 50 L. Ed. 596. In *New Orleans Gas Co. v. Drainage Commissioners*, supra, the gas company there involved had a contract with the city of New Orleans whereby it had the exclusive privilege of vending gas therein, and to lay pipes and conduits at its own expense in the public streets. By an act of the Legislature of the state of Louisiana, a board known as the drainage commission of New Orleans was created. This board was given power to control and execute a plan for the drainage of the city. The board, after adopting a system of drainage and proceeding with the construction thereof according to the plans, found it necessary to change the location in some places in the streets of the city of New Orleans of the mains and pipes laid by the gas company therein. These changes were made as a case of necessity and with as little interference as possible with the property of the gas company. It was held by the court that the gas company could not recover any compensation. In the course of its opinion the court said: "It is the contention of the plaintiff in error that, having acquired the franchise and availed itself of the right to locate its pipes under the streets of the city, it has thereby acquired a property right which cannot be taken from it by a shifting of some of its mains and pipes from their location to accommodate the drainage system, without compensation for the cost of such changes. * * * It is admitted that in the exercise of this power (police power) there has been no more interference with the property of the gas company than has been necessary to carrying out of the drainage plan. There is no showing that the value of the property of the gas company has been depreciated, nor that it has suffered any deprivation further than the expense which was rendered necessary by the changing of the location of the pipes to accommodate the work of the drainage commission.

The police power in so far as its exercise is essential to the health of the community it has been held cannot be contracted away. * * * It would be unreasonable to suppose that in the grant to the gas company of the right to use the streets in the laying of its pipes it was ever intended to surrender or impair the public right to discharge the duty of conserving the public health." In the case of *Scranton Gas Co. v. Scranton*, supra, the city, together with the railroad, constructed a viaduct over a railway track. This made it necessary for the gas company to move some of its pipes which were laid in the streets. It was held in that case that the city was under no obligation to pay any compensation for the work done in removing and changing these pipes. The same rule was affirmed and enforced in *Anderson v. Fuller*, supra. From the fact that the work performed in the elevation or depression of the railroad tracks was a public or street improvement, as we held in the *Morris Case* and as we now reaffirm, the city had the right or power to require that the conduits, pipes, etc., connected with appellee's lighting and heating plant, wherever they interfered with the work of making said improvement, be changed or removed, and that such pipes and conduits, if necessary, be placed deeper under the surface of the streets, in order to prevent such interference. As neither of the items of damages assessed and awarded by the board of public works in favor of appellee was recoverable under any existing law, it necessarily must follow that the act of the board in assessing and awarding such damages was not within the authority or jurisdiction conferred upon it by the statute in question, and under the authorities to which we have referred its act must be regarded and held to be void and the assessment made not enforceable.

[6] The method or way in which all legitimate costs or expenses, including any damages recoverable under existing law, shall be adjusted and apportioned among the parties in interest and liable therefor, and paid by each of them respectively, is prescribed and provided by section 6 of the statute in question. This section does not contemplate that thereunder there shall be an action either against the city or any of the railroad companies to recover a personal judgment for the cost or expense incurred in making the improvement.

For the reasons herein given, we conclude that the complaint does not state a right of action against any of appellants, and that each of the several motions for a new trial should have been sustained.

The judgment is therefore reversed and the cause remanded, with instructions to the lower court to grant the several motions for a new trial, and to sustain each and all of the demurrers to the complaint.

(175 Ind. 654)

MORRIS v. STATE. (No. 21,769.)

(Supreme Court of Indiana. May 23, 1911.)

ANIMALS (§ 4*)—DOGS—STATUTORY OFFENSE.

Burns' Ann. St. 1908, § 3201, punishing any person who shall keep or harbor any dog and shall not have paid the township assessor the tax imposed on dogs, defines the offense only where a dog has been listed on the schedule at the time of assessment, and the owner has failed to pay the tax immediately. Section 3206, making it a misdemeanor for any person who does not hold a receipt for the payment of the required tax to keep, harbor, or feed or permit any dog to stay about his premises, defines the offense of keeping and harboring or feeding or permitting to stay about the premises a dog not listed for taxation on the assessment schedule, whether kept or harbored at the time of the assessment or afterwards, without holding a receipt showing the payment of the tax. *Held*, that an affidavit drawn under section 3206 is not supported by proof that accused signed the assessment sheet on which a dog was listed for taxation, that the dog owned by accused was at the premises when he was assessed and he never paid the dog tax.

[Ed. Note.—For other cases, see *Animals*, Dec. Dig. § 4.*]

Appeal from Circuit Court, Wabash County; A. H. Plummer, Judge.

Elmer Morris was convicted of crime, and he appeals. Reversed, and new trial granted.

Robert J. Loveland, for appellant. Thos. H. Houan, Thos. H. Branaman, Edw. M. White, and Jos. E. McCollough, for the State.

MORRIS, J. Appellant was prosecuted by affidavit under Burns' Statutes 1908, § 3206. From a judgment of conviction he appeals to this court. In charging the offense the affidavit follows the language of the statute. Section 3206 reads as follows: "It shall be a misdemeanor for any person who does not hold the township assessor's or township trustee's receipt, showing that the required tax has been paid for the same, as provided in this act, to keep, harbor, board or feed, or permit any dog to stay about his, her or their premises, and upon complaint they shall be liable to a fine in any sum not exceeding ten dollars." The above is section 9 of the act of 1897, relating to taxation of dogs. Acts 1897, p. 178. Section 1 of this act requires the assessor, when assessing property, to inquire diligently as to the number of dogs owned, harbored, or kept by any person assessed, and such person, as assessed, shall immediately pay the assessor \$1 for each male dog so owned. Section 2 of the act requires the assessor to give a receipt for the money paid to the person assessed, which receipt shall show the person's name, and description of dog or dogs, and amount paid. This receipt relieves the owner from paying further tax on the dog described until the next assessment. The assessor is required to keep a record of receipts issued, and of persons owning dogs, and, when the assessment is completed, to turn over such record to the township trustee, together with all amounts

of money collected as dog tax. Section 3 requires the assessor to report to the county auditor the amount of dog tax collected and turned over to the trustee. Section 4 of the act (Burns' Stat. 1908, § 3261) is as follows: "Any person who shall keep or harbor any dog, and shall not have paid the township assessor the tax as above specified and received his receipt for such payment, shall on complaint of any resident of the county, be subject to a fine of not less than five nor more than twenty dollars." Section 5 of the same act requires the assessor to keep a record of the dogs not paid for, and by whom owned, and report the same to the trustee at the time of making his other report, and the trustee is required to report the same to the prosecuting attorney. This section also provides that, if any person shall acquire, keep, or harbor any dog after the assessor shall have completed his assessment, he shall report and pay tax on the same to the township trustee, and get the trustee's receipt for the payment thereof. Section 7 provides that any person when listed for taxation shall make and subscribe to an oath to the assessor, in which he shall state the number of dogs owned, harbored, or kept by him, and fixes a penalty for a false statement to the assessor or trustee. It will be noted that the penalty in section 4 for keeping or harboring any dog by one who has not paid the tax to the assessor "as above specified," and received his receipt therefor, is a fine of from \$5 to \$20, and that by section 9 the penalty for keeping, harboring, boarding, feeding, or permitting any dog to stay about his premises without holding the assessor's or trustee's receipt for payment of the tax is a fine in any sum not exceeding \$10. It must be conceded that it was not the intention of the Legislature to fix a maximum fine of \$20 in one section and a maximum fine of \$10 in another section for the same offense of "keeping" or "harboring" a dog on which no tax had been paid, and that, therefore, the General Assembly provided the different penalties for different offenses. Appellant contends that section 9 must be so construed that the phrase "about his, her or their premises" qualifies the words "keep, harbor, board, feed or permit any dog to stay," and thus there is no offense, unless the keeping, harboring, etc., is on the defendant's premises. This theory is not correct.

This section of the statute defines five offenses, viz., keeping, harboring, boarding, or feeding a dog, regardless of where he stays, and also permitting a dog to stay about the premises. This section was evidently intended to cover all cases not punishable under section 4, and this requires us to determine what offense is defined in the fourth section. Section 10,202, Burns' Stat. 1908, provides that schedules in a certain form shall be furnished assessors to use in

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

listing personal property for taxation. On these schedules or lists is printed the following: "Male dogs owned or harbored by me" and "female dogs owned or harbored by me." The law requires the person assessed to make oath to the schedule. Section 1 of the act of 1897, above referred to, defines the duties of the assessor and person assessed, when the schedule is filled out. We think that section 4 defines the offense only where a dog has been listed on the schedule at the time of assessment, and the person whose dog has been so listed has failed or refused to pay the required tax immediately as required by section 1. Section 9 defines the offense of one keeping, harboring, boarding, feeding, or permitting to stay about the premises a dog not listed for taxation on the assessment schedule, whether kept or harbored at the time of the assessment or afterwards, without holding a receipt showing the payment of the tax.

In this case the evidence given by the state disclosed the following facts only: The assessor of Noble township, Wabash county, on March 24, 1908, assessed the defendant. One male dog was listed on his assessment sheet. Defendant signed the sheet, and a dog owned by defendant was at the premises when defendant was assessed, and at that time was seen by the assessor. Defendant never paid the assessor or trustee any dog tax, and never got any receipt from either officer showing that such tax had been paid. The defendant's assessment sheet, showing the listing of the dog thereon, was offered and admitted in evidence. The state made no attempt to show that after the defendant's assessment was completed he kept, harbored, boarded, fed, or permitted to stay about his premises any dog. When the state rested, the defendant moved the court to instruct the jury as follows: "Gentlemen of the jury, the court instructs you that the evidence offered on behalf of the state is not sufficient to show that the defendant is guilty of the offense charged in the affidavit, and you should return a verdict of acquittal." The record shows that the above was tendered the court and refused and defendant excepted. In refusing to give this instruction the court erred. The affidavit was clearly drawn under section 9 of the act of 1897 (Burns, § 3266). The evidence proved the offense defined in section 4 of the act (Burns, § 3261). The conviction of defendant under section 9 for keeping and harboring an untaxed dog would not be a bar to a prosecution under section 4 for keeping or harboring one duly listed, on which no tax had been paid.

Other questions are presented by defendant, but, in view of the conclusion reached, it is not necessary to consider them. Judgment reversed, with instructions to grant defendant's motion for a new trial.

(175 Ind. 610)
OWEN COUNTY COUNCIL v. STATE ex rel.
GALIMORE et al. (No. 21,653.)

(Supreme Court of Indiana. May 23, 1911.)

1. APPEAL AND ERROR (§ 323*)—TERM APPEAL—PARTIES.

Where a term appeal was taken from an order overruling a demurrer to the complaint in mandamus to compel the county council to appropriate money or levy a tax to pay a judgment, it was not necessary that any of the co-parties should be joined as appellants or appellees, as expressly provided by Burns' Ann. St. 1908, § 675.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 323.*]

2. COUNTIES (§ 227*)—ACTIONS—RIGHT TO APPEAL—COUNTY COUNCIL.

Burns' Ann. St. 1908, § 5945, provides that suits may be brought against county councils for certain purposes, and requires the board of commissioners and the auditor to be joined with them, and section 671 declares that appeals may be taken from circuit and superior courts to the Supreme Court by either party from all final judgments. Held that, where mandamus was brought against a county council, board of commissioners, auditor, and treasurer of a county to compel the appropriation of money to pay a judgment, etc., the council, though not expressly authorized by statute to appeal, was nevertheless entitled to appeal from an order overruling its demurrer to the complaint.

[Ed. Note.—For other cases, see Counties, Cent. Dig. § 366; Dec. Dig. § 227.*]

3. MANDAMUS (§ 12*) — GROUNDS — DUTY — POWER.

In order to obtain a writ of mandamus, both an imperative duty and the power to do the act or acts commanded must be shown.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. §§ 39-42; Dec. Dig. § 12.*]

4. MANDAMUS (§ 154*)—COMPLAINT—DEMURRER.

Where a complaint in mandamus is demurred to, the complaint must show that relator is entitled to the precise and specific relief prayed, whether an alternative writ is issued or not, since, if no alternative writ is issued, the complaint is regarded as taking its place, and it will not be sufficient that the complaint shows relator entitled to some relief.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. §§ 296-316; Dec. Dig. § 154.*]

5. MANDAMUS (§ 154*)—COUNTIES—CLAIMS—PAYMENT.

Where a complaint in mandamus to compel a county council to provide for the payment of a judgment alleged a recovery of the judgment, and that the county then and still had sufficient money on hand belonging to it, with which to pay the judgment, interest, and costs, but by reason of no appropriation the auditor refused to draw his warrant for the payment thereof, etc., and praying that the council order an appropriation to pay the judgment, or, if there was not sufficient funds, that the council authorize the board of commissioners to negotiate a loan and procure the necessary moneys to pay the judgment, it was demurrable as praying in the alternative that the county borrow money to pay the judgment, to which relief relator was not entitled.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. §§ 294-316; Dec. Dig. § 154.*]

6. COUNTIES (§ 226*)—CLAIMS—JUDGMENT—ENFORCEMENT—DEFENSES.

Where a judgment was recovered against a county alone, it was no defense to mandamus to compel payment that part of the amount re-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

covered was due from the state, part from the county, and part from each of 13 different townships, and that it was impossible to know what appropriation should be made from the funds of the several taxing districts, etc., the judgment being determinable thereafter, as a matter of adjustment by the proper officers.

[Ed. Note.—For other cases, see *Counties*, Cent. Dig. § 865; Dec. Dig. § 226.*]

7. JUDGMENT (§ 480*)—COLLATERAL ATTACK—FRAUD.

A judgment against a county could only be attacked for fraud by the board of commissioners in a direct proceeding; it being voidable only, and not void until attacked and set aside by competent authority.

[Ed. Note.—For other cases, see *Judgment*, Cent. Dig. § 916; Dec. Dig. § 480.*]

8. JUDGMENT (§ 494*)—COLLATERAL ATTACK—FRAUD—COUNTY COUNCIL.

Since a county council is not the county and does not represent the corporate entity, it had no such interest in a judgment recovered against the county sufficient to authorize it to attack the judgment for fraud in a collateral proceeding, though a stranger to the judgment.

[Ed. Note.—For other cases, see *Judgment*, Dec. Dig. § 494.*]

Appeal from Circuit Court, Owen County; Jos. W. Williams, Judge.

Mandamus by the State, on the relation of William Gallimore and another, against the Owen County Council. From an order overruling a demurrer to the complaint, defendant appeals. Reversed.

Inman H. Fowler, for appellant. Willis Hickam, for appellees.

MYERS, J. This was a proceeding by mandamus by appellees, as relators, to require appellant to make an appropriation to pay a judgment recovered by appellee Gallimore against the board of commissioners of the county of Owen. The board of commissioners, the auditor, and treasurer were parties, but have not joined in this appeal. A demurrer to the complaint was overruled, and the county council excepted, and filed answer in five paragraphs, to the second, third, fourth, and fifth of which demurrers were sustained. The first paragraph was a general denial upon which trial was had, and a judgment rendered for relators.

[1] Appellees have made a motion to dismiss this appeal upon the ground, first, that the codefendants below, the board of commissioners, auditor, and treasurer of Owen county, are not made parties appellant or appellee. The appeal is a term appeal, and by the express provision of the statute (Burns' 1908, § 675) it was not necessary that any of the coparties below should be joined as appellants or appellees.

[2] The second reason urged on the motion is that county councils being bodies of limited statutory powers, with ministerial duties only, they have no power or authority to prosecute appeals. Appellees' theory upon this question is that counties are known only through their boards of commissioners, which

alone have power or authority to litigate claims against counties, except in those cases in which taxpayers have the right, and in support of their contention cite *Advisory Board v. Levandowsky*, 43 Ind. App. 224, 86 N. E. 1024, and *Boord v. Wild*, 37 Ind. App. 32, 76 N. E. 256. The latter case was one in which the sole question determined was that taxpayers of a county who were not parties to an action could not control an appeal in such action in which the sole defendant was the board of commissioners over the objection of the board, as the sole representative of the county in the action as framed. The *Levandowsky* Case is based upon the proposition that advisory boards of townships can only maintain such suits as they are expressly authorized to maintain. Here, however, we have a statute with respect to county councils, authorizing suits to be brought against them for certain purposes, and requiring the board of commissioners and the auditor to be joined with them (Burns' 1908, § 5945), and appellees have elected to follow that statute here. True, we have no statute expressly providing that county councils may appeal, but, as they may be sued in certain cases by civil action, it would be anomalous to deny them the right of appeal in such cases. We have a statute (Burns' 1908, § 671), which provides for appeals "from circuit and superior courts to the Supreme Court, by either party, from all final judgments." Appellees secured a final judgment requiring the appropriation by the county council of the amount necessary to pay their judgments, and it would require a radical departure from the recognized practice to hold that they may not appeal. They have more than mere ministerial duties to perform. They have the exclusive power to fix the tax rate, also to fix the amount they will appropriate, not exceeding the estimates furnished them, and the exclusive power to authorize the borrowing of money, and, as to those appropriations necessary after the annual appropriation, it requires the concurrence of two-thirds of all the members. Burns' 1908, §§ 5932, 5937, 5949, 5938. If they may not appeal in this kind of case, neither could they upon the character of questions confided to them as shown above, and it would certainly be unwise, if not in direct violation of the statute, to deny the right of appeal, and the motion to dismiss the appeal is denied.

[5] The complaint alleges, in substance, that on October 26, 1909, relator, Gallimore, recovered a judgment against the board of commissioners of the county of Owen for \$3,024.40 and costs; that no appeal has been perfected and the judgment has not been paid or replevied; that about the 6th day of November, 1909, relator filed a certified copy of such judgment in the office of the auditor of Owen county; that said defendants then

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

had, and as relators are informed and believe still have, a sufficient amount of money on hand belonging to said county with which to pay said judgment, interest, and costs, but, by reason of no appropriation being made for the payment of the judgment, the auditor refuses to draw his warrant; that the auditor and the board of commissioners fixed a day in November, 1909, for a special meeting of the county council, and prepared and filed in the auditor's office an estimate of the amount necessary to pay the judgment, and also prepared an ordinance and filed it therewith authorizing the appropriation one week before the date fixed for the meeting of the county council in special session, and that the latter were called in special session, at which more than two-thirds of the members were present, at which the estimate and ordinance were presented by the auditor and by appellee Gallimore and his attorney, and request made for the enactment of the ordinance, and that they make the necessary appropriation to pay the judgment, and the council without cause or excuse neglected, failed, and refused, and have ever since failed and refused, and intend to refuse, to appropriate any money to pay such judgment; that Gallimore had assigned a portion of the judgment to his corelator Hickam before this suit was brought; that the total amount of the indebtedness of the county, including the judgment interests and costs, does not exceed 2 per cent. of the taxable property of the county, etc. Prayer for "a mandatory order of court against said defendants, and ordering said board of commissioners and said auditor to fix a date and issue the proper call and notice to said defendant the Owen county council to meet in special session and prepare and place on file in due time the necessary estimate of the amount necessary to pay said judgment, interest, and costs and also an order of appropriation of the necessary amount and to present the same to said defendant, the Owen county council, when so convened in said special session and ordering said Owen county council to make said appropriation, and, if there is not sufficient money to make said appropriation, then that the said defendant the Owen county council be ordered to authorize said defendant the board of commissioners to negotiate a loan, and procure the necessary moneys with which to pay said judgment. There was no alternative writ, but an appearance and demurrer to the complaint.

The sufficiency of the complaint is challenged by an original assignment of error, and upon ruling upon demurrer; both assigning the want of facts sufficient to constitute a cause of action. The specific challenge to the complaint is that under no state of facts would appellees be entitled to an order requiring the county council to pass an ordinance authorizing the board of commissioners to borrow money to pay the judgment, or to require the board to make a loan

for that purpose. It will be noted that the prayer of the petition is in the alternative; that is, that, if there be not money on hand sufficient to be appropriated, that a loan be required. It must be conceded that while there might be a right to have an appropriation made, if there are available funds on hand unappropriated, appellees could not require a borrowing. They might be entitled to have a tax levied, but we know of no authority to require them to borrow the money. See sections 5945, 5949, Burns' 1908.

[3] In order to obtain a writ of mandamus, both an imperative duty and the power to do the act or acts commanded must be shown. *State v. Winterrowd*, 91 N. E. 956; *Town of Windfall City v. State*, 172 Ind. 302, 88 N. E. 505; *Board v. State*, 173 Ind. 52, 88 N. E. 673, 89 N. E. 367.

[4] It is claimed that the question raised by a demurrer to a complaint, the same as in case of a complaint and alternative writ of mandate, is not whether relators are entitled to some relief, but whether they are entitled to the specific relief demanded in the complaint, or complaint and alternative writ. The rule is well settled that, in case of a complaint and alternative writ of mandate, a relator must show himself entitled to the precise and specific relief prayed for in the alternative writ, in order to withstand a demurrer or motion to quash. *State v. Indiana Board*, 173 Ind. 706, 91 N. E. 338; *State v. John*, 170 Ind. 233, 84 N. E. 1; *Advisory Board v. State*, 166 Ind. 237, 76 N. E. 986; *State v. Connersville Co.*, 163 Ind. 563, 71 N. E. 483; *State v. Indianapolis, etc., Co.*, 160 Ind. 45, 66 N. E. 163, 60 L. R. A. 331; *State v. Commercial Ins. Co.*, 158 Ind. 680, 64 N. E. 466; *Applegate v. State*, 158 Ind. 119, 63 N. E. 16; *Trant v. State*, 140 Ind. 414, 39 N. E. 513.

It is urged by appellees that where the alternative writ is waived, and a demurrer is interposed to the petition, it stands the same as any other civil action, and, if the petitioner is entitled to any relief, the demurrer should be overruled. This rule is, of course, sound as applied to ordinary actions, but an action for mandamus is not an ordinary action. It is quite clear that if an alternative writ had issued, in which had been included the prayer of the petition, that the county council be required to authorize and the board of commissioners be required to borrow money, the writ would have been bad upon a motion to quash, or upon demurrer, in demanding more than relators were entitled to. The writ, when issued, must be based upon the petition, and can be no broader, and should run in the language of the petition and prayer, and for that reason the petition should show by direct and positive averment, the relief to which a party is entitled. The alternative writ is but the jurisdictional notice which brings a party into court to answer. Board

v. Mowbray, 160 Ind. 10, 66 N. E. 46; Wren v. City of Indianapolis, 96 Ind. 206. When the alternative writ is waived, the petition must stand in the stead of the alternative writ, and is to be tested by the same rules. The prayer of the petition in this case being in the alternative, the petition was insufficient. State ex rel. v. John, 170 Ind. 233, 84 N. E. 1, and cases cited; State ex rel. v. Adams Express Co., 171 Ind. 138, 85 N. E. 337, 966, 19 L. R. A. (N. S.) 93.

It was a very serious question whether the petition is not also insufficient in failing to aver that there are available funds on hand unappropriated sufficient to pay the judgment; at any rate such facts, if stated, are only stated inferentially and deducible from a process of reasoning. The judgment must be reversed for the insufficiency of the petition, but, as the questions presented by the answers may arise again, we will determine those questions.

Appellant filed answer in five paragraphs. The first is a general denial. The second paragraph alleges the recovery by appellee Galimore of a judgment for \$3,024.40 in gross, and alleges that part of said sum is due from the state, part from the county, and part from each of the thirteen townships of the county, and that it is impossible to know what amount of appropriation should be made from the funds of the several taxing districts, and, before any appropriation can be made, the amounts to be appropriated from each, and that the county council should not be required to make an appropriation until they shall be advised of the amount necessary to be appropriated from the respective funds.

The third, fourth, and fifth paragraphs seek to attack the judgment as void, as having been procured by fraud, and by deceit practiced upon the court.

[6] As to the second paragraph of answer, it will be seen that the question sought to be presented is that the county council could not make an appropriation from the various funds which were required to contribute without knowing how much was due from each, the judgment being one in gross. The judgment so far as disclosed was against the county. If it had been desired, or was proper, to have it appear from what funds the judgment should be paid, steps should have been taken to have it so appear in and by the judgment. As it stands, it appears as a judgment against the funds of the county, and if the judgment is otherwise unassailable, the funds other than those of the county should contribute, that would be a matter for adjustment by the proper officers. The county council could not appropriate funds of the townships to pay their proportion. The second paragraph is clearly insufficient to bar the remedy. The third, fourth, and fifth paragraphs of answer all show the rendition of the judgment October 26, 1900, and the

record shows the filing of the amended complaint in this proceeding January 10, 1910, and it may be a very serious question whether, if the county council had a right to attack the judgment at all, it would not have been required to do so directly. It is not shown in either paragraph when they learned the facts constituting the alleged fraud. See Shultz v. Shultz (1893) 136 Ind. 323, 38 N. E. 126, 43 Am. St. Rep. 820.

Aside from this question, however, is the more serious one as to whether the county council has any standing to attack the judgment, or whether that can only be done by the board of commissioners or a taxpayer on refusal of the board. It will be seen that there is no allegation that the board have refused upon request to attack it, or seek to get rid of it in some manner known to the law. The board of commissioners is the corporate entity representing the county through which it acts, and is in legal contemplation the county. State v. Clark, 4 Ind. 315; Board v. Wild, 37 Ind. App. 32, 76 N. E. 256; Burns' 1908, § 5947.

[7] So far as the board itself is concerned, it could only attack the judgment in a direct proceeding. Ross v. Banta, 140 Ind. 120, 34 N. E. 865, 39 N. E. 732; Shultz v. Shultz, supra; Hogg v. Link, 90 Ind. 346. It has been repeatedly held that a judgment obtained by fraud is not void, but voidable, until attacked and set aside by some competent party. Hollinger v. Reeme et al., 138 Ind. 363, 36 N. E. 1114, 24 L. R. A. 46, 46 Am. St. Rep. 402; Palmerton v. Hoop, 131 Ind. 23, 30 N. E. 784; Ratliff v. Stretch, 130 Ind. 282, 30 N. E. 30; Weiss v. Guerin-eau, 109 Ind. 438, 9 N. E. 399. It was said in the latter case: "A party against whom an unauthorized or inequitable judgment has been obtained, whether by fraud or mistake, cannot treat the judgment as invalid until he has taken some proceeding known to the law to set it aside, or to secure its modification. Methods for obtaining a new trial or to review the judgment for material new matter or for error of law are pointed out by the statute, and beyond methods thus prescribed courts possessed inherent power to an almost unlimited extent to redress wrongs by modifying or setting aside judgments obtained by fraud or mistake. These methods, however, all contemplate proceedings in which the unauthorized judgment is alleged to have been obtained. They give no countenance to the motion that judgments, however wrongfully obtained, may be ignored, and the rights of the parties again inquired into, in a collateral proceeding. So long as the judgment is not void, it concludes the parties upon the subjects therein determined"—citing cases. But it is urged that the county council is a stranger to the judgment, and that it may attack it in a collateral proceeding for fraud used in obtaining it. Hogg v. Link, supra; Delsner v. Simpson,

72 Ind. 435; *Kress v. State ex rel.*, 65 Ind. 106; *Britton v. State*, 54 Ind. 535; *Adkins v. Nicholson*, 39 Ind. 535; *Lee v. Back*, 30 Ind. 148; *De Armond v. Adams*, 25 Ind. 455; *Freeman on Judgments* (3d Ed.) § 336.

[8] Whilst that is true, the party must show himself as in some way affected by the judgment, and this brings us to the question whether a county council as such has such interest as may be affected by the judgment, and the question of its powers and functions. It is not a corporation, and acts as authorized by the statute, and in the matters and manner pointed out by the statute. Even before the creation of these boards, when the entire county business was confided to boards of commissioners, the latter possessed only statutory powers, and could not, as they cannot now, do any act not expressly or impliedly authorized by statute. The county is an involuntary corporation organized as a political subdivision of the state for governmental purposes, and exercises the powers delegated by the state, and for the state. *State v. Goldthait*, 172 Ind. 218, 87 N. E. 133; *Board v. Board*, 170 Ind. 595, 85 N. E. 513; *Kemp v. Adams*, 164 Ind. 258, 73 N. E. 590; *Gavin v. Board*, 104 Ind. 201, 3 N. E. 846; *Board v. State*, 61 Ind. 75; *Wrought Iron Bridge Co. v. Board*, 19 Ind. App. 672, 48 N. E. 1050. A county council is neither the county, nor does it represent the corporate entity. It is charged with the performance of certain duties, in which may be involved some discretion and business judgment, but it has as such no interest in a judgment against the county, and, whatever may be the merits of the claim in this particular case, it would clearly be the establishment of a bad precedent to hold that, after a board of commissioners had litigated a claim to judgment, a county council should be permitted to again litigate it.

For the reasons pointed out, the third, fourth, and fifth paragraphs of answer were insufficient, and the demurrers properly sustained.

For the error in overruling the demurrer to the petition, the judgment is reversed, with instruction to the court below to sustain the demurrer to the petition.

(176 Ind. 585)

BALZER v. WARRING et al. (No. 21,874.)¹

(Supreme Court of Indiana. June 1, 1911.)

1. MASTER AND SERVANT (§ 121*)—DANGEROUS MACHINERY—REVOLVING SHAFTS—FAILURE TO GUARD—NEGLIGENCE PER SE.

Failure of a master to guard a revolving shaft extending a short distance from the floor under a long sewing machine table and used to operate many machines on the table, as required by Factory Act 1899, § 9 (Burns' Ann. St. 1908, § 8029), resulting in plaintiff, an operative, getting her hair caught in the shaft, while searching on the floor under the machine for a

falling shuttle, was negligence per se on the part of the master.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 228-231; Dec. Dig. § 121.*]

2. MASTER AND SERVANT (§ 204*)—INJURIES TO SERVANT—DANGEROUS MACHINERY—STATUTES—ASSUMED RISK.

A servant does not assume the risk of injury from machinery left unguarded in violation of Factory Act 1899, § 9 (Burns' Ann. St. 1908, § 8029), requiring the guarding of shafts where it can be done without impairing its usefulness.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 545; Dec. Dig. § 204.*]

3. MASTER AND SERVANT (§ 228*)—INJURIES TO SERVANT—DANGEROUS MACHINERY—CONTRIBUTORY NEGLIGENCE.

Though a master fails to guard dangerous machinery in violation of Factory Act 1899, § 9 (Burns' Ann. St. 1908, § 8029), a servant is still required to use reasonable and ordinary care to prevent injury to himself, and if he fails to do so, may not recover, notwithstanding the employer's default.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 671; Dec. Dig. § 228.*]

4. MASTER AND SERVANT (§§ 129, 247*)—INJURIES TO SERVANT—PROXIMATE CAUSE.

Plaintiff was employed as a machine operator in a glove factory working at a power sewing machine table operated by a shaft running under the table, which was unguarded in violation of Factory Act 1899, § 9 (Burns' Ann. St. 1908, § 8029), though it might have been guarded without impairing its usefulness. Plaintiff knelt down from her seat to search for a fallen shuttle, and, as she did so, strands of her hair were caught in the shaft, and she was injured. *Held*, that defendant's default in failing to guard the shafts, and not plaintiff's own conduct in stooping under the table to search for the shuttle, was the proximate cause of the accident.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 258, 796; Dec. Dig. §§ 129, 247.*]

5. NEGLIGENCE (§ 56*)—"PROXIMATE CAUSE."

"Proximate cause" is that act which immediately causes or fails to prevent an injury that might reasonably have been anticipated as a result of the negligent act or omission charged, and without which such injury would not have occurred, the test being found in the probable injurious consequences which were to be anticipated, and not in the number of subsequent events or agencies which might arise to bring such consequences about.

[Ed. Note.—For other cases, see *Negligence*, Cent. Dig. §§ 69, 70; Dec. Dig. § 56.*]

For other definitions, see *Words and Phrases*, vol. 6, pp. 5758-5769; vol. 8, p. 7771.]

6. MASTER AND SERVANT (§ 289*)—INJURIES TO SERVANT—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.

Plaintiff, a machine operator in a glove factory, was injured by her hair becoming caught on a rapidly revolving unguarded shaft underneath a long sewing machine table. Plaintiff, while working at her machine dropped her shuttle, and being required to pay for parts lost leaned over with her head slightly under the table to search for the shuttle, and while in this position strands of her hair were caught by the unguarded shaft, and she was injured. *Held*, that plaintiff was not negligent as a matter of law.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 1089-1132; Dec. Dig. § 289.*]

¹For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

7. TRIAL (§ 142*)—QUESTION FOR JURY—EVIDENCE.

A peremptory instruction for defendant at the close of plaintiff's evidence can be granted only when the evidence favorable to plaintiff, when taken as true and supported by all fair and legitimate inferences therefrom is totally insufficient to justify a recovery for plaintiff under any state of the case.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 337; Dec. Dig. § 142.*]

8. NEGLIGENCE (§ 136*)—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.

While the burden of contributory negligence is on defendants, such burden is discharged if the plaintiff's evidence aided from the just inferences therefrom show her to be guilty of contributory negligence and if reasonable men might draw different conclusions from the facts, as to whether plaintiff's conduct was negligent and contributed to her own injury, that burden is not sustained so as to justify the granting of a peremptory instruction for defendant on that ground.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 333-346; Dec. Dig. § 136.*]

9. MASTER AND SERVANT (§ 274*)—INJURIES TO SERVANT—EVIDENCE.

Where plaintiff, a sewing machine operator in a glove factory, was injured by her hair becoming caught on an unguarded shaft under a sewing machine table as she was leaning under the table in search of a shuttle which she had lost, evidence that her forewoman had instructed her that if she lost anything connected with her work, which was not found, she would be compelled to pay for it, and that when she had broken a shuttle shortly before the accident, it had been charged to her, was admissible.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 939-949; Dec. Dig. § 274.*]

Appeal from Circuit Court, Huntington County; C. E. Sturgis, Judge.

Action by Mayme Balzer against Larry C. Warring and others. Judgment for defendants, and plaintiff appeals. Case transferred from Appellate Court. Reversed and remanded.

See, also, 92 N. E. 739.

Transferred from Appellate Court under Burns' Ann. St. 1908, § 1405.

James C. Branyan and Wilbur E. Branyan, for appellant. J. Fred France and Elam & Fesler, for appellees.

COX, J. This is an action for personal injuries by complaint of appellant, based on the failure of appellees to guard a certain power shaft in their factory pursuant to the provisions of section 9 of the Factory Act of 1899, being section 8029, Burns' Statutes 1908, by reason of which failure of duty by appellees it is averred appellant was permanently injured. After issue formed by general denial the cause was submitted to a jury for trial. At the close of appellant's testimony the court on motion of appellees peremptorily instructed the jury to return a verdict for the appellees which was done. Appellant relies upon this action of the trial court and certain adverse rulings excluding

evidence offered by her as errors compelling a reversal of the cause. The action of the trial court in nonsuiting appellant was taken upon the following facts established by the testimony given in her behalf: At the time of appellant's injury, June 25, 1908, the appellees were conducting a glove factory in the city of Huntington, and appellant was in their employ sewing gloves with a power machine and had been for five months. The machine at which appellant worked was one of a large number placed on a long stationary table about three feet apart. These machines alternately fronted both sides of the table and the girls and women operating them sat at their respective machines on both sides of the table. The table which was four feet wide was supported by iron legs about eight feet apart, and save a narrow board running along on either side, parallel with the table and attached to these legs near the bottom, the space under the table was entirely open. Under the center of the table and nearer the floor than the top of the table there was placed a power shaft extending the length of it with pulleys attached about each three feet for the operation of the machines on the table. This shaft was not guarded, but both it and the pulleys could have been guarded without in any way interfering with the efficiency of the machinery. The appellant operated her machine, while sitting in a chair at the table facing it. On the day of appellant's injury and prior thereto there was posted in the factory, and appellant knew of it, a rule that all parts of machines broken or lost would be charged to the employé losing or breaking a part. While sitting at her machine at work on the day above mentioned appellant dropped the bobbin and shuttle of her machine, but she caught the bobbin, the shuttle falling to the floor. She arose from her seat to make search for it, and after thorough search about her chair, resulting in a failure to find it, she stooped and looked under the table, to do which she placed one hand and arm and her head and shoulders thereunder; and while so looking, to see if the shuttle had fallen through a hole in the floor in front of her, and near to the revolving shaft, strands of her hair, which was coiled on her head, were caught by it and wound around the shaft. Appellant knew that the shaft was under the table and that it was unguarded, but she did not see it while looking for the shuttle. Most of her hair was violently torn from her scalp and she was severely injured. The injury and nervous shock accompanying it greatly, injuriously, and permanently affected her health so that at the time of the trial she had lost much flesh and had become emaciated and chronically nervous.

At common law there rests upon an em-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

ployer the general duty to exercise reasonable and ordinary care to provide for the employé a safe place to work. This rule of the common law was evolved to fit general conditions. When conditions of labor were simpler, when there was little congestion of machinery and labor in mills and factories, when tools, appliances, and machinery used in productive industry were less complicated and complex, when the power and speed of operation of machinery were not so great, when labor largely served apprenticeship in small mills and factories usually under the careful and skillful personal guidance of the master, when life in all of its phases was more deliberate, the rule had its growth and was reasonable in the duty it placed upon the employer and fairly adequate to protect labor. The principle upon which this legal duty rested was largely ethical, that human duty of man to man. But—

"New occasions teach new duties;
Time makes ancient good uncouth."

Conditions in industry have changed with the speed of a revolution. Small mills and factories with primitive, slow power, and simple machinery under the personal direction of the owner, have fled from the small town and village. Great mills and factories, crowded with complex machinery driven at great speed with powerful engines, have taken their place in the large centers of active life. Through the production by inventive genius of marvelously efficient machinery, relatively less dependence is placed upon the careful, deliberate skill of the workman of the former time. Demand has arisen for multitudes of operatives in a large measure young, raw, unskilled and without experience with machinery. From these changed conditions accidents to workmen of a shocking character became alarmingly frequent. The employer did not readily meet the need for the protection of his employées from the dangers of their work, and the employées hurried and absorbed by their duties fell victims to conditions. The just conservatism of courts made them hesitate to extend the common-law liability of the employer to fit the changed conditions. The rule was applied generally, and whether the failure of the employer to take any particular precaution for the protection of his employé was a violation of his duty was often uncertain. The state has an interest in the welfare of its citizens, and through its lawmaking power it may impose reasonable burdens on the employers of labor in dangerous pursuits and about dangerous machinery for the purpose of lessening the danger.

[1] The act of 1899, of which the section involved in this case is a part, is the deliberate act of the state by the lawmaking branch of its government to make just provisions for new occasions and changed conditions. The general common-law duty is by it in some particulars changed, extended, added to, enlarged, and made absolute and specific.

Under this act the duty of the employer to protect his employées from the dangers of power shafting, such as that operating the machines of appellees, by reasonably efficient guards which can be applied without impairing the effectiveness of the shafting and which will prevent dangerous contact with the employées while engaged in their duties, becomes an imperative one. Employées do not assume the risk of injury from shafting left unguarded by a violation of the duty of the employer. The failure to comply with the statute which specifically requires such shafting to be guarded is negligence per se, for which the employer is bound to respond in damages to an employé injured thereby. *Montelth v. Kokomo, etc., Co.* (1902) 159 Ind. 149, 64 N. E. 610, 58 L. R. A. 944; *Green v. American, etc., Co.* (1904) 163 Ind. 135, 71 N. E. 268; *Buehner Chair Co. v. Feulner* (1904) 164 Ind. 368, 73 N. E. 816; *Robertson v. Ford* (1904) 164 Ind. 538, 74 N. E. 1; *Bessler v. Laughlin* (1906) 168 Ind. 38, 79 N. E. 1033; *United States Cement Co. v. Cooper* (1909) 172 Ind. 599, 88 N. E. 69; *Espenlaub v. Ellis* (1904) 34 Ind. App. 163, 72 N. E. 527; *Baltimore, etc., R. Co. v. Cavanaugh* (1904) 35 Ind. App. 32, 71 N. E. 239; *Robbins' Adm'x v. Ft. Wayne, etc., Co.* (1907) 41 Ind. App. 557, 84 N. E. 514; *Evansville, etc., Co. v. Bailey* (1908) 43 Ind. App. 153, 84 N. E. 549; *Crawford, etc., Co. v. Gose* (1908) 43 Ind. App. 373, 87 N. E. 709; *Hohenstein-Harmetz, etc., Co. v. Matthews* (1910) 92 N. E. 196. Being highly penal and in derogation of the common law it is perhaps to be strictly construed, but it is not to be wantonly narrowed, limited, or emasculated, and rendered ineffective to work its just and beneficent purpose by a strained construction contrary to the intent of its enactment, as shown by the existing wrongs and conditions intended to be remedied and the declaration of its title that it is an act providing means for the protection of the liberty, safety, and health of laborers in mills, factories, etc.

[2, 3] While the employé does not assume the risk of injury from machinery left unguarded in violation of the employer's statutory duty, which necessarily inheres in his employment with and about it, he is still bound to use reasonable and ordinary care to guard himself from injury therefrom, and a failure to do so which results in his injury will preclude a recovery by him notwithstanding the employer's neglect of duty. *Davis Coal Co. v. Pollard* (1902) 158 Ind. 607, 62 N. E. 492, 92 Am. St. Rep. 319; *Montelth v. Kokomo, etc., Co.*, supra; *Buehner Chair Co. v. Feulner*, supra; *United States Cement Co. v. Cooper*, supra; *Espenlaub v. Ellis*, supra; *Buehner Chair Co. v. Feulner* (1902) 28 Ind. App. 479, 63 N. E. 239; *Baltimore, etc., R. Co. v. Cavanaugh*, supra; *Robbins v. Ft. Wayne, etc., Co.*, supra.

[4] In this case the shafting was not guarded. It could have been readily guard-

ed without impairing its usefulness. Such shafting within reach of the clothing and person of the employé is notoriously dangerous. The failure on the part of appellees to discharge their statutory duty was actionable negligence. Their failure to guard the shafts as the law enjoins, together with the whirling shaft on the one hand, and the action of the appellant in stooping under the table in proximity to it to look for the shuttle of her machine on the other, alone entered into and were influential in bringing about her injury. The appellees were by positive law guilty of negligence for which they are liable to respond to her in damages unless they are absolved by her own intervening act.

We are informed by counsel for appellees that the trial court in peremptory instructing the jury to find for appellees acted on the assumption that the unguarded shaft was not the proximate cause of appellant's injury, but that her own conduct constituted in law contributory negligence and was such proximate cause. As we have seen the appellees violated a definite statutory duty in failing to guard the shaft. This of itself was negligence. Appellant to whom appellees owed the duty to guard the shaft; while in the ordinary course of her duties as appellees' employé, was injured by the uncovered revolving shaft. Actuated not alone by the natural impulse of one working at the machine as she was, to recover a part necessary to its operation which had, as such things will, slipped from her fingers and probably and naturally fell into her lap; and from thence under the table, but also impelled by the rule of the shop requiring payment for parts lost she looked for it and was hurt; all she did was clearly in the line of her duties. The unguarded shaft was obviously a proximate cause of her injury.

In the case of *Bessler v. Laughlin*, supra, which involved an omission of duty by the employer under the same statute, this court by a unanimous concurrence approved the following language of Gillett, J., who delivered the opinion of the court: "But granting that the omission was negligent, that, without the intervention of any supervening cause, the wrong followed the injury in a natural sequence, and that the negligence and the injury were so correlated that morally the defendant's omission should be regarded as the efficient cause of the wrong complained of, it may, without hesitation, be affirmed that such omission should be regarded as a proximate cause of the injury. *Coy v. Indianapolis Gas. Co.*, supra [146 Ind. 655, 46 N. E. 17, 36 L. R. A. 535]. To borrow from the thought of a leading writer, whose text upon the subject was quoted in extenso by this court in the case last cited: 'The law is practical, and courts do not indulge refinements and subtleties as to causation if they tend to defeat the claims of natural justice. They rather adopt

the practical rule that the efficient and predominating cause in producing a given effect or result, though subordinate and dependent causes may have operated, must be looked to in determining the rights and liabilities of the parties.' Here a statute has been enacted, as has been observed in other jurisdictions in interpreting like statutes, in extension of the common-law duty to furnish a safe place. The enactment in question is a legislative recognition of the fact that the existence of such things in a factory as open vats so reduces the margin of safety that accidents will thereby not infrequently happen to employés while in the line of duty, and so the lawmaking power, becoming at once a conscience and a judgment for the master, has declared his duty in the premises. As to those to whom the duty is owing, the provisions of the statute are not to be emasculated by acquitting the master of responsibility merely because he can point to some nonresponsible or nonnegligent agency in the line of causation, where his own omission was in reality the efficient and morally responsible cause of the injury. It was said by the Supreme Court of Iowa, in a case which apparently rested on the common law: 'It is argued for defendant that the proximate cause of the accident was either the negligence of Hopkins, the coemployé, in feeding a board into the machine while plaintiff was in such position as to be struck by it when thrown out, or the blow received by plaintiff from such board, and not the uncovered cogwheels. But, excluding the negligence of plaintiff himself, it is immaterial whether there was another concurrent cause for the injury, if the injury would not have happened had the cogwheels not been negligently left unguarded. The very purpose of guarding the cogwheels would have been to avoid the injury to an employé, if by some cause, not due to his fault, he was brought within reach of them.' *Buchner v. Creamery, etc., Mfg. Co.* (1904) 124 Iowa, 445, 100 N. W. 345, 104 Am. St. Rep. 354."

[5] "Proximate cause" is that act which immediately causes or fails to prevent an injury that might reasonably have been anticipated would result from the negligent act or omission charged, and without which such injury would not have occurred. The test is to be found in the probably injurious consequences which were to be anticipated, and not in the number of subsequent events or agencies which might arise to bring such consequences about. *Evansville Hoop, etc., Co. v. Bailey* (1908) 43 Ind. App. page 157, 84 N. E. page 549, and authorities there cited.

Appellant was merely doing the things required of her, and doing them in the way of ordinary human action. But for the breach of duty by appellees she would not have been hurt. It was the originating cause and the immediate cause of her in-

jury. It was clearly the sole efficient and morally responsible cause unless it must be said as a matter of law that appellant was guilty of contributory negligence which was a concurrent proximate cause. To hold otherwise would clearly violate the very purpose of the provision of the statute and take from those who work in mills and factories, and with and about dangerous machinery and appliances, the protection which the law sought to give them. In such places and about such machinery, if the statute is not complied with, accidents and injuries must happen from nonresponsible agencies, and from acts of employes not in themselves negligent, and to absolve the employer from liability in such cases is to nullify to a degree the statute itself.

[6] This leaves us merely to consider whether, upon the facts disclosed, appellant was guilty of contributory negligence as a concurring cause of her injury—whether her conduct, under all of the facts and circumstances shown, supported by all of the intendments and inferences to be drawn therefrom favorable to her, was that of an ordinarily careful person.

[7] It of course needs no citation of authorities to sustain the proposition that where a motion for a nonsuit by a peremptory instruction for the defendant is made at the close of the plaintiff's evidence, the evidence favorable to plaintiff is taken as true, and it is supported by all fair and legitimate inferences that may be drawn from the facts established thereby, and that no intendments are to be made in favor of the defendant.

[8] While the burden of establishing contributory negligence was on the appellees, that burden of course was discharged if the appellant's evidence aided by the just inferences therefrom nevertheless showed her to be guilty of contributory negligence. Would reasonable men draw different conclusions from these facts, showing the circumstances and surroundings and appellant's conduct, as to whether her conduct was negligent and that it contributed to her own injury? If so of course the trial court invaded her rights when her case was withdrawn from the free consideration of the jury by the peremptory instruction. Without discussing the facts shown by the evidence heretofore set out in substance, we think the question just put must be answered in the affirmative.

Impelled by her general duty to operate her machine, which involved her duty to recover a part which was necessary to its operation, and still further by the rule requiring her to pay for lost parts, and still further, probably, urged to haste by the fact that she may have been doing piece work at a nominal price per dozen, it must be manifest that her conduct was such that the average judgment of 12 men of varying degrees of carefulness should have been taken upon it to determine whether it amounted to

culpable carelessness rather than the judgment of one man perhaps cautious in the extreme. As applicable to such a case as this, this court has, in the case of Buehner Chair Co. v. Feulner, *supra*, approved the following language found in the opinion of Mr. Justice Hunt in Railroad Co. v. Stout, 17 Wall. 657, 21 L. Ed. 745: "Upon the facts proved in such cases, it is a matter of judgment and discretion, of sound inference, what is the deduction to be drawn from the undisputed facts. Certain facts we may suppose to be clearly established from which one sensible, impartial man would infer that proper care had not been used, and that negligence existed; another man equally sensible and equally impartial would infer that proper care had been used, and that there was no negligence. It is this class of cases and those kin to it that the law commits to the decision of a jury. Twelve men of the average of the community, comprising men of education and men of little education, men of learning and men whose learning consists only in what they have themselves seen and heard, the merchant, the mechanic, the farmer, the laborer; these sit together, consult, apply their separate experience of the affairs of life to the facts proved and draw a unanimous conclusion. This average judgment thus given it is the great effort of the law to obtain. It is assumed that 12 men know more of the common affairs of life than does one man; that they can draw wiser and safer conclusions from admitted facts thus occurring than can a single judge."

Also the following language of Denman, J., in *Finegan v. London, etc., R. Co.*, 53 J. P. 663: "I think to make questions of law out of what are in their real nature questions of fact for a jury does harm and not good; and it tends to unsettle the law rather than to settle it, and I am confirmed in that view, I think, by that which is certainly an undoubted but deplorable fact, that whenever questions of negligence are argued and put forward as questions of pure law then the difficulty arises, and in most cases they divide judges of great experience and great acuteness more than any other questions which have ever been discussed in courts of justice."

In the opinion in which these quotations are made, the injured employe was working about a power machine with which holes were bored in wood with bits, and his sleeve was caught by the rapidly revolving and descending bit and his arm severely injured thereby, and it was contended there as here that his contributory negligence concurred in producing his injury. In the opinion of Gillett, J., it was said: "For the court to say, as a matter of law, in a case of this kind, that there was contributory negligence, and that therefore there could be no recovery, would be to leave but little room for a beneficial statute."

In *United States Cement Co. v. Cooper*, supra, an employé in going about his work in the attempt to step over an uncovered screw conveyor, not specifically required to be covered, but dangerous and within the purpose of section 9, slipped and stepped into the turning screw and was injured. It was held that the question of his contributory negligence was properly for the jury. See, also, *Hohenstein-Harmetz Co. v. Matthews*, supra; *New Castle Bridge Co. v. Doty* (1906) 168 Ind. 259, 265, 79 N. E. 485; *Evansville Hoop Co. v. Bailey* (1908) 43 Ind. App. 153, 84 N. E. 549.

We have no authority to abridge the law and therefore hold that the trial court erred in instructing the jury to find for the appellees.

[9] During the trial of the cause appellant offered to prove, in answer to questions submitted to her and another witness in her behalf, that the forewoman in charge of the factory had, before the accident resulting in the injury of the appellant, instructed appellant that if she lost anything connected with her work she must hunt for it, and if not found that she would be compelled to pay for it, and that when she had broken a shuttle shortly before the accident she had been compelled to pay for it. This testimony was excluded by the court, and appellant urges that this is an error which prejudiced her cause. We think the court committed error in excluding this evidence. The jury was entitled to have it as it bore even more potentially and specifically on her action in searching for the lost shuttle and the scope of her duties than the posted notice.

The judgment is reversed, with instructions to the lower court to grant appellant's motion for a new trial and for further proceedings not inconsistent with this opinion.

(48 Ind. A. 3)

KROUSE v. KROUSE. (No. 7,271.)

(Appellate Court of Indiana, Division No. 2.
June 2, 1911.)

1. EVIDENCE (§ 35*)—JUDICIAL NOTICE—LAWS OF OTHER STATES.

Courts do not take judicial notice of the laws of other states.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 35, 51; Dec. Dig. § 35.*]

2. JUSTICES OF THE PEACE (§ 100*)—PROCEDURE IN CIVIL CASES—PLEADING.

Under Burns' Ann. St. 1908, § 1749, a defense based upon the law of another state may be put in evidence in a suit in a justice's court without plea.

[Ed. Note.—For other cases, see Justices of the Peace, Dec. Dig. § 100.*]

3. EVIDENCE (§ 80*)—PRESUMPTIONS—LAWS OF OTHER STATES—COMMON LAW.

The general presumption is that the common law prevails in another state.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 14-16; Dec. Dig. § 80.*]

4. COMMON LAW (§ 11*)—ADOPTION AND REPEAL—IN GENERAL.

The common law of England is the basis of the laws in those states composing the territory originally comprised by the 13 colonies, it having been brought there and established in so far as it was applicable to the conditions and circumstances of the colonies.

[Ed. Note.—For other cases, see Common Law, Cent. Dig. §§ 9, 12; Dec. Dig. § 11.*]

5. EVIDENCE (§ 80*)—PRESUMPTION.

The common law is presumed to still prevail in all the states which were formed from the colonies which recognized the common law of England as the source of their jurisprudence, and in the states carved out of the territory acquired since the Revolution which had not at the time of acquisition any established laws, and in which the people at the time of the establishment of governments therein were emigrants from the original states, it is presumed that the common law was conveyed and became established there in the same way that it was brought to the older states by the colonists; but this presumption does not apply to states in which a government and an established system of law already existed at the time of their addition to the United States.

[Ed. Note.—For other cases, see Evidence, Dec. Dig. § 80.*]

6. COMMON LAW (§ 11*)—ADOPTION—ENACTMENT.

Countries conquered and ceded to a country in which the English common law exists retain their original laws in force until they are abrogated, and the common law does not take effect without positive enactment.

[Ed. Note.—For other cases, see Common Law, Cent. Dig. §§ 9, 12; Dec. Dig. § 11.*]

7. EVIDENCE (§ 11*)—JUDICIAL NOTICE—HISTORICAL FACTS.

Courts take judicial notice of matters in history.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 15, 16; Dec. Dig. § 11.*]

8. CONTRACTS (§ 144*)—VALIDITY—WHAT LAW GOVERNS.

Where the instrument on which a cause of action arose was executed in another state in which the civil law once prevailed, and there is no proof of any statute of that state changing the civil law system, the court must decide the case in accordance with the laws of this state.

[Ed. Note.—For other cases, see Contracts, Dec. Dig. § 144.*]

9. HUSBAND AND WIFE (§ 44*)—CONTRACTS—BILLS AND NOTES.

A note by a husband payable to his wife is valid.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 227; Dec. Dig. § 44.*]

10. PAYMENT (§ 87*)—RECOVERY OF PAYMENTS—DURESS.

Money paid through extortion or oppression, or where undue and unconscionable advantage has been taken of a situation or of the pressing necessity of a person, by means whereof payment has been coerced, may be recovered as money paid under duress.

[Ed. Note.—For other cases, see Payment, Cent. Dig. §§ 283-287; Dec. Dig. § 87.*]

11. BILLS AND NOTES (§ 104*)—VALIDITY—DURESS.

Defendant was an attorney of San Francisco who, after spending a time in the parks following the earthquake, went to his apartments to get a better suit of clothes, but they had been concealed by his wife who refused to let him get them until he had executed a note for money alleged to have been loaned to him

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

by her. *Held*, that the note was not signed under duress.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 242-247; Dec. Dig. § 104.*]

Appeal from Circuit Court, Marion County; Vinson Carter, Judge.

Action by Susanna Krouse against Harry A. Krouse. Judgment for plaintiff, and defendant appeals. Affirmed.

Brown & Kepperly, for appellant. John M. Wall, for appellee.

IBACH, J. Appellee, Susanna B. Krouse, sued appellant, Harry A. Krouse, on a note in the following words and figures: "I promise to pay to my wife (Mrs. H. A. Krouse) known as Marylant S. B. Sheppard, one hundred and fifty dollars she has loaned me from time to time, at the end of three months, or before, if I am earning any money. H. A. Krouse. April 29, 1906. Not negotiable. Mrs. T. O. Olsen." This action was originally brought before a justice of the peace, and the transcript was filed in the circuit court on appeal. The only pleading filed was the complaint. The cause was tried without a jury. The court found against appellant in the sum of \$173.25, and rendered judgment on the finding. The only error assigned is the overruling of appellant's motion for a new trial. Appellant relies for reversal of the judgment on two points: First, the note sued on is void because made by husband to wife, as it was executed in California, and, in the absence of proof to the contrary, the presumption is that the common law prevails in a foreign state. Second, the note was executed under duress. The first question then is, in the absence of proof, what is presumed to be the law of California?

[1-3] Courts do not take judicial notice of the laws of other states, and in all cases the laws of the state in which an action is brought determine prima facie the rule of decision. To obtain the benefit of a different rule a party must aver the same in his pleading, and make this rule a matter of proof. But the present suit was begun in a justice of the peace court, and, under our code of practice in justice courts, any matter of defense, except the statute of limitations, set-off, matter in abatement, or denial of execution, may be given in evidence without plea. Burns' Statutes 1908, § 1749. It appears from the evidence that the note sued on was executed in California. In the absence of proof to the contrary, the general presumption is that the common law prevails in another state, and the court will apply the common law according to its interpretation by the courts of the state of the forum. Therefore, appellant urges, that as no proof was made of the statute law of California the rule is to presume the exist-

ence of the common law and to be governed by its principles, and since under the common law there could be no valid contract between husband and wife, there can be no recovery in this action.

[4, 5] There would be some merit in this contention had California been one of the original colonies of England, or been formed out of territory composing such colonies, for there is no doubt that the common law is the basis of the laws in those states composing the territory originally comprised by the thirteen colonies. The early settlers brought it into our land, and established it as far as it was applicable to their conditions and circumstances. Consequently it is presumed that the common law still prevails in all the states which were formed from the colonies which recognized the common law as the source of their jurisprudence, and when one seeks to show that the common law does not at this time exist in such a state, but has been changed by statute, it is upon such person who asserts a different rule to show that fact by competent evidence.

Such is also the rule as to the states carved out of territory acquired since the time of the Revolution, which had not at the time of acquisition any organized form of society, or any established laws for the government of the people then living in such new possessions, where in fact the people of the state at the time of the establishment of government therein were emigrants from the original states. It is presumed that the common law was conveyed and became established there in the same manner that we are authorized to presume that it was brought by the American colonists from the mother country.

[6] But such presumption does not apply to states in which a government and an established system of laws already existed at the time of their addition to the United States. Their original laws remained in force until by proper authority they were abrogated and other laws enacted. In states whose system of law was independent of the English law in its origin, such as Florida, Texas, Louisiana, and California, there can be indulged no presumption of the existence of the English common law. In countries conquered and ceded to England, the common law does not take effect without positive enactment. *Norris v. Harris*, 15 Cal. 226; *Buchanan v. Hubbard*, 119 Ind. 187, 21 N. E. 538; 1 Blackstone, 107; *Rorer on Interstate Law*, p. 45.

It is a matter of history that California was once a part of Mexico, and that the Mexican system of civil law was there established. During the Mexican war California was conquered by the Americans, and for a time was governed by a mixed system of martial and civil law. By the treaty of peace with Mexico a sum of money was paid

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep.'s Indexes

to her as a partial remuneration for the territory, including California, ceded by her to the United States. The territory continued under a semimilitary government for a short time, and then, Congress having failed to provide a new form of government, a constitutional convention was called by proclamation of Governor Bennett Riley. This proclamation states that "the laws of California, not inconsistent with the laws, Constitution and treaties of the United States, are still in force, and must continue in force until changed by competent authority." The Constitution of California, adopted at this convention, declares (article 12, § 1, Const. 1849) that "all laws in force at the time of the adoption of this Constitution, and not inconsistent therewith, until altered or repealed by the Legislature, shall continue as if the same had not been adopted." This Constitution was ratified by the people, was proclaimed on December 20, 1849, and it having been approved by Congress, California was admitted as a state on September 9, 1850.

In the case of *Fowler v. Smith*, 2 Cal. 568, the Supreme Court of that state say: "When a territory now comprised in the state of California was under Mexican dominion, its judicial system was that of Roman law, modified by Spanish and Mexican legislation. Upon the formation of the present state government, that system was ordained by a constitutional provision to be continued, until it should be changed by the Legislature."

[7-9] It is thus an historical fact that the civil law prevailed in California at the time of its admission into the Union. Courts take judicial notice of matters of history. They do not take judicial notice of statutes of other states, and cannot judicially know whether the Legislature of California has by statute changed the system of civil law once there established. Thus the presumption that the common law prevails in California having been removed by the historical fact that the civil law once prevailed there, this court must as a matter of necessity decide the case in accordance with our own laws. The present case falls within the rule laid down in *Buchanan v. Harris*, supra, and *Norris v. Harris*, supra, and will be governed by the law of Indiana, and as under our law the note is valid, the first reason assigned for reversal will not avail appellant.

The second question for consideration is, Do the facts disclosed by the evidence in the present case show that the note was executed under such duress as to render it ineffectual?

[10] In the case of *Lafayette, etc., R. Co. v. Pattison*, 41 Ind. 327, the Supreme Court of this state made an exhaustive examination of the question of duress of property and announce as their conclusions:

"The foregoing authorities very fully establish the propositions, that the doctrine of

duress applies to property as well as to the person, and that where one person is in possession of the goods or property of another, and refuses to deliver the same up to that other, unless the latter pays him a sum of money which he has no right to receive, and the latter, in order to obtain possession of his property, pays that sum, the money so paid is a payment by compulsion, and may be recovered back. * * * It is well settled, by an unbroken current of authorities in England and in this country, that money can be recovered back which has been procured through imposition, extortion, or oppression, or where an undue and unconscionable advantage has been taken of the situation, or great and pressing necessity of a person, who, by means thereof, has been coerced into the payment, which gives such payment the character of a compulsory payment."

In a recent case, that of *Galusha v. Sherman*, 105 Wis. 263, 81 N. W. 495, 47 L. R. A. 417, it is said after review of the later authorities: "The question in each case is, Was the alleged injured person, by being put in fear by the other party to the transaction for the purpose of obtaining an advantage over him, deprived of the free exercise of his will power, and was such advantage thereby obtained? If the proposition be determined in the affirmative, no matter what the nature of the threatened injury to such person or his property, * * * the advantage thereby obtained cannot be retained. The idea is that what constitutes duress is wholly a matter of law, and is simply the deprivation by one person of will power of another by putting such other in fear for the purpose of obtaining by that means, some valuable advantage of him. The means by which that condition of mind is produced are matters of fact, and whether such condition was in fact produced is usually wholly matter of fact, though of course the means may be so oppressive as to render the result an inference of law. * * * The condition of mind of a person produced by threats of some kind, rendering him incapable of exercising his free will, is what constitutes duress. The means used to produce that condition, the age, sex, and mental characteristics of the alleged injured party, are all evidentiary merely of the ultimate fact in issue, of whether such person was bereft of the free exercise of his will power. Obviously, what will accomplish such result cannot justly be tested by any other standard than that of the particular person acted upon. His resisting power, under all the circumstances of the situation, not any arbitrary standard, is to be considered in determining whether there was duress."

From the evidence in the case it appears that appellant, who was an attorney, and appellee were husband and wife, living in San Francisco at the time of the earthquake and fire; that their marriage was not generally known; and that she, though living with

him in his apartments, kept up separate apartments. For a time after the earthquake, they, in company with many others, had lived much of the time in the parks. On April 29, 1906, appellant, who had been wearing old clothes, went to his apartments to get his good clothes. Appellee had concealed them, it seems, and refused to let him have them until he signed the note in question. She testified that she had loaned money to appellant, including the price of the very suit of clothes which he was demanding; that she had borne the living expenses of the household; and that he had taken money from her in the park, shortly before coming after his clothes, and in repayment of these amounts the note was given, as at the time it was signed she believed that he owed her \$153, though she later found out that she had forgotten many items and the amount was really more. Appellant denied that she had furnished him money to the amount of more than \$10.

Appellant's counsel set up a remarkable argument, the consideration of which somewhat relieves the monotony of the ordinary course of judicial decision. They claim that appellant, a lawyer in San Francisco, a few days after the earthquake, relying only upon the practice of his profession for a livelihood would have little opportunity for getting business or of holding what he had, if he went about his professional duties clothed in a laboring man's garb; that the controlling necessity in the case required that he get suitable wearing apparel, or lose the chance of making a living; that this was one of the times when good clothes were of vital importance to a man; that appellant signed the note, protecting himself from his wife as best he could by writing in the note the words "not negotiable," in order to get his clothes which he must have to properly look after the interests of his clients; and, therefore, the note was signed under duress.

[11] This defense is interesting and ingenuous, and one worthy of a humorist. We know of nothing which requires a man to wear good clothes in order to practice law, and if ever a lawyer could be excused for wearing old clothes, surely it would be after the San Francisco fire, when he would not be conspicuous by their wearing. There nowhere appears from the evidence that appellant had any business or any clients requiring his attention, but it rather appears that because he had no business and no clients, it was his intention to leave his wife and the city. There is evidence to the effect that he owed his wife, and, in this view of the case, the giving of the note could not be payment to her of money which she had no right to receive, but merely a promise to pay money which she had a right to receive. She

testifies that appellant afterwards acknowledged the note, at least to the extent of offering worthless stocks in exchange for it. We cannot say, as a matter of law, that the withholding of the personal property, which if wrongfully withheld, could have been easily recovered by legal process, constitutes duress, in the case of a lawyer who is supposed to have some acquaintance with the law. Admitting that his resisting power, under the circumstances, is to be taken into account in determining whether there was duress, we can find nothing to indicate that appellant was, by the refusal of his wife to surrender his clothes, which she had hidden in his own apartments, deprived of his free will to such an extent that he should sign a note when he owed to her no money. The trial court had before him both appellant and appellee, and was able to judge from the appearance and actions whether appellant was a man of such weak resisting power that the circumstances attending the signing of the note amounted to duress. He decided that no duress existed. We can find no ground to decide otherwise.

No error appearing in the record, the judgment is affirmed. The death of appellant having been suggested, the cause is affirmed as of date of submission.

(47 Ind. A. 681)

CITY OF TIPTON et al. v. RACOBS.
(No. 6,979.)

(Appellate Court of Indiana, Division No. 1.
May 31, 1911.)

1. NEGLIGENCE (§ 136*)—CONTRIBUTORY NEGLIGENCE—QUESTION OF LAW OR FACT.

In general, contributory negligence is a question of fact for the jury, and not for the court.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 333-336; Dec. Dig. § 136.*]

2. ELECTRICITY (§ 19*)—LIVE WIRE—DEATH OF PEDESTRIAN — CONTRIBUTORY NEGLIGENCE.

Decedent for five months prior to his death had been an assistant lineman in the employ of a traction company, assisting in locating storage batteries. He had been instructed as to the danger of coming in contact with electric wires, and directed never to touch a hanging, broken, or fallen wire unless certain that it was dead. On the morning of his death an electric light wire suspended near decedent's house, having broken, one end fell into a shade tree near the sidewalk and hung suspended from a limb, the uninsulated end swaying above and at times touching the ground under the tree. Except for a space of about 5 inches at the end of the wire, and a space of about 3 inches some 15 or 18 inches above the ground which were totally uninsulated the wire appeared to be fully insulated and deceased in order to protect his children and persons passing along the street from the wire, took hold of it at a point where it was apparently insulated to carry it away from the sidewalk, but the insulation being defective he sustained a shock of electricity which knocked him to the ground, and, in falling, the uninsulated end of the wire fell and rested on his body, causing

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

instant death. *Held*, that deceased was not negligent as a matter of law.

[Ed. Note.—For other cases, see *Electricity*, Cent. Dig. § 11; Dec. Dig. § 19.*]

Appeal from Circuit Court, Tipton County; J. F. Elliott, Judge.

Action by Pearl Jacobs, as administratrix, etc., against the City of Tipton and another. Judgment for plaintiff, and defendants appeal. Affirmed.

James M. Purvis, R. B. Beauchamp, and Edward Daniels, for appellants. L. B. Nash and Gifford & Gifford, for appellee.

HOTTEL, J. Action by appellee, administratrix, on behalf of herself and children, against the appellants for damages to them resulting from the death of their husband and father, alleged to have been caused by the negligence of the appellants. The complaint was in two paragraphs, cause tried by jury, verdict for appellee in the sum of \$1,000, with answers to interrogatories. The appellants jointly and separately moved for judgment on the answers to interrogatories and for new trial, each of which motions was overruled, and exceptions saved. The ruling upon the motion for judgment on the answers to interrogatories is the only assigned error presented and argued by appellants in their brief. It is contended by appellants that these answers to interrogatories show that the deceased deliberately and voluntarily placed himself in a position of danger, and that the act which resulted in his death evidenced such a lack of care and caution on his part as to charge him of being guilty of contributory negligence. The answers to the interrogatories, important and controlling upon this question, show that decedent was an experienced railroad brakeman; that he had been in the employ of the Indiana Union Traction Company for about five months as assistant lineman, and in assisting and locating and placing storage batteries; that said employment gave him a good knowledge of the dangers of electricity and of coming in contact with electric wires; that while employed in locating and placing said storage batteries he had been carefully instructed by the person superintending said work as to the danger of coming in contact with electric wires, and never to touch a hanging or broken or fallen wire unless certain it was a dead one and tested it; that he did go up to the broken wire in question and took hold of it with his naked hand.

[1] As a general rule, contributory negligence is a question of fact to be determined by the jury, and not one of law to be determined by the court. *Indianapolis Ry. Co. v. Hockett*, 159 Ind. 677, 66 N. E. 39; *Brosnan v. Sweetser*, 127 Ind. 1, 26 N. E. 555; *Pittsburgh, etc., Ry. Co. v. Wright*, 80 Ind. 182; *Union Traction Co. v. Sullivan*, 38 Ind. App. 513, 76 N. E. 116; *Wortman v. Minich*, 28 Ind. App.

31, 62 N. E. 85. This question, as presented by each of the paragraphs of the complaint upon which the case was tried, was, under the authorities, *supra*, clearly one of fact and not one of law. This the appellants practically concede, as they make no objections to either of the paragraphs of the complaint. If, therefore, the material allegations of either of the paragraphs of the complaint, upon this subject, were proven, such proof warranted the general verdict of the jury, which was the equivalent of the finding that the deceased was not, in fact, guilty of any negligence contributing to his injury.

[2] Assuming that these facts alleged in the complaint were all proven, which assumption is, under the rules of this court, for the purposes of this motion, made imperative by the general verdict, the question then arises: Are the findings of the jury in their answers to interrogatories above set out in such irreconcilable conflict therewith that the general verdict cannot stand? We do not think so. Under the rule, *supra*, the averments of the complaint upon this question become important, and should be considered in connection with the facts found by the answers to interrogatories. These averments, upon this subject, are in substance as follows: That the appellant's wire, carrying many thousand volts of electric current, broke, and one end thereof fell into a shade tree along the sidewalk and hung suspended from a limb of said tree, and was by the swaying of said limb by the wind swung backwards and forwards over said street and sidewalk, at times touching the ground under the tree; that said swinging wire was apparently insulated, except a space of about 5 inches right at the end swinging on the ground, which was entirely uninsulated, and except also a space about 3 inches some 15 or 18 inches above the ground which was also totally uninsulated; that such insulation of said swinging wire, except at said two points above mentioned, seemed to be perfect and sufficient to protect one touching the same from the electricity passing through said wire; that this swinging wire was at a point along the street and sidewalk near the home of the deceased, and he, in coming along the street to the point where said wire was hanging and swinging over said street and walk in said dangerous condition, found his children in close proximity to said wire, and for the purpose of removing said wire and placing the same beyond the reach of his said children, and others passing along said street, which was much traveled by men, women, and children, especially school children going to and from school, took hold of said wire at the point where it was apparently insulated and where there was a substance around said wire resembling insulation; that the insulation of said wire, at said point where deceased took hold of the

*For other cases see same topic and section NUMBER in Dec. Dig. & Ann. Dig. Key No. Series & Rep'r Indexes

same, was in fact imperfect and was not of proper thickness, material, or texture to resist the electricity in said wire and prevent the same from passing into the hand and body of said deceased; that there was, in fact, sufficient electricity passed into his hand and body to knock him down upon the ground, and, in falling, the uninsulated and exposed parts of said wire fell upon and rested upon the body of the deceased, causing the entire current of many thousand volts in said wire to pass through his body and thereby instantly kill him.

In view of these averments of the complaint, which is considering this question, we may, in fact must, treat as proven, the facts found by the jury in their answers to interrogatories would not have warranted the court below, nor will they now justify this court, in saying as a matter of law that the deceased knew when he took hold of the wire in question that he was exposing himself to danger of great bodily injury or death, and that by such act he contributed to his own death. Neither do these answers, as we view them, justify the contention of appellants that the deceased was possessed of the knowledge of an expert in the handling of electric light wires. So far as the interrogatories disclose, his entire information upon the subject was the result of five months' experience with a traction company, which taught him the danger of uninsulated or live wires. In fact, the only knowledge which the jury, by their answers, found that the deceased had of electricity to us seems the explanatory cause for his conduct, considered in the light of the conditions and circumstances that surrounded him. This knowledge taught him the extreme danger of the electric current and the touch of the live wire. Assuming the averments of the complaint to have been proven, he knew, or at least believed, that, so far as touch was concerned, the purpose of insulation was to make the wire safe and that the insulated wire was a dead wire. He saw this broken, hanging wire suspended over the street and sidewalk, and saw the two uninsulated bare spots at and near the end toward the ground, and knew and realized the danger to which children and others would be exposed by the touch of this loose, swinging wire at said exposed uninsulated portion, and believing that he could safely take hold of said wire at its insulated portions and remove it to a place of safety, and thereby prevent the risk of injury to his own children and others ignorant of the dangers of an exposed live wire, he took hold of the wire, at a point that to him appeared to be insulated and safe, to remove it, with the result charged in the complaint. Taking the averments of this complaint as proven, the deceased was led to his death by the deceptive insulated appearance of the wire. Can it be said that this court should, or could, say, as a matter of law, that such circumstances and such mis-

take in judgment constitutes contributory negligence? The question of the extent and character of the knowledge of the deceased, as to the dangers of electric wires and the influence it should have over his conduct in taking hold of the wire in question, was clearly one of fact for the jury, as was the entire question of contributory negligence.

Appellants cite a number of cases which we think, when read in the light of the particular facts in the cases cited, furnish no support to appellants' contention in this case. These cases assert the general principles, that one who casts himself upon known dangers, where the act subjects him to a known peril, is guilty of contributory knowledge, and that knowledge of the danger increases the degree of care to be exercised. That is to say, knowledge of danger is an important factor in determining the question of contributory negligence, "and a higher degree of care is required from one with knowledge of danger to amount to ordinary care than would be required from one without such knowledge." These principles are founded in reason and are the law; but, as we view them, they are in no sense decisive of the question presented by the general verdict and the answers to the interrogatories in the case at bar. In fact, as we view these cases cited by appellants, and the case under consideration, they furnish, by inference at least, good reason against appellants' contention in this case. These cases all recognize that the question of "knowledge of the danger," in each particular case, its character and extent and its influence upon the conduct of its possessor in causing him to do, or omit, the act charged to be contributory to his injury, are all, generally speaking, questions of fact to be determined by the jury and not questions of law for the court.

Some of the cases cited by appellee present a state of facts very similar to those here presented, and strongly support the conclusion which we have reached in this case. This is especially true of the case of *Clements v. Louisiana Electric Light Co.*, 44 La. 692, 11 South. 51, 18 L. R. A. 48, 32 Am. St. Rep. 348, in which the court said: "The wires were visible and to all appearances were safe. The great force that was being carried over the wire gave no evidence of its existence. There was no means for a man of ordinary education to distinguish whether the wire was dead or alive. It had all the appearance of having been properly insulated. From this fact there was an invitation or inducement held out to Clements to risk the consequences of contact. He had a right to believe they were safe, and that the company had complied with its duties specified by law. He was required to look for patent and not latent defects. Had he known of the defective insulation and put himself in contact with the wire, he would have assumed the risk. The defect was hidden, and the insulation wrapping was deceptive. It is certain,

had it been properly wrapped, Clements would not have been killed. His death is conclusive proof of the defect of the insulation and the negligence of defendant. He exercised reasonable care in going under the wire in the performance of his duty, as he had a right to believe, from external appearances, that the wire was safe. His action was such as not to tend to expose himself directly to the danger which resulted in the injury. In fact there was no apparent danger." To the same effect are the following: *Giraudi v. Electric Imp. Co.*, 107 Cal. 120, 40 Pac. 108, 28 L. R. A. 596, 48 Am. St. Rep. 114; *Ennis v. Gray*, 87 Hun (N. Y.) 355, 34 N. Y. Supp. 379; *McLaughlin v. Louisiana E. L. Co.*, 37 S. W. 851, 18 Ky. Law Rep. 693, 34 L. R. A. 812; *Illingsworth v. Boston E. L. Co.*, 161 Mass. 583, 37 N. E. 778, 25 L. R. A. 552; *Will v. Edison Elec. Ill. Co.*, 200 Pa. 540, 50 Atl. 161.

The question, whether or not an injured or deceased party was guilty of negligence contributing to his injury or death, within the meaning of the law, depends for its answer in its last analysis upon whether or not he, at the time of his injury or death, under all the facts, circumstances, and conditions then surrounding him, acted as an ordinarily prudent man would have acted similarly situated. Judged by this test, we think the evidence tended to show the deceased free from negligence contributing to his death; and, in any event, the question was one of fact, which no tribunal is better fitted or qualified to determine than a jury of 12 men. We find no ground for disturbing their verdict in this case.

Judgment affirmed.

(47 Ind. A. 696)

WOODBURN v. WOODBURN. (No. 7,253.)
(Appellate Court of Indiana, Division No. 2,
May 31, 1911.)

1. DIVORCE (§ 286*)—AWARD OF ALIMONY—DISCRETION—REVIEW.

An award of alimony to a wife will not be reversed on appeal, unless it appears that the trial court abused its discretion in the amount allowed.

[Ed. Note.—For other cases, see *Divorce*, Cent. Dig. § 770; Dec. Dig. § 286.*]

2. DIVORCE (§ 240*)—ALIMONY—AMOUNT.

A husband when sued for alimony was the owner of an undivided one-half of 160 acres of land and the owner of an additional 80 acres. He testified that he had refused \$87.50 an acre for such real estate, and it was also shown that he had personal property of unproved value and two life insurance policies for \$1,000, on which he had been paying premiums for 20 years, and for the surrender of which the insurance company had offered \$450. One of his farms was mortgaged for \$2,000, and he was indebted to others for \$700, half of which was used in the purchase of personal property used on the farm. No children were born to the marriage, and about seven years intervened between the separation and the granting of the decree, during which time plaintiff supported

herself. *Held*, that an award of \$2,250 as permanent alimony was not excessive.

[Ed. Note.—For other cases, see *Divorce*, Cent. Dig. §§ 675-678; Dec. Dig. § 240.*]

Appeal from Circuit Court, Gibson County; Q. M. Welborn, Judge.

Action by Minnie L. Woodburn against William Woodburn for divorce. Judgment for plaintiff, and defendant appeals. Affirmed.

Thomas Duncan, for appellant. John W. Brady, for appellee.

ADAMS, J. In September, 1908, the appellee filed her complaint against the appellant for divorce, alleging that she was united in marriage with the appellant on the 8th day of December, 1892, and lived with him as his wife until the 31st day of July, 1902, when she left him. In her complaint appellee charges that at and before the date of their separation the appellant was guilty of cruel and inhuman treatment, and was and still is an habitual drunkard. In March, 1909, judgment was tendered in favor of appellee, granting her a divorce, alimony in the sum of \$2,250 and attorney's fees in the sum of \$150. Appellant filed a motion for a new trial, and also nine motions to modify the judgment, by reducing the amount of alimony to the amount set out in each of said motions. Error is assigned on the overruling of each motion.

[1] The only question seriously urged by the appellant is that the judgment for alimony is excessive. The rule is well settled in this state that the court on appeal will not reverse a case of this kind, unless it appears that the trial court abused its discretion in the amount of alimony allowed. This amount is largely within the discretion of the trial court, and the statute requires the court to make such award, as the circumstances of the case shall render just and proper. It would serve no purpose to set out the evidence given at the hearing in support of the charges of cruelty and habitual drunkenness. It is sufficient to say that the evidence fully established these charges.

[2] As to the amount of alimony allowed by the court, the evidence shows that the appellant is the owner of an undivided one-half of 160 acres of land, and the owner of an additional 80 acres. As a witness in the case, appellant testified that he had refused \$87.50 per acre for his real estate holdings. It is shown that he is the owner of certain personal property, but the evidence does not disclose the value. It is also shown that appellant was the owner of two endowment life insurance policies for \$1,000 each, on which he had been paying premiums for 20 years, but the surrender value of such policies is not shown, although the appellant testified that the company offered \$225 in cash for each policy. One of appellant's farms is

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes

mortgaged for \$2,000, and he is indebted to various parties in the further sum of \$700, about one-half of which was used in the purchase of personal property used on the farm.

Estimating the value of appellant's real estate at the price for which he could have sold it, adding \$450, the value of the life insurance policies, and subtracting from the total the amount of debts not represented by personal property, the net value of his estate would be approximately \$9,000. No children were born to this union. After the separation, the proof shows that appellant continued his intemperate habits, and contributed nothing to the support of his wife. Almost seven years intervened between the separation and the granting of the divorce, during which time the appellee supported herself. Where a wife leaves a husband on account of his fault, it is the duty of such husband to support her, and, in this case, the length of time during which the appellee was compelled to support herself was an element to be considered by the court with all the other evidence in the case in fixing the amount of alimony. We do not believe there was any abuse of discretion on the part of the trial court in awarding alimony in the sum of \$2,250. Indeed, we believe that the court upon the facts disclosed by the record, without any abuse of discretion, might have allowed alimony in a larger amount. We find no error in the record.

Judgment is affirmed, with 10 per cent. damages.

(47 Ind. App. 689)

WILSON et al. v. NATIONAL FOWLER BANK. (No. 7,259.)

(Appellate Court of Indiana: May 31, 1911.)

1. APPEAL AND ERROR (§ 761*)—BRIEFS—PREPARATION—FORM.

Where appellants' brief stated their points under the heading "Points," and, as an excuse for failure to cite authorities, stated that they had been unable to find any decisions bearing directly on the points presented, there was a substantial compliance with Supreme Court rule 22 (55 N. E. vi), regulating the preparation of briefs on appeal, which was sufficient.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3096; Dec. Dig. § 761.*]

2. GAMING (§ 19*)—BUCKET SHOP TRANSACTIONS—NOTES.

As between the parties, a note given in settlement of losses arising out of a bucket shop speculation as to future prices of grain or other commodities, where delivery is not contemplated by either party, is invalid, and payment will not be enforced for that reason and also because such contracts are contrary to public policy, as disclosed by Acts 1907, c. 242 (Burns' Ann. St. 1908, § 3837).

[Ed. Note.—For other cases, see Gaming, Cent. Dig. §§ 39-44; Dec. Dig. § 19.*]

3. BILLS AND NOTES (§ 375*)—BONA FIDE PURCHASER—DIFFERENCES—ILLEGAL CONSIDERATION.

There being no statute in Indiana making a note given for payment of differences on gambling transactions in grain or securities void in

the hands of an innocent purchaser, such holder may enforce its payment against the maker, regardless of the fact that it was given for an illegal consideration.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 971-981; Dec. Dig. § 375;* Gaming, Cent. Dig. § 44.]

4. BILLS AND NOTES (§§ 478, 486*)—PLEADING—BONA FIDE PURCHASER.

In an action by an indorsee on a note given for a gambling consideration, an answer alleging that the note originated in such illegal transaction was sufficient to withstand a demurrer, and to require a reply as showing that the note was purchased in good faith and without notice.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1522, 1565; Dec. Dig. §§ 478, 486.*]

5. BILLS AND NOTES (§ 497*)—INDORSEMENT—BONA FIDE PURCHASER.

Possession of a note by an indorsee which on its face shows no infirmity raises a presumption that it came into the hands of the holder in the usual course of business without notice of any defect in the consideration.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1675-1687; Dec. Dig. § 497.*]

6. BILLS AND NOTES (§ 339*)—TRANSFER—DUTY OF PURCHASER.

In the absence of any infirmity appearing on the face of commercial paper or circumstances to excite the suspicion of a person of ordinary prudence, the purchaser is not required to inquire of the maker or holder as to the facts under which the paper was executed.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 821-823; Dec. Dig. § 339.*]

7. BILLS AND NOTES (§ 340*)—TRANSFER—BONA FIDE PURCHASER—EVIDENCE.

Plaintiff bank at the time it purchased the note in suit knew that the payee was running a bucket shop. The payee was a customer of the bank, but it did not appear that the bank had knowledge that the maker of the note ever had any deals or trades or transacted any bucket shop business with the payee. Held insufficient to charge the bank with the duty of inquiring of the maker of the note whether it was given for an illegal consideration in the settlement of differences in bucket shop transactions.

[Ed. Note.—For other cases, see Bills and Notes, Dec. Dig. § 340.*]

Appeal from Circuit Court, Tippecanoe County; Richard P. De Hart, Judge.

Action by the National Fowler Bank against De Witt C. Wilson and another, as trustees, etc., of the estate of Noah Justice, an insolvent. Judgment for plaintiff, and defendants appeal. Affirmed.

Wilson & Quinn, Chas. H. Henderson, and Charles E. Thompson, for appellants. Stuart, Hammond & Simms, for appellee.

MYERS, J. On February 26, 1908, Noah Justice executed his unconditional promissory note for \$1,052.50, payable at a bank in this state to the order of E. A. Haney, with 6 per cent. interest after date, and due in four months. Thereafter Haney indorsed the note to appellee. October 20, 1908, appellee filed said note with an affidavit attached as to its correctness, with the appellants as trustees

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

of said Noah Justice, an insolvent debtor, for allowance and payment as a claim against said insolvent's estate. January 4, 1909, appellants disallowed said claim, and on the same day filed the same, together with their objections thereto, with the clerk of the court below, and thereupon said claim was docketed as a cause for trial.

The action of the court in sustaining appellee's demurrer for want of facts to appellants' amended third paragraph of answer is assigned as error. Whether the answer states facts sufficient to constitute a cause of defense is before us for consideration.

[1] Appellee first insists that appellants' brief does not comply with rule 22 (55 N. E. vi) of the Supreme and this court, and for that reason this appeal should be dismissed. Appellants' brief does not technically comply with this rule, but they have substantially complied with it, and that is all that is required. They have stated their points under the heading "Points," but have cited no cases or authorities in support thereof, but excuse themselves for not so doing by the statement that they have been unable to find any decisions bearing directly upon the points presented. The contention of appellee in support of its claim that this appeal should be dismissed cannot be sustained. Appellants concede that appellee came into possession of the note in question before maturity, paying therefor full value; that said note was negotiable under the law merchant; that appellee purchased the note not in any unusual manner, nor at any unusual time. But they do insist that the facts averred in the answer show that, while appellee had no actual knowledge of any infirmities of the note, yet the facts surrounding its execution were of such a character as to put it upon inquiry as to the consideration for which the note was given, and its failure to make such inquiry under the circumstances amounted to bad faith in making the purchase, and deprived it of its right as an innocent purchaser under the law merchant. The answer, in substance, shows that appellee knew that the original payee of the note had an office within a few feet of appellee's place of business; that his only business was operating a bucket shop; that appellee knew by inspection that a telegraph instrument and a blackboard were maintained in the office of the payee of said note, and were used solely for the purpose of learning and displaying for inspection by all persons so desiring the ruling prices of stocks, grains, provisions, and other commodities on the board of trade in the cities of Chicago, Ill., and New York; that appellee knew that many persons patronized and paid said indorser large sums of money, the greater part of which was deposited with it to the credit of said indorser, the latter being a regular customer of the bank as a large borrower and by daily depositing and checking out large sums of money; that appellee at the time of the purchase of said

note made no inquiry as to the consideration therefor, but relied entirely upon the solvency of the indorser and the maker, Noah Justice; that it knew at the time it purchased said note that said Noah Justice had for many years prior to the date of the execution thereof "many times advanced moneys to different persons engaged in bucket shopping business" in La Fayette. It is averred that said note was executed by Justice to Haney in settlement for differences in the market prices quoted on the board of trade at the said city of Chicago for commodities bought and sold by Justice of and from Haney between July 1, 1907, and February 26, 1908; that said transactions and sales were made with the understanding and intention on the part of both Justice and Haney that no actual delivery of the commodities bought and sold should be made.

[2] As between the parties, a note given in settlement of a wager or to cover losses arising out of a bucket shop speculation as to future prices of grain or other commodities, where delivery of such grain or commodity is not contemplated by either party, is invalid, and the law will not enforce its payment for the reason that its consideration rests in a transaction condemned by law, and for the further reason that it is contrary to public policy and void. Acts 1907, p. 488; section 3837, Burns' Ann. St. 1908; *Whitesides v. Hunt*, 97 Ind. 191, 49 Am. Rep. 441; *Sondheim v. Gilbert*, Assignee, 117 Ind. 71, 18 N. E. 687, 5 L. R. A. 432, 10 Am. St. Rep. 23; *Plank v. Jackson*, 128 Ind. 424, 26 N. E. 568, 27 N. E. 1117; *Schmeuckle v. Waters*, 125 Ind. 265, 25 N. E. 281. In the case at bar, the answer shows that the note had its inception in an illegal transaction, and that the immediate parties thereto were in pari delicto; consequently the law will not aid either in enforcing any claim against the other growing out of such transaction. *American Mutual Life Insurance Co. v. Mead*, 39 Ind. App. 215, 220, 79 N. E. 526, and cases there cited; *Whitesides v. Hunt*, supra.

[3] But, as there is no statute in this state making the note void in the hands of an innocent purchaser, such holder, by reason of the character of the paper, may enforce its payment against the maker, regardless of such infirmity. *Schmeuckle v. Waters*, supra.

[4] The fact that the note originated in an illegal transaction rendered the answer sufficient to withstand the demurrer, and to require a reply showing that the note was purchased in good faith, and without notice of its illegality. *Schmeuckle v. Waters*, supra; *Shirk v. Mitchell*, 137 Ind. 185, 36 N. E. 850; *New v. Walker*, 108 Ind. 365, 9 N. E. 386, 58 Am. Rep. 40; *Shirk v. Neible*, 156 Ind. 66, 59 N. E. 281, 83 Am. St. Rep. 150; *State National Bank v. Bennett*, 8 Ind. App. 679, 36 N. E. 551; *Giberson v. Jolley*, 120 Ind. 301, 22 N. E. 306; *First State Bank v. Hammond*, 104 Mo. App. 403, 79 S. W. 493; *Chap-*

man, *Executrix, v. Snyder*, 1 Neb. (Unof.) 230, 95 N. W. 346; *McGill v. Young*, 16 S. Dak. 360, 92 N. W. 1066. But we are not asked to hold the answer good on that theory, and for that reason we refuse to disturb the judgment on that ground.

The parties to this appeal by so framing their pleadings, and by adroitly prepared briefs, have endeavored to control and limit our consideration to the single question, Do the facts pleaded overcome the presumption of good faith on the part of appellee, and create the legal presumption that it acted in bad faith in failing to make inquiry regarding the consideration of the note, or, to more nearly state the question in line with the decisions, it is not whether the indorsee might have ascertained or could have known that the consideration of the note was illegal, but, are the facts averred sufficiently pointed and emphatic as to lead directly and irresistibly to the conclusion that the purchaser in fact had such notice, or purposely refrained from making inquiry which would have resulted in such knowledge? If so, good faith is overthrown and bad faith is shown. *Tescher v. Merea*, 118 Ind. 586, 21 N. E. 816; *Hankey v. Downey*, 3 Ind. App. 325, 29 N. E. 606; *State National Bank v. Bennett*, supra, page 684; *Shirk v. Neible*, supra; *Bank v. Ohio Valley Furniture Co.*, 57 W. Va. 625, 50 S. E. 880, 70 L. R. A. 312; *Harrington v. Butte & Boston Mining Co.*, 33 Mont. 330, 83 Pac. 467, 114 Am. St. Rep. 821; *Merritt v. Dewey*, 115 Ill. App. 503; *Batesville Bank v. Lehner*, 43 Ind. App. 457, 87 N. E. 990.

[5] The note in suit is governed by the law merchant. It is in the hands of an indorsee, and conceded to show no infirmity upon its face. Its possession and production raises a presumption that it came into the hands of the holder "in the usual course of business, for value, without notice of any defect in the consideration." *Sondheim v. Gilbert, Assignee*, supra; *Citizens' Bank v. Leonhart*, 126 Ind. 206, 25 N. E. 1099; *Fisher v. Fisher*, 113 Ind. 474, 15 N. E. 832; *Tescher v. Merea*, supra. In the case last cited it is said: "Commercial paper is regarded with favor on account of its convenience in mercantile affairs, and so the rule is that nothing short of fraud or bad faith, not even negligence, is sufficient to defeat the right of a holder for value and without notice to recover."

[6] The rule seems to be that in the absence of any infirmity appearing upon the face of commercial paper, or circumstances under which it is presented for sale and purchase to excite the suspicion of a person of ordinary prudence, the purchaser would not be called upon to make inquiry of the maker or holder as to the facts under which such paper was executed. *Citizens' Bank v. Leonhart*, supra; *Pope v. Branch County Savings Bank*, 23 Ind. App. 210, 54 N. E. 835. "Circumstances calculated to awaken suspicion merely are not sufficient," nor is it a ques-

tion of negligence or diligence, but one of honesty and good faith. *Tescher v. Merea*, supra.

[7] Again, referring to the facts applicable to the question under consideration, they may be stated as follows: That appellee at the time it bought the note in question knew that the payee thereof was running a well-equipped bucket shop, which was well patronized, and that it made no inquiry regarding the consideration for the note; that said payee was a customer of the appellee, bank, borrowing and handling large sums of money, daily depositing and checking on such deposits; that the maker of the note for many years prior to the execution thereof "many times advanced moneys to different persons engaged in bucket shopping business." It does not appear for what purpose Justice made these advancements, nor does it appear that appellee at any time had any notice or knowledge that Justice ever made any deals, trades, or transacted any business with any bucket shopping operator other than the information furnished by the note. If he advanced money to them, such transaction might have been perfectly legitimate. *Plank v. Jackson*, supra; *Sondheim v. Gilbert, Assignee*, supra. If this answer is to be upheld, it must be solely upon the ground of appellee's knowledge of the business in which the payee of the note was engaged, and this is not enough to overcome the presumption that appellee in purchasing the note acted honestly and in good faith.

For the reasons stated, the judgment is affirmed.

(49 Ind. App. 157)

INLAND STEEL CO. v. HARRIS.

(No. 7,127.)¹

(Appellate Court of Indiana, Division No. 1.
June 2, 1911.)

1. APPEAL AND ERROR (§ 289*)—MATTERS REVIEWABLE—MOTION FOR NEW TRIAL.

Error in the admission or exclusion of evidence cannot be presented for the first time by assignment of errors, but must be alleged as cause for a new trial.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 1691, 1696; Dec. Dig. § 289.*]

2. APPEAL AND ERROR (§ 293*)—INTERROGATORIES—MOTION FOR JUDGMENT ON ANSWERS TO INTERROGATORIES.

Questions relating to the answers to interrogatories by the jury are not properly a part of the motion for a new trial. If the answers are in conflict with the general verdict, appellant should move for judgment on the answers to the interrogatories non obstante veredicto, and, if his motion is overruled, he can then present the question to the Appellate Court by independent assignment of error.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 1700; Dec. Dig. § 293.*]

3. APPEAL AND ERROR (§ 757*)—COMPLIANCE WITH RULES—BRIEFS.

Though appellant has not observed the rules prescribed for presentation of the evidence

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes
1 Rehearing denied.

in the briefs, where appellee's brief supplements that of appellant in this respect, the Appellate Court will pass upon the question whether there is any evidence to support the findings upon the material propositions in issue.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3092; Dec. Dig. § 757.*]

4. MASTER AND SERVANT (§ 39*)—SERVICES—ACTION—BREACH OF CONTRACT—COMPLAINT—SUFFICIENCY.

Where a complaint shows an employment contract and a part performance thereof by plaintiff, and his willingness to continue under the contract, and a breach thereof by the defendant in refusing to permit him to continue the service, resulting in damages to plaintiff, it is good as against a demurrer.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 39.*]

5. APPEAL AND ERROR (§ 995*)—MATTERS REVIEWABLE—WEIGHT OF EVIDENCE.

Where there is legal evidence tending to support the finding of the jury, upon all material questions in issue, the Appellate Court will not weigh the evidence, unless it is of such a character that to believe it would involve an absurd or unreasonable conclusion.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3907; Dec. Dig. § 995.*]

6. DAMAGES (§ 140*)—EXCESSIVE DAMAGES—BREACH OF CONTRACT.

Plaintiff was a skilled mechanic, and was guaranteed \$3,600 the first year, and would have made under his contract between \$4,000 and \$5,000 each year. He was idle about 18 months, and during the 12 months before the trial was receiving \$2,400 a year. He had resigned a former position to accept employment with defendant, and this made it difficult for him to secure other employment. *Held*, that a verdict for \$5,000 for wrongful discharge was not excessive.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 404, 405; Dec. Dig. § 140.*]

7. MASTER AND SERVANT (§ 41*)—SERVICES—DAMAGES.

There can be but a single action for damages for breach of an executory contract for services, and all damages sustained, whether present or prospective, must be included in the recovery; and hence the measure of damages is not affected by the fact that the action is brought and the trial held before the expiration of the term of the contract.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 60-63; Dec. Dig. § 41.*]

Appeal from Superior Court, La Porte County; H. B. Tuthill, Judge.

Action by Oliver Harris against the Inland Steel Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Crumpacker & Daly and Wm. J. McAleer, for appellant. L. L. Bomberger, Henry Bowers, and Bomberger, Sawyer & Curtis, for appellee.

FELT, P. J. Suit by appellee against appellant for damages for breach of a contract of employment. The case was brought originally in the Lake superior court, and on change of venue was taken to the Porter superior court, where the case was tried and verdict returned in favor of appellee for \$3,600. On motion of appellant, a new trial

was granted and the venue was changed to La Porte superior court, where the case was again tried and a verdict rendered in favor of appellee in the sum of \$5,000, upon which the judgment was rendered from which this appeal is taken.

The errors assigned are the overruling of appellant's demurrer to the substituted amended complaint and the overruling of the motion for a new trial. The motion for a new trial alleges that the verdict of the jury is contrary to law and not sustained by sufficient evidence; that the damages are excessive; that the court erred in giving to the jury of its own motion each of instructions 1 to 27, inclusive, and in refusing to give to the jury each of 37 instructions tendered by appellant.

[1] Paragraph 6 of appellant's assignment of errors questions the trial court's action in admitting certain testimony; but error in the admission or exclusion of evidence cannot be presented for the first time by assignment of errors, but must be alleged as cause for a new trial, and the questions so presented to the lower court become available on appeal by assigning the error in overruling the motion for a new trial. Appellant's failure to question the admission of testimony in the motion for a new trial waives the error, if any, on that account, and no question is presented by the direct assignment of error thereon. *Storer v. Markley*, 164 Ind. 535, 73 N. E. 1081; *Nordyke & Marmon Co. v. Keokuk Bag Co.*, 26 Ind. App. 548, 59 N. E. 393. In the motion for a new trial, appellant has also assigned as reasons that the answers to the interrogatories are contrary to law and not sustained by sufficient evidence.

[2] Questions relating to the answers to interrogatories by the jury are not properly a part of the motion for a new trial. If the answers were in conflict with the general verdict, appellant should have moved for judgment on the answers to the interrogatories non obstante veredicto, and, if his motion was overruled, he could then have presented the question to this court by independent assignment of error. *Elliott's App. Proc.* § 847; *L. N. A. & C. Ry. Co. v. Kane*, 120 Ind. 140, 22 N. E. 80; *N. W. M. F. Ins. Co. v. Blankenship*, 94 Ind. 535, 548, 48 Am. Rep. 183.

[3] Appellee insists that appellant's brief fails to comply with the rules of this court, and that no question relating to the evidence is presented. It is apparent that the rules prescribed for the preparation of briefs have not been strictly followed by appellant, but appellee has set out a portion of the evidence in his brief, and this, considered with that set out by appellant, is sufficient to enable the court to pass upon the only question relating to the evidence which is before it, viz., Is there any evidence tending to support the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes

finding upon the material propositions in issue? *Low v. Dallas*, 165 Ind. 392, 394, 75 N. E. 822; *Howard v. Adkins*, 167 Ind. 184, 186, 78 N. E. 665; *Funk, Treas., v. State ex rel.*, 166 Ind. 455, 456, 77 N. E. 854; *Roberts v. Ft. Wayne Gas Co.*, 40 Ind. App. 528, 532, 82 N. E. 558; *Tipton L. H. & P. Co. v. Dean*, 164 Ind. 533, 73 N. E. 1082. The substituted amended complaint alleges, in substance: That on April 21, 1905, appellant and appellee entered into a written agreement by which appellee was employed to work in appellant's factory as a roller for three years, with a guaranty of \$3,600 as wages for the first year, and a further condition that the appellee was to have the benefit of amounts earned in excess of the guaranteed salary based "on the January first scale of the American Sheet Steel Co.'s" schedule, and agreeing to be bound by such scale during the term of the contract, payments to be made semimonthly, and appellee "to render as good and efficient service on the class of work rolled on this mill and that you will furnish competent men to work on the mill and a complete crew, so far as possible." That appellee began work under this contract on May 5, 1905, and continued until May 15th, and on that day presented himself at the mill and sought to continue his work, and was ready and willing to continue the fulfillment of his part of said agreement, but appellant refused to allow him to continue his work and run the mill, according to their agreement, and notified him that he could not thereafter continue so to do. That appellant has since that time refused to permit appellee to fulfill his contract, and has run the mill with other men. That appellee gave up a similar employment at Canal Dover, Ohio, to accept this employment. That he has diligently sought, but been unable to obtain, employment as a roller, or to earn any money. That he has at all times been ready and willing to perform his part of said contract, and has performed the same, except as prevented by appellant. That by the terms of said contract he could and would have earned an average of \$15 per day. That he has been damaged in the sum of \$15 per day, and demands judgment for \$10,000.

[4] The complaint is clearly good as against the demurrer. It shows an employment contract, the part performance thereof, and a willingness to continue under the contract, and a breach thereof by appellant in refusing to permit appellee to continue the service which he contracted to render, resulting in damages to appellee. *Hamilton v. Love*, 152 Ind. 641, 53 N. E. 181, 54 N. E. 437, 71 Am. St. Rep. 384; *Pennsylvania Co. v. Dolan*, 6 Ind. App. 109, 32 N. E. 802, 51 Am. St. Rep. 289. Upon the trial it was conceded by appellant that it refused to permit appellee to continue his work on the job for which he was hired and to which he was assigned, and upon which he worked until stopped by

95 N.E.—18

appellant; but appellant contends that it is not liable for the reason that it offered him other employment of substantially the same kind and he refused to accept it. Appellant also, by special answers and by evidence, sought to show that appellee was incompetent, and that he failed to comply with his agreement to furnish "competent men to work on the mill and a complete crew, so far as possible." The court submitted to the jury by interrogatories the question whether appellee was offered employment of substantially the same kind by appellant, and the jury found against appellant upon the proposition and also found especially, that appellee was wrongfully discharged; that he was competent and rendered good and efficient services; that, by the use of reasonable diligence, he could not obtain substantially the same character of work elsewhere; that he had unsuccessfully applied for work at nine different mills, after his discharge by appellant.

[5] These were important questions of fact and, there was evidence tending to support the finding of the jury, both as to its answers to interrogatories and the general verdict. Where there is legal evidence tending to support the finding of the jury upon all material questions in issue, this court will not weigh the evidence or reverse the judgment on the weight of testimony, unless it is of such a character that to believe it would involve an absurd or unreasonable conclusion. *Bower et al. v. Bowen*, 139 Ind. 31, 36, 38 N. E. 328; *Center Tp., etc., v. Davis*, 24 Ind. App. 603, 607, 57 N. E. 283.

[6] On the verdict of the jury, judgment was rendered for \$5,000, which is a large amount, but on the evidence we cannot say that it is unwarranted. The evidence tends to show that appellee is a skilled mechanic and was guaranteed \$3,600 the first year; that he would have made, under his contract, between \$4,000 and \$5,000 each year; that he was idle about 18 months, and during the 12 months he was employed before the last trial was receiving \$2,400 per year; that resigning his position in Ohio to accept employment with appellant made it difficult for him to secure other employment; that he was diligent in seeking other employment.

The court instructed the jury that it is the duty of a person, when unlawfully discharged, to make reasonable effort to obtain work elsewhere, and that in no event could he recover more than what his actual loss might have been had he made such reasonable effort to obtain employment; that the employment he is required by the law to seek is that which is similar to, or of the same general character as, that which he had contracted to perform; that appellee was bound to seek employment which was of the same general character as that of his trade as a roller. Appellant contends that these instructions were misleading on the subject of the duty of a discharged employé to seek

other employment, and also as to the kind of employment he was required to accept to discharge his duty under the law; but we cannot agree with this contention, and hold that the instructions were fair and accurate statements of the law on the subject. *Hinchcliffe et al. v. Koontz*, 121 Ind. 422, 428, 23 N. E. 271, 16 Am. St. Rep. 403; *Pennsylvania Co. v. Dolan*, 6 Ind. App. 123, 32 N. E. 807, 51 Am. St. Rep. 289. The court further instructed the jury: "(17) If plaintiff was wrongfully discharged before his contract expired, he had a right to sue at once for a breach of the contract, and would have a right to recover his full damages to the end of his term." The court in other instructions applied the above proposition to the facts of the case on trial and also stated the law to be that, if appellee was entitled to recover, appellant was entitled to credit for what appellee has earned since his discharge, or what he might reasonably have earned during the remainder of the time for which he was employed.

[7] It is urged that the seventeenth instruction, above quoted, and those following the same principle, state an erroneous rule for the measure of damages. There is considerable conflict in the decisions from the several states as to the measure of damages in cases like the one at bar, some holding that, if the discharged employé brings his suit before the expiration of the term of his employment, he can only recover damages for the period from the date of his wrongful discharge to the time of the trial, while others place the limit at the time the action is begun. The decisions in Indiana, with a single exception, which is easily accounted for, firmly establish the doctrine that there can be but a single action for damages for the breach of an executory contract for services, and that all damages sustained by the discharged employé in consequence of the wrongful act of the employer, whether present or prospective, must be included in the recovery, and a judgment obtained for such injury bars all other claims. The suit may be brought at any time after the breach and before the action is barred by the statute of limitations, and the measure of damages is the same whether the action is brought and the trial held before or after the expiration of the term of the contract. *Hamilton v. Love*, supra; *Hinchcliffe v. Koontz*, supra; *Elkhart Rubber Works v. Neff*, 46 Ind. App. —, 92 N. E. 553; *Pennsylvania Co. v. Dolan*, supra; *Pierce v. Tenn. Coal & Iron R. Co.*, 173 U. S. 1, 19 Sup. Ct. 335, 43 L. Ed. 591. See, also, *Levin v. Standard Fashion Co.*, 11 N. Y. Supp. 706; *Maynard v. Royal Worcester Corset Co.*, 200 Mass. 1, 85 N. E. 877, 6 L. R. A. (N. S.) 113, note. In the case of *Pape v. Lathrop*, 18 Ind. App. 633, 654, 46 N. E. 154, 160, decided February 18, 1897, this court held that, where the trial occurred

before the expiration of the term of the employment, "the damages recoverable are the amount of his wages, at the contract price, to the date of the trial, * * * less any sum it is shown he has earned, or might reasonably have earned, since his discharge." In support of this proposition, the learned judge who wrote the opinion cited *Hamilton v. Love* (Ind. Sup.) 43 N. E. 873, and, some cases from other states. On examination we find that the case of *Hamilton v. Love*, cited from the Northeastern, is the same case that appears later in 152 Ind. 641, 53 N. E. 181, 54 N. E. 437, 71 Am. St. Rep. 384, as above cited. The last opinion in that case holds that the damages collectible cover the entire term of the employment, without reference to the time of the trial, where the suit is not barred by the statute of limitation, which is exactly opposite, on that point, to the holding of the Supreme Court in the first opinion. The original opinion was rendered April 21, 1896, and a petition for a rehearing was filed June 19, 1896, and the same was not ruled upon until July 1, 1898, when a rehearing was granted. The final opinion, as reported in 152 Ind. 641, 53 N. E. 181, 54 N. E. 437, 71 Am. St. Rep. 384, was rendered on March 8, 1899, and the judgment affirmed; whereas, in the original opinion, the judgment was reversed as a result of the conclusion reached upon this question. It thus appears that *Pape v. Lathrop* which was decided some 10 months after the first opinion in *Hamilton v. Love*, supra, followed the latest expression of the Supreme Court on the question of the measure of damages, and that almost two years after the decision of the *Pape* Case by this court the final opinion was rendered in the *Hamilton* Case, as above stated. To the extent that the case of *Pape v. Lathrop*, supra, holds that the damages recoverable are limited to the amount accrued before the trial, where the term of the employment has not expired, the case is overruled.

Complaint is made of other instructions given and refused, but those refused, so far as correct and applicable, were fully covered by those given, and the instructions given, when considered as a whole, state the law fully and fairly to both parties. There is no available error shown by the record.

Judgment affirmed.

(48 Ind. A. 1)

FERDINAND RY. CO. v. LINK et al.
(No. 7,248.)

(Appellate Court of Indiana, Division No. 2
June 1, 1911.)

**APPEAL AND ERROR (§ 1001*) — REVERSAL —
EVIDENCE TO SUPPORT JUDGMENT.**

The Appellate Court will not reverse on the facts, where there is any evidence supporting the judgment.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3923-3934; Dec. Dig. § 1001.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes

Appeal from Circuit Court, Dubois County; Thomas Duncan, Special Judge.

Condemnation proceedings by the Ferdinand Railway Company against Edward Link and another. From a judgment for defendants on exceptions to the award, plaintiff appeals. Affirmed.

C. M. C. Shanks and R. W. Armstrong, for appellant. A. L. Gray, for appellees.

ADAMS, J. The appellees are the owners of 80 acres of land in Dubois county. The appellant is a railway company, and in 1908 obtained a right of way across the lands of appellees by condemnation proceedings. The instrument of appropriation, filed by appellant, sought to acquire a right of way over the lands of the appellees 6 rods wide and 1,238 feet long, containing $2\frac{1}{10}$ acres. Appraisers were appointed by the court, who assessed appellee's damages at \$225. Appellees filed exceptions to the award, and on the trial the court found for appellees, and fixed their damages at \$350. Appellant's motion for a new trial was overruled, and this action of the trial court is assigned as cause for reversal.

The only error argued by appellant is that the court erred in its award, and that the damages are excessive. It is shown by the evidence that the right of way of appellant extends northwest and southeast through appellees' lands, cutting off from the main body a triangular tract, estimated at from eight to eleven acres. This tract of land was valued by the different witnesses at from \$30 to \$65 per acre, and the damages resulting to the same were estimated by the witnesses at from \$2 per acre to a total loss. It is shown that the grade of the railroad across appellees' land was from 2 to 3 feet above the level and that appellees could not reach the tract thus cut off except over the railroad right of way; that the drainage from the 11-acre tract was to the north; and that no opening had been made across said right of way through which the water accumulating on said triangular tract might be carried off. A large number of witnesses were examined at the trial, and the evidence, which covers 200 pages of the record, is conflicting, both on the question of values and the question of damages.

[1] It is the duty of the trial court to weigh the evidence, and this court will not reverse a case upon the proof, where there is any evidence in the record supporting the judgment. *Albaugh Bros., Dover & Co. v. Lynas*, 93 N. E. 678; *Heaston et al. v. Gallagher*, 41 Ind. App. 20, 83 N. E. 252; *Cleveland, etc., R. Co. v. Scott*, 39 Ind. App. 420, 432, 79 N. E. 226; *First National Bank v. Beach*, 84 Ind. App. 80, 89, 72 N. E. 287; *Borror v. Carrier*, 84 Ind. App. 353, 372, 73 N. E. 123.

From a careful reading of the evidence

given at the trial, we think the court below was fully warranted in awarding damages to the appellees in the sum of \$350.

The judgment is affirmed.

(50 Ind. App. 600)

HENRY v. EPSTEIN. (No. 7,233.)¹

(Appellate Court of Indiana, Division No. 2, May 23, 1911.)

1. RECEIVERS (§ 183*)—ACTIONS—ISSUES.

Burns' Ann. St. 1908, § 371, provides that pleas to the jurisdiction or in abatement, and all dilatory pleas, must be supported by affidavit; that the character or capacity in which a party sues or is sued, and his capacity to sue, need not be proved, unless denied under oath; and that an answer in abatement must precede an answer in bar, and that the issue thereon must be separately tried. A receiver was sued as such for negligence, and answered only by a general denial, designating himself as receiver of the company. *Held* that, in the absence of a plea in abatement, the questions whether he was such receiver, and whether plaintiff had permission to sue, were not in issue, and called for no proof at the trial.

[Ed. Note.—For other cases, see *Receivers*, Cent. Dig. § 365; Dec. Dig. § 183.*]

2. STREET RAILROADS (§ 78*)—ACTION FOR NEGLIGENCE OF SERVANT—EVIDENCE OF RELATION.

In an action against the receiver of a street car company for running down plaintiff's wagon, the evidence showed that the company owned the tracks on which the car was running which struck the wagon, and that the car was one of the company's cars, and the employees in charge of the car testified that they were employed by the company. It was admitted that the company was in the hands of a receiver, and that defendant was the receiver. *Held*, that the jury were justified in finding that the car was operated by the defendant when the collision occurred.

[Ed. Note.—For other cases, see *Street Railroads*, Dec. Dig. § 78.*]

3. CORPORATIONS (§ 559*)—APPOINTMENT OF RECEIVER—EFFECT ON TITLE TO PROPERTY.

The appointment of a receiver for a corporation does not affect the title to the corporate property until a sale, but merely takes the control of the corporation out of its officers and directors, and vests it in the receiver to be managed under the orders of the court.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. §§ 2253-2260; Dec. Dig. § 559.*]

4. STREET RAILROADS (§ 93*)—OPERATION—CARE REQUIRED.

Where a highway, on which there was a street railroad, just outside of the city limits passed under a railroad viaduct, which narrowed the available space so as to leave no room for vehicles to pass through without driving onto the tracks, the motorman of an electric street car approaching the spot was bound to know that vehicles passing under the viaduct would have to enter on the tracks, and to regulate the speed of his car so as not to expose other persons using the highway to unnecessary danger.

[Ed. Note.—For other cases, see *Street Railroads*, Cent. Dig. §§ 195-200; Dec. Dig. § 93.*]

5. STREET RAILROADS (§ 114*)—COLLISION WITH WAGON—NEGLIGENCE—CONTRIBUTORY NEGLIGENCE—EVIDENCE.

In an action against a street railroad company for collision with plaintiff's wagon, evi-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

¹Rehearing denied. Transfer to Supreme Court denied. See, also, 101 N. E. 641.

dence held sufficient to sustain findings by the jury of defendant's negligence in running at an excessive speed, and of plaintiff's lack of contributory negligence.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 239-250; Dec. Dig. § 114.*]

6. APPEAL AND ERROR (§ 1002*)—VERDICT—CONCLUSIVENESS.

Where the evidence on the issue of contributory negligence is such that men of ordinary intelligence and honesty might draw different conclusions from it, the finding of the jury thereon will not be disturbed on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3935-3937; Dec. Dig. § 1002.*]

7. STREET RAILROADS (§ 98*)—COLLISION WITH WAGON—CONTRIBUTORY NEGLIGENCE—LOOK AND LISTEN RULE.

The look and listen rule does not apply in all its force to persons about to cross street railroad tracks laid on streets or highways in closely populated localities.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 204-208; Dec. Dig. § 98.*]

8. TRIAL (§ 214*)—REQUESTED INSTRUCTIONS.

On proper and reasonable request, a party is entitled to definite and specific instructions as to the law applicable to the facts which the evidence tends to prove.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 480; Dec. Dig. § 214.*]

9. TRIAL (§ 252*)—INSTRUCTIONS—APPLICATION TO CASE.

The mere fact that instructions given as to the care required of plaintiff before driving onto defendant's tracks were so worded as to be applicable to any person under similar circumstances does not lay them open to objection as being abstract, where the circumstances detailed in the instructions were so applicable to the state of facts claimed to have been established by the evidence that the jury could not have failed to properly apply the law to the facts which the evidence tended to prove.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 596-612; Dec. Dig. § 252.*]

Appeal from Circuit Court, Marion County; Vinson Carter, Judge.

Action by Harmon Epstein against Charles L. Henry, as receiver of the Indianapolis & Cincinnati Traction Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Elam & Fesler and Claude Cambern, for appellant. Myers & Ogden and Merrill Moores, for appellee.

LAIRY, P. J. This was an action brought by the appellee to recover for personal injuries and for injuries to his property, caused by the collision of a car, operated by appellant, with a wagon in which appellee was riding. The horses attached to said wagon were killed, and other personal property belonging to appellee was damaged, and appellee was personally injured. Two actions were brought by appellee in the court below—one for injuries to his person and one for injuries to his property. By order of the court these cases were consolidated and tried together, resulting in a verdict in favor

of appellee in the sum of \$1,000. Over appellant's motion for a new trial, the court rendered judgment on the verdict.

The only error relied on for reversal is that the court erred in overruling the motion of appellant for a new trial. Three causes are assigned in appellant's motion, as follows: First, that the verdict is not sustained by sufficient evidence; second, that the verdict is contrary to law; and, third, that the court erred in giving and refusing to give certain instructions. It is alleged in the complaint that, when the accident complained of occurred, the Indianapolis & Cincinnati Traction Company, on whose tracks appellee was injured, was in the possession of and being operated by the appellant as receiver, but there is no direct evidence to prove this allegation. Neither was there evidence introduced to prove the further allegation that appellant was appointed receiver for the Indianapolis & Cincinnati Traction Company, and that, before bringing this suit, appellee received permission from the court appointing such receiver to bring action. It is contended by the appellant that these were all material facts in issue in the case, proof of which was necessary to sustain the verdict, and that a total want of evidence as to any one or more of such facts is fatal.

[1] In order that the verdict in this case may be upheld, it must appear that every material allegation of the complaint put in issue by the pleadings is supported by the evidence in the record, unless the fact so in issue is one of which the court trying the case could take judicial notice. If any material fact averred in the complaint was not traversed by the defendant, such fact cannot be said to have been in issue, and it was not incumbent on the plaintiff to offer evidence, in support of such uncontroverted fact. Section 371, Burns' Ann. St. 1908, provides: "Pleadings denying the jurisdiction of the court, or in abatement of the action, and all dilatory pleadings, must be supported by affidavit. The character or capacity in which a party sues or is sued, and the authority by virtue of which he sues, shall require no proof on the trial of the cause, unless such character, capacity, or authority, be denied by a pleading under oath, or by an affidavit filed therewith. An answer in abatement must precede, and can not be pleaded with an answer in bar, and the issue thereon must be tried first and separately." The appellee was sued in the capacity of receiver of the Indianapolis & Cincinnati Traction Company. The only answer filed by him was a general denial, in which he designated himself as receiver of the Indianapolis & Cincinnati Traction Company. He filed no answer under oath denying that he was such receiver, or that he occupied the capacity in which he

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

was sued, and he did not file any such answer denying the authority of the plaintiff to bring the action. Under the provisions of the statute quoted, the allegations of the complaint as to the authority by virtue of which the plaintiff sued or the capacity in which appellant was sued could not be put in issue except by a plea in abatement. As such facts were not put in issue, it was not incumbent on the plaintiff to offer proof to sustain them. *Ayres, Receiver, v. Foster*, 25 Ind. App. 99, 57 N. E. 725; *Elkhart Car Co. v. Ellis et al.*, 113 Ind. 215, 15 N. E. 249; *McNulta v. Lockridge*, 137 Ill. 270, 27 N. E. 452, 31 Am. St. Rep. 362; *McNulta v. Ensich*, 184 Ill. 46, 24 N. E. 631.

[2] The further point is made by the appellant that the evidence wholly fails to show that the operation of the road and of the car which caused the injury complained of was under the control and management of the receiver and his servants at the time of such injury. This was one of the material facts necessary to a recovery, and it was put in issue by the general denial. *Indianapolis, etc., Ry. Co. v. Lawn*, 80 Ind. App. 515, 66 N. E. 508; *Citizens' St. Ry. Co. v. Stockdell*, 159 Ind. 25, 62 N. E. 21. If the jury was not justified in finding that the car which struck appellee's wagon and caused his injury was at the time under the management and control of the employees of the receiver, the verdict cannot stand. A jury may be justified in finding a fact to be true in several ways: First, the fact may be admitted; second, the court may take judicial notice of such fact; third, the evidence may directly prove the fact; and, fourth, the fact may be rightly and reasonably inferred by the jury from other facts which are either admitted, or proved by the evidence, or taken notice of judicially by the court. There is no direct evidence that the men in charge of the car causing appellee's injury were in the employ of the appellant as receiver. It is admitted by the pleadings that the appellant was the receiver of the Indianapolis & Cincinnati Traction Company, and the evidence shows without controversy that said company was the owner of the tracks on Prospect street upon which the car was running at the time it struck appellee's wagon, and that said car was one of the cars of said company known as the Connersville Dispatch. The employees in charge of the car testified that they were employed by the Indianapolis & Cincinnati Traction Company.

[3] The appointment of a receiver for a corporation does not affect the title or ownership of the property of such corporation, unless a sale of such property is made in the due administration of the trust, and, in that event, the title to the corporate property remains in the corporation until such sale. The whole effect of such a decree is to take the custody, control, and management of such corporation out of the hands of the directors

and officers of the corporation and place the same in the custody and under the control of the receiver, to be managed under the orders of the court. *Louisville, etc., R. Co. v. Cauble*, 46 Ind. 277. It being admitted that the Indianapolis & Cincinnati Traction Company was in the hands of a receiver and that Charles L. Henry was such receiver, and it further appearing from the evidence that the car which collided with appellee's wagon and caused the injury was one of said company's cars running upon its tracks, we think that the jury was warranted in inferring that the car was being operated under the control and management of said receiver and his agents and servants.

We will next consider the evidence bearing upon the question of contributory negligence. Appellant claims that the undisputed evidence shows that appellee, being in a place of safety immediately before the collision, suddenly and without warning turned upon the tracks directly in front of the car and in such close proximity as to make it impossible for those in charge of the car to prevent the collision by stopping the car or by taking other precautions. It appears from the evidence that the Indianapolis & Cincinnati Traction Company maintained a double track on the extension of Prospect Street in the city of Indianapolis, which is a street extending east and west, and that the south track was used by cars going east, and that the north track was used by cars going west. It also appears that the collision occurred east of the city limits at a point where the Belt Railroad maintained a viaduct over said street supported by walls on each side thereof. There was also testimony tending to prove that the tracks and road were so constructed at the place where they passed under the viaduct that a person using a wagon or other vehicle could not drive through the viaduct without entering upon the tracks. The conditions thus shown to exist rendered the operation of cars dangerous to travelers on the highway at that point.

[4] Those in charge of electric cars approaching this point were bound to know that persons using the highway with wagons and other vehicles had a right to pass through such viaduct, and that in so doing they would necessarily enter upon the tracks, and thus be exposed to danger, and it was their duty to so regulate the speed of cars approaching this point as not to expose persons so using the highway to unnecessary danger and to use such care and caution in the general management and operation of the cars at that point, as was required by the known danger to which other travelers on the highway were exposed. The appellee was traveling on said highway in a wagon going west, and the car which collided with his wagon also came from the east on the north track. When appellee approached and entered the subway, the evidence tends to show

that he was on the south side of the highway on the south track, and that, before he emerged from beneath the viaduct, he saw a car coming from the west on the south track, and that, for the purpose of getting out of the way of the car going east, he turned to the north upon the north track where he was struck by an interurban car running at a high rate of speed and approaching from his rear. There is evidence tending to show that, when two cars are side by side under this viaduct, there is no place that a wagon can pass, and that the only way in which a driver of such a vehicle can escape from one of the tracks at that point is by going upon the other. There was evidence that appellee looked back along the track at a point about 600 feet east of the viaduct and saw no car approaching, and that a train of cars were passing over the viaduct making considerable noise which might have prevented him from hearing the approach of the car or from hearing any signals of such approach. There was a conflict in the testimony, but the jury was the exclusive judge of the credibility of the witnesses and of the weight of the evidence.

[6] The jury was clearly warranted in finding that appellant was negligent in operating its car at the high and dangerous rate of speed shown by the evidence as it approached the viaduct, and we think that it was also warranted in finding in favor of appellee upon the question of his contributory negligence.

[8] Where the evidence upon the question of contributory negligence is of such a character that one man of ordinary intelligence and honesty might draw an inference of negligence, and another of equal intelligence and honesty might draw the opposite inference, the question is one of fact for the jury, and its finding will not be disturbed on appeal. *Indianapolis, etc., R. Co. v. Marschke*, 166 Ind. 490, 77 N. E. 945.

[7] It is true that appellee did not look back immediately before he turned upon the north track, but it must be borne in mind that the track upon which the car was being operated was laid longitudinally in the highway upon which appellee was traveling, so that the rule in respect to looking and listening, which applies to travelers upon highways when approaching the crossing of a steam railway, did not apply in all its strictness to appellee. *Indianapolis, etc., Street R. Co. v. Schmidt*, 35 Ind. App. 202, 71 N. E. 663, 72 N. E. 478. As said by the court in the case of *Indianapolis, etc., Street R. Co. v. Marschke*, supra: "While we recognize that the right of the company is superior in point of precedence, that the driver should not obstruct the operation of the cars, and that a person who without care drives along the track may subject himself to a charge of contributory negligence, yet where, as here, there was an excuse for driving near the

track, and some degree of care exercised in respect to looking and listening a short time before the injury, and with the burden resting upon appellant to show contributory negligence, we hold that it is not error to submit the question to the jury. It must not be forgotten that a person driving along a street railroad track in broad daylight has a right, at least in some degree, to indulge the supposition that, if a car is approaching from the rear, a proper lookout is being maintained thereon, and that ordinary care not to injure him will be exercised."

The appellant has saved exceptions to the giving of certain instructions by the court, and also to the refusal of the court to give certain instructions tendered by appellant. It would unduly extend this opinion to discuss each of these instructions separately. We have examined the instructions given, and are of the opinion that they fully and fairly present the law applicable to the case. The instructions given are criticised on the ground that they contain general abstract propositions of law, and that they are not so framed as to apply the propositions of law stated therein directly to facts which the evidence tends to prove.

[8] It is true that a party has a right to have the jury instructed definitely and specifically as to the law applicable to the facts which the evidence tends to prove, if such instructions are properly and seasonably requested and are within the issue; and, where evidence is offered by a party tending to prove a state of facts within the issues, and he claims that such facts are proved, he is entitled to an instruction submitting such hypothetical state of facts to the jury and advising them as to the law applicable to such state of facts, provided they find such facts to be established by the evidence. *Carpenter v. State*, 43 Ind. 371.

[9] The instructions given in this case are not open to the criticism that they do not apply to the specific evidence introduced at the trial in all of its details. It is true that the instructions given, defining the care required of the plaintiff, and the precautions which he was required to use before driving upon the tracks of the defendant, were so worded as to be applicable to any person under like conditions and circumstances; but the circumstances and conditions referred to in the instructions given were so applicable to the state of facts which the defendant claimed the evidence established in respect to the conditions and circumstances surrounding the plaintiff at and immediately before the injury that the jury could not have failed to make the proper application of the law to the facts which the evidence tended to prove.

The instructions refused were fully covered by those given. Taken as a whole, the instructions given were as favorable to appellant as he had a right to ask, and we are of the opinion that the jury could not have

failed to understand the law applicable to the case, and that it was not in any way misled by the instructions given.

Judgment affirmed.

(47 Ind. App. 605)

TODD v. HOWELL et al. (No. 6,985.)

(Appellate Court of Indiana, Division No. 1.
May 23, 1911.)

1. MECHANICS' LIENS (§ 86*)—RIGHTS OF CONTRACTORS.

A contractor as such is not entitled to a mechanic's lien under mechanics' lien law (Burns' Ann. St. 1908, § 8295) which does not include contractors and subcontractors.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. § 117; Dec. Dig. § 86.*]

2. CUSTOMS AND USAGES (§ 12*)—CONSTRUCTION OF CONTRACTS.

Parties presumptively contract with reference to the generally known usages of the business or trade involved, and particular terms must be given the meaning acquired in such business by common usage, unless by express words such usage is excluded or is inconsistent with the contract.

[Ed. Note.—For other cases, see *Customs and Usages*, Cent. Dig. §§ 23, 24; Dec. Dig. § 12.*]

3. CUSTOMS AND USAGES (§ 15*)—CONSTRUCTION—GENERAL AND LEGAL USAGES—EVIDENCE.

A general custom is a part of the existing law and will be considered in construing contracts without proof thereof, but a local usage must be proved by evidence which will not modify a written contract but which will merely give effect to its provisions by making intelligible that which is ambiguous in the absence of proof.

[Ed. Note.—For other cases, see *Customs and Usages*, Cent. Dig. §§ 30-33; Dec. Dig. § 15.*]

4. CUSTOMS AND USAGES (§ 15*)—VARYING CONTRACTS.

Where a written contract required a contractor to do all the carpenter work on a building in a workmanlike manner according to specifications, describing the kind of materials without designating the same as new, or providing that secondhand materials shall be used, and providing for the making of a large window sash specified by the architect, and requiring the owner to furnish the materials, evidence of common usage in the vicinity to furnish new material and mill-made sash, where not otherwise specified, was competent to aid in construing the contract without modifying it.

[Ed. Note.—For other cases, see *Customs and Usages*, Cent. Dig. §§ 30-33; Dec. Dig. § 15.*]

5. EVIDENCE (§ 457*)—PAROL EVIDENCE—VARYING CONTRACTS.

A written contract for the carpenter work in a building according to specifications arranging topics under headings "Carpentry and timbers" followed by the topics "roof," "wall plates," "ceilings," described as "steel ceilings," "floor," "partition called," "plastering," followed by other topics clearly belonging to carpentry, is ambiguous, and parol evidence is admissible to show that putting in the steel ceiling is not carpentry, but is extra work for which the contractor is entitled to recover.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 2104, 2107, 2108; Dec. Dig. § 457.*]

6. MECHANICS' LIENS (§ 310*)—BUILDING CONTRACTS—RECOVERY—ATTORNEY'S FEES.

Where a contractor is entitled only to a personal judgment against the owner and not

to a lien, it is error to render judgment for attorney's fees allowable only on enforcing a lien.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. § 652; Dec. Dig. § 310.*]

Appeal from Circuit Court, Tipton County; Jesse R. Coleman, Judge.

Action by John W. Howell and another against Ezra N. Todd. From a judgment for plaintiffs, defendant appeals. Reversed in part, and conditionally affirmed in part.

Gifford & Gifford, for appellant. Every A. Mock, for appellees.

FELT, P. J. The record discloses that appellees entered into a written contract with appellant to do all the carpenter work on a certain livery barn and opera house for \$370, in accordance with the plans and specifications therefor. The court found for appellees in the sum of \$130.02 and for \$50 attorney's fees, and for foreclosure of a mechanic's lien against appellant's real estate. Appellant assigns as error the overruling of his motion for a new trial, and that the court erred in his conclusions of law stated upon the special finding of facts. The motion for a new trial, among numerous reasons assigned, alleges that the decision of the court is contrary to law and not sustained by sufficient evidence.

[1] The appellees are contractors, and as such are not entitled to a mechanic's lien, as it has been held that the title of the act, under which the mechanic's lien laws (Burns' Ann. St. 1908, § 8295) were enacted, by virtue of which they assert their lien, does not include or apply to contractors and subcontractors. *Indianapolis, etc., Traction Co. v. Brennan* (1910) 174 Ind. —, 87 N. E. 215, 30 L. R. A. (N. S.) 85; *Id.* (Sup.) 90 N. E. 65; *C., C. & St. L. Ry. Co. v. De Frees*, 173 Ind. 717, 87 N. E. 722; *Fleming et al. v. Greener et al.*, 173 Ind. 260, 87 N. E. 719, 90 N. E. 72; *Korbly, Rec., et al. v. Loomis et al.*, 172 Ind. 352, 88 N. E. 698. The motion for a new trial challenges the correctness of the trial court's rulings in the admission of certain testimony relative to the kind of material to be furnished, and certain alleged usages or customs of trade in the carpenter business in the vicinity of Windfall, Ind., where the buildings in question were erected.

The appellees, by their contract, obligated themselves to do all the carpenter work in a good and sufficient workmanlike manner, and according to the plans and specifications made by one John Hollingsworth, architect. The appellant was to furnish all the material, and the specifications described the kind to be used, but did not designate it as new, or provide that any old or secondhand material should be used. Appellant furnished certain old and secondhand material, and appellees used same in constructing the build-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

ing, and upon the trial made a claim for extra work on that account. The court permitted testimony to be introduced, over appellant's objection, to show that it was the usage or custom in that vicinity to use new material only unless the contract specified otherwise. A controversy also arose over the making of a certain large window sash, specified by the architect, and made by appellees, for which they claimed extra pay. The court heard testimony, over appellant's objection, tending to show that the custom was, under such specifications, to have all sash furnished from the mill ready made, unless otherwise specified. Appellant objected on the ground that, under the contract, appellees were required to use any material furnished, regardless of any custom or usage, and that the contract required them to do all work performed by them, and they were not entitled to prove a custom or usage to determine what the contract required of them.

Evidence cannot be heard to vary or contradict the terms of an express contract, [2] but where parties enter into a contract with reference to a particular business or trade, they are presumed to have contracted with reference to the generally known usages of that business or trade, and their contracts are to be interpreted consistently with such usage. Peculiar expressions or terms are to be given the meaning which they have acquired in such business by common usage, unless, by the express terms of the contract, such usage is excluded, or is inconsistent with the contract. [3] Where a custom is general and of universal prevalence, it becomes a part of the existing law and is to be considered without proof; but where the usage is local, or of limited application, it is a question of fact, to be proved by the evidence, not to change or modify the contract, but to give effect to its provisions, by thus making clear and intelligible that which is ambiguous in the absence of such proof. *Rastetter v. Reynolds*, 160 Ind. 133, 136, 66 N. E. 612; *Everitt, Seedman, v. Ind. Paper Co.*, 25 Ind. App. 287, 57 N. E. 281; *Leiter et al. v. Emmons*, 20 Ind. App. 22, 25, 50 N. E. 40; *Thompson v. Hamilton*, 12 Pick. (Mass.) 425, 23 Am. Dec. 619, 621; *Conner v. Citizens' St. R. R. Co.*, 146 Ind. 430, 442, 45 N. E. 662; *Patterson v. Crowther et al.*, 70 Md. 124, 16 Atl. 531.

[4] The court committed no error by admitting testimony showing that it was the common usage in that vicinity, under similar specifications, to furnish new material, and mill-made sash, where not otherwise specified.

[5] A further and somewhat similar question arose as to whether steel ceiling was included in the carpenter work. The ambiguity on this question arises from the peculiar provisions, or irregular order of ar-

range ment of the several topics in the specifications. Following the heading of "carpentry and timbers" are those of "roof" and "wall plates," and then "ceilings," which are described as "steel ceilings." Immediately following the latter are the topics "floor" and "partition celled," and then "plastering." Following "plastering" are seven other topics which clearly belong to carpentry. There are no general headings followed by subheads, and as it is clear that "plastering" is not included in the carpenter work, it is at least doubtful whether "steel ceilings" was intended by the architect to be so included, or whether it, like the plastering, was sandwiched in between other topics belonging to the carpenter work. With this ambiguity in the specifications, from which the carpenter work is to be determined, we cannot say that the trial court erred in admitting testimony showing that the work of putting on the steel ceiling was extra, and in allowing appellees therefor.

[8] The personal judgment is not erroneous, except as to the \$50 included therein as attorney's fees, which amount, in the court's finding of facts, is clearly separated from the \$130.02 due for carpenter work. As the lien cannot be sustained, the attorney's fee cannot be justified.

It is therefore ordered that the judgment of foreclosure be reversed; that the personal judgment below be affirmed, if within 60 days appellees shall enter a remittitur for \$50, as of the date of the original judgment. Otherwise the judgment is reversed, with instructions to the trial court to sustain appellant's motion for a new trial, and for further proceedings in accordance with this opinion.

(47 Ind. App. 657)

INDIANAPOLIS & C. TRACTION CO. v. AR-
LINGTON TELEPHONE CO.

(No. 7,237.)

(Appellate Court of Indiana, Division No. 2
May 23, 1911.)

1. APPEAL AND ERROR (§ 1040*)—DEMURRER
TO COMPLAINT—RULINGS—MATERIALITY.

The overruling of a demurrer to a complaint is immaterial, and will not be reviewed on appeal where the trial court finds the facts and states conclusions of law thereon, as an exception to such conclusions presents the same questions.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 1040.*]

2. TRIAL (§ 405*)—OBJECTIONS AND EXCEPTIONS—CONCLUSIONS OF LAW—EFFECT OF EXCEPTIONS.

An exception to the conclusions of law admits that the facts have been fully and properly found for the purposes of exception.

[Ed. Note.—For other cases, see Trial, Dec. Dig. § 405.*]

3. LICENSES (§ 58*)—TELEPHONE WIRES—EXECUTED LICENSE—REVOCATION.

Where plaintiff telephone company acquired the right to erect poles and string its wires over

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

certain private land, it thereby acquired a license to so use the land, and, the poles and wires having been constructed by expenditure of money and labor, the license, though by parol, became executed, and was irrevocable.

[Ed. Note.—For other cases, see Licenses, Cent. Dig. § 119; Dec. Dig. § 58.*]

4. EASEMENTS (§ 22*)—CONVEYANCE OF SERVIENT ESTATE—EFFECT.

Where a landowner gave a parol license authorizing plaintiff telephone company to maintain poles and wires over her land, and the license so given became executed and irrevocable, and plaintiff's use was open and obvious at the time the land was sold to defendant for an interurban right of way, defendant acquired its right of way subject to the burden of plaintiff's easement under the rule that an easement appurtenant to real estate passes with the grant and becomes a burden on the servient estate in the hands of subsequent owners.

[Ed. Note.—For other cases, see Easements, Cent. Dig. § 60; Dec. Dig. § 22.*]

5. TELEGRAPHS AND TELEPHONES (§ 13*)—RIGHT OF WAY—EASEMENT—CHANGE OF WIRES—EXPENSE.

Where plaintiff telephone company had acquired a right to maintain its poles and wires over certain private property, thereafter conveyed to defendant for a right of way for an interurban railroad, and the maintenance of defendant's high voltage wires along such right of way necessitated the removal of plaintiff's telephone wires from poles and placing them in an underground conduit across such right of way and the right of way of an adjoining railroad company, defendant was liable to plaintiff for the reasonable cost of such changes.

[Ed. Note.—For other cases, see Telegraphs and Telephones, Dec. Dig. § 13.*]

Appeal from Circuit Court, Rush County; W. M. Sparks, Judge.

Action by the Arlington Telephone Company against the Indianapolis & Cincinnati Traction Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Smith, Cambern & Smith, for appellant. Douglass Morris, for appellee.

ADAMS, J. Action by appellee against appellant to recover damages accruing on account of being compelled to reconstruct its telephone lines across appellant's right of way. The complaint was in one paragraph, to which a demurrer for want of sufficient facts was overruled, and the cause was put at issue by general denial. The evidence was heard by the court, and upon request of both appellee and appellant the court made a special finding of facts, and stated its conclusions of law thereon. Appellant excepted to the conclusions of law, motion for a new trial was overruled, and judgment rendered upon the special finding in favor of appellee. The errors assigned and relied upon for reversal are: (1) Error of the court in overruling the demurrer to the amended complaint. (2) Error of the court in stating its conclusions of law. (3) Error of the court in overruling appellant's motion for a new trial.

[1] It is unnecessary to separately consider the first specification of error. The rule

is well settled by the decisions of the Supreme and this court that the overruling of a demurrer to a complaint is not material in an action where the court finds the facts, and states conclusions of law thereon. In such case, an exception to the conclusions of law presents the same questions as those arising on demurrer to the complaint. *Fry v. Hare* (1906) 166 Ind. 417, 77 N. E. 803; *Board v. Wolff* (1905) 166 Ind. 328, 76 N. E. 247; *Ross v. Van Natta* (1905) 164 Ind. 557, 74 N. E. 10; *Goodwine v. Cadwallader* (1902) 158 Ind. 202, 61 N. E. 939; *Woodward v. Mitchell* (1895) 140 Ind. 408, 39 N. E. 437; *Eisman v. Whalen* (1907) 89 Ind. App. 350, 79 N. E. 514, 1072; *Chicago, etc., R. Co. v. Yawger* (1900) 24 Ind. App. 460, 56 N. E. 50.

[2] It is also the settled law of this state that an exception to the conclusions of law admits that the facts have been fully and correctly found for the purposes of the exception. *National State Bank v. Sanford Co.*, 157 Ind. 10, 60 N. E. 699; *Blair v. Curry*, 150 Ind. 99, 46 N. E. 672, 49 N. E. 908; *City of Indianapolis v. Board*, 28 Ind. App. 319, 62 N. E. 715; *Ladd v. Kuhn*, 27 Ind. App. 535, 61 N. E. 747; *Austin Mfg. Co. v. Smithfield Township*, 21 Ind. App. 609, 52 N. E. 1011.

[3] The court found the facts to be substantially as follows: The appellee, the Arlington Telephone Company, is a corporation, organized and in operation in 1902, with its office in the unincorporated village of Arlington, Rush county, Ind.; that Main street in the village of Arlington runs north and south; that the right of way of the Cincinnati, Hamilton & Dayton Railway from the east side of said village extends slightly north of west through the same; that north of the Cincinnati, Hamilton & Dayton right of way, a highway, known as Phillips' alley, extends west from Main street for a distance of 165 feet, where it opens into another highway known as the north and south alley, which extends north one block, and opens into a street extending east and west; that said north and south alley was not, and never had been, opened for travel south of the point where it joins Phillips' alley; that the real estate west of Main street, south of Phillips' alley, and north of the Cincinnati, Hamilton & Dayton right of way was owned by one Rebecca Sampson, and was unimproved, except a store building was located on the east 60 feet thereof; that the west part was uninclosed and unimproved, and had been in such condition for 40 years; that the appellee in 1902 acquired the right from Mrs. Sampson to erect a telephone pole near the west end of said real estate, and near the south line thereof; that, pursuant to said right, the appellant erected a pole which remained at that place, and was used by ap-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

pellant until the latter part of December, 1904, when the plaintiff's wires were placed underground, and another pole erected in the north and south alley, near the east line thereof, and immediately north of Phillips' alley; that in 1902 appellant had strung 28 telephone wires on the pole located on the property of Mrs. Sampson, and by means of said wires was giving telephone service to more than 56 patrons of said company; that said wires at the point of intersection with appellant's right of way were 25 feet high; that appellant is a corporation, organized in 1903, authorized to construct an interurban railway from the city of Indianapolis to the city of Rushville, through the village of Arlington, and to use electricity as its sole motive power; that the right of way of the appellant is 66 feet wide, and through the village of Arlington lies immediately north of the right of way of the Cincinnati, Hamilton & Dayton Railway Company; that appellant in June, 1903, acquired by purchase from Mrs. Sampson the vacant property upon which the telephone pole hereinbefore mentioned was located as a part of its right of way; that appellant erected poles along said right of way on which it suspended its trolley wires, and also erected poles on which it fastened its high tension wires, for the purpose of transmitting electricity at a high voltage, to wit, 33,000 volts, for the propelling of its cars; that on November 25, 1904, there were six of said high-tension wires on said poles, the highest of which at the point of intersection with appellee's telephone wires was 32 feet above the ground; that on said day appellant notified the appellee in writing that it intended to put up trolley and other wires "over and across the highway at Arlington, along which you are now, as we understand, maintaining a telephone line," also stating that it will be necessary for the appellee to adjust the height of its wires so that the same will not come in contact with appellant's wires, and saying further: "This you can do by setting a high pole on each side of our right of way and running your wires above our wires, or you may run a lead covered cable under our tracks, from one side of the right of way to the other. The latter, we understand, is more desirable for telephone purposes, so as to avoid all interference from electric current on our line. It will be desirable both for you and for us that you attend to this matter promptly as the electric current will be turned into our lines in a short time. If you desire to put a lead covered cable under the right of way, and will notify us, we will execute to you a written license authorizing the same." On November 29, 1904, the appellee replied to this notice, saying: "We will comply with your demands to change our telephones wires, to prevent interference with your wires, but in doing so the

Arlington Telephone Company waives no right to damage from your company, and further states that it will look to you for compensation for all expenses required in making the change." Within the next 40 days, the appellee did encase its wires in a lead cable, and placed the same underground across the right of way of the appellant, and extended said cable under the right of way of the Cincinnati, Hamilton & Dayton Railway Company; that the value of the time, labor, and material required to make such change was \$199; that it was necessary for the appellee either to place said wires underground or elevate them above the high-tension wires of appellant; and that to have placed the telephone wires above said high-tension wires would probably have endangered the lives and property of the patrons of appellee, and that the cost of changing said wires by suspending the same above the high-tension wires, and maintaining them in a reasonably safe condition suspended from poles, would have been more than \$200; that the appellant prior to this time had duly obtained from the board of commissioners of Rush county, Ind., the right to construct and maintain its railway tracks in and across the highways in said county; that the cost of placing appellee's wires under appellant's right of way in the manner the same was done from a pole on each side of said right of way, and run up said pole to a height of 25 feet, would be \$70; that appellee had not previous to the time appellant acquired its right of way through the village of Arlington any easement in real estate upon which to erect telephone poles south of Phillips' alley, and said north and south alley, and north of the right of way of the Cincinnati, Hamilton & Dayton Railway Company, except that acquired from Mrs. Sampson, at a point 163 feet west of Main street, and did not afterwards acquire any right within said territory to erect poles; that appellant never offered appellee permission to erect and maintain poles on its right of way, and that if appellee had placed its wires under appellant's right of way, and over the Cincinnati, Hamilton & Dayton right of way, it would have been necessary to carry the cable on the south side of appellant's right of way up a pole for a distance of 25 feet, and the pole so carrying said extended cable would have to be securely anchored from the north; that appellee never acquired, nor did appellant ever offer, any right to set anchors within its right of way, and that it would have been impracticable to have anchored a telephone pole set on the south side of the right of way to an anchor placed on the north side of said right of way; that appellant has never paid any part of the expense of making said change.

The court found that the appellant had acquired from the board of commissioners of Rush county the right to construct and

maintain its railroad tracks in and across the highways in said county. In view of this grant, the appellant insists that the interurban company has priority of right over a telephone company in the highways and in the streets and alleys of the unincorporated towns in Rush county, and can only be held liable to the appellee for damages unnecessarily or negligently inflicted. Neither the proposition urged, nor the authorities cited can be considered in the determination of this case. The record before us does not require or call for a decision upon the conflicting rights of an interurban railroad company and a telephone company in the use of highways, streets, and alleys. It affirmatively appears from the facts found that the pole and wires of appellee were located upon private property, and not upon any public highway, street, or alley. The court also found that in 1902 the appellee acquired the right to erect a pole upon the real estate of Mrs. Sampson. The finding does not show how this right was acquired, but assuming that it was by a mere parol license, even this slender right, after the appellee had expended money and labor in the erection of the pole, became an executed license and irrevocable. It has been frequently held in this state that an executed license, the execution of which required the expenditure of money and labor, is regarded in equity as an executed agreement for a valuable consideration, and, although a parol license for the use and occupation of real estate, it is irrevocable. *Ferguson v. Spencer*, 127 Ind. 66, 25 N. E. 1035; *Nowlin v. Whipple*, 120 Ind. 596, 22 N. E. 669, 6 L. R. A. 159; *Joseph v. Wild*, 146 Ind. 249, 253, 45 N. E. 467; *Town of New Castle v. Lake Erie, etc., R. Co.*, 155 Ind. 18, 26, 57 N. E. 516; *Oster v. Broe*, 161 Ind. 113, 64 N. E. 918; *Roush v. Roush*, 154 Ind. 562, 570, 55 N. E. 1017; *Buck v. Foster*, 147 Ind. 530, 532, 46 N. E. 920, 62 Am. St. Rep. 427; *Knoll v. Baker*, 34 Ind. App. 124, 72 N. E. 480; *Rerick v. Kern*, 14 Serg. & R. (Pa.) 267, 16 Am. Dec. 497; *Messick v. Midland Ry. Co.*, 128 Ind. 81, 82, 83, 27 N. E. 419.

[4] When the license became executed, Mrs. Sampson could not revoke it, and when the real estate upon which the pole stood was conveyed to the appellant, with notice, the real estate was taken over with its burden. The location and obvious character of the telephone pole on appellant's newly acquired right of way was sufficient to put the appellant upon inquiry, which in this case would amount to notice of the easement. *Hodgson v. Jeffries*, 52 Ind. 334, 341; *Paul v. Connorsville, etc., R. R. Co.*, 51 Ind. 527. An easement appurtenant to real estate passes with the grant, and becomes a burden upon the servient estate in the hands of the subsequent owners. *Robinson v. Thrallkill*, 110 Ind. 117, 120, 10 N.

E. 647; *Nowlin v. Whipple*, 120 Ind. 596, 22 N. E. 669, 6 L. R. A. 159; *Steinke v. Bentley*, 6 Ind. App. 663, 34 N. E. 97.

[5] It will therefore be seen that the rights of the appellee in the real estate acquired by the appellant for its right of way were not affected by the purchase, and that appellee could not be required to remove or change its pole and wires from said right of way, without being compensated for the expense made necessary by such change. When the appellee constructed its railroad, and strung its high-tension wires, on account of the dangerous character of such wires, it became necessary for the telephone wires to be either elevated or run underground across said right of way. The appellant ordered the appellee to change its pole and wires, and suggested the underground method as being the most approved and safest. Appellee consented to make the change, but reserved its right to collect damages for the expenses incurred. The wires were encased in a lead cable, and run under the tracks of the appellant, and also under the tracks of the Cincinnati, Hamilton & Dayton Company, immediately south of appellant's right of way. The court found that this was not only the best method, but the cheapest, and that it was impracticable to run said wires underground across appellant's right of way, and overhead across the right of way of the Cincinnati, Hamilton & Dayton Company.

The court also found that the cost of making the change required by the appellant was \$199, and that plaintiff was damaged in said amount. From the facts found the court stated, as a conclusion of law, that the appellee was entitled to recover from appellant the sum of \$199 and costs.

There was no error in this conclusion of law. The evidence not being in the record, it does not appear that the court erred in overruling appellant's motion for a new trial.

The judgment is affirmed.

(260 Ill. 338)

PEOPLE v. COTTON.

(Supreme Court of Illinois. April 19, 1911.
Rehearing Denied June 9, 1911.)

1. INDICTMENT AND INFORMATION (§ 110*)— FORGERY.

An indictment which follows the language of the statute, and charges that defendant falsely and feloniously altered and changed a chattel mortgage, necessarily includes the element of a want of lawful authority, and is sufficient.

[Ed. Note.—For other cases, see *Indictment and Information*, Cent. Dig. §§ 289-294; Dec. Dig. § 110; * *Forgery*, Cent. Dig. §§ 61, 64.]

2. CRIMINAL LAW (§ 403*)—EVIDENCE— EXCLUSION OF PAROL BY DOCUMENTARY EVIDENCE.

At a trial for forgery of a part of a chattel mortgage, the parol testimony of the justice who took the acknowledgment to the mortgage

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes

and docketed it as to the words and figures appearing on the docket to prove that the words and figures alleged to have been changed were not on the docket is admissible, although the docket had been lost, and a copy of it had been made from evidence taken before a master in chancery.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 889; Dec. Dig. § 403.*]

3. CRIMINAL LAW (§ 1169*)—APPEAL AND ERROR—HARMLESS ERROR—ADMISSION OF EVIDENCE.

In a prosecution for forgery, where defendant offered a copy of the docket of the justice by whom the mortgage had been docketed, which had been lost, made up from the evidence taken before a master in chancery to show a want of accuracy on the part of the justice, the admission of parol evidence as to the contents of the docket is harmless, since the defendant had had the benefit of any inference arising from the discrepancy.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3137-3143; Dec. Dig. § 1169.*]

4. WITNESSES (§ 260*)—EXAMINATION—DISCRETION OF COURT—REFRESHING MEMORY.

Where a witness for the state shows a surprising lapse of memory as to matters about which he had previously testified, permission to the state's attorney to call his attention to his former testimony to refresh his recollection is within the proper discretion of the court.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 897, 898; Dec. Dig. § 260.*]

5. FORGERY (§ 48*)—INTENT TO DEFRAUD—INSTRUCTION IN LANGUAGE OF STATUTE.

An instruction at a trial for forgery of a chattel mortgage that an intent to defraud may be manifested by circumstances, following Cr. Code (Hurd's Rev. St. 1909, c. 38, §§ 280, 281) div. 2, §§ 8, 9, declaring what constitutes a criminal offense and by what means intention is manifested, is good.

[Ed. Note.—For other cases, see Forgery, Dec. Dig. § 48.*]

6. CRIMINAL LAW (§ 786*)—TRIAL—INSTRUCTIONS—CREDIBILITY OF WITNESSES—INTEREST.

An instruction in a criminal prosecution advising the jury that the interest of defendant may be taken into consideration in determining the weight to be given his testimony, but not authorizing a jury to disregard his testimony, is proper.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1787, 1895-1901, 1960, 1984; Dec. Dig. § 786.*]

7. CRIMINAL LAW (§ 784*)—TRIAL—INSTRUCTIONS—CIRCUMSTANTIAL EVIDENCE.

An instruction that, while the jury must be convinced of the guilt of the defendant beyond a reasonable doubt, the proof need not be the direct evidence of persons who saw the offense committed, and that the acts constituting the crime might be proved by circumstances, is proper.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1883-1888; Dec. Dig. § 784.*]

8. CRIMINAL LAW (§ 806*)—TRIAL—INSTRUCTIONS—REPETITION—REASONABLE DOUBT.

The mere redundancy of instructions not relating to any fact, as of definitions of reasonable doubt made by courts at various times, will not justify reversal.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1973, 1991; Dec. Dig. § 806.*]

9. FORGERY (§ 44*)—EVIDENCE—WEIGHT.

In a prosecution for forgery of a chattel mortgage, that the mortgage was made and acknowledged at a certain place, and that defendant, the mortgagee, attempted to collect it there, will justify an inference that the forgery was committed at that place.

[Ed. Note.—For other cases, see Forgery, Cent. Dig. §§ 117-121; Dec. Dig. § 44.*]

10. FORGERY (§ 44*)—EVIDENCE—SUFFICIENCY.

Evidence in a prosecution for forgery of a chattel mortgage held sufficient to sustain a conviction.

[Ed. Note.—For other cases, see Forgery, Cent. Dig. §§ 117-121; Dec. Dig. § 44.*]

Farmer, Vickers, and Cooke, JJ., dissent.

Error to Circuit Court, Peoria County; Leslie D. Puterbaugh, Judge.

J. Allen Cotton was convicted of forgery of a chattel mortgage, and he appeals. Affirmed.

Sucher & McNemar (Dailey & Miller, of counsel), for plaintiff in error. W. H. Stead, Atty. Gen., Robert Scholes, State's Atty., and Fred H. Hand (Harry B. Pratt, of counsel), for the People.

CARTWRIGHT, J. The plaintiff in error, J. Allen Cotton, was found guilty by a jury in the circuit court of Peoria county of the forgery of a chattel mortgage by adding to the property therein described and mortgaged the words and figure "1 Singer sewing machine," with intent to prejudice, damage, and defraud the mortgagors, Grant Mitchell and Dora Mitchell, his wife. The court overruled motions for a new trial and in arrest of judgment, and pronounced sentence in accordance with the verdict.

The mortgage was given to secure rent of a house of the defendant occupied by the mortgagors, and one of the mortgagors, Grant Mitchell, died before the trial. Dora Mitchell testified that the figure and words "1 Singer sewing machine" were not in the chattel mortgage when she signed it, and that the sewing machine was her own property and of the value of \$60. The mortgagors acknowledged the mortgage before John Schofield, a justice of the peace, who entered the mortgaged property on his docket, and the justice and one Richard H. Radley, who received the docket from the justice, testified that the figure and words in question did not appear on the docket. The defendant and Henry Gibson testified that the mortgage was made out in the office of the justice of the peace; that the writing in the printed blank was done by the defendant; that he had a list of the articles to be mortgaged on the inside cover of a small receipt book, including the sewing machine as the last item; that Gibson read off the list of articles, and after the mortgage was completed they checked the list and found the Singer sewing machine had been omitted; and that defendant then wrote the

figure and words in the chattel mortgage following the description of the other property. The justice said that he thought the sewing machine was mentioned between the defendant and Gibson, but his impression was that the defendant told Gibson he did not want the machine and that he had enough without it. A witness testified that Dora Mitchell told him that she said the sewing machine was not on the chattel mortgage to save herself, because she had mortgaged the goods to another person, but she denied that she made any such statement. Another witness testified that after a fire which occurred in the house he saw the defendant look toward the sewing machine and take a book with a wine-colored or brown leather back and write something on it.

[1] It is first contended that the indictment was insufficient for want of an averment that the writing was made without lawful authority. The indictment was in the language of the statute and the language was such as to be readily understood, which was sufficient. It alleged that the defendant falsely and feloniously altered and changed the chattel mortgage, which necessarily included the element of a want of lawful authority.

[2, 3] The next proposition of counsel is that the court erred in permitting the justice and the other witness to testify that the words and figure alleged to have been forged did not appear on the justice's docket. The docket had been lost and the entry had been copied as a part of the evidence taken before the master in chancery. The argument is that the people should have proved the contents of the docket by the copy, which was not a certified copy. Where records are lost or destroyed, their contents may be proved by verbal testimony, like any other writing. *Gage v. Schroder*, 73 Ill. 44; *Ashley v. Johnson*, 74 Ill. 392. The only purpose of the evidence was to prove that the figure and words were not on the docket and not to prove what was on it, and for that purpose a copy of the entry would not have been a higher class of evidence than the testimony of witnesses who had examined the docket. The defendant wanted to have the copy used because the mortgage described, among other things, "1 cooking stove and cooking utensils," while the docket entry was "1 cooking stove and utensils," which, it is said, would have shown a want of accuracy on the part of the justice. The defendant offered in evidence the copy and had the benefit of any inference arising from the discrepancy.

[4] It is next contended that the judgment ought to be reversed on account of improper conduct by the state's attorney in the examination of A. J. Saunders, a witness called on behalf of the people. The state's attorney did nothing improper, and the real complaint is against the rulings of the court. The witness had testified touching the matter before

and developed an unusual and remarkable forgetfulness and lapse of memory, and the court permitted the state's attorney to call the attention of the witness to his former testimony for the purpose of refreshing his recollection. If a witness gives testimony different from previous statements, so that his testimony is a matter of surprise to the party calling him, the party may refresh his memory by calling his attention to the former statement, either to refresh his memory or awaken his conscience. *Chicago City Railway Co. v. Gregory*, 221 Ill. 591, 77 N. E. 1112; *People v. Lukoszus*, 242 Ill. 101, 89 N. E. 749. We see no reason why the same rule should not apply where a witness claims that his mind has become an entire blank concerning matters about which he has previously testified. The permission to ask such questions rests largely in the discretion of the court, who can judge from the manner of the witness and his appearance whether they ought to be permitted, but in this case the failure of memory was so surprising as to indicate intentional forgetfulness, and, judging the ruling by the record alone, we are satisfied the court did not err.

[5] Errors are assigned upon the giving of instructions, and, as to the first instruction, the objection is that it states an incorrect rule in saying that an intent to defraud may be manifested from circumstances. The instruction is a copy of sections 8 and 9 of division 2 of the Criminal Code (*Hurd's Rev. St. 1909*, c. 38, §§ 280, 281), declaring what constitutes a criminal offense and by what means intention is manifested. There can be no dispute of the law as made by the Legislature, and it is a self-evident proposition that to give the jury the law in the language of the law itself is not error. *Petefish v. Becker*, 176 Ill. 448, 52 N. E. 71; *Donk Bros. Coal & Coke Co. v. Peton*, 192 Ill. 41, 61 N. E. 330. The same may be said of instruction No. 2, which is a copy of the statute defining the crime of forgery so far as applicable to this cause. Counsel say that it is wrong in describing the intent as "intent to prejudice, damage or defraud any person," while the statute says the intent must be to "prejudice, damage and defraud." A reference to the statute will show the error of counsel, since the language of the statute is precisely the same as that of the instruction.

[6] Instruction No. 10 related to credibility, and evidently referred to the testimony of the defendant, although it apparently referred to something going before which was omitted. It advised the jury that the interest of the defendant in the trial was a matter proper to be taken into consideration by them in determining the weight to be given to his testimony, but it did not authorize the jury to disregard the testimony of the defendant or any other witness, and it was not incorrect.

[7] The fourth instruction stated that while

the jury must be convinced of the guilt of the defendant beyond a reasonable doubt, from the evidence, the proof need not be the direct evidence of persons who saw the offense committed, and that the acts constituting the crime might be proved by circumstances. Counsel liken the instruction to one held bad in *Otmer v. People*; 76 Ill. 149, but there is no resemblance between them. This instruction did not intimate that testimony of facts and circumstances merely pointing to the defendant's guilt would be sufficient.

[8] Several instructions were given as to what constitutes a reasonable doubt, and it is objected that the duty to instruct on that subject was overdone. It has often been doubted whether such instructions make the meaning of the words "reasonable doubt" more clear than the words without comment, and the instructions in this case were practical repetitions. They consisted of statements made by the courts at different times in efforts to explain the meaning of the words, and a mere redundancy of instructions not relating to any fact would not justify a reversal.

[9] Finally, it is contended that the court erred in not granting a new trial on the ground that the verdict was not supported by the evidence, and under that head it is insisted that the venue was not proved. The chattel mortgage was made and acknowledged in Peoria county, and the defendant attempted to collect it there and instituted a foreclosure proceeding for that purpose. These facts would justify an inference that the place of forgery was in Peoria county. *Bland v. People*, 3 Scam. 364; *Langdon v. People*, 133 Ill. 382, 24 N. E. 874; *People v. McIntosh*, 242 Ill. 602, 90 N. E. 180. It is also urged that there is no proof of a want of authority to make the change after the execution of the mortgage, but the defendant testified that he wrote in the figure and words before the mortgage was executed and never claimed that he inserted them afterwards, so that the question of authority is of no importance.

[10] The question of guilt or innocence depended upon the credibility of the witnesses, and there is no controlling fact or circumstance from which we are able to say that the verdict was wrong. The chattel mortgage and the receipt book with a brown cover were in evidence, and were certified to this court. The inside cover of the receipt book contains a list of articles, including the sewing machine. In the chattel mortgage there are diagonal lines across the blank space below the description of the property, and the paper presents an appearance of the figure and words having been written after the other property, somewhat closer together, and the word "machine" runs beyond the printed border line. It looks as though the figure and words were written in after the

diagonal lines were drawn, but the appearance of the mortgage is not inconsistent with the testimony of either party.

We find no reason which would justify a reversal of the judgment, and it is affirmed. Judgment affirmed.

FARMER, VICKERS, and COOKE, JJ., dissenting.

(250 Ill. 326)

STRAUSE v. DUTCH et al.

(Supreme Court of Illinois. April 19, 1911. Rehearing Denied June 8, 1911.)

1. MORTGAGES (§ 584*)—FORECLOSURE—EFFECT—SATISFACTION OF LIEN.

The foreclosure of a deed of trust extinguishes the lien.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. § 1682; Dec. Dig. § 584.*]

2. MORTGAGES (§§ 559, 561, 583, 584*)—FORECLOSURE—EFFECT—SATISFACTION OF DEBT.

While the foreclosure of a deed of trust and the sale of the property extinguishes the lien, it does not extinguish the debt, where the property does not sell for enough to pay it; and if personal service has been had on the debtor, the creditor may have, by Hurd's Rev. St. 1909, c. 95, § 16, a deficiency decree in the foreclosure proceedings, or he may bring an action at law and recover judgment.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. §§ 1592, 1600-1603, 1605-1608, 1681, 1682; Dec. Dig. §§ 559, 561, 583, 584.*]

3. MORTGAGES (§ 594*)—REDEMPTION—PERSONS ENTITLED—FORECLOSING CREDITORS—STATUTE.

A foreclosing creditor, who has obtained a deficiency decree, stands on equal footing with other judgment creditors, and hence, after the sale of mortgaged property, under Hurd's Rev. St. 1909, c. 77, § 20, providing that if the mortgagor does not redeem within 12 months after a foreclosure sale, any decree or judgment creditor may redeem within 15 months after foreclosure, he may redeem the land sold by him under foreclosure, to subject it to the payment of the deficiency decree.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. §§ 1713, 1714; Dec. Dig. § 594.*]

Farmer, Cartwright, and Vickers, JJ., dissenting.

Appeal from Appellate Court, Second District, on Appeal from Circuit Court, Peoria County; T. N. Green, Judge.

Action by Flora Strause against Mae E. Dutch and Charles C. Dutch. From a judgment of the Appellate Court (154 Ill. App. 269), affirming a judgment for plaintiff, defendants appeal. Affirmed.

Charles C. Dutch, for appellants. Jack, Irwin, Jack & Miles and Radley & Radley, for appellee.

COOKE, J. Appellee, Flora Strause, brought suit in forcible entry and detainer in the circuit court of Peoria county to recover possession of certain premises from the appellants, Mae E. Dutch and Charles C. Dutch. On a hearing before the court on stipulation of the facts, judgment was ren-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

dered for appellee. This judgment was affirmed by the Appellate Court for the Second District. 154 Ill. App. 269. Having secured a certificate of importance, appellants have appealed from that judgment.

Appellants executed three trust deeds to the premises in question. The first and third in point of priority were given to secure notes held by the Interstate Bank & Trust Company for \$5,000 and \$2,500, respectively, and the second was to secure a note held by Arthur Keithley for \$3,000. The Interstate Bank & Trust Company brought suit to foreclose its first and third trust deeds, to which suit Keithley was made a party. Decree of foreclosure was entered at the May term, 1907. By this decree the amount due on each of the three trust deeds was found, a sale of the premises ordered, and the proceeds of the sale were directed to be applied, first, to the payment of the note secured by the first trust deed; second, to the payment of the note secured by the second trust deed held by Keithley; and, third, to the payment of the note secured by the third trust deed. The decree also provided that, if the amount realized should not be sufficient to pay the full amount of the indebtedness due the Interstate Bank & Trust Company, it should be entitled to a deficiency decree for the balance. The premises were sold under this decree for an amount sufficient to pay in full the note secured by the first trust deed and the costs of the suit and \$400, which was applied on the Keithley indebtedness. The property was purchased by Edgar A. Strause, the husband of appellee. The sale was confirmed on September 11, 1907, and the Interstate Bank & Trust Company thereafter secured a deficiency decree against appellants for the sum of \$2,686.90, which decree provided "that plaintiff have execution therefor as upon a judgment at common law." No deficiency decree was entered in favor of Keithley. Neither the appellants nor any other persons authorized to do so by the statute redeemed from the sale within 12 months. On August 15, 1908, the Interstate Bank & Trust Company sued out an execution on its deficiency decree, paid to the sheriff the amount required to redeem from the master's sale (which amount was accepted by Edgar A. Strause), and caused the execution to be levied upon the premises as provided by statute. On October 13, 1908, the premises were sold under this execution to appellee, and on December 13, 1908, the sheriff, in pursuance of the certificate of purchase issued at the time of the sale, executed to appellee a deed to the premises. It is under this deed that appellee claims title.

[1] The only question for our determination is whether a mortgagee who has secured a deficiency decree after the sale of the mortgaged property in foreclosure proceedings is such a decree creditor as is entitled, under the statute, to redeem the premises

sold. Upon the sale of the premises to Strause under the foreclosure decree, the liens of the two trust deeds upon which the foreclosure suit was predicated were extinguished. Those liens no longer existed, and the complainant in the foreclosure suit had secured every benefit possible to be secured under such liens.

[2] The debt itself, however, was not extinguished. A portion of it remained unsatisfied by reason of the failure of the property to sell for the full amount of the indebtedness. Under such circumstances the creditor, if personal service has been had upon the debtor, may have a deficiency decree for the balance due, upon which execution may issue as on a money decree (Hurd's Stat. 1909, c. 95, § 16), or he may bring his action at law and secure judgment for the balance due. Such deficiency decree or judgment is secured by no lien whatever. It is not based upon the lien of the mortgage, but upon the personal liability of the mortgagor to pay the full amount of the indebtedness secured by the mortgage. [3] A creditor with such a decree or judgment is on the same footing with any other decree or judgment creditor of the debtor, and is entitled to employ the same means to enforce his decree or judgment.

Our statute, after making provision for the redemption of property sold under execution or decree by any defendant, his heirs, administrators, assigns, or any person interested in the premises through or under him, within 12 months after the sale, provides: "If such redemption is not made, any decree or judgment creditor, his executors, administrators or assigns may, after the expiration of twelve months and within fifteen months after the sale, redeem the premises," etc. Hurd's Stat. 1909, c. 77, § 20. Under this statute, which is plain and unambiguous in its terms, the Interstate Bank & Trust Company had a clear right to redeem the premises. To hold otherwise would not only have the effect of limiting the decree or judgment secured for the deficiency and putting it in a class by itself, but would work a hardship on the debtor. We have repeatedly held that a liberal construction is to be given to our redemption laws, to the end that the property of the debtor may pay as many of the debtor's liabilities as possible. *Schuck v. Gerlach*, 101 Ill. 338; *Whitehead v. Hall*, 148 Ill. 253, 35 N. E. 871; *Strauss v. Tuckhorn*, 200 Ill. 75, 65 N. E. 683. The object in allowing judgment creditors to redeem is to prevent a sacrifice of the debtor's estate, and to allow as many of his judgment creditors as can to secure the payment of their judgments by making an advance which the debtor cannot or will not make himself. *Sweezy v. Chandler*, 11 Ill. 445. In this case appellants did not redeem, but their failure to redeem within 12 months did not deprive them of all interest in the premises. They still had an equity, which

would not be extinguished until the full period of redemption had passed and a deed had issued to the purchaser. *Lightcap v. Bradley*, 186 Ill. 510, 58 N. E. 221. It is a matter of common knowledge that real estate values, either from general or local causes, make sudden and material advances. To deprive a creditor in a deficiency decree of the right to redeem as a judgment creditor might in many instances prevent the debtor from securing the full value of his equity and the extinguishment of his debt.

It is insisted that a creditor cannot redeem from his own sale. No such general rule has been laid down by this court. On the contrary, in *Tewalt v. Irwin*, 164 Ill. 592, 46 N. E. 13, it was held that a creditor might redeem from his own sale. In that case Lagow foreclosed his mortgage against Tewalt. While the statutory period of redemption was running, Tewalt died. The probate court allowed a claim against the estate in favor of Lagow. He assigned the claim to his attorney, who sued out a special execution and redeemed from the foreclosure sale. It was there contended that the redemption was in fact by Lagow, and that he could not redeem from his own sale; but we held that a mortgagee who was also a creditor under a separate claim might redeem the premises from his own foreclosure sale, thus placing him in the same class with other debtors. The precise question here involved has never been presented to us for decision, but we can perceive no difference, in principle, between the case at bar and the *Tewalt Case*, supra. Under the statute, Lagow, in the *Tewalt Case*, secured no greater rights by his judgment against the estate of *Tewalt* than were secured by the *Interstate Bank & Trust Company* through its deficiency decree. They were creditors with equal rights and on an equal footing.

By a mortgage or trust deed the grantor makes a conditional sale of his premises. Upon a failure of the grantor to comply with the conditions of his mortgage deed, the grantee may foreclose, and thus terminate the grantor's equity of redemption from his conditional deed. By foreclosure all the equity retained by the grantor by virtue of his conditional deed is extinguished; but by the statute the grantor in the conditional deed is given a further equity of redemption. This equity of redemption does not exist by virtue of the mortgage, but is purely statutory. If the grantor does not redeem within the 12 months allowed him under the statute, he still retains an equity, which is subject to sale within the succeeding 3 months by "any decree or judgment creditor" who will reimburse the purchaser at the sale, in the manner prescribed by the statute. There exists no reasonable foundation for a rule which would prevent the grantee in the conditional deed from subjecting this statutory equity to sale under his deficiency decree, and the statute plainly

includes such a decree creditor within its terms.

In support of their contentions appellants rely, among other cases, upon *Selligman v. Laubheimer*, 58 Ill. 124, *Ogle v. Koerner*, 140 Ill. 170, 29 N. E. 563, *Lightcap v. Bradley*, supra, and *De Witt County Bank v. Mickelberry*, 244 Ill. 77, 91 N. E. 86, 135 Am. St. Rep. 304. The question here presented was not before us in any of those cases, and what was said there was said in reference to the matters then presented for our decision. Our holding here, however, in no way conflicts with the holdings in those cases, but, on the contrary, is in entire harmony with them.

The judgment of the Appellate Court is affirmed.

Judgment affirmed.

FARMER, CARTWRIGHT, and VICKERS, J.J. (dissenting). In our opinion the decision of the court in this case is contrary to our previous decisions, and lays down a very harmful rule on the subject of redemption by judgment or decree creditors—a rule not sustained, as we read and understand the decisions, by reason or authority. We do not agree that the statute gave the bank "a clear right to redeem the premises." The eighteenth section of the chapter on judgments and decrees (*Hurd's Stat.* p. 1365), authorizes redemption by the mortgagors, or any one interested in the premises through or under them, within 12 months. By the twentieth section it is provided that, if redemption is not made by those authorized to redeem the premises within 12 months, "any decree or judgment creditor" may redeem within 3 months after the expiration of the 12 months. The opinion of the court holds that the bank was, at the time it redeemed, a decree or judgment creditor by reason of the fact that its decree was not satisfied by the sale, and as to the balance due, as found by the deficiency decree, it was a decree or judgment creditor within the meaning of the statute, and had full power and authority to redeem by virtue of the deficiency decree. To our minds it seems clear the Legislature never intended, by the use of the words "any decree or judgment creditor," to authorize such a creditor to make successive sales of the debtor's property by bidding at the first sale less than the amount of the decree, and then redeem from his own sale and resell the property which had been previously sold by virtue of, and to satisfy, the same decree. The bank procured a decree authorizing it to sell the premises to satisfy its mortgages. When it sold at the foreclosure sale, the purpose of obtaining the decree was accomplished, the authority given by virtue of the decree executed, and the property discharged from all liability to be sold again to satisfy a portion or balance of the same decree, and the situation was not avoided or altered by

authorizing an execution to issue for a deficiency. If the mortgagor had other property liable to execution, it could be sold to satisfy the deficiency; but the mortgaged premises could not lawfully be again sold to pay the same debt. The deficiency was a part of the same decree to satisfy which the mortgaged premises had been once sold. Redemption laws are to be construed liberally; but this does not require our statute to be construed to place the mortgagor at the mercy of the mortgagee. The result of the construction given the statute by the court will lead to harsh and unjust consequences, never contemplated or intended by the Legislature.

The decree in this case authorized the sale of the property for the payment of the entire amount due the bank on both of its mortgages. It did not authorize two sales, nor successive sales until the debt was paid. The bank presumably knew the value of the property, and had it in its power to bid its fair cash value, and the presumption is that it did so. It was not intended by the statute on redemption, and is contrary to the policy of the law, that a mortgagee be permitted, at the foreclosure sale, to suffer the property to be sold for less than its fair value, and if not redeemed by the mortgagor, or some one claiming through or under him, that then the mortgagee may redeem from the sale made by him and again sell the same property for the payment of a part of the same indebtedness. To permit this to be done would subject the mortgagor to great disadvantage. His property may be sold for less than its value, and less than the amount of the decree it is sold to satisfy. If he does not redeem from the sale, and no one else redeems, the title will pass from him without his having received the value of it in satisfaction of his indebtedness. If he redeems, then the property is again subject to be sold to satisfy the remainder due under the decree. If the bank had the right to redeem under a deficiency decree, it had the right, and it would be the right of any other mortgagee in a foreclosure sale, to pursue that course, and make it possible to acquire title to the property for less than its fair value, and leave the debtor liable for a part of the amount that would have been satisfied if he had received the benefit of the value of the property by the sale under the decree. This view is sustained by *Seligman v. Laubheimer*, 58 Ill. 124, *Ogle v. Koerner*, 140 Ill. 170, 29 N. E. 563, and *Lightcap v. Bradley*, 186 Ill. 510, 58 N. E. 221.

This court said in the *Ogle Case*, 140 Ill. 179, 29 N. E. 565: "A mortgage, or, as in this case, a deed of trust in the nature of a mortgage, vests in the party secured a lien upon the mortgaged premises. By virtue of that lien the mortgagee is entitled to have the mortgaged property sold under a decree of foreclosure and the proceeds of the sale

applied to the payment of the debt secured. This is the mode provided by law for the enforcement of the lien, and, when the lien has been once enforced by the sale of the property, it has, as to such property, expended its force and accomplished its purpose, and the property is no longer subject to it. * * * When the redemption is made by a party primarily liable on the mortgage debt, it may be that the same property may be resorted to again for the purpose of subjecting it to the payment of an unpaid balance due on the mortgage; but that is not because of any right to enforce the mortgage lien against the same property a second time, but because of the rule of law which subjects all the property of a debtor to the payment of his debts until they are satisfied in full. But where the redemption is made by a party not liable upon the mortgage debt, the mortgage lien having been exhausted, the property cannot be subjected a second time to the satisfaction of the same lien. * * * It is idle for the senior mortgagee to urge that the property redeemed is, in fact, worth much more than the price for which it was sold at the foreclosure sale. He was a competent bidder at such sale, and therefore had it in his power to bid the property up to its fair cash value, and if he failed to do so a presumption arises, from which he cannot escape, that the property sold for what it was reasonably worth. At any rate, the mortgagee under whose decree the mortgaged property is sold, in the absence of all irregularity and unfairness in the sale, must be conclusively held to the price bid as a full equivalent for and satisfaction of his lien, and having received the proceeds of the sale he becomes a mere stranger to the property."

In *Lightcap v. Bradley* the court approved the *Ogle Case*, and said (186 Ill. 526, 58 N. E. 226): "The sale of premises under a decree of foreclosure, where the decree does not expressly save any right to resort to the land again, is an absolute discharge of the premises from the lien. In the absence of a provision for another sale, the premises will be discharged, even from un-matured portions of the debt. *Rains v. Mann*, 68 Ill. 264. Such a sale is a sale of the land and of all interests, both that which the mortgagor had at the execution of the mortgage and the interest of the mortgagee and other parties to the suit. It is made by the court as vendor, and a sale discharges the land from the lien, and transforms it into the statutory lien by the certificate of purchase."

In the case of *Tewalt v. Irwin*, 164 Ill. 592, 46 N. E. 13, cited in the opinion of the court, no question of a sale under a deficiency decree or a sale to satisfy a balance on a decree under which the premises had been previously sold was involved.

In our opinion, the judgment of the cir-

cuit court and the judgment of the Appellate Court are wrong, and should be reversed

(208 Mass. 89)

MONTGOMERY WARD & CO. v. JOHNSON.
(Supreme Judicial Court of Massachusetts.
Worcester. May 19, 1911.)

1. SALES (§ 22*)—OFFER TO SELL—SUFFICIENCY.

A circular issued by a manufacturer of revolvers, to secure uniformity in their retail sale price, setting forth the terms upon which revolvers would be furnished to the jobbing trade and that no order would be filled except upon the terms set forth, and reciting that the manufacturer would not be liable for failing to fill orders, etc., was not a general offer to sell, but an invitation of proposals for sales on the terms stated, which might be accepted or rejected; and hence plaintiff's transmission of an order which the manufacturer refused to fill did not form a contract subject to specific performance.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 39-43; Dec. Dig. § 22.*]

2. SALES (§ 22*)—OFFERS TO SELL—EFFECT—"CONTRACT."

An invitation to prospective buyers to negotiate for a license, and to trade, even when confined to a definite class, does not bind the sender to accept any offer thereafter received. The order of the prospective buyer does not ripen into a "contract," which is an agreement which creates an obligation, until the defendant's acceptance, and then only as to goods specifically ordered.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 39-43; Dec. Dig. § 22.*]

For other definitions, see Words and Phrases, vol. 2, pp. 1513-1534; vol. 8, pp. 7615, 7616.]

Appeal from Supreme Judicial Court, Worcester County.

Bill by Montgomery Ward & Co. against Mary E. Johnson. Decree for defendant, and plaintiff appeals. Affirmed.

Chas. F. Choate, Jr., and Geo. P. Merrick (Richard W. Hale, of counsel), for appellant. Herbert Parker and Henry H. Fuller, for appellee.

BRALEY, J. The essential allegations of the bill are admitted by the demurrer, but if they fail to show a binding contract between the parties, it cannot be maintained for specific performance, or injunctive relief. The defendant manufactured and sold firearms of certain types, which had acquired in the market a recognized reputation for their quality and style of workmanship. In the management of the business, sales were made only to jobbers, who were to resell to their customers at a uniform price. But having received complaints that the scale of prices in some instances had not been followed, she issued a printed letter, which after reciting the cause of its publication, and that "we have prepared, and are sending under this cover by registered post, a printed document setting forth the terms and conditions upon which Iver Johnson revolvers will be supplied to the jobbing trade," contained

the statement that "hereafter no order will be filled except upon the terms set forth in the enclosed document, therefore please read it carefully, for we are going to ask your support and cooperation." The plaintiff apparently was a customer of the defendant, and having received the letter, alleges that it was "a certain offer in writing to make a contract," the terms and conditions of which were expressed in the accompanying document. It is then alleged that, "intending to accept said contract, and to cause that the defendant should be bound by said acceptance, and that the parties should be mutually bound thereby," the plaintiff transmitted to the defendant an order for revolvers; but there is no allegation that this purpose was communicated to her, or that the order was accepted with this understanding. [1] The plaintiff relies on these transactions as constituting a bilateral contract. But if the letter and document are examined in connection with the recitals, they were not in the nature of a general offer, where upon compliance with the conditions by those to whom it is addressed, a legally binding contract at once springs into existence. The defendant promulgated the terms under which she proposed to do business in the future, not with the plaintiff only, but with the members of the jobbing trade, who were to be treated as licensees, if they would agree to abide by them. It is expressly announced, in the seventh paragraph of the document, that the defendant does not undertake to furnish, or to be responsible for a failure to deliver goods which may be ordered, and the words, "that it can be revoked without liability for damages by thirty days written notice, to date from the actual mailing of the notice," refer to the license to deal in the defendant's product, with a discontinuance of all business relations. [2] "A contract is an agreement which creates an obligation," said Mr. Justice Field in *Ashcroft v. Butterworth*, 136 Mass. 511, 514. And an invitation to prospective buyers to negotiate for a license, and to trade with the defendant, even when confined to a definite class, imposes no obligation on the sender of accepting any offer which thereafter might be received. The order of the prospective buyer does not ripen into a contract of sale until the defendant's acceptance, and then only as to goods specifically ordered. *Smith v. Gowdy*, 8 Allen, 566; *Lincoln v. Erie Preserving Co.*, 132 Mass. 129; *Edge Moor Bridge Works v. Bristol*, 170 Mass. 528, 49 N. E. 918; *Moulton v. Kershaw*, 59 Wis. 316, 18 N. W. 172, 48 Am. Rep. 516; *Spencer v. Harding*, L. R. 5 C. P. 561; *Canning v. Farquhar*, 16 Q. B. D. 727, 732.

We are of opinion that a fair interpretation of the letter, and document, very plainly shows that it was not a general offer to

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep.'s Indexes

sell to those addressed, but an announcement, or invitation, that the defendant would receive proposals for sales on the terms and conditions stated, which she might accept or reject at her option. No contract between the parties having been created, the defendant's refusal to accept and fill the plaintiff's orders, as alleged in the bill, was not an actionable wrong, and the further questions of a breach, and the measure and form of relief, and whether the contract was legally terminated by the notice, become immaterial, and need not be discussed.

The decree of the single justice, sustaining the demurrer and dismissing the bill, must be affirmed with costs.

Decree accordingly.

(200 Mass. 129)

COPELAND v. EATON et al.

(Supreme Judicial Court of Massachusetts.
Suffolk. May 19, 1911.)

1. APPEAL AND ERROR (§ 1008*)—REVIEW—FINDINGS.

A finding of fact by the trial court will not be disturbed, unless plainly wrong.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3955; Dec. Dig. § 1008.*]

2. PATENTS (§ 192*)—TITLE.

Joint owners in a patent are at the mercy of each other.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 269; Dec. Dig. § 192.*]

3. PATENTS (§ 212*)—CONTRACTS—CONSTRUCTION—"INTEREST."

An article in the contract by which patentees granted an exclusive license to manufacture and sell the invention for a term of years provided that, if the patentees do not desire to renew the contract they shall deliver such transfers as will vest in the licensee fifteen one-hundredths interest in said patent, and also fifteen one-hundredths interest in all the profits arising from business during the life of the patent, and all the provisions of the article defining profits shall apply to the parties *mutatis mutandis*, and if the patentees desire to sell said patent, and obtain a bona fide offer, then the licensee may buy and credit his fifteen one-hundredths interest on the price, and if he does not buy then the patentees may sell the same and account to him for his fifteen one-hundredths part of the proceeds of such sale. *Held*, that the licensee was not entitled to an assignment of the title to any part of the patent on the termination of the contract; the term "interest," as used, meaning a limited property right less than ownership, namely, a right to a fractional part in the proceeds of a sale when one was made, to a preferential option to buy at the same price offered by an outsider, crediting his interest towards such purchase price, and to share in the profits as defined by the contract.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 312-314; Dec. Dig. § 212.*]

For other definitions, see Words and Phrases, vol. 4, pp. 3692-3709; vol. 8, p. 7691.]

4. PATENTS (§ 212*)—CONSTRUCTION—"MUTATIS MUTANDIS."

Where profits are defined by a certain article, all the provisions of which are to apply to the relations between the parties springing into existence after the expiration of the contract "*mutatis mutandis*," these latter words

mean necessary changes in details to conform to a single vital alteration, and suggest a reversal of the relative positions of the parties under the contract, which was to continue the same in other respects.

[Ed. Note.—For other cases, see Patents, Dec. Dig. § 212.*]

Appeal from Superior Court, Suffolk County; J. B. Richardson, Judge.

Action by William A. Copeland against William G. Eaton and others. From a decree for plaintiff, defendants appeal. Reversed.

G. W. Anderson and W. C. Rogers, for appellants. William Quinby, for appellee.

RUGG, J. [1] This is a suit in equity brought to specifically enforce certain terms of a contract touching letters patent. A cross-bill was brought by the defendants asking affirmative relief. The defendants, being owners of a patent issued by the United States for "machines" and "rolls," entered into an agreement with the plaintiff by which the latter was granted an exclusive license to manufacture and sell the patented devices for a term of five years. Paragraph VII of the contract regulated in detail the way in which the accounts of the plaintiff while exercising the rights of manufacture and sale should be kept, what should be treated as manufacturing costs, and how the profits of the business should be computed, and in what proportion and at what times the part to which the defendants were entitled should be paid to them. The main difficulty arises in interpreting paragraph VIII of the contract, which, so far as material, is as follows: "At the expiration of said licenses and of this contract, * * * if the parties of the second part [the defendants] do not then desire to renew the said contract for a further term, they shall deliver such transfers, papers and instruments as will vest in the party of the first part [the plaintiff] from and after said July 1, 1900, fifteen one-hundredths ($\frac{15}{100}$) interest in and to said patent, * * * and also fifteen one-hundredths ($\frac{15}{100}$) interest in and to all the profits arising from business in machines during the life * * * of said patents * * * and also twenty one-hundredths ($\frac{20}{100}$) interest in and to all the profits arising from the sale of rolls, spare parts and supplies furnished to said machines or protected in any manner by the patents. * * * Profits within the meaning of the foregoing provisions shall mean the differences between the manufacturing cost and the amount of the receipts in each instance as hereinbefore defined in article VII, and all the provisions of that article shall apply to the parties hereto *mutatis mutandis*. And in the event the parties of the second part desire to sell said patent or patents and business done

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep't Indexes

under them, and in the event that they obtain a bona fide offer therefor, then the same shall be by them forthwith communicated to the party of the first part, and after the receipt of such communication by the party of the first part he shall have ten (10) days in which to determine whether he will buy said patents and business at said offer. The party of the first part may, if he is the purchaser of said patents and business, credit his fifteen one-hundredths ($15/100$) interest in the purchase price and make payment for the balance of the purchase price at such times and in such manner as may be agreed upon. In the event the parties of the second part should not receive from the party of the first part notice of his intention to buy within ten days, then the parties of the second part may sell the same to the person making such offer for the amount of such offer, and accounting to the party of the first part for his fifteen one-hundredths ($15/100$) part of the proceeds of such sale as aforesaid. But in the event that the person making such offer does not purchase, then no sale can be made of said patents and business by the parties of the second part until a new offer shall have again been submitted to the party of the first part and rejected by him in like manner as before."

A right of renewal was given to the patentees. The judge of the superior court found that there was no renewal of the contract, and that it terminated on July 1, 1900. While his finding is not very clear as to whether the terms of clause X of the contract have been complied with by the plaintiff, we understand it to mean that it has been substantially performed, and that if in small particulars it has not been, specific performance has been waived by the conduct of the defendants. These conclusions of fact must stand as final under the familiar rule that they will not be disturbed unless plainly wrong. A perusal of the evidence discloses no ground for us to say that they should be set aside.

[2] The pivotal controversy relates to the signification to be attributed to the word "interest" as used in clause VIII of the contract, which required to be transferred to the plaintiff a fractional "interest in and to said patent." The word "interest" has not become a term of art in patent law, and has no technical meaning. It is elastic in use, and may convey in different connections a considerable variety of ideas. Excluding those which do not relate to a pecuniary concern in property, it has been held to be more comprehensive than title, and to be synonymous with it, to express less than title, and to be distinguishable from it, and to be broad enough to embrace all claims of every description, to include every right in the nature of property below title, and to refer to equitable rather than legal estates, the somewhat diverse meanings de-

pending upon the relation in which it is found and the subject to which it refers. It would not be profitable to review the cases. The end to be reached is an ascertainment of what this contract means in view of the relations of the parties, the matter about which they were dealing, the particular language employed, the other provisions of the contract, and the practical results likely to flow from the several constructions contended for. The contract recites that the parties are the owners of a patent who desired to enlarge the business of manufacturing and selling the patented articles, on one side, and a manufacturer possessed of capital, plant and organization of which the patentees desire to avail themselves, on the other. The relations were to continue for five years with a right of renewal reserved to the patentees alone. The plaintiff during the term of the contract had exclusive rights of manufacture and sale. The subject of the contract on which all its provisions hinged was a patent. This is a property right of a peculiar nature, with attributes which distinguish it from all other classes of property. The distinguishing characteristics of ownership in a patent are that in this country the number of such owners may be unlimited, each freely and without the consent of his co-owners may use the protected invention, without responsibility to them for profits, grant licenses for such use, and in his own name recover royalties or profits therefor, and assign and transfer his share to a purchaser, who would be free from liability for infringement to the other owners. The nature of a patent is such that joint owners in it "are at the mercy of each other." *McDuffee v. Hestonville, M. & F. Pass. Ry. Co.*, 89 C. C. A. 76-79, 162 Fed. 36-39; *Steers v. Rogers*, [1893] A. C. 232; *Dunham v. Indianapolis & St. Louis R. R.*, 7 Biss. 223, Fed. Cas. No. 4,151; *Mathers v. Green*, L. R. 1 Ch. App. 29; *Vose v. Singer*, 4 Allen, 226, 81 Am. Dec. 696.

[3, 4] The word "interest" occurs in paragraph VIII subsequently to the phrase above quoted, and there relates to the profits in which the plaintiff was to share arising from the business to be carried on during the life of the patents by the defendants after the expiration of the contract. In these connections, obviously it can refer only to an executory obligation on the part of the defendants to account for profits as they arise, to a future potentiality and not to a present and existing title. It is natural that a word repeated several times in the same paragraph should have the same meaning in each instance. Moreover, these profits are defined as meaning the same as in article VII, all the provisions of which are to apply to the relations between the parties, springing into existence after the expiration of the contract "mutatis mutandis." These two words mean necessary changes in

details to conform to a single vital alteration. Together with reference to this clause of definition, they speak strongly of a reversal of the relative positions of the parties as to the real purpose of the contract, which was to continue the same in other respects. The chief end of the contract was to make money for all concerned by vesting the exclusive right of manufacture and sale under the monopoly of the patent in one party. During the term of the contract, the plaintiff was to manufacture and sell exclusively and share the profits, calculated according to the rule established by the agreement, with the defendants. "Mutatis mutandis" in this connection conveys the thought that, after the expiration of the time limited in the contract, the defendants were to have the exclusive rights of manufacture and sale, subject to a similar obligation to share the profits, calculated in the same way, with the plaintiff. It hardly seems probable that the parties would have been so careful to provide for an accounting by the patentees, who would be, compelled to start anew in business after an interruption of five years, if the plaintiff, who is by the contract described as possessed of "capital, plant and organization" had such rights of title to the patent as would enable him to continue the business established under the license without material interruption.

The terms as to a sale point to ownership of the entire patent by the defendants. Their desire "to sell said patent" is made the turning point of a sale. If the plaintiff exercises his option to purchase, he is authorized to credit himself with his fractional interest in the price, but if he does not, the defendants are authorized to "sell the same," that is, the patents, and not eighty-five one-hundredths of them, and to receive the entire purchase price, with obligation only to account to the plaintiff for his part. This power implies entirety of title. The practical effect of the interpretation contended for by the plaintiff renders the patent itself of little or no value to the weaker party. The distinguishing characteristic of a patent is that it enables the holder to prevent everybody else from manufacturing the protected article, except upon terms imposed by the patentee. As between hostile co-owners, the one of larger resources has a great advantage, but the means for conserving the special benefits which the patent confers no longer exist. An interpretation of a contract which would lead to this result would not ordinarily be given unless the language plainly required it. The words of the agreement before us bear no such indication. On the contrary, they show an intent to maintain the integrity of the patent and an employment of its protection in the use which would yield its largest value to all those having a right to share in its prof-

its. These considerations all lead to the conclusion that under the contract the plaintiff is not entitled to a present assignment of the title to any part of the patent. "Interest" as used in this agreement is something different from title. It means a limited property right arising under and defined in the contract, less than an absolute ownership. He is entitled to his fractional part in the proceeds of a sale when one is made, to a preferential option to buy at the same price offered by any outsider, crediting his interest toward such purchase price, and to a share in the profits, as defined by the contract, of the business of manufacture and sale based on the patent while carried on by the defendants. He is entitled to a decree to that effect.

The decree in favor of the plaintiff is reversed. Upon their cross-bill, the defendants are entitled to an accounting under the contract prior to July 1, 1909, and to a general accounting for all use made by the plaintiff of the patents since July 1, 1909.

So ordered.

(200 Mass. 1)

IN RE WINNISIMMET CO.

(Supreme Judicial Court of Massachusetts.
Suffolk. May 18, 1911.)

1. EMINENT DOMAIN (§ 58*)—EXTENT OF RIGHT.

The right to take private property for public use is limited to public necessity, both as to amount of land and nature of the interest therein.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 147-160; Dec. Dig. § 58.*]

2. EMINENT DOMAIN (§ 317*)—EXTENT OF INTEREST ACQUIRED.

Generally, where land is taken for a purpose consistent with a general right of property in the owner, the right taken is an easement only.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 834-840; Dec. Dig. § 317.*]

3. EMINENT DOMAIN (§ 317*)—INTEREST ACQUIRED—FERRY SLIPS.

Upon taking land to widen a ferry slip under authority specially conferred, by St. 1871, c. 188, as amended by chapter 845, a ferry company acquired a fee.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 834-840; Dec. Dig. § 317.*]

Exceptions from Land Court, Suffolk County; C. T. Davis, Judge.

Petition by the Winnisimmet Company to register a land title. On exceptions by Edward L. Grueby and others. Exceptions overruled.

Jas. R. Dunbar, Arthur P. Teele, and H. M. Davis, for petitioner. Richard Stone and Robt. B. Stone, for respondents.

HAMMOND, J. The only question is whether by the taking under St. 1871, c. 188, as amended by St. 1871, c. 345, the petitioner acquired a fee in the locus.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

[1] The right to take private property for a public use is founded upon and limited by public necessity. Where the necessity stops there stops the right to take, both as to amount of land and the nature of the interest therein. [2] Accordingly the general rule is that where land is taken for a purpose not inconsistent with a general right of property in the owner the right taken is not a fee, but only an easement. *Harback v. Boston*, 10 Cush. 295; *Rockport v. Webster*, 174 Mass. 385, 54 N. E. 852; *Newton v. Newton*, 188 Mass. 226, 74 N. E. 346, and cases cited therein. In the first case above cited Shaw, C. J., said (10 Cush. 297): "When, therefore, the Legislature, being vested with this high power, use language not precise and explicit, but open to construction, and if one construction would convey the power beyond the limit necessary to meet the public exigency, and another construction would limit it by the extent of such exigency, we think the latter ought to be adopted, as the one intended by the Legislature."

But sometimes a fee is taken. *Dingley v. Boston*, 100 Mass. 544; *Page v. O'Toole*, 144 Mass. 303, 10 N. E. 851. And in the former of these two cases *Chapman, C. J.*, uses the following language: "Whether land be taken under the clause [in the state Constitution] authorizing the making of wholesome and reasonable laws, or by virtue of the clause authorizing the appropriation of private property to public uses, it must in either case be left to the Legislature to decide what quantity of estate ought to be taken in order to accomplish its purpose, and do the most complete justice to all parties. In the taking of other property no one would doubt that an absolute title might be acquired. * * * In taking land for highways, the Legislature has not deemed it necessary to take more than an easement; but the easement is usually perpetual. * * * The Constitution provides for the protection of all private property, and it provides that, when the public exigencies require that the property of any individual shall be appropriated to public uses, he shall receive a reasonable compensation therefor. But it leaves the Legislature, without any restriction, express or implied, to decide in each case as it arises, what constitutes such exigency; and if land is to be taken, what estate in it shall pass." 100 Mass. 560. The question is always one of the construction of the statute authorizing the taking (*Harback v. Boston*, *ubi supra*), and, as said by *Holmes, J.*, in *Newton v. Perry*, 163 Mass. 319, 321, 39 N. E. 1032, "there are no sacramental words which must be used in a statutory power to take and hold lands in order to give a right to take the lands in fee. Any language in the statute which makes its meaning clear is sufficient."

[3] In the light of the circumstances existing at the time of the enactment of the statute in question what is its true inter-

pretation? The petitioner was incorporated under a special act (St. 1833, c. 197), by which it was empowered "to purchase and hold any ferry or ferry rights, between Boston and Chelsea, and to construct and maintain wharves, landing places and other works suitable and convenient for the steamboats and other vessels which may be used on any such ferry, and for the accommodation of foot passengers, horses, carriages and merchandise; provided, that nothing herein shall authorize said corporation to take private property for any of said purposes otherwise than by legal authority from the owners thereof, nor to build any bridge or dam over the channel of any public navigable waters, or otherwise permanently to obstruct the same." It was further provided that said corporation might purchase and dispose of the whole or any part of the real estate held by certain trustees and described in a certain deed therein named, and "such other real estate at or near the landing places of any such ferry, not exceeding in value \$75,000, as may be necessary, or convenient for the purposes aforesaid, together with vessels and steamboats and such other personal property not exceeding in value \$100,000, as may be necessary and convenient for the better management of any such ferry and of the affairs of said corporation."

In October, 1833, the corporation purchased the ferry property and other real estate and took the title thereto in fee. The land and flats immediately adjoining the ferry property on the south including the locus were owned in 1837 by one *Aspinwall*. At that time the estates of the corporation and *Aspinwall* and of adjoining proprietors extended only to low-water mark, but by St. 1837, c. 211, and c. 212, both the corporation and *Aspinwall* were granted rights to extend their respective wharves to the old commissioners' line. A controversy arose between *Aspinwall's* successors in title and the corporation claiming under these legislative grants as to the boundary line between these estates below low-water mark. By a decision of this court rendered in 1865 (*Winnissimmet Co. v. Wyman*, 11 Allen, 432) the line was located further over upon the land of the corporation, thereby contracting its extent. In 1871 the corporation needing more land petitioned for authority to take some adjoining land for ferry purposes. The situation at that time is stated by the land court in the following language: "The *Winnissimmet Company* owned its adjoining ferry property in fee and was authorized by its charter to so hold it. It had trespassed on the land now in question by maintenance of piles for one wing of its ferry slip in such a manner as to interfere with the legitimate use of the whole of the present locus. After extended litigation it had been ejected therefrom. It had then failed to obtain any portion of the present property by agreement with the owner."

It had no way of getting the property except by legislative grant, and this it did not have. It never had been authorized to take property by right of eminent domain, even although the use it desired to make of it was a public use. The land was substantially the northerly half of a long, narrow strip reaching from Commercial street northerly to the commissioners' line, and was about 320 feet long and about 48 feet wide at one end and 66 feet at the other, a part being above low-water mark and a part below, with the rights and easements granted by St. 1837, c. 211. The ferry was upon one side of it, and Constitution Wharf, in which the owner of this land is not shown to have had any interest, was upon the other. Such was the situation, and such were the circumstances leading to it, at the time of the passage of St. 1871, c. 188.

The statute was passed upon the petition of the corporation for authority "to take land adjoining its present ferry slip in the city of Boston for the purpose of widening said ferry slip." The first section authorizes the corporation "to widen their ferry slip * * * in the city of Boston." The second section provides that the corporation "may purchase, or otherwise take, for the purpose of such widening" the locus, accurately describing it, "with all the rights, privileges, appurtenances and easements to * * * said estate belonging." It further provides that if the corporation shall not be able to obtain such land by an agreement with the owner thereof they shall pay such as shall be assessed in legal proceedings to be instituted for that purpose. Then follows the third section: "Nothing herein contained shall give said ferry company any right to enter upon, or deal with anything less than the whole of the parcel of land herein described or intended; and this act shall be void unless said land shall be purchased and paid for, or otherwise taken, and notice of such taking given in writing, to said Grueby or his representatives within six months from its passage."

It is to be noted that we are not dealing with a statute which is laying down the rules under which every ferry corporation shall take property at any time thereafter. The whole case is before the Legislature. The land to be taken is specifically described, and it is to be taken with all the rights, privileges, appurtenances and easements thereto belonging. And the corporation can take nothing less than the whole of the parcel of land. It must take the whole if anything, and it must purchase and pay for the land or take it within six months.

The conviction forced upon a person reading this statute in the light of the situation is that it is dealing with one special piece of property under peculiar circumstances; that

the Legislature was of the opinion that the ferry should be widened as prayed for by the corporation; that to do complete justice to both parties all the land with its easements and appurtenances should pass from the owner to the corporation, and that if the corporation could not purchase the property, it might take it, and that whether the corporation took by purchase or by right of eminent domain was immaterial so far as respected the amount of the land, or the nature of the interest taken. In either event it was to acquire under the peculiar circumstances the same estate, namely, a fee in the whole land with its easements and appurtenances. There seems to be no other reasonable construction of the statute. The amending statute being St. 1871, c. 345, has no bearing to the contrary.

Exceptions overruled.

(209 Mass. 206)

WILDE v. WILDE et al.

(Supreme Judicial Court of Massachusetts.
Suffolk. May 19, 1911.)

1. INSURANCE (§ 244*)—LIFE INSURANCE—SURRENDER VALUE OF POLICIES.

If pleaded, it would be a defense, in a suit to have the cash surrender value of unmatured life policies, issued by a company of another state, applied to indebtedness of insured to the assignee of the policies, that the policies contain no provision for a settlement till death of insured, and that the bill does not allege that by force of some statute of such other state the policies were given a surrender value.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 524-530; Dec. Dig. § 244.*]

2. INSURANCE (§ 200*)—ASSIGNMENT OF POLICIES—VALIDITY AND EFFECT—LAW GOVERNING.

Though insurance policies were issued by a company of another state, the validity and effect of assignments thereof, made and delivered between parties residing in Massachusetts, are governed by the local law, depending on construction of the policies.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 469; Dec. Dig. § 200.*]

3. INSURANCE (§ 147*)—POLICIES—CONSTRUCTION—LAW GOVERNING.

Insurance policies, issued by a company of another state, are to be construed by the laws of Massachusetts, where the insurance was applied for, the premium paid, the policies delivered, assured and insured resided, and the company did business, though at maturity the insurance money was to be paid at the home office.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 293; Dec. Dig. § 147.*]

4. INSURANCE (§ 203*)—LIFE POLICY—INTEREST OF INSURED.

Under a life policy payable to insured's wife, or, in case of her death before his, to their children, and reserving no right to him to change the beneficiary, or to surrender the policy, at his option, for its value in cash, he has no pecuniary interest therein which he can assign.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 471; Dec. Dig. § 203.*]

5. INSURANCE (§ 204*)—LIFE POLICY—ASSIGNMENT BY BENEFICIARY.

The interest of the wife of insured, under the provision of the policy on his life that the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

insurance money shall be paid to her if she survives him, passes under her assignment of the policy.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 472; Dec. Dig. § 204.*]

6. INSURANCE (§ 204*)—LIFE POLICY—ASSIGNMENT—PRIMARY AND SECONDARY BENEFICIARIES.

Under a life policy providing for payment of the insurance money to insured's wife or her assigns within 90 days after notice and proof of death of insured, and in case of the death of said assured before the death of insured then the money to be payable to their children, the right of the children, the wife having died before insured, was not defeated by her prior assignment of the policy, in which they did not join.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 472; Dec. Dig. § 204.*]

Appeal from Superior Court, Suffolk County.

Suit by Frank D. Wilde against George F. Wilde and others. From an adverse decree, plaintiff appeals. **Affirmed.**

Chas. H. Sprague and Everett W. Crawford, for appellant. Powers, Folsom & Powers, for appellees.

BRALEY, J. The plaintiff by the original bill as amended, and the supplemental bill, asks to have the cash surrender value of certain policies of life insurance not yet matured, applied in payment of the indebtedness of the defendant, George F. Wilde, who is the insured. The right to relief is rested on the ground, that the assignments of the policies to the original creditor, to whose rights the plaintiff has succeeded, having been given as security for the debt of the insured, and in which his wife, Catherine A. Wilde, who at that time was the assured, joined, entitles the plaintiff to a decree, that the policies which never were delivered to the assignee should be surrendered to the company, and their value paid to him. [1] It would be a sufficient answer to this claim, if the defense had been made, that the policies on their face contain no provision for a settlement until the death of the insured, and the bill does not allege that by force of some statute of the state of New Jersey, the company's domicile, the policies were given a cash surrender value. *Haskell v. Equitable Life Ins. Society*, 181 Mass. 341, 63 N. E. 899. [2] But the question not having been raised by the pleadings, and the company being willing to pay the cash surrender values if the rights of all parties having an interest therein are released, the validity and effect of the assignments, which having been made and delivered between parties residing here are governed by the local law, depend upon the construction of the policies. *Mutual Life Ins. Co. v. Allen*, 138 Mass. 24, 52 Am. Rep. 245.

[3] The plaintiff contends that this question must be decided according to the laws of New Jersey. It being undisputed, how-

ever, that the insurance was applied for, the premiums paid, and the policies delivered here, where the assured and the insured resided, and the company did business, the contracts, even if at maturity the insurance money was to be paid at the home office, are to be construed, and the rights of the parties ascertained, by the laws of Massachusetts. *Daniels v. Hudson River Fire Ins. Co.*, 12 Cush. 416, 422, 423, 59 Am. Dec. 192; *Thwing v. Great Western Ins. Co.*, 111 Mass. 93, 104, 109; *Millard v. Brayton*, 177 Mass. 533, 537, 59 N. E. 436, 52 L. R. A. 117, 83 Am. St. Rep. 294. It consequently becomes unnecessary to consider the effect of the foreign statute, and the decision under it put in evidence by the plaintiff, and we come directly to the terms of the policies. [4] The insurance was effected by the wife on the life of her husband, although the premiums were paid by him until the assignments. By a provision common to both policies, the company agreed to pay the amount of the insurance to her or her "assigns within ninety days after due notice and proof of the death of" the insured, "and in case the said assured should die before the decease of the said George F. Wilde then the amount of this insurance shall be payable to their children or to their guardian if under age, within ninety days after due notice and proof of interest, and of the death of said George F. Wilde. * * *". The right is not reserved to the insured to change the beneficiary with the consent of the company, or to surrender the policies at his option for their value in cash, and he had no pecuniary interest which he could assign. *Langdeau v. John Hancock Mutual Life Ins. Co.*, 194 Mass. 56, 66, 80 N. E. 452, 18 L. R. A. (N. S.) 1190; *Weatherbee v. New York Life Ins. Co.*, 182 Mass. 342, 65 N. E. 383; *Blinn v. Dame*, 207 Mass. 159, 93 N. E. 601.

[5] The language of the company's obligation to the assured is not uncertain, and should be given its apparent and usual meaning. It agreed to pay the money to the wife if she survived her husband, and this interest passed to the plaintiff by the assignments. *Boyden v. Mass. Mutual Life Ins. Co.*, 153 Mass. 544, 546, 27 N. E. 689; *Sullivan v. Maroney*, 76 N. J. Eq. 104, 73 Atl. 842. [6] But if she was the primary beneficiary, yet upon her death after the assignments were given, the insured having survived, neither her personal representatives nor assigns acquired any title to the insurance money. *Fuller v. Linzee*, 135 Mass. 468. If the wife predeceased her husband, the contract is then to pay to their children, who are to be ascertained at this period, and succeed as beneficiaries. *Thomson v. Ludington*, 104 Mass. 193. The defendants George F. Wilde, Jr., and Stella L. Wilde, having been at their mother's death the only living offspring of

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

the marriage, their rights to the proceeds of the policies at their father's death not having been defeated by the assignments to which they were not parties, became absolute, and the bill must be dismissed with costs. *Millard v. Brayton*, 177 Mass. 533, 59 N. E. 436, 52 L. R. A. 117, 83 Am. St. Rep. 294; *Knickerbocker Life Ins. Co. v. Weitz*, 99 Mass. 157; *Pingrey v. National Life Ins. Co.*, 144 Mass. 374, 382, 11 N. E. 562.

Decree accordingly.

(209 Mass. 198)

CROSBY v. CLEM.

(Supreme Judicial Court of Massachusetts.
Suffolk. May 19, 1911.)

1. HUSBAND AND WIFE (§ 36*)—POWER TO CONTRACT MUTUALLY.

One cannot contract directly with his wife.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. § 218; Dec. Dig. § 36.*]

2. HUSBAND AND WIFE (§ 47*)—MUTUAL TRANSACTIONS—VALIDITY.

A husband can give to a third person a valid note, mortgage or security for advances to the husband by the wife.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. § 238; Dec. Dig. § 47.*]

3. HUSBAND AND WIFE (§§ 47, 205*)—MUTUAL TRANSACTIONS—VALIDITY.

A wife can take and hold a transfer of a note or mortgage against her husband without extinguishing it, and can enforce it against his estate or transfer good title during his lifetime; but she cannot enforce it during his lifetime in her own name.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. §§ 238, 752; Dec. Dig. §§ 47, 205.*]

4. HUSBAND AND WIFE (§ 47*)—MUTUAL TRANSACTIONS—VALIDITY.

Validity of a note and mortgage in the hands of the debtor's wife is not defeated because the third person to whom they were executed immediately assigned them to her.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. § 238; Dec. Dig. § 47.*]

5. HUSBAND AND WIFE (§ 47*)—MUTUAL TRANSACTIONS—VALIDITY.

Validity of a note and mortgage based on the maker's debt to his wife is not affected by the fact that the consideration was executed; no rights of creditors being involved.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. § 238; Dec. Dig. § 47.*]

Appeal from Superior Court, Suffolk County; Edward P. Pierce, Judge.

Bill by Charles W. Crosby against Vernal E. Clem. Decree for plaintiff, and defendant appeals. Reversed, and bill dismissed.

C. R. Elder, for appellant. J. H. Vahey and P. Mansfield, for appellee.

RUGG, J. This is a suit in equity to restrain the foreclosure of a mortgage. The bill alleges that the plaintiff executed a mortgage of personal property to the defendant, and that it was assigned afterwards to the wife of the plaintiff. A justice of the superior court found as facts that in 1908

the wife of the plaintiff, at her husband's request, paid \$2,000 from her private property as the purchase price for the conveyance to the plaintiff of a stock of goods. Later, trouble having arisen between the two and the wife having filed a libel for divorce, an agreement was made that the husband should give to the wife \$500, and to the defendant, who was the wife's brother, a note for the \$2,000 so advanced by her, to be secured by a mortgage on what remained of the stock of goods bought with her money and subsequent purchases, and that the wife should suspend the divorce proceedings. This arrangement was carried out. The note and mortgage were executed accordingly, and made payable and delivered to the defendant. He immediately indorsed the note in blank, and assigned the mortgage to the plaintiff's wife, and delivered them to her. She thereafter retained possession of them until November, 1910, when she assigned the mortgage to the defendant without consideration, who commenced the foreclosure.

[1] It is settled in this commonwealth that even under recent statutes a husband cannot contract directly with his wife. [2] But it has been repeatedly decided that since the removal of the common-law disabilities of a wife there is nothing in law to prevent the husband from executing and delivering to a third person a valid note, mortgage or security for money advanced by her to the husband or for his benefit.

[3] A wife may take and hold a transfer of a note or mortgage against her husband without extinguishing either. *MacKeown v. Lacey*, 200 Mass. 437, 86 N. E. 799, 21 L. R. A. (N. S.) 683. The wife cannot enforce such obligations against her husband in her own name during his life, but she may against his estate after his death, and she may transfer a good title to others during his life.

[4] The note and mortgage were valid at their inception, having been as alleged in the bill and found by the court, executed and delivered to a third person. This legality was not impaired by the fact that they were at once assigned to the wife. If the transaction is genuine, as in this case, the length of time that the title is held by the third person is of no consequence, though where the facts are controverted this element may be significant evidence. It has not been argued that the mortgage and note are affected because given in the course of an adjustment of other difficulties between husband and wife, one element of which was a suspension of divorce proceedings already begun. See *Merrill v. Peaslee*, 146 Mass. 460, 16 N. E. 271, 4 Am. St. Rep. 334; *Newsome v. Newsome*, L. R. 2 P. & D. 306. Apparently this was severable, relating to a distinct matter, where the strongly equitable claim of the wife for security for the money advanced

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes

from her own estate was recognized and established.

[5] Nor is it of consequence that the consideration was past and executed, as no rights of creditors are involved.

Caldwell v. Nash, 190 Mass. 507, 77 N. E. 515, is plainly distinguishable in its facts. In that case it was said: "The evidence tended to show that these notes were given by the debtor to his wife * * * and there was no evidence that Henry L. Caldwell, Jr. [the nominal payee] had any relation to the transaction except to put his name upon the back of the notes. If these notes were given by the debtor to his wife for borrowed money, they were void." The course followed in the execution of the note and mortgage here in question was in substance the same as in *Spooner v. Spooner*, 155 Mass. 52, 28 N. E. 1121, where (as was said in *Caldwell v. Nash*) "the note was made and delivered as a valid contract with a third person upon a consideration moving from the wife." It is not necessary to determine whether if no mortgage and note had been given, the wife might have secured in equity relief for the money advanced for the benefit of the plaintiff. See *Atkins v. Atkins*, 195 Mass. 128, 80 N. E. 806, 11 L. R. A. (N. S.) 273, 122 Am. St. Rep. 221, and cases cited. The case is within the principle of *Butler v. Ives*, 139 Mass. 202, 29 N. E. 854, *Atlantic Bank v. Taverner*, 130 Mass. 407, *Holmes v. Winchester*, 133 Mass. 140, *Model Lodging House Ass'n v. Boston*, 114 Mass. 133, and *Degnan v. Farr*, 126 Mass. 297.

Decree reversed.

Bill dismissed.

(209 Mass. 229)

CORAM v. DAVIS et al.

(Supreme Judicial Court of Massachusetts.
Suffolk. May 20, 1911.)

1. DESCENT AND DISTRIBUTION (§ 157*) — LIENS — REMEDY IN EQUITY — ENFORCING PAYMENT OUT OF A SPECIFIED FUND.

Complainant made advances to the heirs of a decedent under assignments of fractional interests the heirs would receive on the disallowance of the will of decedent. The will was admitted to probate under a compromise agreement, which substantially set the will aside, and which provided that one-half of the expenses incurred in carrying out the agreement should be paid by complainant and two others, to be reimbursed out of funds of the estate. The agreement provided that complainant and his associates should be paid out of the amount to be paid by the trustees of the estate. *Held*, that complainant was entitled to sue in equity to recover the advances made to the heirs, because an equitable charge on the interests of the heirs was created.

[Ed. Note.—For other cases, see *Descent and Distribution*, Dec. Dig. § 157.*]

2. DESCENT AND DISTRIBUTION (§ 157*) — LIENS — REMEDY IN EQUITY — ENFORCING PAYMENT OUT OF A SPECIFIED FUND.

Complainant could sue in equity for the money furnished, on the theory that all the par-

ties in interest agreed that the money should be repaid out of a designated fund.

[Ed. Note.—For other cases, see *Descent and Distribution*, Dec. Dig. § 157.*]

3. WILLS (§ 212*)—PROBATE—AGREEMENT RESPECTING—CONSTRUCTION.

A compromise agreement, allowing in form the probate of a will, but in fact disallowing it, provided that one-half of the expenses incurred in carrying out the agreement should be paid by plaintiff and associates, and stipulated that they would advance from time to time as required by the trustees of the estate one-half of all expenses, and declared that all funds furnished for expenses in carrying out the agreement should be reimbursed out of the estate. *Held*, that complainant was entitled to recover expenses paid by him, though they were not required by the trustees; the stipulation as to advancements as required by the trustees not qualifying the provision that all funds furnished for expenses should be reimbursed.

[Ed. Note.—For other cases, see *Wills*, Dec. Dig. § 212.*]

4. COURTS (§ 475*)—CONFLICTING JURISDICTION.

A bill in the nature of a creditors' bill to reach the interests of the heirs of a decedent for the payment of sums disbursed and expenses incurred by complainant on behalf of the heirs in connection with litigation over the estate is not objectionable, as seeking to overthrow the orders of distribution made by a court having jurisdiction of the estate, where complainant must look to the orders as the basis on which his bill must be maintained, and equity has jurisdiction of the controversy.

[Ed. Note.—For other cases, see *Courts*, Dec. Dig. § 475.*]

5. EXECUTORS AND ADMINISTRATORS (§ 314*)—DISTRIBUTION—SCOPE OF INQUIRY.

The probate court, in making orders of distribution of an estate, does not concern itself with assignments or pledges of distributive shares, or with the enforcement of equitable liens thereon, but such questions must be determined in a court of equity.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 1274-1297; Dec. Dig. § 314.*]

6. COURTS (§ 17*)—JURISDICTION—PROPERTY IN FOREIGN STATE.

A bill in the nature of a creditors' bill to reach the interests of heirs of a decedent for the payment of sums disbursed and expenses incurred on behalf of the heirs in connection with the litigation over the estate may be maintained, though part of the property involved may be in a sister state.

[Ed. Note.—For other cases, see *Courts*, Cent. Dig. §§ 46-52; Dec. Dig. § 17.*]

7. DESCENT AND DISTRIBUTION (§ 157*) — LIENS—ENFORCEMENT—REMEDY IN EQUITY.

The remedy of one claiming to charge for a payment due him the whole or some fractional parts of any of the distributive shares of the estate of a decedent, or any part of a trust fund of the estate, or to reach and apply any part of the fund in the hands of distributees, receiving it from trustees, either as volunteers or with notice of complainant's equitable rights, can only be enforced in equity.

[Ed. Note.—For other cases, see *Descent and Distribution*, Dec. Dig. § 157.*]

8. EQUITY (§ 148*)—PLEADING—MULTIFARI- GEOUSNESS.

A bill in equity, which seeks to reimburse complainant for expenses incurred in litigation over the estate of a decedent, by the application of funds of the estate in one or another of which all defendants are directly or indirectly interest-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes

ed, and which asks that the amount of the shares of distributees of the estate who have sold their interests to complainant be ordered paid, is not objectionable as multifarious, and the fact that different means are sought for the attainment of one equitable right out of the whole or different parts of the estate does not make the bill multifarious.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 341-367; Dec. Dig. § 148.*]

9. LIMITATION OF ACTIONS (§ 180*)—PLEADING—DEMURRER RAISING DEFENSE.

That a bill shows that plaintiff's whole remedy is barred by limitations is a ground of demurrer.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 670-675; Dec. Dig. § 180.*]

10. LIMITATION OF ACTIONS (§ 173*)—PERSONS WHO MAY ASSERT DEFENSE—DEMURRER.

Where a defendant, entitled to set out the defense of limitations to a bill in equity, waives the defense, a codefendant, not entitled to rely on limitations, may not by demurrer set up the defense.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 658; Dec. Dig. § 173.*]

11. ACTION (§ 53*)—SPLITTING CAUSE OF ACTION—ITEMS NOT MATURED.

One making advancements in behalf of heirs of a decedent in connection with litigation over the estate need not, on seeking a reimbursement out of the estate pursuant to the agreements of the parties, ask to be reimbursed for what must be paid to an attorney employed in the litigation until liability therefor has been established.

[Ed. Note.—For other cases, see Action, Cent. Dig. §§ 549-623; Dec. Dig. § 53.*]

12. LIMITATION OF ACTIONS (§ 180*)—PLEADING—DEMURRER.

A defense of limitations based on the law of a sister state not stated in a bill in equity is not a ground of demurrer to the bill.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 670-675; Dec. Dig. § 180.*]

13. EQUITY (§ 87*)—PLEADING—DEMURRER—GROUNDS.

A bill brought to enforce security by reason of equitable liens or charges on the estate of a decedent for advancements and expenses incurred for the heirs of the decedent in connection with litigation over the estate is not demurrable on the ground that an action at law is barred.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 242-244; Dec. Dig. § 87.*]

14. EQUITY (§ 71*)—PLEADING—DEMURRER—LACHES.

A bill in equity is not demurrable on the ground of laches, in the absence of any showing therein that the suit was not begun with reasonable expedition, or that the rights of defendants have been injuriously affected by the delay.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 204-211; Dec. Dig. § 71.*]

Report from Supreme Judicial Court, Suffolk County.

Bill in equity by Joseph A. Coram against Andrew J. Davis and others, in the nature of a creditors' bill to reach and apply the interest of the heirs of Andrew J. Davis, deceased, to the payment of sums disbursed and expenses incurred by complainant on behalf of heirs in connection with the litigation over the estate, finally settled by compromise un-

der which distribution of the estate has proceeded. Case reported to the Supreme Judicial Court by a single justice. Demurrers to the bill overruled.

Chandler M. Wood and Horace B. Stanton, for complainant. Hollis R. Bailey, E. N. Harwood, and Charles E. Stearns, for respondents.

SHELDON, J. The plaintiff claims in his bill that for his advances made to the defendant Root for his benefit and for that of the other four heirs to the Davis estate for whom Root was acting (hereinafter called the Root group) he had, under the assignments made by the Root group, a lien upon fractional interests of what would be their respective shares in said estate if the will of the elder Davis should not be allowed; that by the agreement of compromise made April 28, 1893, between the parties in interest, the will, although in form to be allowed, was in reality set aside and shares larger than they could have expected were assigned to the Root group; that by that agreement there was to be allowed to the Root group out of the estate the sum of \$500,000, on account of their expenses theretofore incurred in litigation, and that this provision was intended to be a provision for the repayment of the advances so made by the plaintiff, and for the payment of Mr. Ingersoll, who had been employed to represent that group on the promise of a contingent fee. This agreement provided also in its thirteenth article, that all expenses incurred in carrying it out should be furnished, one-half by the parties to it of the first part, and one-half by the plaintiff and two others, and provided for their reimbursement out of the estate. A decree was afterwards entered in the Montana court, in which the contest over the will was pending, admitting the will to probate, ordering distribution according to the terms of the compromise agreement and some later agreements not now material, and adopting the agreements of the parties. That court also by a later decree confirmed the agreement of compromise and the later agreements by which contests over the will were settled. The plaintiff claims also that he then advanced further sums of money which ought, under the agreement, to have been repaid to him out of the estate as well as out of the shares of the Root group. He avers that the assets in the hands of the defendant Leyson, the ancillary administrator of the estate of the elder Davis in this commonwealth, after paying the amount which has been found due to Ingersoll, and the shares of other heirs upon which the plaintiff has no specific right of charge, are insufficient to meet the plaintiff's demands, and claims the right to hold the assets that are or should be in the hands of the defendants Davis and

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Palmer, regardless of distributions thereof which they have made to the distributees of the estate. He claims also, after the payment of Ingersoll out of the funds which are available to him, that he is entitled to be subrogated to the equitable lien or charge which it has been decided that Ingersoll has upon the shares of the Root group or parts thereof. *Ingersoll v. Coram*, 211 U. S. 335, 29 Sup. Ct. 92, 53 L. Ed. 208. He has joined as defendants the administrators of the Davis estate in Montana and in this commonwealth, all parties interested in the estate as distributees or their representatives, and all the parties to the agreement of compromise.

[1] 1. The first ground of demurrer is for lack of equity. We are of opinion that the plaintiff shows for the payment of his advances made before April 28, 1893, an equitable charge upon the interests in the shares of the Root group, of which he had taken assignments. This is scarcely disputed, and need not be discussed.

These shares or rights could not come into existence, and there would be no fund upon which the plaintiff could have a charge, unless the will of Davis were disallowed; and the will was admitted to probate. But it was merely a formal allowance, and in reality all but a few minor provisions of the will were wholly set aside by the agreement of the parties and the decree of the Montana court made thereon. This has been so decided both by the Circuit Court and by the Supreme Court of the United States. *Ingersoll v. Coram* (C. C.) 127 Fed. 418; *Id.*, 211 U. S. 335, 29 Sup. Ct. 92, 53 L. Ed. 208. It was so held in Montana, the state in which Davis had his domicile and in whose courts the proceedings were had. *Davis' Estate*, 27 Mont. 490, 71 Pac. 757. We cannot now regard this as an open question.

Can the plaintiff resort in equity to the fund provided by the compromise agreement to meet the expenses thus far incurred in the litigation? Was this fund or any part of it so far appropriated for the payment of his claim including what might be found to be due to Ingersoll, as to give this right to the plaintiff? It was not provided by the agreement that payment should be made to him or to Ingersoll; the parties were "to have and receive" it out of the amount which was to be paid by the trustees. But it was set aside for their expenses. It was a means provided to meet these liabilities, a fund out of which they were to make the payments. Under such circumstances a creditor may in equity avail himself of the means of paying his demand which have been thus set apart for the relief of his debtor and through his debtor for himself. *Wiggin v. Dorr*, 3 Sumn. 410, 1 Fed. Cas. No. 17, 625; *Rice v. Dewey*, 13 Gray, 47; *Demott v. Stockton Paperware Co.*, 32 N. J. Eq. 124; *Harmony Bank's Appeal*, 101 Pa. 428; *Dunlap v. O'Bannon*, 5 B. Mon. (Ky.) 393; *Ross v. Saulsbury*, 52 Ga.

379; *Dover, Ex parte*, 14 Q. B. D. 611; *City Bank v. Luckie*, L. R. 5 Ch. 773.

[2] The plaintiff for the money furnished by him to carry out the compromise agreement rests upon the provision thereof that this should in part be furnished by him and others and should be repaid out of the estate. It is true, as was said in *Elmore v. Symonds*, 183 Mass. 321, 326, 67 N. E. 814, that a mere personal promise to pay a debt out of a particular fund will not create a lien or equitable charge upon the fund. *Christmas v. Russell*, 14 Wall. 69, 20 L. Ed. 762; *Dillon v. Barnard*, 21 Wall. 430, 22 L. Ed. 673; *Trist v. Child*, 21 Wall. 441, 22 L. Ed. 623; *Removal Cases*, 100 U. S. 457, 25 L. Ed. 593; *Butler's Estate*, 105 Fed. 549, 44 C. C. A. 584; *Rogers v. Hosack*, 18 Wend. (N. Y.) 319; *McDonald v. American Bank*, 25 Mont. 456, 65 Pac. 896. But this was not a naked agreement to pay the expenses in the manner provided. It was an arrangement by which the persons who were to furnish the necessary money had the right to understand that the funds of the estate, at least so far as those funds should come to the hands of the trustees, were appropriated for their payment. It was an agreement by all the parties then in interest, undertaking to provide for the disposition of the whole estate and engaging that the amounts properly furnished for the carrying out of the agreement should be repaid out of the designated fund. It authorized the custodians of the fund to apply it so far as might be necessary for this purpose. It appropriated the fund for the repayment, and thereby created an equitable charge upon it. This doctrine has been undisputed since the decision of *Legard v. Hodges*, 1 Ves. Jr. 478. It has been affirmed by this court. *Baylies v. Payson*, 5 Allen, 473; *Pinch v. Anthony*, 8 Allen, 536. It has been declared by other courts in elaborate opinions. *Ingersoll v. Coram*, 211 U. S. 335, 29 Sup. Ct. 92, 53 L. Ed. 208; *Walker v. Brown*, 165 U. S. 454, 17 Sup. Ct. 453, 41 L. Ed. 865; *Fourth Street Bank v. Yardley*, 165 U. S. 634, 17 Sup. Ct. 439, 41 L. Ed. 855; *Ketchum v. St. Louis*, 101 U. S. 306, 25 L. Ed. 990; *Fletcher v. Morey*, 2 Story. 555, Fed. Cas. No. 4,864; *Stranahan v. Richardson*, 75 Minn. 402, 78 N. W. 110, 671.

[3] But the defendants claim that by the compromise agreement the plaintiff and his associates were to be repaid only such advances as they were required by the trustees to make. This contention is based upon the undertaking of *Coram* and others subjoined to the agreement that they would "advance from time to time as required" by the trustees "one half of all expenses," etc. This bound the plaintiff to make only such advances as should be required by the trustees, but it leaves unqualified the provision in the thirteenth article of the agreement that all funds furnished for "expenses incurred in the carrying out" of the agreement should be re-

imbursed out of the estate. The plaintiff may well have been unwilling to bind himself without limitation by an independent promise to advance money without an assurance from the trustees that it was really needed; but the parties to the agreement did not choose to put the limitation upon their promise of repayment. Moreover the covenant of the parties of the first part to furnish one-half of such expenses was unlimited, and called for no assurance or requirement from the trustees; and the obligation of repayment to the plaintiff was the same as to those parties. We cannot now for the benefit of the defendants add to their absolute obligation a limiting stipulation not contained in the agreement. The agreement as written must be taken to be the final and complete repository of the intention of the parties to it. *Bray v. Kettell*, 1 Allen, 80, 83; *Howland v. Leach*, 11 Pick. 151, 154; *Brown v. Fales*, 139 Mass. 21, 28, 29 N. E. 211.

[4-6] The bill in no way seeks to overthrow the orders of distribution made in the district court of Montana or in the probate court here. Indeed, those orders, establishing the funds to which the plaintiff must look and fixing their amount, are the basis upon which, if at all, the bill must be maintained. Until those orders should be made, the plaintiff's remedy would not be completely available. Even if his rights might have been established and declared before the making of those orders, yet they could not all have been enforced until those orders should be made. *Ingersoll v. Coram*, 211 U. S. 335, 357, 29 Sup. Ct. 92, 53 L. Ed. 208. Those orders, if not appealed from, conclusively establish the amounts to be distributed, the parties entitled, and the sums to be paid to each distributee; they are not now to be attacked. *Loring v. Steineman*, 1 Metc. 204; *Crippen v. Dexter*, 13 Gray, 330; *White v. Weatherbee*, 126 Mass. 450; *Pierce v. Prescott*, 128 Mass. 140, 143; *Harris v. Starkey*, 176 Mass. 445, 447, 57 N. E. 698, 79 Am. St. Rep. 322; *Tobin v. Larkin*, 187 Mass. 279, 72 N. E. 985; *Minot v. Purrington*, 190 Mass. 336, 77 N. E. 630; *Cleveland v. Draper*, 194 Mass. 118, 80 N. E. 227. But the probate court does no more than to determine these questions and to order distribution accordingly. It does not concern itself with assignments or pledges of the distributive shares or with the enforcement of equitable liens thereon. Such questions must be determined in other courts; and in the case at bar the questions raised are for a court of equity to settle. *Lenz v. Prescott*, 144 Mass. 505, 515, 11 N. E. 923. Nor is it a bar to maintaining this bill that part of the property involved may be in Montana. *Ricketson v. Merrill*, 148 Mass. 76, 83, 19 N. E. 11.

[7] 2. The reasons already stated show that the plaintiff has not an adequate remedy at law. His claim to charge for his payment the whole or some fractional parts of any of the distributive shares of this estate,

or any part of the trust fund already referred to, or to reach and apply any part of that fund in the hands of distributees who have received it from the trustees either as volunteers or with notice of the plaintiff's equitable rights, plainly can be enforced only in equity. *Lenz v. Prescott*, 144 Mass. 505, 11 N. E. 923; *Ingersoll v. Coram*, 211 U. S. 335, 29 Sup. Ct. 92, 53 L. Ed. 208. The bill does not state a case in which the plaintiff has trusted merely to personal promises and must be left to rely upon them as in *Hussey v. Arnold*, 185 Mass. 202, 203, 70 N. E. 87, and *Taylor v. Davis*, 110 U. S. 330, 4 Sup. Ct. 147, 28 L. Ed. 163. We need not consider whether, if that were the case, the bill could be maintained under the prayer for general relief or otherwise under R. L. c. 159, § 3, cl. 7.

[8] 3. It is said also that the bill is multifarious. So far as it seeks merely to recover the plaintiff's advances to the Root group and the amounts furnished by him to carry into effect the compromise agreement, this objection cannot be sustained. The bill aims at one object, the reimbursement of the plaintiff by the application of certain funds, in one or another of which all the defendants are directly or indirectly interested. The fact that different means are sought for the attainment of one equitable right, out of the whole or different parts of one estate, does not make the bill multifarious. *Parker v. Simpson*, 180 Mass. 334, 62 N. E. 401; *Dunphy v. Traveller Newspaper Association*, 146 Mass. 495, 499, 16 N. E. 426; *Lenz v. Prescott*, 144 Mass. 505, 512, 513, 11 N. E. 923; *Commercial Ins. Co. v. McLoon*, 14 Allen, 351. As in *Andrews v. Tuttle-Smith Co.*, 191 Mass. 461, 78 N. E. 99, it is desirable that all the claims of the plaintiff which affect the administration of the estate should be disposed of in one suit. All of the defendants are properly made parties. *Attorney General v. Parker*, 126 Mass. 216; *Cassidy v. Shimmis*, 122 Mass. 406; *Graves v. Corbin*, 132 U. S. 571, 576, 10 Sup. Ct. 196, 33 L. Ed. 462, following *Brinkerhoff v. Brown*, 6 Johns. Ch. (N. Y.) 139; *Colbert v. Daniel*, 32 Ala. 314. The language of *Devens, J.*, in *Lenz v. Prescott*, 144 Mass. 505, 513, 11 N. E. 923, is applicable: "The plaintiff has a demand growing out of an assignment by which every defendant was affected, and their various interests are so blended that it would be impossible to separate the investigation of them with convenience. It is not indispensable that all the parties should have an interest in all the matters contained in the suit; it is sufficient if each party has an interest in some matters in the suit, and that they are connected with the others. Even if one is a necessary party to some portion only of the case, the bill is not therefore necessarily multifarious."

The plaintiff avers also that he has purchased the interests of two of the distributees of the estate, and asks that the net

amount of their shares be ordered to be paid to him. This alleged right too is a part of the general right which the plaintiff claims to have acquired in the estate and its administration. It is within the reason of the decisions last referred to. It is for the interest of all parties that the whole question of the plaintiff's rights in the estate should be settled once for all in one suit. *Noble v. Joseph Burnett Co.*, 208 Mass. 75, 94 N. E. 289.

[9-13] 4. If the bill shows that the plaintiff's whole remedy is barred by our statute of limitations, this is ground of demurrer. *Fogg v. Price*, 145 Mass. 513, 516, 14 N. E. 741. But it is not material to determine whether an action at law for the plaintiff's advances made to the Root group before April 28, 1893, would be so barred. Those defendants have not cared to raise the question upon the demurrers. If they choose to waive the defense, it is not for the demurring defendants to set it up. Moreover, as we have seen, the plaintiff's equitable remedy against the fund here was not complete until proper action had been taken in the probate court; it would be hard to say that he was bound to bring his bill earlier. The same considerations apply to money furnished by the plaintiff since the date last mentioned under the compromise agreement. Nor need he seek to be reimbursed for what must be paid to Ingersoll until that liability had been established. So far as this defense depends upon the Montana statute of limitations and the local law of that state, this is matter of fact, of which, as it is not stated in the bill, we can have no knowledge except by plea and proof, and is not a ground of demurrer. And the bill is brought to enforce security which the plaintiff claims to hold by reason of equitable liens or charges. We need not consider whether such equitable security would fall with the indebtedness if the debtors should maintain this defense, or whether the plaintiff still could enforce his equitable security though the action at law was gone. *Shaw v. Silloway*, 145 Mass. 503, 506, 14 N. E. 783; *Townsend v. Tyndale*, 165 Mass. 293, 43 N. E. 107, 52 Am. St. Rep. 513. This is not a good ground of demurrer.

[14] 5. For substantially similar reasons, it cannot be said that the bill shows such laches as to bar the plaintiff. The bill seems to have been brought with reasonable expedition after the decree of the probate court had been made. There is nothing to show that the rights of the defendants have been injuriously affected by delay. There is no fixed rule as to what constitutes laches; it depends upon the circumstances. *Snow v. Boston Blank Book Mfg. Co.*, 153 Mass. 456, 458, 26 N. E. 1116. See *Sunter v. Sunter*, 190 Mass. 449, 77 N. E. 497; *Manning v. Mulrey*, 192 Mass. 547, 78 N. E. 551; *Hill v. Mayor of Boston*, 193 Mass. 569, 79 N. E.

825; *Moseley v. Bolster*, 201 Mass. 435, 87 N. E. 606. The bill upon its face does not come within the doctrine of such cases as *Royal Bank of Liverpool v. Grand Junction Railroad*, 125 Mass. 490, 494; *Dunphy v. Traveller Newspaper Association*, 146 Mass. 490, 495, 16 N. E. 428; *Willard v. Wood*, 164 U. S. 502, 17 Sup. Ct. 176, 41 L. Ed. 531; *Holder v. Hillson*, 170 Mass. 466, 49 N. E. 643; *Doane v. Preston*, 183 Mass. 569, 67 N. E. 867; *Sawyer v. Cook*, 188 Mass. 163, 74 N. E. 356; and *Marvel v. Cobb*, 200 Mass. 493, 86 N. E. 360. See *Hawkes v. Lackey*, 207 Mass. 424, 93 N. E. 828. It may be that when the facts shall have been developed the plaintiff's case will fail in whole or in part by reason of laches or of the statute of limitations, if those defenses are set up, but we cannot say that either of them is shown by the averments of the bill.

We have not considered whether the agreements under which the plaintiff advanced money to the Root group could be avoided for champerty or maintenance, as that question has been neither raised nor argued.

Demurrers overruled.

(200 Mass. 18)

WATSON et al. v. CITY OF BOSTON.

(Supreme Judicial Court of Massachusetts.
Suffolk. May 18, 1911.)

1. TAXATION (§ 61*)—"PROPERTY."
"Property," within the tax laws, includes every species of valuable right and interest.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. §§ 145, 164, 165; Dec. Dig. § 61.*

For other definitions, see *Words and Phrases*, vol. 6, pp. 5693-5728; vol. 8, pp. 7768-7770.]

2. TAXATION (§§ 241, 242*) — EXEMPTION — TRUST FUNDS.

The interest of a literary, benevolent, charitable, or scientific institution as beneficiary of income of a trust fund is property, and exempt under Rev. Laws, c. 12, § 5, cl. 3, exempting the personal property of such institutions from taxation, unaffected by the provision by clause 5 of section 23 that, with certain exceptions, personal property held by a trustee to pay the income to another shall be assessed to the trustee.

[Ed. Note.—For other cases, see *Taxation*, Dec. Dig. §§ 241, 242.*]

Report from Superior Court, Suffolk County.

Petition by Paul Barron Watson and others, trustees, against the City of Boston, to abate a tax. On report. Judgment for petitioners.

O. F. Choate, Jr., and P. B. Watson, for petitioners. J. D. McLaughlin, for respondent.

HAMMOND, J. The petitioners do not contest their liability to be taxed for that part of the trust fund whose income is payable to certain persons, but they contend that the part whose income is payable to the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Wentworth Institute is exempt from taxation. Inasmuch as this case concerns only this latter part, for the sake of brevity this part will be hereinafter designated as the trust fund.

R. L. c. 12, § 5, cl. 3, so far as material to the question before us, provides that "the personal property of literary, benevolent, charitable and scientific institutions" shall be exempt from taxation. And the question is whether personal property held in trust to pay over the income to such an institution is within the statute.

R. L. c. 12, § 23, cl. 5, provides that with certain exceptions personal property held by a trustee the income of which is payable to another person shall be assessed to the trustee. In any event therefore this fund cannot be assessed to the cestui que trust the Wentworth Institute. The contention of the respondent that the fund is not exempt is based largely upon this provision. It is stated in its brief as follows: "The statute exempting from taxation the personal property of certain institutions should be construed as exempting it only so far as such property would be otherwise taxable to such institutions. If, under the statutes declaring to whom property shall be assessed, the institution could not legally be assessed for its equitable interest in personal property, then the statute of exemptions cannot be invoked, because the object of this statute is merely to forbid an assessment where one could otherwise be legally made." And in support of this position it argues that the section exempting the property of the institutions named "does not operate on the property itself, but, read in connection with those sections of the same chapter which provide where and to whom property shall be assessed [it] in effect declares that such institutions shall not be assessed for such property," and further that under our scheme of taxation an assessment, so far, at least, as respects personal estate, is not a proceeding in rem but "purely one in personam" and "[l]iability to pay [taxes upon personal estate] attaches to the person and not to the property on account of which the tax is assessed."

In considering the question it is well to look into the history of the legislation respecting taxation.

Under the colonial statutes of 1651-57 (Anc. Ch. 69), personal property held in trust appears to have been taxed to the trustee and not to those beneficially interested in the trust. It was described in these statutes as being "under the custody or managing" of the person assessed. And the same provision is contained in the provincial statutes. See Prov. Sts. 1692-93, c. 4, § 1; Prov. Sts. 1694-95, c. 2, § 4; 1 Prov. Laws, 29, 167, et passim. Early in the tax acts there was a provision that the assessors should make a fair list of the assessment, "setting forth in

distinct columns, against each particular person's name, how much he or she is assessed at for polls, how much for houses and lands, and how much for personal estate and income by trade or faculty." This last phrase did not mean income from property, but from employment. Prov. Sts. 1715-16, c. 11, § 2; Prov. Sts. 1740-41, c. 8, § 3; 2 Prov. Laws, 21, 1033, et passim; Prov. Sts. 1742-43, c. 31, § 3; Prov. Sts. 1745-46, c. 1, § 3; 3 Prov. Laws, 61, 233, et passim. And as early as 1747 this provision was amended by adding thereto the following: "And if as guardian, or for any estate in his or her improvement in trust, to be distinctly expressed." Prov. St. 1746-47, c. 1, § 3; Prov. St. 1747-48, c. 1, § 3; 3 Prov. Laws, 288, 354. This provision is continued through the succeeding provincial statutes (Prov. Sts. 1757-58, c. 2, § 3; Prov. Sts. 1759-60, c. 2, § 3; Prov. Sts. 1767-68, c. 8, § 3; 4 Prov. Laws, 15, 261, 971, et passim; Prov. Sts. 1769-70, c. 1, § 3; Prov. Sts. 1773-74, c. 14, § 3; Prov. Sts. 1780, c. 16, § 2; 5 Prov. Laws, 19, 319, 320, 1430, et passim) and the earlier state statutes (St. 1780, c. 43; St. 1781, cc. 16, 28; St. 1782, c. 65; St. 1784, c. 25; St. 1785, c. 74), up to St. 1795, c. 11, where the phrase "in his or her improvement" was changed to "in his or her possession," and as thus verbally changed this part of the provision continued until St. 1804, c. 144, when it was changed so as to read "distinguishing any sum assessed on such person as guardian, or for any estate in his or her possession in trust," and so continued (see among others the tax acts of 1810, 1811, 1821) until the statute passed March 4, 1829, commonly cited as St. 1828, c. 143.

This statute made a change as to the assessment of trust property. It provided that "persons entitled to the income of any personal property held by others in trust for them, shall be liable to be taxed for the capital or principal sum in the town where such persons reside." And with a modification as to married women not here material such continued to be the law until changed in 1860 by the General Statutes. Rev. St. 1836, c. 7, § 10, cl. 5, and Report of the Commissioners on this clause.

The commissioners on the General Statutes recommended a change which in substance was adopted and became Gen. St. 1860, c. 11, § 12, cl. 5, which reads as follows: "Personal property held in trust by an executor, administrator, or trustee, the income of which is payable to another person, shall be assessed to the executor, administrator, or trustee, in the place where such other person resides, if within the state, and if he resides out of the state it shall be assessed in the place where the executor, administrator, or trustee resides, and if there are two or more executors, administrators, or trustees, residing in different places, the property shall be assessed to them in equal

portions in each place, and the tax thereon shall be paid out of said income. If the executor, administrator, or trustee, is not an inhabitant of this state, it shall be assessed to the person to whom the income is payable in the place where he resides." And such has been the law up to the present time. Pub. St. 1882, c. 11, § 20, cl. 5; R. L. c. 12, § 23, cl. 5; St. 1909, c. 490, pt. 1, § 23, cl. 5.

From this review of the tax legislation it appears that from 1651 to 1828 property held in trust was assessed to the trustee; from 1828 to 1860 to the cestui que trust; and from 1860 to the present time, in certain cases to the trustee and in certain other cases to the cestui que trust.

From an early period in our history there have been exemptions from general taxation. There are at least two classes, the first based upon the use to which the property is appropriated, as for instance the personal property of educational institutions, household furniture and workmen's tools; the second based upon the inability of the owner to pay a tax, as for example the estates of infirm and poor people. The property is exempt in the first class irrespective of the question whether the owner is able to pay a tax, and in the second irrespective of the nature of the use. The present general provision as to the exemption of the personal property of institutions like the Wentworth Institute was inserted in the Revised Statutes, and, with some modifications not material to the question before us, has continued to the present time. Rev. St. 1836, c. 7, § 5, cl. 2; Gen. St. 1860, c. 11, § 5, cl. 3; St. 1874, c. 375, § 8; St. 1878, c. 214; Pub. St. 1882, c. 11, § 5, cl. 3; St. 1882, c. 217, § 2; St. 1886, c. 231; St. 1888, c. 158; 1889, c. 465; R. L. c. 12, § 5, cl. 3; St. 1909, c. 490, pt. 1, § 5, cl. 3.

[1] The legal title to this trust fund, it is true, is in the trustees, but the whole beneficial interest is in the institution. The term "property" in its ordinary legal signification "is nomen generalissimum and extends to every species of valuable right and interest." *Boston & Lowell R. R. v. Salem & Lowell R. R.*, 2 Gray, 1, 35. See, also, *Williston Seminary v. County Commissioners*, 147 Mass. 427, 18 N. E. 210. It certainly is broad enough to cover an equitable interest like that possessed by the Wentworth Institute in this trust fund.

Nor can it be material that the property is by law assessable to the trustee and not to the person entitled to the beneficial interest.

The exemption is based upon the use which is presumed to be made of the fund, namely for an educational purpose, and not upon the persons in whom stands the legal title. The law as to the assessment of personal property held in trust whose income is payable to another has been changed from time to time. As already stated, from 1828 to 1860 the fund was assessed to the cestui que trust, if living in the state, otherwise to the trustee in the town where he resided. R. L. c. 12, § 23, cl. 5, makes various provisions about the assessment of property held in trust, depending upon the respective residences of the trustee and beneficiaries. It is assessed to the trustee if residing in this commonwealth, otherwise to the beneficial owner residing in this commonwealth. And there are various provisions as to the particular town in which it shall be assessed. In this very case, if the trustees should remove from the commonwealth the fund would be taxable to the Wentworth Institute; and hence, even upon the reasoning of the respondent, would be exempt. And if one of the trustees should afterwards become a resident of this commonwealth, then it would be taxable to him and upon the same reasoning would not be exempt. And so if the respondent's position is correct property whose exemption is based upon the use to which it is appropriated would be exempt or not exempt according as the trustee lived without or within the commonwealth.

This interpretation loses sight of the ground of the exemption and makes the exemption hinge upon a merely accidental circumstance not pertaining to the ground upon which it is based. It must be held to be unreasonable.

[2] For the reasons above stated we are of opinion that the equitable interest of the Wentworth Institute in the trust fund is property within the meaning of the exempting clause of the statute, and that the section prescribing the manner of assessing trust funds in no way affects the right of exemption under that clause. Under this interpretation the question of exemption is made to depend not upon the irrelevant fact of the residence of the trustee within or without the commonwealth as the case may be, but upon the true test, namely, the use to which the property is to be appropriated.

In accordance with the terms of the report the order is:

Judgment for the petitioners.

(176 Ind. 70)

BENDER v. STATE ex rel. HARNISH.

(No. 21,914.)

(Supreme Court of Indiana. June 9, 1911.)

1. APPEAL AND ERROR (§ 722*)—ASSIGNMENT OF ERRORS—PARTIES.

Under the rules of the Supreme Court, assignment of errors must contain the names of all the parties.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2990-2996; Dec. Dig. § 722.*]

2. APPEAL AND ERROR (§§ 722, 748*)—ASSIGNMENT OF ERRORS—PARTIES—“ADMINISTRATOR.”

Where the defeated party to a judgment was a party thereto in his representative capacity as administrator, the assignment of errors on his appeal, which described him by name, followed by the word “administrator,” did not describe him in his representative capacity, and the appeal must be dismissed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2990-2996, 3058-3064; Dec. Dig. §§ 722, 748.*]

For other definitions, see Words and Phrases, vol. 1, pp. 198, 199; vol. 8, p. 7566.]

Appeal from Circuit Court, Wells County; A. M. Waltz, Judge.

Action by the State, on the relation of Clara Harnish, against John H. Bender, administrator of Charles W. Bender, deceased. From a judgment for plaintiff, defendant appealed to the Appellate Court, and it transferred the cause to the Supreme Court under Burns' Ann. St. 1908, § 1405. Dismissed.

Eichhorn & Vaughn, for appellant. Sharp & Sturgis and A. W. Hamilton, for appellee.

MONKS, J. Appellant appealed from a judgment rendered in favor of appellee against John H. Bender, administrator of the estate of Charles W. Bender, deceased. The parties are designated in the assignment of errors as follows: “John H. Bender, Administrator, Appellant, v. The State of Indiana on the relation of Clara Harnish, Appellee.”

[1] The rules of this court require that the assignment of errors shall contain the full names of all the parties, and, unless this rule is complied with, the appeal will be dismissed. *Ewbank's Man.* §§ 13, 120, 126; *Whisler v. Whisler*, 162 Ind. 136, 67 N. E. 984, 70 N. E. 152, and cases cited.

In *Whisler v. Whisler*, supra, one of the defendants named and described in the complaint was Cornelius Lumaree, executor of the estate of John Whisler, deceased, with the will annexed. Another was Lewis Signs, who was sued and described in the pleading as trustee under the will of John Whisler, deceased, for some five beneficiaries. Neither of said parties was so described in the assignment of errors; but their names appear therein as “Cornelius Lumaree, executor, Lewis Signs, trustee.” This court said, on pages 139, 140 of 162 Ind., on page 985 of 67 N. E.: “These two defendants were

sued in the representative capacity and not as individuals. * * * Where persons sue or are sued in a representative or official capacity, the rule that the full names of the parties shall be set out in the assignment of errors requires that they shall be properly described in that pleading as such representatives or fiduciaries. Otherwise the court to which the appeal is taken acquires no jurisdiction over them. The appellee ‘Cornelius Lumaree, executor of the estate of John Whisler, deceased, with the will annexed,’ could not have been sued and charged in his representative character by the description ‘Cornelius Lumaree, executor,’ without the addition of a further averment or designation showing his relation to the will or estate of some person. The same thing is true of the appellee Lewis Signs, who is described in the assignment of errors simply as ‘trustee’; but how created, or for whom, does not appear. Neither of these persons in his representative capacity is before the court. As two of the parties named in the complaint, and in whose favor judgment was rendered against appellant, are not properly designated in the assignment of errors, either in its title or body, we are compelled to hold that the assignment does not comply with rule 6 [27 N. E. iv], and therefore that the appeal must be dismissed.”

[2] In this case appellant was a party to the judgment in his representative capacity and not as an individual. He is not before this court in his representative capacity. Upon the authority of the case of *Whisler v. Whisler*, supra, we therefore hold that, as he is not properly described as such representative in the assignment of errors, the appeal must be dismissed.

Appeal dismissed.

(176 Ind. 33)

CLIFTON et al. v. STATE ex rel. DICKSON.

(No. 21,724.)

(Supreme Court of Indiana. June 8, 1911.)

1. DRAINS (§ 76*)—ASSESSMENTS FOR DITCHES—POWER TO MAKE.

Under Burns' Ann. St. 1908, § 9515, empowering any regularly appointed deputy county surveyor to perform all the services required of county surveyors, a deputy county surveyor may make assessments for the repair of drains.

[Ed. Note.—For other cases, see Drains, Cent. Dig. §§ 76-83; Dec. Dig. § 76.*]

2. DRAINS (§ 54*)—CONTRACT TO REPAIR DRAINS—CONSTRUCTION.

A contract to repair a public ditch must receive a reasonable interpretation, and it must be approximately performed.

[Ed. Note.—For other cases, see Drains, Cent. Dig. § 65; Dec. Dig. § 54.*]

3. STATUTES (§ 227*)—CONSTRUCTION—MANDATORY STATUTES.

Where the interest of the public or of private persons is involved, permissive statutes are deemed mandatory.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 308, 309; Dec. Dig. § 227.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

4. DRAINS (§ 54*)—CONTRACTS FOR REPAIRS—TIME FOR PERFORMANCE.

Though the statute be silent on the subject of whether a contract for the repair of a public drain should fix a time for performance, time is still an essential factor, and the surveyor may not grant extensions of time for the performance of the work merely because of weather conditions or difficulty in procuring laborers, which would operate as evasions of the contract and of the duty owing to the public and to individuals.

[Ed. Note.—For other cases, see Drains, Cent. Dig. § 65; Dec. Dig. § 54.*]

5. DRAINS (§ 54*)—CONTRACTS FOR REPAIR—CONSTRUCTION — PERFORMANCE — ACQUIESCENCE IN DELAY.

The rule of acquiescence in delay as between persons contracting in a private capacity has no relevancy to the duty of public officers and to contractors for the discharge of a public duty, and in such cases public officers may not waive the obligation and duty as against the public, and a contract to repair a public drain is entire, and time is material to accomplish the end for which assessments are made, and where work is seasonably done in making repairs between designated stations, but part is much delayed, there is no way of apportioning the expense, and the contract must be deemed entire, and the contractor must recover all of the assessments or none.

[Ed. Note.—For other cases, see Drains, Cent. Dig. § 65; Dec. Dig. § 54.*]

6. MANDAMUS (§ 93*)—COMPELLING ACCEPTANCE OF WORK TO REPAIR A PUBLIC DRAIN.

Mandamus will not lie to compel the acceptance of a public drain as completed under a contract for its repair, unless the contractor shows a clear and imperative duty on the part of the officers to accept and no other remedy exists, and, where he was at fault and his claim would work injustice to the landowners because of a lack of the benefits for which they were called on to pay and a possible loss from insufficient drainage, mandamus will not lie.

[Ed. Note.—For other cases, see Mandamus, Dec. Dig. § 93.*]

7. MANDAMUS (§ 15*)—RIGHT TO MANDAMUS.

Mandamus will not lie where the relator is at fault or where it will work injustice.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. §§ 47-49; Dec. Dig. § 15.*]

Appeal from Circuit Court, Marshall County; Harry Berentha, Judge.

Mandamus by the State, on the relation of one Dickson, against Lewis Clifton and others to compel the acceptance of a public ditch as completed, under contract for its repair. From a judgment granting relief, defendants appeal. Reversed, with instructions.

Harley A. Logan, for appellants. Chas. Kellison, for appellee.

MYERS, J. Petition by appellee relator for a writ of mandamus to compel the surveyor of Marshall county to accept a public ditch as completed, under a contract for its repair. The alternative writ of mandate to the petition was overruled, an answer of general denial, a second paragraph alleging in detail the particulars of the failure to complete the work within the time fixed, to which

a demurrer was overruled, and a third paragraph alleging that the assessments were made by a deputy county surveyor and were invalid, and thus there was no fund with which to pay. A demurrer was sustained to this paragraph, of which appellants here complain. The action was originally against the county surveyor alone; but appellants as landowners were admitted upon their application as parties to defend on the ground that they were interested parties, and that the surveyor was a nominal party and without other interest than to do his duty, and they filed answers, as did also the surveyor. No cross-errors are assigned, and we do not consider the question of the propriety or necessity for the landowners being admitted as parties to defend. There was a trial and finding and judgment for the relator, and the landowners alone appeal.

[1] The third paragraph of answer was clearly insufficient. In the case of State ex rel. v. Roach, Auditor, 123 Ind. 167, 24 N. E. 106, this court held that a deputy surveyor, under the then existing statute, could not make assessments for repair of drains. The next session of the General Assembly gave the power. Burns 1908, § 9515.

The sufficiency of the petition is challenged by the assignment of error in overruling the demurrer to the petition, and by an independent assignment here, as to its sufficiency. Appellee alleges the entering into a written contract by him in March, 1906, with the county surveyor of Marshall county to repair a certain ditch of 181 stations. The contract was not reduced to writing until May 10, 1906. That by the terms of the contract "the time fixed for the completion of the work was September 1, 1906, but that, on account of the delay in commencing the work occasioned by the delay of the surveyor, it was understood after said written contract was executed, and before and at the time he commenced work, that the relator would probably not be able to complete the work within the time specified. That it is a fact, and was so understood by the surveyor, that during portions of the summer months it was impracticable to get help to do such work, and that at no time did said surveyor, or the defendant Troyer (his successor) ever treat or regard or claim that time was of the essence of the contract.

* * * That he was not permitted to commence work until June 6, 1906, and fully completed the work from station 181 to 55 before September 1, 1906, and that part constituted more than three-fourths of the labor and expense. That on July 25, 1906, the surveyor inspected the work from station 181 to 135 and promised to return before September 1st and inspect to 55, and before that time was requested to, but never came, and went out of office January 1, 1907, without accepting the work, or any official action

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

to enable plaintiff to obtain payment for that part of the work." That on account of being unable to obtain help, and on account of the weather, he did not finish from 55 to 0 in 1906. That, on account of quicksand and other sands between 181 and 55, it was impossible to prevent the ditch from becoming partly filled up without curbing and tiling, and the specifications did not call for either. That in the fall of 1906 and spring of 1907 part of the ditch from 181 to 55 was out of repair, partly through the washing and sliding of sand, and partly through trampling of cattle. "That long before the commencement of this action he fully cleaned that portion from 55 to 0," while the defendant was in office, according to his contract, except as to the element of time, and threw out and cleaned portions a second time. That the defendant on demand refused to accept the work from 181 to 55 because the former surveyor had not accepted the work, and when the defendant saw it in 1907 it was in no condition to be accepted.

It is difficult to determine just what was the force and effect of this complaint. It seems to proceed upon the theory that when the contract was made it was known that it could not be complied with, and that, though a time was fixed for completion, it was to be inconsequential, and the element of time immaterial, and that the surveyor had waived the provisions as to time indefinitely, for this action was not instituted until March 8, 1909, and, when the work was claimed to have been completed, we are not advised by the complaint. For aught that appears, the contract was an entire one, without any provision for partial acceptance, or acceptance in sections, and this seems to be sought to be obviated by the allegation that its filling could not be prevented without curbing or tiling, neither of which was specified, and, whether anticipated or unforeseen, it could hardly be claimed that a contractor would be required to maintain the condition of a ditch through quicksand, or to provide against the filling by sand or by the trampling of cattle; but it does not follow that he may do such work in sections, at his will, and at such intervals of time that the first section is demanding repair by the time the last section is repaired.

[2] Appellee was bound to recognize the conditions of doing work, such as might arise from labor conditions, or the seasons; but he made no provision against them, apparently, unless it be the element of consent by the surveyor, and, while even such contracts ought to receive reasonable interpretation and enforcement, there must be in their very nature and purposes approximately fulfillment.

[3] Where the interest of the public or private persons is involved, even permissive statutes are held to be mandatory. 29 Cyc. 1432.

[4] So that, even though the statute is silent as to requiring a time for performance

being fixed by the contract, it is so manifestly important as to become an imperative duty on the part of the officer. In a matter in which the element of time is such an essential factor, public policy forbids that a surveyor shall have the power to waive the rights of those for whom he acts, in extensions of time for the performance of the work of repairing drains, merely because of weather conditions, or difficulty in procuring laborers, which would operate as evasions of the contract, and of the duty owing to the public and to individuals.

The parties seem to have treated it as a good faith effort to complete the work, though it is manifest that the farmers have not received the whole benefits for which they are assessed. Appellants' chief contention is in the failure to complete the work by September 1, 1906, and that in contracts of this character, from their very nature, time is necessarily of the essence of the contract. Taking judicial notice of the action of the elements, we know that ditches will fill up, and that weeds, grass, and obstructions of various kinds will make great progress in two years, in obstructing ditches, and that only by doing the work within reasonable approximation of the time fixed can the waterway be kept open, and the benefits received for which assessments are made. It is not shown that relator was not financially responsible, and presumably the surveyor gave a good bond. It is made the duty of surveyors and trustees to keep ditches in repair, and there is a liability upon their bonds for failing to do so, and it is notorious that they give little attention to their duty with respect to keeping drains in repair, and a few suits of that character would probably have a wholesome effect.

[5] The rule of acquiescence in delay, as between persons contracting in a private capacity, can have no relevancy to the duty of public officers, and those contracting for the discharge of a public duty; in such cases public officers cannot waive the obligation and duty as against the public. *Supervisor v. Otis*, 62 N. Y. 88, 96; *County Com'rs v. Macrae*, 89 N. C. 95; *Looney v. Hughes*, 26 N. Y. 514; *People v. Jenkins*, 17 Cal. 500; *Bonta v. Mercer Co.*, 7 Bush (Ky.) 576; *Mayor v. Merritt*, 27 La. Ann. 568; *Duncan v. State*, 7 La. Ann. 377; *Supervisors v. Knipfer*, 37 Wis. 496.

Such contracts as the one before us are necessarily ones of entirety, and time is material in order to accomplish the end for which assessments are made, and to drag the work along until the period for recleaning under the law arrives would be a gross injustice to those who are required to pay for it. It is alleged that from station 181 to 135 the work was seasonably done, and in reasonable compliance with the specifications; but we see no way of apportioning the expense in view of the fact that the assessments are made as covering the whole cost, so as to re-

move the case from the category of entire contracts, so that appellee must recover all, or none. Nor is it shown that relator was entitled to have the work accepted in sections, nor when the work was actually claimed to be completed.

[8] It would be manifestly unjust to require appellants to pay for something they have not obtained, and cannot obtain from the assessments, and equally manifest, in order that appellee sustain his contention, that he must show plainly a clear and imperative legal duty on the part of the officer to accept the ditch, where no other remedy exists, which we think is not shown. *Town of Windfall City v. State ex rel.*, 172 Ind. 302, 306, 88 N. E. 505. To hold otherwise would be to adjudge indirectly the validity of the assessments, and leave the landowners remediless, except a possible suit on the surveyor's bond, and this is based upon the ground of waiver by the surveyor, which is not to be tolerated.

[7] Nor will mandamus lie where the relator is at fault, or where it will work injustice. *Teepie v. State*, 171 Ind. 268, 276, 86 N. E. 49.

We see no reason why appellee may not have a right of action upon the surveyor's bond, for such damages as he may have sustained, if any, by reason of his refusal or neglect of a duty owing relator, and, if so, this action would not lie; but, in any event, we do not think appellee shows a clear right, and a clear and imperative duty on the part of the officer to accept the work, and the burden is upon him to make this appear, and it does appear that he is at fault, and that his claim would work injustice to the landowners, both because of the lack of the benefits for which they are called on to pay, and in the possible losses from inefficient drainage.

The judgment is reversed, with instructions to the court below to sustain the demurrer to the petition, and for further proceedings not inconsistent with this opinion.

(176 Ind. 25)

MARKLE v. BURGESS. (No. 21,886.)

(Supreme Court of Indiana. June 7, 1911.)

1. CORPORATIONS (§ 60*)—"CAPITAL STOCK"—NATURE.

The capital stock of a business corporation is the sum fixed by the corporate charter as the amount paid in or to be paid in by the stockholders for the prosecution of the business and for the benefit of the creditors, and belongs to the corporation as a legal entity, and is distinguished from the amount of property owned by it. Capital stock is a liability of the corporation to its shareholders after creditors' claims have been liquidated.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 162; Dec. Dig. § 60.*]

For other definitions, see Words and Phrases, vol. 1, pp. 959-967; vol. 8, p. 7595.]

2. CORPORATIONS (§ 65*)—"SHARE OF STOCK." A share of stock is a proportional part of rights in the management and profits of a corporation during its existence and in the assets on dissolution.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 165-171; Dec. Dig. § 65.*]

For other definitions, see Words and Phrases, vol. 7, pp. 6477-6480.]

3. CORPORATIONS (§ 94*)—"STOCK CERTIFICATE."

A stock certificate is a written acknowledgment by a corporation of the interest of the shareholder in the corporate property, and is evidence of his ratable share in the distribution of the assets of the corporation on the winding up of its business.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 485; Dec. Dig. § 94.*]

For other definitions, see Words and Phrases, vol. 2, pp. 1032-1033.]

4. APPEAL AND ERROR (§ 1064*)—HARMLESS ERROR—ERRONEOUS INSTRUCTIONS.

Where, in an action for breach of contract binding defendant to transfer to plaintiff certificates of shares in a corporation representing one-sixth thereof, plaintiff demanded the value of the stock which defendant refused to transfer, a charge that the stock of the corporation was liable for the bona fide debts of the corporation, and the value of the stock might be affected by the debts of the corporation, was not prejudicial to defendant on the ground that the debts must be paid out of the assets before any part thereof could be used for the redemption of stock.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 1064.*]

5. APPEAL AND ERROR (§ 1064*)—HARMLESS ERROR—ERRONEOUS INSTRUCTIONS.

Where, in an action for the value of corporate stock which defendant refused to transfer, pursuant to his contract, plaintiff minimized the bona fide debts of the corporation and defendant showed that its liabilities were about equal to its assets, and expert witnesses stated their opinions as to the value of the entire property of the corporation, a charge that the value of the stock might be determined by the debts of the corporation was not prejudicial to defendant.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 1064.*]

Appeal from Circuit Court, Fayette County; J. L. Gray, Judge.

Action by Roy Neil Burgess against George B. Markle. From a judgment for plaintiff, defendant appealed to the Appellate Court, and it transferred the cause to the Supreme Court under Burns' Ann. St. 1903, § 1405. Affirmed.

Conner, Conner & Chrisman, for appellant. McKee, Little & Frost, for appellee.

MORRIS, J. Suit by Burgess, appellee, against appellant, Markle, for damages, for breach of an oral contract. The complaint alleges that defendant purchased the plant of the General Gas, Electric & Power Company of Connersville and the same was transferred to a new corporation organized by defendant and others, with a capital stock of \$100,000, divided into 1,000 shares of the par value of \$100 each, and of which defendant became the owner of 995 shares;

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

that defendant agreed with plaintiff that in consideration of certain services to be performed by plaintiff in negotiating for the purchase of the plant, the organization of the new company, and in assisting in managing the business of the new corporation for a period, the defendant would cause to be assigned and transferred to plaintiff certificates of shares in the stock of the corporation representing one-sixth thereof; that the services were performed for defendant, but on demand defendant refused to perform his obligation with reference to the transfer, and the relief demanded is the value of the stock which defendant refused to cause to be transferred. There was a trial by jury and a verdict for plaintiff in the sum of \$2,000.

The only error, relied on by appellant, is the giving by the court, on its own motion, of that portion of instruction No. 11, which reads as follows: "As a principle of law the stock of a corporation is liable for the bona fide debts of the corporation. And the value of the stock of a corporation may therefore be affected or determined by the debts of the corporation." Counsel for appellant criticize this instruction for two reasons: First, because, counsel say, the stock of a company is not liable for the debts, but the debts must be paid out of the assets or property before any part of the same can be used for the redemption of stock; second, because the value of the stock cannot be determined alone from its debts.

[1] The capital stock of a corporation of this nature is the sum of money fixed by the corporate charter as the amount paid in, or to be paid in, by the stockholders, for the prosecution of the business of the corporation and for the benefit of corporate creditors. 1 Cook on Corporations, § 8; 6 Cyc. 348. The capital stock belongs to the corporation considered as a legal person; the shares are the property of the individual shareholders. 10 Cyc. 364, 365. The capital stock is to be distinguished from the amount of property owned by the corporation. 1 Cook on Corporations, § 8. Generally the capital stock does not vary, although the actual property of the corporation may fluctuate widely in value. Sometimes the word "stock" has been used to indicate the same thing as capital stock, but generally means shares of stock. 1 Cook on Corporations, § 8.

[2, 3] A share of stock may be defined as a proportional part of certain rights in the management and profits of the corporation during its existence, and in the assets upon dissolution. 1 Cook on Corporations, § 12. A stock certificate is a written acknowledgment by the corporation of the interest of the shareholder in the corporate property, and occupies a position similar to other muniments of title. 10 Cyc. 588. It is evidence of his ratable share in the distribution of the

assets of the corporation on the winding up of its business. The capital stock is a liability of the corporation to its shareholders, after creditors' claims have been liquidated. All the property of the corporation including its capital stock is liable for the payment of corporate debts.

[4] While an instruction informing the jury that all the property of the corporation is liable for the payment of its indebtedness would have been preferable, we do not think that appellant was harmed by the instruction given, in the particular claimed by counsel in the first point of their criticism.

[5] The second point of criticism, that the court erroneously instructed the jury that the value of the stock might be "determined by the debts of the corporation," is urged with vigor.

Appellee's claim was for an amount equal in value to one-sixth of the shares of stock in the company. Appellee was seeking to minimize the bona fide indebtedness of the corporation. Appellant offered evidence tending to show that the liabilities of the company were about equal in value to its assets. The real value of all the shares was the difference between the values of the assets and debts. Consequently the amount of indebtedness became a determining factor. Expert witnesses stated their opinions as to the value of the entire property of the company. If the jury had, after considering this evidence, reached a conclusion with reference to the value of the property, then, in determining the value of the shares of stock, nothing but the amount of debts remained for consideration; and, in such case, the instruction could not have been harmful. It will be noted, moreover, that the instruction did not inform the jury that the value of the stock might or must be determined from the debts alone, but simply that the value of the stock may be determined by the debts.

While the instruction is subject to criticism, it would seem that appellee, rather than appellant, was the one who might have been harmed thereby. The instruction was calculated to emphasize, if not exaggerate, the importance of the question of indebtedness, but this error could have harmed only the appellee. For such error a judgment will not be reversed. Judgment affirmed.

(176 Ind. 29)

DELPHOS HOOP CO. v. SMITH.
(No. 21,913.)

(Supreme Court of Indiana. June 8, 1911.)

1. TRIAL (§§ 165, 178*) — DISMISSAL — DIRECTION OF VERDICT — SCOPE OF MOTIONS.

Where, in an action for work performed and for board furnished, there was no evidence that any one except plaintiff had any interest therein though there was evidence that a person not a party had an interest in the cause of

action for work performed, the motions to dismiss the action on the ground that a third person had an interest in "the subject-matter of the action" and to direct a verdict for defendant "on the issues formed on the complaint" were properly overruled, notwithstanding Burns' Ann. St. 1908, §§ 251, 252, 263, providing that every action must be prosecuted in the name of the real party in interest and that all persons having an interest in the subject-matter must be joined as plaintiffs.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 373, 374, 401-403; Dec. Dig. §§ 165, 178.*]

2. TRIAL (§ 420*)—OVERRULING OF MOTION FOR DIRECTED VERDICT—WAIVER.

A defendant introducing evidence after the overruling of his motion for a directed verdict in his favor, thereby waives the right to question the ruling of the court.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 983; Dec. Dig. § 420.*]

3. NEW TRIAL (§ 15*)—"PARTY IN INTEREST"—EVIDENCE.

In an action for sawing lumber, the evidence showed that the contract therefor was made by plaintiff and defendant, and that no third person was known as having any interest therein. A third person testified that he was interested in the job because he owned the engine operating the mill sawing the timber and for which he should receive one-half of the proceeds and furnish one-half of the expense, but stated that nothing was said about his being entitled to any part of plaintiff's recovery. Plaintiff testified that he had no partner in the work. Held not to show as a matter of law that plaintiff and the third person were partners in the work, or that the third person was a real party in interest within Burns' Ann. St. 1908, § 251, and the court, submitting to the jury the issue whether the third person was interested in the contract, properly refused to grant a new trial on that ground.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. § 21; Dec. Dig. § 15.*]

For other definitions, see Words and Phrases, vol. 4, pp. 3692-3709; vol. 8, p. 7691.]

Appeal from Circuit Court, Wells County; Chas. E. Sturges, Judge.

Action by Josiah H. Smith against the Delphos Hoop Company. From a judgment for plaintiff, defendant appealed to the Appellate Court, and the cause was transferred to the Supreme Court under Burns' Ann. St. 1908, § 1405. Affirmed.

Eichhorn & Vaughn, for appellant. Sharp & Sturgis, for appellee.

MONKS, J. This action was brought by appellee to recover for work and labor performed by appellee in sawing lumber under a contract with appellant and for board furnished by appellee to appellant's servants at appellant's request. A trial of said cause resulted in a verdict in favor of appellee, and over a motion for a new trial judgment was rendered against appellant.

At the close of appellee's evidence in chief, and before appellant entered upon the introduction of its evidence, appellant moved the court to dismiss the action for the reason that the evidence shows that one Bowman "is a party in interest in the cause of action and in obtaining the relief demanded

and has an interest in the subject-matter involved in plaintiff's complaint." This motion was overruled. Appellant thereupon moved the court to instruct the jury to return a verdict in its favor "on the issues formed on the complaint." This motion was overruled. Each of these rulings was assigned as a cause for new trial.

It is insisted by appellant that the court erred in overruling each of said motions because "on the trial of said cause one Bowman, a witness for appellee, testified that he was to bear one-half of the expenses and receive one-half of the profits," and "by sections 251, 252, 263, Burns 1908, it is enacted that every action must be prosecuted in the name of the real party in interest, and that all persons having an interest in the subject-matter of the action and in obtaining the relief demanded shall be joined as plaintiffs."

[1] Said motions were properly overruled for the reason, if no other, that evidence had been given to sustain an item in the complaint for board furnished the employees of appellant at its request to which the evidence of the witness Bowman had no application, and in which there was no evidence that any one except appellee had any interest whatever.

[2] Moreover, the right of appellant to question the action of the court in overruling the motion of appellant to instruct the jury to return a verdict in its favor was waived because after said motion was overruled by the court appellant introduced its own evidence. *Baltimore, etc., R. W. Co. v. Conoyer*, 149 Ind. 524, 527, 48 N. E. 852, 49 N. E. 452. The court said in said case: "If a defendant, in an action upon the close of the plaintiff's evidence in chief, moves the court to direct a verdict on such evidence in his favor, he must stand by his motion; for, if he subsequently introduces his own evidence, he will be regarded as having waived or receded from his motion, and therefore no question can be considered under such motion on appeal."

[3] It is also insisted by appellant that, as "the evidence shows that the account sued on is due appellee and another, the verdict is contrary to law," and that therefore the court erred in overruling its motion for a new trial. This contention of appellant is predicated upon section 251, Burns 1908, which provides that "every action must be prosecuted in the name of the real party in interest," etc. It is not necessary to decide whether or not this question is properly presented by said cause for a new trial, under the issues in the case, for the reason that, if it is, it does not necessarily follow that the court erred in overruling appellant's motion for a new trial. The evidence shows that the contract for sawing said lumber was entered into by appellee and appellant, and

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

that no other person was mentioned or known as a party thereto or as having any interest therein.

The witness Bowman testified that he "was interested in a sense in the job appellee had of sawing lumber for appellant, in this, that he owned the engine which pulled the mill of appellee while the lumber was being sawed under the contract sued upon, and for which he was to have one-half the profits and furnish one-half the expense." He was asked if he was "entitled to one-half the recovery if appellee recovered anything," and answered that "nothing had been said about it."

Appellee was a witness on his own behalf, and on cross-examination by appellant testified that he had no partner in the work of sawing this lumber for appellant under said contract.

There was no evidence, except as above set out, that the witness Bowman was to share in the profits, if any, in said contract because he was a principal therein, or that he was to share in the losses, if any, or that he and appellee had any community of interest in said contract.

"It has been decided in a number of cases that to constitute a partnership inter sese there must be a community of losses as well as of profits." 30 Cyc. and note 34.

The court submitted the question of whether said Bowman was a party in interest in said contract with appellee within the meaning of section 251, supra, and the jury by its verdict found that he was not. It does not necessarily follow from the evidence that appellee and said Bowman were partners as between themselves in the contract sued upon (*Macy v. Combs*, 15 Ind. 469, 77 Am. Dec. 103, and cases cited; *Emmons v. Newman*, 38 Ind. 372, 374, 375; *Keiser v. State*, 58 Ind. 379, and cases cited; *Stumph v. Bauer*, 76 Ind. 157; *Bradley v. Ely*, 24 Ind. App. 2, 56 N. E. 44, 79 Am. St. Rep. 251, and cases cited; *George on Partnership*, 30-52; *Mechem's Elements of Partnership*, §§ 42-50), or that he was a real party in interest therein with appellee within the meaning of section 251, supra.

Under the rules governing this court in determining such questions on appeal, we cannot say from the evidence that the verdict was contrary to law as to said question of fact or as to any other question of fact in the case.

Judgment affirmed.

(176 Ind. 487)

WABASH R. CO. v. JACKSON et al.
(No. 21,727.)¹

(Supreme Court of Indiana. June 9, 1911.)

1. DRAINS (§ 55*)—DRAINAGE IMPROVEMENTS—RAILROADS.

In a drainage proceeding under Act 1907 (*Burns' Ann. St. 1908*, § 6141 et seq.), the cost

of a culvert in a railroad embankment is properly borne by the railroad company, and not assessable as part of the cost of the improvement, especially where the natural flow of water is already obstructed by the embankment to the damage of adjoining owners.

[Ed. Note.—For other cases, see *Drains*, Dec. Dig. § 55.*]

2. DRAINS (§ 76*)—DRAINAGE IMPROVEMENTS—ASSESSMENTS—DESCRIPTION OF PROPERTY.

Lands assessed for a drainage improvement are sufficiently described if the descriptions can be made certain.

[Ed. Note.—For other cases, see *Drains*, Dec. Dig. § 76.*]

Appeal from Circuit Court, Wabash County; A. H. Plummer, Judge.

Drainage proceeding by William A. Jackson and others against the Wabash Railroad Company. From the judgment, the company appeals. Affirmed.

Stuart, Hammond, Simms & Stuart and J. D. Conner, Jr., for appellant. Murphy & Todd, for appellees.

MYERS, J. Appellees filed a petition in the Wabash circuit court under the act of 1907 (*Burns 1908*, § 6141 et seq.) for the drainage of certain lands in that county by a public drain. Such proceedings were had that the drain was established over the remonstrance of appellant, the right of way of which is crossed by the drain. By their report the commissioners of drainage found for the construction of the drain, and the costs and expenses were fixed at \$788.52. Benefits and damages were assessed in which appellant was reported as benefited \$60 and the assessment against it fixed at \$50, but in their report, the commissioners recommended that appellant construct a bridge at its own cost and expense 12 feet high and 24 feet wide. Various lands, lots, and a public highway were reported as to be affected by the construction of the proposed drain, and all were reported as benefited in amounts in excess of the assessments for construction. Upon remonstrance by appellant a special finding of facts was made and conclusions of law stated. The findings are quite lengthy, but they show that the railroad was constructed in 1854 with a fill; that at the point where the proposed drain crosses the right of way it was 22 feet high and 14 feet wide on top and 80 feet wide at its base, at which point, in 1881, appellant constructed a stone culvert 4 feet and 1 inch wide at the bottom, and the same width to the height of 3 feet, and for the next 2 feet, 11½ inches wide, the total height being 5 feet 1 inch; this culvert is called No. 440. At a point about 800 feet southwesterly is culvert 441 which was constructed when the line was built. A natural stream approaches the railroad from the northwest called Jackson creek; when the railway was constructed that stream crossed in a state of nature about 300 feet southwesterly of culvert No. 441, and the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

¹ Rehearing denied, 96 N. E. 464.

stream was diverted through that culvert, which was of stone, 8 feet wide at the bottom, 4 feet high, and was replaced in 1902 by a cast iron pipe 5 feet in diameter. The natural stream has its source in hills some $2\frac{1}{2}$ miles northwesterly from the railway crossing. Soon after the construction of culvert No. 440, which was at a point where there was no waterway prior thereto, one Jackson, father of some of the appellees, constructed a ditch southeasterly from Jackson creek to, and through, culvert No. 440. It is found that culvert No. 440 on the line of the proposed drain will not in times of high water be sufficient to conduct the water which will flow into the proposed drain, which is partly in the channel of the old creek, but diverges from it at its greatest distance 400 feet, and will be of the average width of 4 feet in the bottom, 12 feet at the top, and of the average depth of 4 feet and runs over a portion of the ditch constructed by James Jackson connecting with culvert No. 440, after the construction of which ditch he plowed and filled up Jackson creek proper from a point 238 feet north of culvert No. 441 and caused the water of Jackson creek to flow through culvert No. 440.

It is found that since the construction of the railway grade none of the culverts have been sufficient to carry the waters of Jackson creek, and in times of heavy rains the water backs up at the railway embankment, and runs southwesterly over a public highway, and into the houses of residents of the town of Rich Valley, and covering the highway and remaining in the houses five or six hours at a time. All necessary facts authorizing the establishment of the drain are found, but the court found that a culvert 17 feet long, 8 feet high, will be sufficient to carry the water. As conclusions of law the court established the ditch, and required the construction of the culvert by appellant at its own expense, which it found will be \$8,000, as against \$10,000 the cost of a culvert recommended by the commissioners of drainage.

[1] It is urged by appellant that the cost of the culvert, added to the cost of construction, would largely exceed the benefits assessed and the proceeding should have been dismissed. The case therefore turns upon the question whether the cost of the culvert is to be included in the cost of constructing the drain, or whether the cost of the culvert should be wholly borne by appellant. That question has been determined adversely to appellant. *Chicago, etc., Co. v. Luddington*, 91 N. E. 939, 93 N. E. 273.

It is urged, however, that this case is to be distinguished from that, because in that case "it may be inferred from the proceedings that a large amount of land was assessed benefits, largely in excess of the damages sustained by the company, it appearing that the damages sustained by the company in that case were only about \$3,200." In

this case the total benefits assessed are \$927.97, and the cost exclusive of the bridge \$778.52. If, as was held in the *Luddington* Case, railroad companies as a matter of law are required to construct at their own expense such culverts as are required, so as not to interfere with the free use of public drains, whether constructed prior to or after the construction of the railway, and in such manner as not to unnecessarily impair their usefulness, the cost of such culvert is not the subject of damages, within the contemplation of the statute, which is specifically referred to in that case, to which we adhere. It cannot reasonably be contended that the construction of a drain, and as to whether it is of public utility and beneficial to highways, can be made to depend alone upon the number of acres of land immediately drained, or the amount of travel over, or the length of highways, or the cost of restoring, or opening a waterway for the passage of water. It is shown by the findings that the stream arises in the hills $2\frac{1}{2}$ miles away, and precipitates the water in large volume upon these lower lands, and that it is impeded by the railway embankment, and insufficiency of the waterways through it, and seriously affects the residents of a village, the lands north of and adjoining the railway, and the highway.

[2] It is also contended that certain assessments are so defective as to description of the property assessed that they cannot be enforced. Some descriptions are not very accurate, but they can be made certain, and that is sufficient. Upon an application to foreclose the lien the correct description could be supplied. It is to be noted that under section 6144, Burns 1908, sale of land for ditch assessments can only be made by county treasurers in the manner that other taxes are collected, and it has been held under a similar statute that collection can only be made in that method. *Storms v. Stevens*, 104 Ind. 46, 3 N. E. 401; *Lockwood v. Ferguson*, 105 Ind. 380, 5 N. E. 8. But it is also held under the same statute that under a proceeding to foreclose, after sale, the lien may be enforced against the land intended to be assessed, by its true description. *Ager v. State*, 162 Ind. 538, 70 N. E. 803; *Luzadder v. State*, 131 Ind. 598, 31 N. E. 453; *Cullen v. Strauz*, 124 Ind. 340, 24 N. E. 883; *Brosemer v. Kelsey*, 106 Ind. 504, 7 N. E. 569; *Baker v. Clem*, 102 Ind. 109, 26 N. E. 215.

The apparent hardship of a case where the expense to appellant, in being put to an expense of \$8,000 to produce a benefit of \$927.97, cannot be invoked as against a public enterprise. If this were so, it will be readily seen that many very much needed improvements for the public benefit and in the interest of public health would be prohibited, unless assessments should be made which would amount to confiscation of the property of those who, except for the creation of conditions such as here presented, would not

need the improvement, and appellant received and exercises its franchise subject to both the common law and the statutory power to require it to perform the duty imposed upon it by this proceeding.

No error is made to appear, and the judgment is affirmed.

(176 Ind. 68)

MACBETH-EVANS GLASS CO. v. VAN BLARICAN. (No. 21,879.)

(Supreme Court of Indiana. June 9, 1911.)

MASTER AND SERVANT (§ 80*)—ACTION FOR WAGES—SUFFICIENCY OF EVIDENCE—FINDINGS.

Evidence in an action by a servant for wages held to sustain a finding that plaintiff was justified in leaving defendant's employment.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 107-127; Dec. Dig. § 80.*]

2. CONSTITUTIONAL LAW (§ 205*)—MASTER AND SERVANT (§ 69*)—EQUAL PROTECTION OF LAWS—IMPOSITION OF PENALTIES.

Burns' Ann. St. 1908, § 7990, which requires corporations engaged in mining or manufacturing to pay their employes on demand at least once in two weeks the amount due such employes, and in lawful money of the United States, and section 7999, which adds a penalty for each day's failure to pay after demand and a reasonable attorney's fee, are not in violation of Const. art. 1, § 23, which declares that the General Assembly shall not grant to any citizen or class of citizens privileges or immunities which upon the same terms shall not belong to all citizens.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 591-624; Dec. Dig. § 205; Master and Servant, Cent. Dig. §§ 78-81; Dec. Dig. § 69.*]

8. APPEAL AND ERROR (§ 1078*)—ERROR WAIVED IN APPELLATE COURT—FAILURE TO DISCUSS.

Where an error assigned on appeal is not discussed in appellant's brief, it is waived.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4256-4261; Dec. Dig. § 1078.*]

Appeal from Circuit Court, Grant County; H. J. Pauls, Judge.

Action by Melvin Van Blarican against the Macbeth-Evans Glass Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Transferred from Appellate Court, under Burns' Ann. St. 1908, § 1405 (Acts 1901, p. 590).

Campbell & Call, Joseph F. Cowern, and F. E. Matson, for appellant. Stephen McSwiggan, for appellee.

MORRIS, J. Appellant is a corporation engaged in manufacturing glassware, and employed appellee as a laborer in its factory. This suit was for wages alleged to be due appellee from appellant, and for attorney's fees, under sections 7996, 7999, Burns' Stat. 1908. It was commenced before a justice of the peace and appealed to the circuit court. De-

fendant filed no answer. Trial by court. Finding and judgment for appellee for \$28.75 and the further sum of \$25 for plaintiff's attorney's fees. It was admitted by the parties at the trial that appellee had earned \$28.75 while in appellant's employ which had not been paid to him. Appellant offered in evidence a written contract signed by appellee, which provided that the company shall retain in its hands 5 per cent. of the wages earned as a guarantee for the faithful performance of the terms of the contract and for any breach of which the money so retained shall be paid to the company as liquidated damages for the breach. The contract bound the company to employ plaintiff for a period of five years from January 11, 1906. Defendant contends that the evidence shows that appellee voluntarily quit the service, without cause, and thereby forfeited any right to recover the five per cent. of the wages retained. The amount retained was a little more than 5 per cent. of the amount earned.

[1] Appellee was the only witness who testified about the termination of the service. He said he quit work in March, 1907, because he could no longer make a living working on the scale of wages provided in the contract by reason of the bad glass—"stiff glass"—furnished him by the company on which to work; that, by reason of the bad quality of material furnished him, he was compelled to lose so much time he could not make a living. This evidence was not disputed. It sustains the finding of the circuit court that appellee was justified in quitting the employment.

[2] Appellant contends that the court was not justified in making any allowance for plaintiff's attorney's fees because the statute above mentioned violates section 23 of article 1 of the Constitution of Indiana. The contrary was held by this court in *Macbeth-Evans Glass Company v. Amama*, 95 N. E. 228, decided by this court at the present term.

[3] One of the errors assigned on this appeal is that the complaint is insufficient in its allegations of facts. This alleged error is waived by failure to discuss it in appellant's brief. There is no error in the record. Judgment affirmed.

(176 Ind. 19)

DRISCOLL et al. v. PENROD et al.
(No. 21,835.)

(Supreme Court of Indiana. June 6, 1911.)

1. EVIDENCE (§ 455*)—PAROL OR EXTRINSIC—AMBIGUITY.

While a formal written contract appearing to be complete cannot be enlarged or contradicted by parol evidence, yet when the terms employed are susceptible of more than one meaning, it is the court's duty to inform itself of the circumstances surrounding the parties at the time.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2104; Dec. Dig. § 455.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

2. CONTRACTS (§ 154*)—CONSTRUCTION.

That construction of a written instrument will be adopted, if possible, which will make it effectual and reasonable.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 735; Dec. Dig. § 154.*]

3. INFANTS (§ 75*)—JOINDER IN ACTIONS BY OTHERS.

In an action on a lease, involving personal property, it was proper to refuse to require the bringing in as parties plaintiff infant heirs of a plaintiff dying pending the action, the administrator of decedent having been substituted.

[Ed. Note.—For other cases, see Infants, Cent. Dig. § 191; Dec. Dig. § 75.*]

4. APPEAL AND ERROR (§ 1170*)—HARMLESS ERROR.

While the better practice in case of the death of a party is to file a supplemental complaint alleging the fact, and the qualification of his personal representative and praying for the substitution of the latter, yet under Burns' Ann. St. 1908, § 700, providing that the Supreme Court shall not reverse a judgment where the merits have been fairly determined where, on motion, the administrator of a deceased party was made plaintiff, etc., the overruling of a motion to postpone the trial until an amended complaint making the administrator a party was filed was harmless, where defendants did not seek to reopen the issues, and it did not appear that they were endeavoring to secure anything but delay.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4540-4545; Dec. Dig. § 1170.*]

5. LANDLORD AND TENANT (§ 24*)—LEASES—DESCRIPTION OF LAND.

No particular description of land is necessary in a rental contract.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 61-65; Dec. Dig. § 24.*]

Appeal from Circuit Court, Wells County; C. E. Sturgis, Judge.

Action by Calvin S. Penrod, administrator, and others against Timothy J. Driscoll and others. Judgment for plaintiffs and defendants appeal. Transferred from Appellate Court, under section 1405, Burns' Ann. St. 1908; Acts 1901, p. 590. Affirmed.

L. B. Simmons and J. P. Boyd, for appellants. Elchhorn & Vaughn, for appellees.

MORRIS, J. This was an action by appellees against appellants to recover rentals on a gas and oil lease. From a judgment for plaintiffs, the defendants appeal. A demurrer to the complaint for insufficient facts was overruled, and this action of the lower court is first assigned as error. The complaint, omitting formal parts, is as follows:

"The plaintiffs complain of the defendants and say that on the 3d day of January, 1902, the plaintiffs, George Grey and Elizabeth Grey and Roena Feazel leased to the defendants the following described real estate in Chester township, Wells county, Indiana, to wit: The northeast quarter of the southeast quarter of section four (4), township twenty-five (25) north, range eleven (11) east, for the purpose of drilling and operating for oil and gas, and to erect and maintain buildings and structures and to lay all necessary pipes for the

production and transportation of oil and gas; the plaintiffs, under the terms of said lease, were to have one-eighth part of all oil produced and saved from said premises, to be delivered in the pipe line which the second party might connect with said wells; that afterwards, to wit, on the _____ day of _____ said Roena Feazel conveyed by warranty deed all her right, title, and interest in and to the above-described real estate to the plaintiff herein Mary C. Fetters, who has ever since been and now is the owner of said Feazel's interest; that immediately after the execution of said lease, which was then duly acknowledged, the defendants herein entered into full possession of said real estate for the purpose of carrying out the terms of said lease and drilling and operating said leased premises; that a copy of the lease referred to is herein set forth and marked 'Exhibit A,' and made a part of the pleadings herein; that the same was duly entered of record in Miscellaneous Record of Recorder's office, in Record 18, on February 14, 1892; that prior to the execution of said lease said premises had been leased for the purpose of developing said premises and producing gas and oil from said land, and that one well had been theretofore drilled on said land, which was producing oil at the time said lease was executed; that said defendants, by the terms of said lease, agreed that a second well should be drilled thereon within thirty days from the date of the execution of the lease, or pay a monthly rental of \$10 per month, and it was also agreed that a third well should be drilled in thirty days from the completion of the second well, or pay the monthly rental in advance, and a fourth well was to be drilled by the defendants within sixty days from the completion of the third well, or pay a monthly rental of \$10 in advance. It was also agreed by the defendants that they would drill a fifth well within sixty days from a completion of the fourth well, or forfeit the undrilled parts, and that each well was to hold eight acres of land; that a reference in this lease to the drilling of a second well was understood between the plaintiffs and defendants to mean that the well already drilled when the above lease was executed should be regarded and called the first well on said premises. Plaintiffs allege that the defendants drilled the second well as herein specified, and that afterwards, within the time as specified in said lease the third well was drilled on said premises by the defendants, which made and constituted two wells drilled by said defendants. That the second well drilled by the said defendants was completed in April, 1902, and the plaintiffs further allege that the defendants, although they held possession of said premises and operated the said wells already drilled, have never drilled any other well on said premises, and have

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

never drilled the fourth and fifth wells, as mentioned in said lease. That by reason of such failure and under the terms of said agreement the defendants have wholly failed to comply with the terms of their lease and have wholly failed to pay any rental whatever. That there is now due from said defendants to these plaintiffs the sum of \$600, for rental under the terms of said lease. Wherefore the plaintiffs demand judgment against the defendants in the sum of \$600, and for all other proper relief.

"Exhibit A.

"In consideration of the sum of one dollar, the receipt of which is hereby acknowledged, we, George Grey, Roena Feazel, and Elizabeth Grey, of Chester township, Indiana, of the first part, hereby grant and guarantee unto T. J. Driscoll and Charles McCauley, second party, all the oil and gas in and under the following described premises, together with the right to enter thereon at all times for the purpose of drilling and operating for oil and gas, either or both, and to erect and maintain all buildings and structures, and lay all pipes necessary for the production and transportation of oil or gas. The first party shall have the one-eighth part of all oil produced and saved from said premises, to be delivered in the pipe line which second party may connect all wells, namely: All that certain lot of land situated in the township of Chester, county of Wells, in the state of Indiana, described as follows, to wit: The northeast quarter of the southeast quarter of section four, Chester township, containing 39 acres, more or less. To have and to hold the above premises in the following conditions: If gas only is found in sufficient quantities to transport, second party agrees to pay first party at the rate of \$100 per annum for the product of each and every well so transported, and the first party to have gas free of cost to heat all stoves, and light all jets in dwelling house; second party shall bury all oil and gas lines where likely to interfere with cultivation, otherwise not, and pay all damages done growing crops. In case no well is completed within thirty days from this date then this grant shall become null and void, unless second party shall thereafter pay at the rate of ten dollars for each month such completion is delayed. A deposit to the credit of first party in _____ Bank, in _____ will be good and sufficient payment for any money falling due on this grant. The second party shall have the right, free of charge, to use sufficient gas, oil and water, to run all machinery for operating said wells, also the right to remove all property at any time; there is to be a second well drilled in 30 days from this date, or pay the monthly rental, and a third well in thirty days from the completion of the second well or pay the monthly rental in advance, and fourth well in sixty days from completion of third well or pay the monthly

rental in advance, and fifth well in sixty days from the completion of fourth well or forfeit the undrilled parts; each well is to hold eight acres. It is understood between the parties to this agreement that all conditions between the parties hereto shall extend to their heir, executors, successors and assigns. In witness whereof, the parties hereto have hereunto set their hands and seals this 3rd day of Jan., 1902."

Appellants maintain that the demurrer should have been sustained because the lease is so indefinite and uncertain that the intention of the parties cannot be determined; that the intention of the parties is immaterial, unless the same can be ascertained from the terms of the lease. The complaint alleges that when the lease in suit was executed there was a producing oil well on the land, and that reference in the lease to the drilling of a second well was understood by the parties to mean that the well already drilled should be regarded as the first well on the premises.

[1] The rule that a formal written contract, which appears on its face to be complete, cannot be enlarged, modified or contradicted by parol evidence, is abundantly settled, but it is equally well settled that when the terms employed are susceptible of more than one meaning, it is the duty of the court, not only to regard the words within the four corners of the instrument, but also to inform itself of the circumstances which surrounded the parties at the time, so as to interpret the language employed from the standpoint which the parties occupied when they executed the contract. *Cravens v. Eagle Cotton Mills Co.* (1889) 120 Ind. 6, 21 N. E. 981, 16 Am. St. Rep. 298, and cases cited; *Dreyer v. Hart* (1897) 147 Ind. 604, 47 N. E. 174; *Pate v. French* (1890) 122 Ind. 10, 23 N. E. 673.

[2] That construction of a written instrument will be adopted, if possible, which will make it effectual, rather than ineffectual, and reasonable and just rather than the opposite. *Lyles v. Leshar* (1886) 108 Ind. 382, 9 N. E. 365; *Reissner v. Oxley* (1881) 80 Ind. 580; 17 Am. & Eng. Ency. Law, 18; *Cravens v. Eagle Cotton Mills Co.*, supra. The complaint stated a cause of action.

[3] After the cause was at issue and before the trial thereof, George Grey, one of the plaintiffs, died, and Calvin S. Penrod, his administrator, was, by order of the trial court, substituted as a party plaintiff. Appellants afterwards filed a verified motion, in which it was averred that the deceased, George Grey, left surviving him two minor children, who had no legal guardian, and praying that the proceedings in the cause be stayed until a legal representative for the minor children shall have been appointed and been made a party to the action. This motion was overruled, and defendants excepted and have assigned this action of the trial

court as error. The court did not err. This proceeding related to personal property and the heirs of the decedent would not have been properly substituted as parties plaintiff.

[4] On the day set for the trial, appellants appeared and objected to proceeding with the trial "until a proper amended complaint or supplemental complaint had been filed by the plaintiffs' making said Penrod, administrator of the estate of said George Grey, deceased, a proper party plaintiff in said cause." This objection was overruled and exception given plaintiffs. This action of the circuit court is claimed to be erroneous. The complaint was filed by George Grey, Mary C. Feters, and Elizabeth Grey, plaintiffs, on October 15, 1907; George Grey died December 23, 1907, after the cause was at issue. On May 15, 1908, Calvin S. Penrod was appointed, and qualified as administrator of the estate of George Grey; on the same day, on verbal motion of plaintiffs' attorneys, Penrod as administrator was by order of court substituted as a party plaintiff for decedent. There was no objection by plaintiffs to this action of the court. No amended or supplemental complaint was filed.

While the better practice, in case of the death of a party, is to file a supplemental complaint, alleging the fact, and the qualification of his personal representative, and praying for the substitution of the personal representative, we fail to see wherein defendants were harmed. They did not seek to controvert the fact of the death of decedent, or the fact that a personal representative had qualified; they did not seek to reopen the issues. If appellants were endeavoring to secure anything else than delay in the trial of the cause, the record does not disclose it.

Burns Stat. 1908, § 700, provides that this court shall not reverse a judgment for any defect in form or imperfection contained in the record which by law might be amended in the court below; nor shall any judgment be reversed where it appears to the court that the merits of the cause have been fairly determined by the trial court. This statute was enacted to dispose of such objections as is here raised. The lower court did not err in its action. Burns Stat. 1908, § 272; Trent v. Edmonds, 32 Ind. App. 432, 70 N. E. 169; Cray v. Kurtz, 132 Iowa, 105, 105 N. W. 590, 119 Am. St. Rep. 549; White v. Johnson, 27 Or. 282, 40 Pac. 511, 50 Am. St. Rep. 726, and note.

[5] The next contention is that the lease does not describe or identify any land in Wells county or elsewhere, and therefore is not enforceable. There is no merit in this claim. No particular description of land is necessary in a rental contract.

There is no error in the record.
Judgment affirmed.

(48 Ind. A. 23)

SHEDD v. AMERICAN CREDIT-INDEMNITY CO. OF NEW YORK.

(No. 7,281.)

(Appellate Court of Indiana, Division No. 2.
June 6, 1911.)

1. INSURANCE (§ 539*)—INSOLVENCY OF CUSTOMERS—TIME FOR PROOFS OF LOSS.

The provision in a policy insuring a merchant against any loss, over and above a certain per cent. of insured's sales, through insolvency of his customers, that insured shall make a final statement of claim for such excess loss, to be in the possession of the insurer within 30 days after the expiration of the policy, and expressly declaring that otherwise there shall be no liability under the policy, being plain and unambiguous, and consistent with the other parts of the policy, is binding, in the absence of waiver.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1328-1336; Dec. Dig. § 539.*]

2. INSURANCE (§ 558*)—PROOFS OF LOSS—TIME—"WAIVER" OF PROVISIONS.

Waiver being an intentional relinquishment of a known right, or conduct warranting an inference of relinquishment thereof—an election by one to dispense with something of value or to forego some advantage he might have taken or insisted on—the provision of a policy, insuring against losses by insolvency of insured's customers, relating to time for proof of loss, was not waived by the fact that in case of prior policies of insurer, an authorized agent of insurer had each year, and within 30 days after expiration of each policy, come to insured, and prescribed the manner in which his claim against insurer should be made out; such acts not having been subsequent to and with respect to the last contract.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1382-1390; Dec. Dig. § 558.*]

For other definitions, see Words and Phrases, vol. 8, pp. 7375-7381; vol. 8, pp. 7831, 7832.]

3. CUSTOMS AND USAGES (§ 17*)—EXCLUSION BY TERMS OF CONTRACT.

Proof of a custom may not be given when in direct conflict with the terms of a contract sought to be avoided.

[Ed. Note.—For other cases, see Customs and Usages, Cent. Dig. § 34; Dec. Dig. § 17; Evidence, Cent. Dig. §§ 1945-1952.]

4. INSURANCE (§ 558*)—POLICIES—PROVISIONS FOR FINAL STATEMENT.

Under the provision of a policy insuring against losses by insolvency of insured's customers, in excess of a certain per cent. of insured's sales, that in order to make insurer liable insured shall make a final statement of claim for such loss, in the manner prescribed by insurer, on blanks to be furnished on application, which statement shall be in insurer's possession within 30 days after expiration of the policy, insurer is not required to prescribe the manner of making the statement prior to any application by insured for blanks.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1382-1390; Dec. Dig. § 558.*]

5. INSURANCE (§ 536*)—POLICIES—COMPLIANCE WITH PROVISIONS.

Compliance with the provision of a policy insuring one against losses by insolvency of customers, in excess of a certain per cent. of the total sales of insured during the term of the policy, that insured shall within 20 days after receiving information of the insolvency of any customer give insurer notice thereof, does not take the place of compliance with the provision that, in case of any claim for such an excess loss, insured shall make a final statement of

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes

claim, to be in insurer's hands within 30 days after expiration of the policy; as in the absence of such final statement insurer cannot know whether there is any excess loss.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1823; Dec. Dig. § 536.*]

Appeal from Superior Court, Marion County; Vinson Carter, Judge.

Action by Edwin H. Shedd, receiver of the Gem Garment Company, against the American Credit-Indemnity Company of New York. Judgment for defendant. Plaintiff appeals. Affirmed.

Charles R. Willson and Romney L. Willson, for appellant. Brown & Kepperly, for appellee.

ADAMS, J. This action was instituted by the Gem Garment Company against the appellee on an insurance policy or indemnity bond, by the terms of which said Gem Garment Company claimed there was due it the sum of \$2,392.95, net losses suffered on account of the insolvency of certain of its customers. The Gem Garment Company, since submission, passed into the hands of a receiver, and Edwin H. Shedd, receiver of the Gem Garment Company, was, by order of the court, substituted as appellant herein.

The amended complaint is in one paragraph, and alleges that the Gem Garment Company (designated herein as the appellant) is an Indiana corporation, with its chief place of business in the city of Indianapolis; that the appellee is a New York corporation, doing business in the state of Indiana, in accordance with the laws regulating foreign insurance companies, and engaged in writing credit insurance; that on the 5th day of December, 1906, in consideration of \$300 premium paid by the appellant, the appellee executed and delivered to appellant a policy of insurance, which guaranteed the appellant against certain actual losses which might be sustained on account of the insolvency of its customers, for one year from February 1, 1907, a copy of such policy being attached to and made a part of the complaint; that during the term of the policy, appellant suffered a large loss on account of the insolvency of certain of its customers, setting out the same in detail, and aggregating the amount of the demand. The complaint further avers that appellant has performed all of the terms and conditions of said policy on its part to be performed, except as provided in clause 5 of said policy, which is as follows: "(5) Final Settlement of Claim. If any claim for excess loss is made under this bond, a final settlement of the claim, duly sworn to, shall be made by the indemnified on the manner prescribed by this company, and upon blank forms which will be furnished upon application, and such final statement must be received by this company at its office, Broadway and Locust streets, St. Louis, Mo., with-

in thirty days after the expiration of this bond; otherwise there shall be no liability under this bond. The adjustment shall be had within sixty days, after the receipt by this company of such final statement, and the amount ascertained to be due on covered proved losses shall at once become payable."

The complaint then avers that during the term of the policy, appellant had, in compliance with the provisions thereof, notified the appellee on the blanks furnished by it, of the insolvency of each of its debtors, and of the amount which each owed appellant, and that at the expiration of said policy, appellee had full notice of the losses so sustained by appellant; that appellant for a number of years prior to the execution of the policy sued on, had written credit indemnity insurance for appellant, and during such years, the appellee always, within 30 days from the expiration of each of said policies, by an authorized agent, came to appellant and prescribed the manner in which the appellant should make out its claims under such policies for the year then expired. The complaint also avers that after the execution of the policy in suit, appellant, relying upon the terms of said clause 5, and of the custom of appellee in prescribing the manner of making final statement, expected to receive instructions from appellee for making out its final statement of claim as provided in said clause, and delayed preparing such statement until it should receive such instructions; that appellee did not communicate with appellant, nor give any instructions, nor prescribe any manner in which appellant should make such statement of claim, although appellee knew that appellant had sustained losses covered by said policy; that because of such failure to prescribe the manner of making final statement, and relying upon the terms of said clause 5 that appellee would so prescribe the manner of making such statement of claim, the appellant did not make out such statement during the 30 days as provided in said clause 5. It is further averred in the complaint that appellant, in expectation of hearing from appellee, delayed taking any steps in making out its said claim, until 9 weeks after the expiration of the policy; that appellant then wrote to the appellee in regard to the same, but received no answer; that 6 days later it wrote again, and 10 days later received from appellee a letter, wherein appellee denied its liability under said policy, for the reason that appellant had not filed its final statement of claim within the time provided for in said policy. The bond, which is set out and made a part of the complaint, provides that an initial loss shall be borne by the indemnified, and shall be eight-tenths of 1 per cent of the total amount of gross sales made by indemnified during the term of the bond, but said percentage shall

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

be computed on sales of not less than \$200,000, and said initial loss shall be deducted from the aggregate amount of the net covered, proved losses, ascertained in the adjustment.

The policy or bond is made subject to a number of other provisions. The first defines the class of debtors who shall be deemed to be insolvent for the purposes of the bond; the second relates to the credit ratings of such insolvent debtors, and limits the recovery to a certain per cent. of the gross loss. Clause 3 is as follows: "Notification of Insolvency. Notification of each insolvency under this bond must be given by the indemnified to this company on blanks supplied by this company for that purpose, and must be received by this company at its office Broadway and Locust streets, St. Louis, Mo., during the term of this bond, and within twenty days after the indemnified has received first information of the insolvency of the debtor; otherwise the loss shall not be included in the adjustment. * * *

Clause 4 requires the indemnified to use diligence in procuring the largest possible amounts from insolvents. Clause 6 relates to the amount to be deducted in the adjustment from each gross loss. Other provisions in the policy provide in detail the manner of handling insolvent estates, but do not affect the question presented by this appeal.

The appellee demurred to the amended complaint for the reason that the same did not state facts sufficient to constitute a cause of action, which demurrer was sustained by the court. Appellant electing to abide by its amended complaint and exception to the ruling of the court in sustaining the demurrer thereto, final judgment was rendered in favor of appellee. The appellant has assigned as error the sustaining of appellee's demurrer to the amended complaint, and this constitutes the only question presented by the record and briefs.

It will be noted that the complaint admits a failure on the part of appellant to make out a final statement of its claim for excess loss within 30 days after the expiration of the bond, as provided in clause 5. Failure to make the statement, as required by the contract, would defeat a recovery in this case, and the complaint, disclosing such failure, would be bad on demurrer, unless the other facts averred therein are sufficient to constitute a waiver of this provision in the bond.

[1] The contract required the appellant to make a final statement of claim for excess loss, which is understood to mean any loss over a minimum of \$1,600, the exact amount to be determined upon the entire sales made by appellant during the term covered by the policy. This statement was to be in the possession of the appellee within 30 days after the expiration of the policy; otherwise there would be no liability. This provision in the policy is plain and unambiguous, and

it is binding upon the parties, unless waived by the appellee in the manner averred in the complaint.

In passing upon a contract of this general class, courts will construe the same most strongly against the insurer, and will indulge all reasonable presumptions against a forfeiture, but courts will not make a new contract for the parties; and in this case, if the contract of indemnity sued on is consistent in all its parts, free from uncertainty, and there has been no waiver and no fraud, it follows that the rights of the parties must be determined according to the terms of their written agreement.

[2] Waiver has been defined as the intentional relinquishment of a known right, or such conduct as warrants an inference of relinquishment of such right; an election by one to dispense with something of value or to forego some advantage he might have taken or insisted upon. 29 Am. & Eng. Enc. of Law (2d Ed.) 1091; *Bucklen v. Johnson*, 19 Ind. App. 406, 49 N. E. 612; *Warren v. Crane*, 50 Mich. 301, 15 N. W. 465; *Fraser v. Aetna L. Ins. Co.*, 114 Wis. 510, 90 N. W. 476; *Virginia F. & M. Ins. Co. v. Aiken*, 82 Va. 424.

Mr. Bishop, in his work on Contracts (section 792) says: "Waiver is where one in possession of any right, whether conferred by law or by contract, and with full knowledge of a material fact, does or forbears the doing of something inconsistent with the existence of the right, or of his intention to rely upon it. Thereupon, he is said to have waived it, and he is precluded from claiming anything by reason of it afterwards."

Measured by these definitions, we find nothing in the complaint establishing directly or inferentially an intention on the part of appellee to waive any provision in the contract. It is true, the complaint avers that appellant had for a number of years been a policy holder in appellee company, and always during such years, and within 30 days after the expiration of appellant's policies, an authorized agent of appellee came to appellant, and prescribed the manner in which its claim against the appellee should be made out; that relying upon the terms of clause 5, and the custom of the appellee, the appellant delayed taking steps toward making out its final statement until 9 weeks after the expiration of the policy in suit. If the purpose of these averments is to establish an estoppel or a constructive waiver, we think it fails, for the reason that the action of appellee through its agent, related, not to the contract in suit, but to former contracts between the same parties. It is elemental that where a party seeks to be relieved from the obligations of a contract by showing a waiver, either express or constructive, by the other party, he must show that such waiver was exercised with reference to the contract forming the basis of the action, and, to be

available, the acts relied upon as constituting the waiver must be subsequent to the written contract, and have been done with intent to waive some provision of the contract. *United Firemen's Insurance Co. v. Thomas*, 82 Fed. 406, 27 C. C. A. 42, 47 L. R. A. 450; *Havens v. Home Insurance Co.*, 111 Ind. 90, 94, 12 N. E. 137, 60 Am. Rep. 689; *Walton v. Insurance Co.*, 116 N. Y. 317, 22 N. E. 443, 5 L. R. A. 677; *Franklin Life Ins. Co. v. Sefton*, 53 Ind. 380, 388.

[3] Nor does it aid the appellant to characterize the assistance given by the agent of appellee, in making out final statements under former contracts, as a custom. Proof of a custom will not be heard, when in direct conflict with the express terms of a contract sought to be avoided. *Atkinson v. Allen*, 29 Ind. 375; *Clem v. Martin*, 34 Ind. 341; *Franklin Life Insurance Co. v. Sefton*, supra.

Moreover, in this case, the custom alleged was with reference to other policies, the nature, terms, and obligations of which are not shown in the complaint, and it does not appear that the agent on such former occasions did not come in response to an application for the blank forms upon which the final statement is required to be made.

It appears from the complaint that the appellant did nothing in the way of making the proof of loss as required until five weeks after the 30 days given to make the same had passed. By clause 5 of the contract, it was provided that where there was any claim for excess loss, the final statement thereof should be made by the indemnified in the manner prescribed by the company, and upon the blank forms which the company would furnish upon application, and it was expressly provided that no liability would arise in the event that such final statement was not received by the appellee within 30 days after the expiration of the policy.

[4] The appellant insists that under the terms of the provision above quoted, it was incumbent upon the appellee to prescribe the manner of making the final statement, and that this was a duty enjoined upon appellee under the contract, as the initial step in the settlement. We do not so read the clause herein set out. While the final statement is to be made in the manner prescribed by the company, it is to be made upon the blank forms which the company agrees to furnish upon application. Clearly then, as the first step, the indemnified must apply to the company for the blank forms, for no final statement could be made except upon such forms, and there was no obligation upon appellee to furnish forms, except upon application. Indeed, we fail to understand how appellee could have any notice of excess loss in the absence of some information from appellant at the expiration of the policy, to the effect that such a loss had been sustained.

[5] It is, however, urged by appellant that appellee, at the expiration of the year, had full notice of the losses, having been notified, as provided in clause 3, of each loss within 20 days after receiving the first information of insolvency. Manifestly, clause 3 was not intended to supply the final statement contemplated by clause 5, but was intended to give the Indemnity Company notice of the gross loss, and the name and residence of each insolvent. The contract in this case provides that an initial loss of eight-tenths of 1 per cent. of the entire sales made during the term of the policy is to be borne by the indemnified, and this initial loss was not to be less than \$1,600, the actual amount to be determined upon the entire sales of the year. The amount of such sales could not be ascertained until the close of the year. The current notices of insolvency advised the appellee of the amount of appellant's claim against each insolvent, but to assume that the loss in each case was total would be wholly unwarranted. The notice contemplated by clause 3 was not intended to furnish data from which appellee could ascertain the extent of its liability. In the absence of the final statement the appellee could not know the amount of the initial loss, or that the loss for which it was liable was in any sum in excess of the initial loss. The agreement of the parties provides that should there be any claim for excess loss, a final statement thereof, duly sworn to, should be made by the indemnified in the manner prescribed by the appellee, and upon blank forms to be furnished upon application. While it is incumbent upon appellee to prescribe the manner of making the final statement, where an excess loss is claimed, it is the duty of appellant to advise appellee of such claim, and apply for the forms upon which to make the final statement. The complaint fails to show that this requirement was waived, and the demurrer was properly sustained.

Judgment affirmed.

(48 Ind. A. 56)

TOLEDO, ST. L. & W. R. CO. v. LANDER.
(No. 6,988.)

(Appellate Court of Indiana, Division No. 1.
June 9, 1911.)

1. DEATH (§ 57*)—PLEADING AND EVIDENCE—EXISTENCE OF BENEFICIARY.

Since, under Burns' Ann. St. 1908, § 285, providing that personal representative may maintain an action for wrongful death, and that the damages shall inure to the widow and children and next of kin, the complaint must allege the existence of persons to whom the damages inure, the existence of such beneficiaries is put in issue by the general denial.

[Ed. Note.—For other cases, see Death, Cent. Dig. § 74; Dec. Dig. § 57.*]

2. PLEADING (§ 17*)—DIRECTNESS—RECITALS.

Burns' Ann. St. 1908, § 343, cl. 2, declaring that a complaint shall contain a statement of the facts constituting the cause of action in

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

plain and concise language, without repetition, and so as to enable a person of common understanding to know what is intended, does not change the rule requiring material facts to be alleged directly, and not by way of recital.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 38; Dec. Dig. § 17.*]

3. APPEAL AND ERROR (§ 1170*)—DEATH (§ 49*)—TECHNICAL ERRORS—COMPLAINT—ALLEGATIONS OF EXISTENCE AND INTEREST OF BENEFICIARIES.

The complaint in an action by an administrator for wrongful death of his decedent alleged that the decedent died intestate leaving surviving him as his only heirs at law and next of kin, his widow, and infant children. Burns' Ann. St. 1908, § 407, provides that judgment shall not be reversed for technical errors. *Held*, that the allegations sufficiently stated the fact that the decedent left a widow and infant children.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4540-4545; Dec. Dig. § 1170.* Death, Cent. Dig. §§ 64-66; Dec. Dig. § 49.*]

4. DEATH (§ 52*)—PLEADING AND EVIDENCE—LOSS OR INJURY RESULTING FROM DEATH.

A complaint by an administrator for the wrongful death of his decedent, which alleges that the decedent died intestate leaving surviving him as his only heirs at law and next of kin his widow and infant children, and that he was capable of and was earning \$5 per day, and that the action was prosecuted for the benefit of his widow and infant children, who had suffered damages because of the wrongful death, sufficiently alleges facts showing a cause of action against the defendant in favor of the decedent had he lived; and hence facts sufficient to show a cause of action for the benefit of his widow and infant children, since Burns' Ann. St. 1908, § 285, names the widow and infant children as persons entitled to the benefit of any recovery had in such action, on the theory that the death resulted to the damage of those dependent upon him.

[Ed. Note.—For other cases, see Death, Cent. Dig. § 69; Dec. Dig. § 52.*]

5. RAILROADS (§ 352*)—ACCIDENT AT CROSSING—GENERAL VERDICT—ANSWERS TO INTERROGATORIES—CONSISTENCY.

In an action by an administrator for wrongful death of his decedent at a railroad crossing, answers to interrogatories showing that decedent was approaching the crossing at the rate of two miles per hour, and that he knew he was approaching the crossing, and was familiar with it, and that from a point 40 feet from the track one looking east could have seen an approaching train for a distance of 496 feet; that the defendant's train approached the crossing at a speed of 40 miles per hour, and passed over the crossing at 30 miles per hour; that the noise of escaping steam from an engine on the sidetrack prevented the decedent from hearing the whistle sounded for the station just beyond the crossing—are not inconsistent with a general verdict for plaintiff.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1216; Dec. Dig. § 352.*]

6. RAILROADS (§ 324*)—OPERATION—CROSSINGS—CARE IN GOING ON OR NEAR TRACKS.

A person who is in possession of his faculties must use them as an ordinarily careful and cautious person to avoid injury from passing trains at highway crossings.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1020; Dec. Dig. § 324.*]

7. RAILROADS (§ 327*)—OPERATION—CROSSINGS—DUTY TO LOOK AND LISTEN.

It is the duty of one approaching a railroad crossing to listen and look both ways for

approaching trains if the surroundings are such as to permit of such precautions before attempting to cross the track.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1043-1056; Dec. Dig. § 327.*]

8. RAILROADS (§ 330*)—OPERATION—CROSSINGS—RELIANCE ON PRECAUTIONS ON PART OF RAILROAD COMPANY.

A person approaching a railroad crossing has a right to expect that the railroad company will give the statutory crossing signals, but the company's failure will not absolve such person from the exercise of care commensurate with the danger of which he is bound to take notice by reason of the fact that it is a railroad crossing.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1071-1074; Dec. Dig. § 330.*]

9. RAILROADS (§ 313*)—CROSSINGS—SIGNALS FROM TRAINS.

The failure of a railroad company to give the statutory signal on approaching a crossing constitutes negligence.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1002; Dec. Dig. § 313.*]

10. RAILROADS (§ 348*)—ACCIDENTS AT CROSSINGS—SUFFICIENCY OF EVIDENCE—CONTRIBUTORY NEGLIGENCE.

Evidence in an action by an administrator for the wrongful death of his decedent who was killed at defendant's railroad crossing *held* sufficient to sustain a general verdict for plaintiff.

[Ed. Note.—For other cases, see Railroads, Dec. Dig. § 348.*]

11. TRIAL (§ 296*)—INSTRUCTIONS—CONSTRUCTION OF CHARGE AS A WHOLE.

An instruction is to be considered with other instructions; and, if the instructions clearly and explicitly inform the jury as to the law referred to in a particular instruction, error in that instruction is harmless.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 705-713; Dec. Dig. § 296.*]

12. NEGLIGENCE (§ 141*)—INSTRUCTION—CONTRIBUTORY NEGLIGENCE.

An instruction in an action by an administrator for the wrongful death of his decedent, authorizing a recovery unless decedent contributed "materially" and directly to his death, is not erroneous.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 382-399; Dec. Dig. § 141.*]

13. COURTS (§ 91*)—RULINGS OF DECISION—DECISION OF HIGHEST APPELLATE COURT.

The decisions of the Supreme Court are ruling precedents in the Appellate Court, and cannot be contravened by it.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 325; Dec. Dig. § 91.*]

14. APPEAL AND ERROR (§ 1064*)—HARMLESS ERROR—INSTRUCTIONS.

An instruction in an action by an administrator for wrongful death of his decedent upon defendant's railroad crossing, which refers to the statutory penalty with reference to engineers at railroad crossings, which feature of the instruction was not afterwards referred to or emphasized, and where the record did not indicate that it in any manner influenced the jury as against the defendant, is harmless.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 1064.*]

15. TRIAL (§ 296*)—INSTRUCTIONS—ERROR CURED BY OTHER INSTRUCTION.

An instruction in an action by an administrator for the wrongful death of his decedent upon defendant's railroad crossing, leaving the jury to assess plaintiff's damages at such sum as they might believe he ought to recover, not exceeding \$10,000, taken in connection with an

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

other instruction limiting the plaintiff's recovery to the evidence in the case, in the absence of a more specific instruction, is not reversible error.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 706-713; Dec. Dig. § 296.*]

16. TRIAL (§ 260*)—INSTRUCTIONS—INSTRUCTION ALREADY GIVEN.

The refusal of an instruction upon a part of the case fully covered by the instructions given is not error.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 851; Dec. Dig. § 260.*]

Appeal from Circuit Court, Miami County; Jos. N. Tillett, Judge.

Action by Thomas Lander, administrator, against the Toledo, St. Louis & Western Railroad Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Guenther & Clark, Clarence Brown, Charles A. Schmettau, and Robert J. Loveland, for appellant. St. John, Charles & Gemmill, Antrim & McClintic, and Thomas B. Dicken, for appellee.

MYERS, J. This was an action by appellee against appellant to recover damages for the alleged negligent killing of Harry E. Lander at a grade crossing in the town of Van Buren. Trial by jury, general verdict, and judgment in favor of appellee. The jury with their general verdict returned answers to 86 interrogatories, on which the appellant moved for judgment in its favor.

The errors assigned and presented call in question the action of the court in overruling a demurrer, for want of facts to the first paragraph of the complaint, and in overruling appellant's motion for judgment on the answers of the jury to the interrogatories, and its motion for a new trial. The objections lodged against the first are alike applicable to the second paragraph of the complaint. The brief of appellant, omitting the caption, sets out a copy of the first paragraph of the complaint, but makes no mention of the second paragraph. The objections urged against the first paragraph are that it does not positively allege in traversable form (1) that the decedent left surviving him a widow, children, or next of kin; (2) that it is not alleged that the beneficiaries were injured by reason of the acts of negligence charged; (3) that, if damages to the beneficiaries are alleged, it does not connect the damages with the negligent acts of which complaint is made. We shall hereafter refer to this paragraph as the complaint.

[1] It is true the complaint must allege the existence of persons to whom under the statute the damages inure. Section 285, Burns' 1908. It is one of the issuable facts to be proved, and is put in issue by the general denial. *Chicago & Erie R. Co. v. La Porte*, 33 Ind. App. 691, 71 N. E. 166. The complaint in question states: "That the said Harry E. Lander died intestate, leaving sur-

living him as his only heirs at law and next of kin Cora Lander, his widow, and Vera Lander and Lucile Lander, his infant children."

[2, 3] Our Code of Civil Procedure (section 343, Burns 1908, cl. 2) provides that a complaint shall contain "a statement of the facts constituting the cause of action, in plain and concise language, without repetition, and in such manner as to enable a person of common understanding to know what is intended." While this provision of our Code does not change the rule requiring material facts to be alleged directly, and not by way of recital, yet it would be exceedingly technical to hold that the quoted allegation of the complaint stated only by way of recital the fact that the decedent left a widow and two infant children. The allegation states more than one fact, but in plain and concise language. It might technically be subject to criticism, but not for any omission or defect which could have affected the substantial rights of appellant. The objection is not well taken. Section 407, Burns 1908; *Louisville, etc., Ry. Co. v. Kendall*, 138 Ind. 313, 36 N. E. 415; *Chicago & Erie R. Co. v. La Porte*, supra.

[4] As to the second and third objections, appellant in support thereof has cited a number of cases defining actionable negligence as the point in those cases affirming the asserted weakness in the complaint before us. There is no contention that the complaint fails to charge negligence on the part of the appellant, or that such negligence was the proximate cause of the death of Harry E. Lander. Following these allegations, the age of Lander at the time of the accident is shown, that he was a healthy, able-bodied man, and capable of and was earning \$5 per day. It is also stated that the action is prosecuted for the benefit of his said widow and infant children, who have suffered damages because of the death of said Lander in the sum of \$10,000, etc. The complaint states facts showing a cause of action against appellant, and in favor of Lander, had he lived, but, as he died from the effect of injuries received because of the negligence of the appellant, the action which he might have maintained survived to his personal representative. Therefore, if the complaint was sufficient to show that it was appellant's failure to perform a duty it owed to the decedent that proximately caused his death, the law steps in and names his widow and children, who, under the showing made in the complaint, are his beneficiaries and entitled to the benefit of any recovery had in such action, on the theory that the death of the decedent, caused in the manner and form set forth in the complaint, as a natural sequence, resulted to the damage of those dependent upon him; they being within the class named in the statute. Section 285, su-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes 95 N.E.—21

pra; Clore v. McIntire, Adm'r, 120 Ind. 262, 22 N. E. 128; Korrady v. Lake Shore, etc., R. Co., 131 Ind. 261, 29 N. E. 1069.

[6] Claim is made that the facts found by the jury in answer to interrogatories conclusively show that the decedent's negligence contributed to his injury and death. The general verdict is a finding of actionable negligence on the part of appellant, and that the decedent was free from contributory negligence. The facts which are said to be in irreconcilable conflict with the general verdict, and relied on to support the charge of contributory negligence on the part of decedent, may be stated as follows: A few minutes after 7 o'clock on the morning of May 29, 1905, the decedent, while riding in an open buggy or buckboard on First street, with two of his employes, one of whom was driving the horse drawing the vehicle, was killed at a grade crossing in a collision with one of appellant's west-bound passenger trains. The railroad track from where it crosses First street eastward makes a four-degree curve to the north. North of the main track, also crossing First street, was a side track, on which, east of said crossing, stood a number of freight cars. At the west line of First street, and on the south side of appellant's main track, a switch track connected, which extended west. On this switch track, at the time of said collision, and close to said crossing, headed east, stood one of appellant's locomotives, from which escaping steam was making a loud noise. Main street connected with First street 427 feet south of said crossing, and from that point north to the crossing a view of the railroad track to the east, or of cars approaching from the east, was obstructed by buildings, and could not be seen by a traveler on First street south of the crossing, going north, until a point about 40 feet south of the track was reached, from which point on the morning of the accident one looking east could have seen an approaching train for a distance of 496 feet, at a point 30 feet from the crossing 455 feet, 20 feet from the crossing, 412 feet, and 10 feet south of the crossing, 364 feet. The decedent approached the crossing traveling at the rate of 2 miles per hour, and from a distance of 700 feet appellant's train approached the crossing at an average speed of 40 miles per hour, actually passing over the crossing at about 30 miles per hour. The engineer, as soon as he saw the decedent's perilous position, attempted to check the speed of the train, but not in time to stop the engine before the accident. An instant before the collision, the decedent was heard to say "Look out!" the horse was turned to the left, and the accident happened. When the decedent was 40 and 30 feet south of the crossing, the train was not in sight. The whistle on the engine was sounded for Van Buren station, but it was not sounded for said First street crossing, nor was it sounded for the road cross-

ing situated about one-half mile east of First street. The sounding of the whistle for the station could not have been heard by the decedent because of the buildings on the east side of First street, the rattle of said vehicle, and the noise of the escaping steam from the engine on the side track west of First street. The decedent knew he was approaching the crossing and was familiar with it. The train was scheduled to arrive at Van Buren at 7:05 a. m., but was from 10 to 15 minutes late. These facts found by the jury may be readily reconciled with the general verdict, supported by all intendments which might have been drawn from evidence admitted within the issues of the cause. The failure of the occupants to stop the horse in time to have averted the accident might have been explained so as to clearly warrant the jury in finding the decedent free from contributory negligence. If this was done, and for the purpose of this motion we must assume that it was, then the court committed no error in overruling it.

In support of the motion for a new trial, it is insisted that the verdict is not sustained by sufficient evidence, and that the court erred in giving instructions 5, 8, 9, and 18 tendered by appellee, and in refusing to give instructions 1 and 31 tendered by appellant.

[6] Appellant earnestly contends that the evidence in this case brings it within the rule that one who approaches a railroad crossing with which he is familiar, and attempts to cross without looking and listening for approaching trains where it is possible to do so, is guilty of such contributory negligence as to preclude him from a recovery if he is injured. We have no fault to find with this rule, for every person who is in possession of all his faculties must use them as an ordinarily careful and cautious person to avoid injury from passing trains at highway crossings. *Lowden v. Pennsylvania Co.*, 41 Ind. App. 614, 82 N. E. 941.

[7] It is his duty to listen and look both ways for approaching trains, if the surroundings are such as to permit of such precautions, before attempting to cross the track. *Mann v. Belt, etc., Co.*, 128 Ind. 138, 26 N. E. 819; *Ohio, etc., R. Co. v. Hill*, 117 Ind. 56, 18 N. E. 461.

[8, 9] He has a right to expect that the railroad company will perform its duty, and give the statutory crossing signals, and its failure to do so will be regarded as negligence. *Baltimore, etc., R. Co. v. Young*, 153 Ind. 163, 54 N. E. 791; *Cleveland, etc., R. Co. v. Carey*, 33 Ind. App. 275, 71 N. E. 244; *Indianapolis Street Ry. Co. v. O'Donnell*, 35 Ind. App. 312, 73 N. E. 163, 74 N. E. 253. But such failure will not absolve the traveler from the exercise of care commensurate with the danger of which he is bound to take notice by reason of the fact that it is a railroad crossing, and that trains may pass at any time. *Evansville, etc., R. Co. v. Clements*, 32 Ind. App. 659, 70 N. E. 554.

[10] We have carefully examined the evidence in this case from which we conclude the jury might reasonably have found that the decedent cautiously and prudently approached appellant's railroad track. If it could be said from the evidence that he knew the scheduled time for the arrival of the train at Van Buren, it does not appear that he knew it was 10 or 15 minutes late. As we have seen, he was not only bound to look to the east for approaching trains, but to the west as well. The standing engine on the side track south of the main track, and west of the crossing, partially obstructed the view of the track to the west. The decedent was about 12 or 14 feet from the head of the horse, and the front feet of the horse were close to the south rail of the track when the occupants of the buggy discovered the approaching train. Immediately the driver turned the horse toward the west, but not in time to get him far enough from the track to prevent the engine striking him in the side, and throwing from the buggy its occupants. There is evidence tending to show that the train which struck the decedent's horse was only about three seconds distant when first the decedent could have seen it had he been looking in that direction, but he as well as the other occupants of the buggy were looking west for an approaching train. They had looked east when about 18 feet from the track, and no moving train was in sight. The train which struck the horse could not be heard because of escaping steam from one of appellant's engines west of the crossing. They heard no signal, and none was given for First street crossing. The evidence is conflicting as to whether a signal was given for a highway crossing known as Corey crossing, 2,079 feet east of First Street crossing, and we may assume it was not. No signals were given after reaching Corey crossing. The evidence is voluminous, and we will not attempt to refer to all the facts it tends to prove favorable to the general verdict. From all the facts and circumstances disclosed by the evidence, the question of the decedent's negligence was for the jury.

[11] It is next insisted that instruction 5, tendered by appellee and given to the jury, was erroneous and harmful to the appellant. This instruction is criticised on the ground that it permits a recovery upon proof of negligent acts not alleged in the complaint; also for the reason that it authorizes plaintiff to recover unless the deceased "contributed materially and directly to his death." The instruction was not carefully prepared, and is not approved for the reason that it contains incomplete statements of law; but, when considered with other instructions in the case which clearly and explicitly inform the jury as to the law referred to in this instruction, we are convinced that they were not misled, or the plaintiff harmed thereby.

[12] The word "materially" as used in this instruction has been many times held by the Supreme and this court not to render the instruction erroneous.

[13] A contrary holding would contravene a ruling precedent of the Supreme Court, and this we cannot do. *Citizens' Street Ry. Co. v. Twine*, 111 Ind. 587, 13 N. E. 55; *Toledo, etc., Ry. Co. v. Goddard*, 25 Ind. 185; *Pennsylvania Co. v. Sinclair*, 62 Ind. 301, 30 Am. Rep. 185; *Citizens' Street Ry. Co. v. Abright*, 14 Ind. App. 433, 42 N. E. 238, 1028; *Union Traction Co. v. Vandercook*, 32 Ind. App. 621, 69 N. E. 486; *Indianapolis, etc., Transit Co. v. Edwards*, 36 Ind. App. 202, 74 N. E. 533.

[14] Instruction 9, after practically quoting the statute requiring all railroad companies operating railroads in this state to equip their locomotives with a whistle and bell, and prescribing the duties of the engineer with reference to their use, and the penalty prescribed by statute for the neglect of such duty, continues by telling the jury, if they find certain facts to be true, then they would be authorized to find for the plaintiff. This instruction is criticised on the ground that it is erroneous because it refers to the penalty in the statute with reference to engineers. The objection is not without some merit, but as this feature of the instruction was not afterwards referred to or emphasized and nothing appearing in the record to indicate that it in any manner influenced the jury as against the company, the only defendant, we are not persuaded that it created a prejudice in the minds of the jury which led them to an incorrect verdict.

[15] Instruction 18 is objected to on the ground that it failed to inform the jury as to the elements of damage they should take into consideration in determining the amount of plaintiff's recovery. While the jury should be instructed as to the legal measure of damages, and not be left to assess plaintiff's "damages at such sum as you may believe he ought to recover not exceeding \$10,000," yet, when this instruction is taken in connection with another instruction which limits the plaintiff's recovery to the evidence in the case, it does not present reversible error. If appellant desired a more specific instruction as to the measure of damages, it should have asked it. Instruction 1 tendered by the appellant and refused by the court, directed the jury to find for the defendant. The evidence did not warrant the giving of this instruction.

[16] Instruction 31 refused by the court was fully covered by other instructions tendered by appellant, and by the court given to the jury.

Finding no reversible error in the record, the judgment is affirmed.

(48 Ind. A. 76)

CITY OF INDIANAPOLIS v. SHOENIG.

(No. 7,270.)

(Appellate Court of Indiana, Division No. 2.
June 9, 1911.)**1. APPEAL AND ERROR (§ 839*)—REVIEW—PLEADING.**

A point that the evidence does not sustain the complaint on the theory upon which it is drawn cannot be considered as affecting the complaint, and can be properly considered only in passing upon the motion for new trial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2915, 3279-3300; Dec. Dig. § 839.*]

2. APPEAL AND ERROR (§ 1078*)—WAIVER OF ERROR—FAILURE TO ARGUE IN BRIEF.

Errors assigned but not discussed in the briefs are waived.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4256-4261; Dec. Dig. § 1078.*]

3. MUNICIPAL CORPORATIONS (§ 821*)—STREETS—DANGEROUS CONDITION—JURY QUESTION.

In an action for injury to a pedestrian who stepped into a deep gutter in the nighttime, whether a dangerous condition existed in the street *held* under the evidence a jury question.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1745-1757; Dec. Dig. § 821.*]

4. MUNICIPAL CORPORATIONS (§ 821*)—STREETS—DANGEROUS CONDITION—JURY QUESTION.

Where the evidence as to the condition of a street is without conflict, and the condition shown is such that different minds might honestly reach different conclusions upon the question as to whether or not the condition shown constituted a dangerous defect or condition, that question is one of fact for the jury.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1745-1757; Dec. Dig. § 821.*]

5. APPEAL AND ERROR (§ 1001*)—REVIEW—FINDINGS—CONCLUSIVENESS.

A verdict sustained by evidence is conclusive on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3922-3934; Dec. Dig. § 1001.*]

6. MUNICIPAL CORPORATIONS (§ 755*)—DEFECTS IN STREETS—LIABILITY.

A city is liable for negligently failing to make a street ordinarily safe for travel as to a condition created by it.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1587-1590; Dec. Dig. § 755.*]

7. MUNICIPAL CORPORATIONS (§ 819*)—DEFECTS IN STREETS—INJURY TO PEDESTRIAN—CONTRIBUTORY NEGLIGENCE—EVIDENCE—SUFFICIENCY.

In an action for injury to a pedestrian who stepped into a deep gutter in the nighttime, evidence *held* to sustain a finding of his freedom from contributory negligence.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1739-1743; Dec. Dig. § 819.*]

8. MUNICIPAL CORPORATIONS (§ 807*)—PEDESTRIANS CROSSING STREETS—CONTRIBUTORY NEGLIGENCE.

It is not necessarily contributory negligence for a pedestrian to attempt to cross a street at a place other than a regular crossing, but he must use care proportionate to known danger.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1679-1681; Dec. Dig. § 807.*]

9. APPEAL AND ERROR (§ 525*)—RECORD—INSTRUCTIONS.

The giving and refusal of instructions are not reviewable, where they are not brought into the record by a bill of exceptions, and the record fails to show that they were filed with the clerk of the trial court as required by Burns' Ann. St. 1908, § 501.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2376-2379; Dec. Dig. § 525.*]

Appeal from Circuit Court, Morgan County; J. W. Williams, Judge.

Action by Joseph Shoenig against the City of Indianapolis. Judgment for plaintiff, and defendant appeals. Affirmed.

Frederick E. Matson, James D. Pierce, and Crate D. Bowen, for appellant. Charles B. Clarke, Walter C. Clarke, and Clement M. Holderman, for appellee.

LAIRY, O. J. This is an action brought by appellee for injuries received by him while traveling upon one of the streets of the appellant city. A complaint was filed in the Marion circuit court to which appellant demurred for want of facts. This demurrer being overruled, the appellant answered in general denial. A change of venue was then taken to the Morgan circuit court, where the cause was tried before a jury resulting in a verdict for the plaintiff in the sum of \$1,800, on which judgment was afterwards rendered. From this judgment an appeal was taken, and the following errors assigned for reversal: First, the complaint does not state facts sufficient to constitute a cause of action; second, the court erred in overruling the demurrer to the complaint; and, third, the court erred in overruling the motion for a new trial.

[1] No objection to the complaint is pointed out by the appellant in its brief, and no authorities are cited bearing upon this proposition. The brief contains no argument as to the sufficiency of the complaint; the only question raised with reference to it being that the evidence in the record does not sustain it on the theory upon which it is drawn. This question cannot be considered as affecting the complaint, but can be properly considered only in passing upon the motion for a new trial.

[2] Errors assigned but not discussed in the brief of the party assigning them will be treated as waived. *Stamets v. Mitchenor*, 165 Ind. 672, 75 N. E. 579; *Hoover v. Weesner*, 147 Ind. 510, 45 N. E. 650, 46 N. E. 905; *Starkey v. Starkey*, 166 Ind. 140, 76 N. E. 876; *City of Ft. Wayne v. Patterson*, 25 Ind. App. 547, 58 N. E. 747.

Several causes are assigned for a new trial, but the only ones discussed are: First, that the verdict of the jury is not sustained by sufficient evidence; second, that the verdict of the jury is contrary to law; third, that the court erred in giving certain designated instructions of its own motion; fourth, that

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

the court erred in giving certain designated instructions requested by appellee; and, fifth, that the court erred in refusing to give certain designated instructions requested by appellant.

The evidence tends to show that appellee received the injuries for which he sues by falling into a deep gutter on the east side of Fulton street near the corner of Ohio street, in the city of Indianapolis, on the night of July 27, 1907.

[3] The first contention of appellant is that the gutter in question was necessary and proper for the purpose of draining the street, and that the manner of its construction was not such as to constitute a dangerous defect in the street. Upon this question the evidence tends to show that Ohio street and Fulton street intersect at right angles; that Ohio street runs east and west and is paved with brick; that Fulton street is a gravel way; that the curb and pavement which constitute the improvement on Ohio street extend up into Fulton street for a distance of 16 feet and 2 inches from the curb line of Ohio street; that Fulton street is paved with brick for that distance north of said curb line; that there was a cement sidewalk 5 feet wide along the curb line on the north side of Ohio street east of Fulton street, and a sidewalk 6 feet wide along the east side of Fulton street next to the property line; that the cement curb which forms a part of the Ohio street improvement is constructed parallel with the north property line of said street and distant therefrom 16 feet and 2 inches; and that this curb turns the corner of Ohio and Fulton streets and extends north parallel with the east property line of Fulton street and distant therefrom 14 feet and 8 inches to a point on a line with the north property line of Ohio street where the curb and also the brick pavement terminates. There is an oblong area 11 feet and 4 inches long from north to south and 8 feet and 4 inches wide located between the sidewalk and curb on Fulton street and immediately north of the sidewalk on Ohio street. This area was about 6 inches above the paved street and was filled with gravel flush with the top of the sidewalk and curb. Near the center of the north end of this area, the old open gutter on the east side of Fulton street connected with a tile drain 10 inches in diameter which was constructed under this area south to a sewer near the north curb line of Ohio street. The bottom of the tile at the north end of this area was about 28 inches below the surface of the area described, and the gutter was so constructed at that point that the bottom of said gutter was on a level with the bottom of the 10-inch tile and about 28 inches below the surface of said area. Above the tile was placed a stone which came up level with the sidewalk and curb, and the gravel was filled in behind this stone so as to leave an offset or declivity at the north end of the described area of about

28 inches. The gutter at that point was not covered, and there was no rail or guard to prevent a pedestrian from stepping off the north end of said area into said gutter and being injured. In that part of the city, as shown by the evidence, some of the sidewalks were constructed along and adjoining the property line, while others were constructed along the curb line. The area described was of such a character that, in the nighttime, it might be easily mistaken for a sidewalk, and a person crossing Fulton street from the west by deviating slightly to the north, without leaving the paved portion of the street and stepping upon this raised area near the north end thereof, would be exposed to the danger of being injured as a result of the unguarded defect at the north end of said area. Whether the condition of the street described was so located and was of such a character as to be dangerous to pedestrians using the streets and sidewalks was a question of fact for the jury.

[4] Where the evidence in reference to the condition of a street is without conflict, and the condition shown is of such a character that different minds of equal intelligence and candor might honestly reach different conclusions upon the question as to whether or not the condition shown constituted a dangerous defect or condition, that question is one of fact for the jury. *Heckman v. Evenson*, 7 N. D. 173, 73 N. W. 427; *Gerald v. City of Boston*, 108 Mass. 580; *Dowd v. Chicopee*, 116 Mass. 93.

[5] The jury having found by its general verdict that the condition shown was such as to make the street unsafe for travel, this finding cannot be disturbed on appeal.

[6] The defendant city, having created this condition, should have taken such precautions as were reasonably necessary to make the street at that point ordinarily safe for travel; and a failure so to do is negligence and renders the city liable. *Higert v. City of Greencastle*, 43 Ind. 574; *City of Delphi v. Lowery*, 74 Ind. 520, 39 Am. Rep. 98; *Jones v. Waltham*, 4 Cush. (Mass.) 299, 50 Am. Dec. 783. In the case of *City of Vincennes v. Spees*, 35 Ind. App. 389, 74 N. E. 277, the language of this court was: "This duty extends not only to the traveled way of streets and alleys, but to adjacent conditions. Ordinarily fences or barriers are not required along highways to prevent travelers from straying out of their limits; but, if there are excavations or other dangerous defects or obstructions close to the way, the city or local authorities are required to erect barriers or take other proper precautions to warn travelers of the danger."

[7] The next contention of the appellant is that, upon the undisputed facts as disclosed by the evidence, the appellee was guilty of contributory negligence. The evidence of appellee shows that he came east on the sidewalk on the north side of Ohio street, and started across Fulton street toward the north-

east corner of Fulton and Ohio streets, and that, after he crossed the street car track, he walked in a northeasterly direction, and stepped up on the curb at the north end of the raised area heretofore described in this opinion, and that in so doing he stepped off the declivity at the north end thereof and was injured. His evidence shows that he did not walk directly east in crossing Fulton street and step up on the curb in a line with the sidewalk on the north side of Ohio street. Appellant insists that it thus appears that, instead of traveling upon the sidewalk, which was safe and suitable for the use of pedestrians, the appellee, for his own convenience, attempted to cut the corner in a diagonal course, and thus unnecessarily exposed himself to the danger which caused his injury, and that he is therefore guilty of contributory negligence.

We cannot agree that the evidence shows without dispute that appellee intentionally left the way prepared by the city for the use of pedestrians. It is true that he walked in a northeasterly direction to the curb after crossing the street car track; but he may have believed from appearances that the raised area between the curb and the sidewalk was the sidewalk on the east side of Fulton street intended for the use of pedestrians. The conditions shown by the evidence would have justified such an inference by the jury.

[8] We cannot, however, give our assent to the proposition that a pedestrian desiring to cross a street is bound to use the crossing provided for that purpose, and that an attempt to cross at any other place is necessarily contributory negligence. Our Supreme Court has held that the fact that a footman undertakes to cross a street at a place other than the regular crossing for footmen will not, of itself, defeat an action for injuries caused by a horseman's negligently riding against him. *Simons v. Gaynor*, 89 Ind. 165; *Stringer v. Frost*, 116 Ind. 477, 19 N. E. 331, 2 L. R. A. 614, 9 Am. St. Rep. 875. In the case last cited, the court said: "The plaintiff had the right to cross the street at the crossing or elsewhere, exercising such caution and prudence as the circumstances demand to avoid being injured, while the defendant had the right to ride along the street, observing such watchfulness for footmen, and having his animal under such control, as would enable him to avoid injury to others who had corresponding and reciprocal rights in the street."

These cases are not directly in point inasmuch as they do not hold that a pedestrian crossing the street at a point other than the regular crossing would be guilty of contributory negligence so as to preclude a recovery for an injury caused by a defect in a street; but we think that the same rule should apply to such a case. If a person, in walking diagonally across a street which he knows to be paved with brick or asphalt, were to be

injured by falling into an excavation in said street negligently left open and unguarded, he surely ought not to be held guilty of contributory negligence as a matter of law merely because he was not using the crossing. If he knew of the dangerous condition of the street, a different question would be presented.

A person who attempted to cross a street at a place other than the crossing provided for that purpose is bound to use care proportionate with the known danger; but, if he knows of no dangerous excavation or obstruction, he has a right to assume that all parts of the street intended for travel are reasonably safe for that purpose. *Brusso v. City of Buffalo*, 90 N. Y. 679; *Collins v. Dodge*, 37 Minn. 503, 35 N. W. 368; *Rea v. Sioux City*, 127 Iowa, 165, 103 N. W. 949; *Heckman v. Evenson*, 7 N. D. 175, 73 N. W. 427; *Magaha v. Hagerstown*, 95 Md. 62, 51 Atl. 832, 93 Am. St. Rep. 317; *Bennett v. Village of Sing Sing*, 14 N. Y. Supp. 463.¹

There is no evidence that appellee had any knowledge of the defect in the street which caused his injury. The fact that he deviated slightly to the north in crossing Fulton street and stepped upon the curb at a point 12 or 15 feet north of the corner did not constitute contributory negligence per se. The jury has by its verdict found that the appellant city was negligent, and that the appellee was free from contributory negligence, and there is evidence to sustain the finding upon both propositions.

Appellant complains of the action of the court in giving certain instructions to the jury, and in refusing to give certain instructions tendered by appellant.

[9] The appellee makes the point that the instructions cannot be considered for the reason that they are not properly in the record. The instructions were not brought into the record by a bill of exceptions, and the record fails to show that either the instructions given or those tendered and refused were filed with the clerk of the court at the conclusion of the argument or at any time. The statute provides: "All instructions requested, whether given or refused, and all instructions given by the court of its own motion shall be filed with the clerk of the court at the close of the instruction of the jury." *Burns' Annotated Statutes 1908*, § 561. We must assume that the purpose of this requirement of the statute was to identify the instructions which the court gave, as was required under section 542, *Burns' 1901* (section 533, R. S. 1881), where no bill of exceptions was filed. *Hadley v. Atkinson*, 84 Ind. 64, 66; *Thompson v. Thompson*, 156 Ind. 276, 59 N. E. 845; *Cleveland, etc., R. Co. v. Ward*, 147 Ind. 256, 45 N. E. 325, 46 N. E. 462; *Ohio, etc., R. Co. v. Dunn*, 138 Ind. 18, 36 N. E. 702, 37 N. E. 546; *Van Sickle v. Belknap*, 129 Ind. 558, 28 N. E. 305; *Butler*

¹Reported in full in the New York Supplement; reported as a memorandum decision without opinion in 60 Hun, 579.

v. Roberts, 118 Ind. 481, 21 N. E. 42; Ft. Wayne, etc., R. Co. v. Beyerle, 110 Ind. 100, 11 N. E. 6; Childress v. Callender, 108 Ind. 394, 9 N. E. 292; Blount v. Rick, 107 Ind. 238, 5 N. E. 898, 8 N. E. 108; Landwerlen v. Wheeler, 106 Ind. 523, 5 N. E. 888; Aufdencamp v. Smith, 96 Ind. 328; Weik v. Pugh, 92 Ind. 382; McIlvain v. Emery, 88 Ind. 298; Heaton v. White, 85 Ind. 376; O'Donald v. Constant, 82 Ind. 212; Supreme Lodge, etc., v. Johnson, 78 Ind. 110.

As the instructions are not in the record, no further question remains to be considered. Judgment affirmed.

(48 Ind. App. 21)

OLIVER TYPEWRITER CO. v. VANCE.

(No. 7,140.)

(Appellate Court of Indiana, Division No. 1.
June 6, 1911.)

1. APPEAL AND ERROR (§ 232*)—QUESTIONS REVIEWABLE—SUFFICIENCY OF PLEADINGS.

The filing of an amended complaint after the overruling of a demurrer to the original complaint takes the original complaint and the rulings thereon out of the record, and the amended complaint is not questioned by the demurrer, and, in the absence of objections to the sufficiency of the amended complaint by demurrer or otherwise in the trial court, its sufficiency is questioned for the first time on appeal, on appellant assigning as error that the amended complaint does not state facts constituting a cause of action.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 232.*]

2. PLEADING (§ 433*)—ERRORS CURED BY VERDICT.

Where the sufficiency of the complaint is questioned after verdict by motion in arrest or by assignment of error all intendments are in favor of the complaint, and where there is not a total failure to state some essential element of the right of recovery and the complaint states facts sufficient to bar another action for the same cause of action, the verdict cures all other defects, and the complaint sustains the judgment.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1451-1477; Dec. Dig. § 433.*]

3. PLEADING (§ 433*)—COMPLAINT—BILL OF PARTICULARS—SUFFICIENCY AFTER VERDICT.

A bill of particulars not referred to in the complaint, nor made a part thereof, but merely following the body of the complaint, is after verdict a part of the complaint.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1451-1477; Dec. Dig. § 433.*]

4. APPEAL AND ERROR (§ 1002*)—VERDICT—CONCLUSIVENESS.

A verdict on conflicting evidence and supported by evidence will not be disturbed on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3935-3937; Dec. Dig. § 1002.*]

Appeal from Circuit Court, Fayette County; George L. Gray, Judge.

Action by Charles F. Vance against the Oliver Typewriter Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Neff & Johnston and Theop. J. Moll, for appellant. Chas. F. Vance, pro se.

FELT, J. Appellee recovered judgment against appellant for \$70, from which this appeal is taken.

The errors assigned are (1) that the amended complaint does not state facts sufficient to constitute a cause of action; and (2) the overruling of appellant's motion for a new trial. The new trial was asked on the ground that the verdict of the jury is not sustained by sufficient evidence and is contrary to law; also, that the damages are excessive. The amended complaint averred, in substance, that appellee was employed by appellant at its special instance and request as its representative and salesman, and was continued in said employment for one month; that appellant agreed to pay him for his services the sum of \$50 per month and expenses amounting in all to \$75; that no part thereof has been paid, and there is due appellee the sum of \$75. Prayer for \$100. Immediately following the body of the complaint is the heading, "Bill of Particulars," showing an account of \$50 for salary and \$45 for meals, and two other items of \$1 each, aggregating \$97.

[1] Appellant contends that the amended complaint is identical with the original, and that, as a demurrer was presented and overruled to the original complaint, he should have the benefit of that demurrer here. But the filing of the amended complaint took the original complaint and all rulings thereon out of the record, and the amended complaint is questioned for the first time by the assignment of errors. Tague v. Owens et al., 11 Ind. App. 200, 38 N. E. 541; Efrogmson et al. v. Smith, 29 Ind. App. 451, 63 N. E. 328.

[2] The principal objection urged to the amended complaint is that the bill of particulars is not referred to in the complaint, or in any way made a part thereof, though it immediately follows the body of the complaint. The pleading is not to be commended, but when the sufficiency of the complaint is questioned after verdict by motion in arrest of judgment, or by assignment of error, as in this case, all intendments are in favor of the pleading, and, if there is not a total failure to state some essential element of the right of recovery and the complaint states facts sufficient to bar another suit for the same cause of action, the verdict cures all other defects, and the complaint will be held sufficient to sustain the judgment. Peoria, etc., R. Co. v. Attica, etc., R. Co., 154 Ind. 218, 221, 56 N. E. 210; City of South Bend v. Turner, 156 Ind. 418, 421, 60 N. E. 271, 54 L. R. A. 396, 83 Am. St. Rep. 200; Colchen v. Ninde et al., 120 Ind. 88, 22 N. E. 94; Elwood State Bank v. Mock, 40 Ind. App. 685, 82 N. E. 1003; Xenia R. E. Co. et al. v. Macy, 147 Ind. 568, 572, 47 N. E. 147; Peters v. Banta, 120 Ind.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

416, 220, 22 N. E. 95, 23 N. E. 84; Gish v. Gish, 7 Ind. App. 104, 114, 84 N. E. 305; Galvin et al. v. Woollen, 66 Ind. 464, 468; Lassiter et al. v. Jackman, 88 Ind. 118.

[3] The exact point raised by appellant in regard to the exhibit is decided in several of the cases above cited. The other objections to the complaint are not well taken, and it is clearly sufficient to withstand the attack made upon it after verdict.

[4] We cannot weigh the evidence, where there is a conflict, and decide the case upon the weight of the testimony. There was a conflict of evidence in this case, but there is legal evidence tending to support the verdict, and it is the long-established rule that in such cases the judgment will not be reversed on the weight of evidence. *C., C. & St. L. Ry. Co. v. Kepler*, 31 Ind. App. 1, 66 N. E. 1080; *Bower et al. v. Bowen*, 139 Ind. 31, 36, 88 N. E. 326. There is no available error in the record.

Judgment affirmed.

(50 Ind. App. 120)

NEW v. JACKSON. (No. 6,957).¹

(Appellate Court of Indiana, Division No. 1.
June 6, 1911.)

1. APPEAL AND ERROR (§ 750*)—ASSIGNMENTS OF ERROR—SUFFICIENCY OF PLEADINGS—QUESTIONS REVIEWABLE.

An assignment that the court erred in overruling the motion for new trial does not present any question as to the sufficiency of the complaint.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3074-3083; Dec. Dig. § 750.*]

2. APPEAL AND ERROR (§ 1078*)—QUESTIONS REVIEWABLE—INSTRUCTIONS.

Where a ground of the motion for new trial related to errors in instructions, only such instructions as are pointed out by appellant in the points and authorities as objectionable will be considered on appeal.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4256-4261; Dec. Dig. § 1078.*]

3. TRIAL (§ 253*)—INSTRUCTIONS—SUFFICIENCY.

An instruction undertaking to state what is necessary to maintain an action or defense must be complete and correct.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 613-623; Dec. Dig. § 253.*]

4. TRIAL (§ 296*)—INSTRUCTIONS—SUFFICIENCY.

Instructions, which do not attempt to state the entire law of the case or the facts necessary to entitle a recovery, are not objectionable because of omissions covered by other instructions.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 705-718; Dec. Dig. § 296.*]

5. FRAUD (§ 13*)—ACTIONABLE FRAUD—ELEMENTS.

Knowledge on the part of one making misrepresentations that the representations are false is not a necessary element to actionable fraud.

[Ed. Note.—For other cases, see *Fraud*, Cent. Dig. §§ 3-5; Dec. Dig. § 13.*]

6. FRAUD (§ 13*)—ACTIONABLE FRAUD—ELEMENTS.

An unqualified statement that a fact exists, made by one to induce another to act on it, implies that the former knows it to exist and speaks from his own knowledge, and where the fact does not exist, and the party states of his own knowledge that it does and induces another to act on the statement, the law imputes to him a fraudulent purpose, and it is not necessary that the statement should have been recklessly made.

[Ed. Note.—For other cases, see *Fraud*, Cent. Dig. §§ 3-5; Dec. Dig. § 13.*]

7. CONTRACTS (§ 94*)—ACTIONABLE FRAUD—ELEMENTS.

Fraud justifying a rescission of a contract in equity is fraud justifying an action for damages.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 420-430; Dec. Dig. § 94.*]

8. APPEAL AND ERROR (§§ 231, 699*)—QUESTIONS REVIEWABLE—INSTRUCTIONS.

An instruction is not reviewable on appeal, where the objection thereto states no ground of objection, and where the papers to which it refers are not set out in the record.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 1299, 1352, 2399-2400; Dec. Dig. §§ 231, 699.* Cent. Dig. §§ 689-696.]

9. TRIAL (§ 233*)—INSTRUCTIONS—SUFFICIENCY.

An instruction, which sets out the allegations of the complaint in detail, and which states that the answer is a general denial forming the issues, and that, under the issues thus formed, to entitle plaintiff to recover, he must prove by a fair preponderance of the evidence all of the material elements of the complaint, is not objectionable, where the sufficiency of the complaint is not questioned, and where the complaint states a cause of action.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 527-530; Dec. Dig. § 233.*]

10. FRAUD (§ 44*)—ACTIONABLE FRAUD—COMPLAINT—SUFFICIENCY.

A complaint, in an action for fraud inducing the exchange of properties consisting of real estate and the business and property of a corporation, which alleges the misrepresentations by defendant of the productivity of the land, the character of the business of the corporation, its assets, earnings, and financial condition, that plaintiff knew nothing about the land or the affairs of the corporation, but relied on the representations of defendant, all of which defendant knew, that defendant made the representations to deceive plaintiff, who relied on them and was induced to make the trade, that each and all of the representations were false and known by defendant to be false, etc., states a cause of action for fraud as against the objection that it contains no averment of any value which the land and the stock of the corporation had at the time of the trade.

[Ed. Note.—For other cases, see *Fraud*, Cent. Dig. § 38; Dec. Dig. § 44.*]

11. FRAUD (§ 13*)—ACTIONABLE FRAUD—COMPLAINT—SUFFICIENCY.

Where the purchaser is ignorant of the value of the property, and the vendor knows that the purchaser is relying on his representation as to value, and such a representation is not a statement of opinion, but is made as a statement of fact which the vendor knows to be untrue, the statement is a representation binding the vendor.

[Ed. Note.—For other cases, see *Fraud*, Cent. Dig. §§ 3-5; Dec. Dig. § 13.*]

¹For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes

²Rehearing denied. Transfer to Supreme Court denied.

12. FRAUD (§ 64*)—ACTIONABLE FRAUD—REPRESENTATIONS—OPINION—QUESTION FOR JURY.

Whether, in an action for fraud, inducing an exchange of properties, representations as to the value of real estate and of the business and assets of a corporation are expressions of an opinion or an affirmation of facts to be relied on, is for the jury under proper instructions.

[Ed. Note.—For other cases, see *Fraud*, Cent. Dig. §§ 65½, 67-71; Dec. Dig. § 64.*]

13. APPEAL AND ERROR (§ 925*)—TRIAL—PRESUMPTIONS—REGULARITY.

The court on appeal will, in the absence of a contrary showing, presume in favor of the regularity of the proceedings in the trial court, and that both parties to the action were present either in person or by attorney when the court called the jury before it and gave instructions, and such presumption is not overcome by the affidavits of the defeated party and two of his attorneys averring that they were not present, without averring that the other counsel were not present, and when such other counsel in their affidavits are silent on the subject.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3729-3734; Dec. Dig. § 925.*]

14. NEW TRIAL (§ 54*)—MISCONDUCT OF JURY—OBJECTIONS.

The defeated party to obtain the setting aside of a verdict on the ground of misconduct of the jury, must show that neither he nor his counsel had knowledge of the misconduct before the jury returned the verdict, or, in case he or his counsel had such knowledge, a sufficient excuse for the failure to interpose a seasonable objection must be shown.

[Ed. Note.—For other cases, see *New Trial*, Cent. Dig. §§ 112-114; Dec. Dig. § 54.*]

Appeal from Circuit Court, Henry County; Ed. Jackson, Judge.

Action by Thomas H. Jackson against Thomas H. New. From a judgment for plaintiff, defendant appeals. Affirmed.

William Ward Cook, Charles H. Cook, William A. Hough, Mark E. Forkner, and George D. Forkner, for appellant. Eugene H. Bundy, James E. McCullough, and William C. Welborn, for appellee.

HOTTEL, J. Action for damages for alleged fraud perpetrated by appellant upon appellee in the exchange and trade of certain properties. The cause was tried by jury, upon a complaint in one paragraph, and an answer in general denial. There was a general verdict and judgment for appellee in the sum of \$2,600. Appellant filed a motion for new trial, which was overruled and exceptions saved.

[1] Appellant, in his brief, insists that the complaint omits material allegations; but no error is assigned which presents to this court any question as to its sufficiency. The only error assigned and presented by appellant's brief is the overruling of the motion for new trial.

[2] The first ground of the motion for new trial, relied upon and presented by appellant under his points and authorities, relates to errors which appellant insists were committed by the court below in the giving of instructions. Only such instructions as are

pointed out in the points and authorities as objectionable, will be considered by this court on appeal. *Knapp v. State*, 168 Ind. 153, 163, 79 N. E. 1076; *Inland Steel Co. v. Smith*, 168 Ind. 245, 252, 80 N. E. 538.

Instruction No. 1 given at request of appellee, of which appellant makes complaint, is practically a copy of language used by the Supreme Court in the case of *Frenzel et al. v. Miller*, 37 Ind. 1, at page 17, 10 Am. Rep. 62, where the court announces as applicable to fraudulent representations four separately numbered "principles of law * * * fairly and logically deducible from the * * * authorities. * * *". The instruction here complained of does not attempt or purport to include all the said principles, that enter into fraudulent representations, but in so far as it makes such attempt it is in perfect accord with said principles announced in said case. The principles announced in this case have been approved in many of the more recent cases; and in the case of *Krewson et al. v. Cloud*, 45 Ind. 273, the Supreme Court, in referring to objections made to the complaint and instructions given in the case last mentioned, used the following language, which is very applicable to the repeated objections urged by appellant to instructions in this case: "The second paragraph of the complaint and the instructions given are in exact accord with the principles of law enunciated by this court in *Frenzel v. Miller*, 37 Ind. 1. It would be a useless waste of time to attempt to restate and re-examine the questions so fully considered in that case. We are entirely satisfied with such ruling, and have adhered to it in several subsequent cases."

Appellee's instructions Nos. 2, 3, and 4 objected to simply undertake to define the character of the misrepresentation that will constitute fraud, and do not attempt to include all the necessary elements to a recovery. The principles declared in each are supported by the decisions of this court, as announced in the following cases: *Ray v. Baker*, 165 Ind. 74, 88, 74 N. E. 619; *Laidla v. Loveless*, 40 Ind. 211, 216, 217; *Peter v. Wright et al.*, 6 Ind. 183; *Bethell v. Bethell*, 92 Ind. 318, 326, 327; *Parrish v. Thurston*, 87 Ind. 437, 438.

[3] Appellant objects to these several instructions on account of certain alleged omissions, and cites a number of cases which correctly hold that, where an instruction undertakes to tell the jury just what is necessary in order to maintain an action or defense, it must be complete as well as correct. We recognize this rule as correct, and our holding with reference to the instructions here considered is in no sense in conflict therewith.

[4] Neither of the instructions in question attempts to state the entire law of the case, or the facts necessary to entitle appellee to a recovery, nor do we think it can be said that either attempts to state every element that enters into and constitutes fraud. In so far

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

as each of said instructions attempts to state the law of the case, applicable to the particular element of fraud discussed therein, each instruction correctly states the same, and other instructions given correctly cover all omissions complained of upon which appellant was entitled to an instruction.

[5] Counsel urge against these instructions, generally, that they omit an important element necessary to be proven to constitute fraud, viz., the element of knowledge on the part of appellant that the representations made were false. But, under the holdings of this and the Supreme Court, this is not a necessary element of fraud. *Kirkpatrick v. Reeves*, 121 Ind. 280, 282, 22 N. E. 139; *Frenzel v. Miller*, supra; *Roller v. Blair et al.*, 96 Ind. 203, 205; *Bethell v. Bethell*, supra; *West v. Wright*, 98 Ind. 335, 339; *Furnas v. Friday*, 102 Ind. 129, 1 N. E. 296; *Slauter v. Favorite*, 107 Ind. 291, 299, 4 N. E. 880, 57 Am. Rep. 106; *Bolds v. Woods*, 9 Ind. App. 657, 36 N. E. 933; *Culley v. Jones*, 164 Ind. 168, 172, 173, 73 N. E. 94.

[6] But counsel insist that, in the absence of such an element in the charge, the court should have told the jury that the statements must have been recklessly made without regard for their truth. In this counsel is in error. In the case of *Furnas v. Friday*, supra, the court said upon this subject, at page 130 of 102 Ind., at page 297 of 1 N. E.: "It is clear that the paragraph before us does not charge fraud, for it does not aver that there was any purpose to defraud, nor that there was any reckless misstatement. On the contrary, the fair conclusion from the facts stated is that the appellant acted honestly, stated what he believed to be true, and gave the plaintiff a full opportunity to examine the sheep for himself. If the complaint had shown that the defendant professed to be an expert, and that he induced the plaintiff to rely upon his superior judgment or skill, or if it had shown that the defendant made the representations for a fraudulent purpose, or had recklessly made them, a different case would have been presented."

In the case of *Kirkpatrick v. Reeves et al.*, supra, at page 282 of 121 Ind., at page 140 of 22 N. E., the court said: "A belief in the truth of a statement does not always clear the person who makes it of a fraudulent purpose or relieve him from liability. * * * An unqualified statement that a fact exists, made for the purpose of inducing another to act upon it, implies that the person who makes it knows it to exist, and speaks from his own knowledge. If the fact does not exist, and the defendant states of his own knowledge that it does, and induces another to act upon his statement, the law will impute to him a fraudulent purpose." *Slauter v. Favorite*, supra; *Furnas v. Friday*, supra; *West v. Wright*, supra; *Roller v. Blair*, supra; *Bethell v. Bethell*, supra; *Krewson v. Cloud*, 45 Ind. 273; *Brooks v. Riding*, 46 Ind. 15; *Booher v. Goldsborough*,

44 Ind. 490; *Frenzel v. Miller*, supra; 8 Am. & Eng. Encyc. Law, 642; *Fisher v. Mellen*, 103 Mass. 503; *Brownlie v. Campbell*, 5 App. Cas. 925; *Slim v. Croucher*, 1 De Gex, F. & J. 518; *Bullis v. Noble*, 36 Iowa, 618; *Raley v. Williams*, 73 Mo. 310; *Oregonian R. W. Co. v. Oregon*, etc. (C. C.) 23 Fed. 232, 10 Sawy. 464; *Cragle v. Hadley*, 99 N. Y. 131, 1 N. E. 537, 52 Am. Rep. 9.

[7] The court in the instructions given in this case told the jury in effect that, before the appellee was entitled to recover, he must show that the representations charged were made for the fraudulent purpose of inducing the appellee to make the trade in question. Appellant also insists that the authorities relied upon by appellee, upon this question, are all cases in equity seeking a rescission and cancellation of the contract, and that the principles therein stated do not apply to a case, like the one at bar, seeking to recover damages on account of the fraudulent representations. The question here involved, viz., whether or not it is necessary that the party making the false representations at the time knew them to be false, in order to constitute them fraudulent, is discussed in the case of *Frenzel v. Miller*, supra, and decided adversely to appellant's contention. This case, as well as all the cases supra, cited and quoted from, recognize that the representations must be made with a fraudulent intent and purpose. Herein lies the difference between cases like the one at bar and cases in equity seeking relief from mutual mistake, the result of misrepresentations innocently made.

[8] Instruction No. 12 is objected to; but no ground of objection is stated, in appellant's points and authorities, other than that the instruction was fatally erroneous. Under the well-established rules of this court, such an objection is too indefinite and uncertain, and therefore not available. *Inland Steel Co. v. Smith*, 168 Ind. 245-252, 80 N. E. 538; *Knapp v. State*, 168 Ind. 153-158, 79 N. E. 1076.

[9] Instructions Nos. 1 and 2 given by the court upon its own motion are each objected to. Instruction No. 1 sets out the allegations of the complaint in detail and with particularity, and tells the jury that "to this complaint the defendant has answered by a general denial, and this forms the issue you are to try." There was certainly no error in such an instruction. The second instruction follows in these words: "Under the issues thus formed, to entitle the plaintiff to recover in this case, he must have proved by a fair preponderance of all the evidence given in the cause all of the material averments of his complaint."

That appellant should object to these instructions taken together seems inconsistent with his failure to present, by any assignment of error, the question of the sufficiency of the complaint. But counsel urges to this instruction an objection which he has attempted in his brief, without any assignment of error presenting the same, to raise to the

sufficiency of the complaint, and which he also raises to the sufficiency of the evidence, viz.: That the complaint contains no averment of any value which the land and the stock of the "Miller Hopkins Manufacturing Company" had at the time the appellant traded it to appellee for his property, and that the only averments as to value of said property was that the appellant at the time represented his farm to be worth \$4,000, and that "without a particle of evidence of any confidential relation between the parties that fact was not a 'material averment' upon proof of which plaintiff was entitled to recover." Counsel have certainly overlooked the averments of the complaint upon this subject. They are too numerous and lengthy to set out in detail in this opinion.

[10] The complaint alleges in detail the representations made with reference to the quality and character of the soil, its productivity, the crops growing thereon, the probable yield thereof, which it is represented has been the usual yield of the farm, the buildings and improvements and their character, and the value of the farm, the character of the business of the corporation, its assets, earnings, financial condition, its profits, soundness, and solidity, value of its stock, that dividends had been declared thereon, the denomination of the separate shares of stock, their face value, and the actual worth of the stock proposed to be traded by appellant, and avers that appellant referred to a man whom he (appellant) claimed to have procured to make an examination of the farm, and represented that he would tell appellee the exact truth as to the value of the farm, character of its soil, improvements, crops growing thereon, etc.; that he procured such person to make to appellee the same false representations made by himself; that he (appellant) also referred appellee to a person connected with said corporation who, he said, knew and would tell him (appellee) the exact truth about the affairs of the same; and that he (appellant) then procured that person to make to appellee the same false representations with reference to said stock, so made by appellant. The trade in question was made in Hancock county, and it is alleged in the complaint that appellant's land traded was situate in Warrick county, Ind.; that appellee had never seen and knew nothing about the same; that he (appellee) knew nothing about said corporation, its affairs or business, or its financial conditions, or the value of its stock, but for information, with reference to all of said matters, both as to the farm and corporation stock, relied wholly upon the representations of appellant and the men to whom appellant referred him, all of which appellant well knew and, so knowing, made said representations for the purpose of deceiving appellee and cheating and defrauding him by inducing him to make said trade; that appellee did so rely upon such representations, and by them was induced to make said trade; that each and

all of said representations were false, and appellant knew them to be so when he made them and procured them to be made. There are other allegations; but we think we have set out sufficient to show that proof of the same would be sufficient to meet the above objection urged to instructions 1 and 2 of the court, under the authorities cited and relied upon by appellant. *Cagney v. Cunson*, 77 Ind. 494; *Bolds v. Woods*, at pages 663 and 664 of 9 Ind. App., 38 N. E. 933; *Culley v. Jones*, supra; *Manley v. Felty*, 146 Ind. 194, 198, 199, 45 N. E. 74; *Harness v. Horne*, 20 Ind. App. 134, 140, 141, 50 N. E. 395.

[11] Where the vendee is wholly ignorant of the value of the property, and the vendor knows this, and also knows that the vendee is relying upon his (the vendor's) representation as to the value, and such representation is not a mere expression of opinion, but is made as a statement of fact, which statement the vendor knows to be untrue, such a statement is a representation by which the vendor is bound. *Culley v. Jones*, supra; *Pomeroy, Eq. Juris.* §§ 878, 879; *Picard v. McCormick*, 11 Mich. 68; *Bolds v. Woods*, 9 Ind. App. at pages 663, 664, and 665, 36 N. E. 933.

[12] Under the allegations of this complaint, "whether such representations as to value are merely the expressions of an opinion or affirmation of facts to be relied upon is a question of fact to be determined by the jury," under proper instructions. *Culley v. Jones*, supra; *Simar v. Canaday*, 53 N. Y. 298, 13 Am. Rep. 523; *People v. Peckens*, 153 N. Y. 576, 591, 47 N. E. 883; *Ingalls v. Miller*, 121 Ind. 188, 191, 22 N. E. 995; 14 Am. & Eng. Encyc. Law (2d Ed.) 35-206.

Upon the subject of the representations as to the value of the stock, the case at bar, if anything, is stronger than the case of *Grover v. Cavanaugh*; 40 Ind. App. 340, at page 346, 82 N. E. 104, at page 106, in which this court said: "The representations averred in the complaint before us were not made to induce the extension of credit. *They were representations of material, existing facts that went to establish primarily the value of the property appellee was seeking to sell.*"

[13] The next alleged error presented by appellant's points and authorities relates to misconduct of jury. There is no showing by the affidavits in support of this ground of the motion for new trial that some of appellant's attorneys did not have knowledge of the misconduct complained of before the verdict of the jury was returned. In fact, it appears from the record that the misconduct charged occurred after the jury retired to consider their verdict, and that the court, after being advised of the same, called the jury into the courtroom and gave them very proper instructions on the subject; and, in the absence of a showing to the contrary, the presumption which this court always indulges in favor of the regularity of the proceedings in the lower court would cause us, in

this case, to indulge the presumption that both parties to the suit were present either in person or by one of their attorneys when such action was taken by the lower court. This presumption, in this case, is strengthened by the fact that the appellant and two of his attorneys in their affidavits each say that they were not present when such action was taken, but do not say that the other counsel for appellant were not present, and such other counsel each make an affidavit in said matter and are silent upon said subject. A very strong showing is made by way of counter affidavits to the effect that appellant was not prejudiced in any event; but the controlling influence in our determination of this question is the absence of a showing that neither of appellant's counsel knew of the misconduct charged, before the return of the verdict, in time to have moved for a withdrawal of the submission of the cause to the jury.

[14] Under the holdings of this and the Supreme Court, the record must show that neither appellant nor his counsel had knowledge of the alleged misconduct before the jury returned their verdict; or, in case they had such knowledge, they must show a sufficient excuse for their failure to interpose seasonable objections to such misconduct. In the absence of such showing, a new trial cannot be granted. *Aurora, etc., Co. v. Niebruggee*, 25 Ind. App. 567, 573, 58 N. E. 864; *Fifth Ave. S. Bank of Columbus, Ohio, v. Cooper et al.*, 19 Ind. App. 13, 19, 48 N. E. 236; *Messenger v. State*, 152 Ind. 227, 231, 52 N. E. 147; *Ellis v. City of Hammond*, 157 Ind. 267, 269, 61 N. E. 565; *Cleveland, etc., R. Co. v. Osgood*, 36 Ind. App. 34, 42, 43, 73 N. E. 285.

If, in this case, a motion to withdraw the submission of the cause to the jury had been made and overruled, such ruling of the court would present a very different question; but appellant, having taken the chances of a verdict in his favor, cannot now avoid the effect of one against him on account of misconduct of the jury known to his counsel prior to the rendition of such verdict. See *Cleveland, etc., R. Co. v. Osgood*, and other cases supra.

Misconduct of counsel for appellee on account of statements made in the argument of objections made to the introduction of evidence, and in the final argument of the cause, are urged as one of the grounds for new trial. The record discloses no misconduct of this character presented for review by this court which was not entirely corrected and cured by instructions of the lower court.

Finally, it is argued that the verdict of the jury is not sustained by sufficient evidence, and especially that there was no proof on the question of amount or measure of damages justifying the verdict. Upon the question of the measure of damages, the instructions given by the court were as favorable to appellant as the law warranted; the court

having given, upon this subject, all the instructions requested by appellant. There was evidence supporting the verdict on all questions material and necessary to a recovery by appellee.

We find no error in the record authorizing a new trial of the case. Judgment affirmed.

FELT, P. J., not participating.

(48 Ind. A. 32)

POLK v. HAWORTH. (No. 7,258.)

(Appellate Court of Indiana, Division No. 2,
June 7, 1911.)

1. CORPORATIONS (§ 431*)—LIABILITY OF AGENT—UNDISCLOSED AGENCY.

Where an officer of an interurban railway company acts as agent of the company in contracting for the payment of damages from the construction of a railway cut and grade, he is personally liable, though he does not intend to bind himself, the landowner not knowing of the agency, and interrogatories and instructions based on a contrary theory are properly refused.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. § 1742; Dec. Dig. § 431.*]

2. LIFE ESTATES (§ 22*)—CONSTRUCTION—LIABILITY FOR DAMAGES—RIGHTS OF OWNERS.

A life tenant is entitled to damages for injuries caused by the construction of a railway cut and grade through the premises and in front of his residence, and the life tenant and remaindermen may recover in separate actions their several damages, the life tenant for loss to present enjoyment and the remaindermen for permanent injury to the property, and an instruction that plaintiff cannot recover unless she is the owner of the fee is properly refused.

[Ed. Note.—For other cases, see *Life Estates*, Cent. Dig. §§ 37-42; Dec. Dig. § 22.*]

3. APPEAL AND ERROR (§ 1051*)—HARMLESS ERROR—ERRONEOUS ADMISSION OF EVIDENCE.

The error, if any, in admitting evidence, is not available, where other uncontradicted evidence of the same character and to the same effect was received without objection.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4161-4170; Dec. Dig. § 1051.*]

Appeal from Circuit Court, Johnson County; Wm. A. Johnson, Special Judge.

Action by Nancy J. Haworth against James T. Polk. From a judgment for plaintiff, defendant appeals. Affirmed.

L. Ert Slack, for appellant. Douglas Dobbins and E. A. McAlpin, for appellee.

IBACH, J. Appellee, plaintiff below, in her complaint alleged in substance: That in 1902 she entered into a contract with appellant, by the terms of which she agreed to permit him, and others whom he might authorize, to enter upon her premises and make a railroad cut and grade in front of her residence; that as a part of said agreement appellant agreed to pay appellee all damages her property might sustain by the construction of such cut and grade; that thereafter appellant, in company with teams and laborers, entered upon said premises and constructed such cut and grade. The injury to her property is described in detail, and she is alleged to have been damaged thereby

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes

in the sum of \$2,000, for which amount she asked judgment. After the overruling of a demurrer for want of facts, the case was put at issue by answer in general denial. A jury trial resulted in a verdict of \$400 for appellee, appellant's motion for a new trial was overruled, and judgment was rendered on the verdict, from which judgment this appeal is prosecuted.

The errors relied upon for reversal arise upon the overruling of the motion for new trial, and present three contentions: (1) That the contract was made with and the work done by the Indianapolis, Greenwood & Shelbyville Railroad Company, of which appellant is but an officer, and therefore not personally liable; (2) that appellee was not the owner in fee simple of the premises damaged, and therefore could not recover; (3) that certain evidence was wrongfully admitted.

Appellant claims that the evidence does not establish the allegations of the complaint, and does not show that appellant made an individual contract with appellee, but rather that appellee made the agreement with the railway company through its officers.

[1] If appellant at the time of making the agreement with appellee was acting merely as agent of the interurban railway company, in order to avoid personal liability, it was his duty to declare to appellee the fact of his agency. Failing to do so, he took upon himself all the liabilities, either express or implied, created by the contract, exactly in the same manner as if he were the principal in interest. *Merrill v. Wilson*, 6 Ind. 426, 427; *Am. & Eng. Ency. Law*, vol. 1, p. 1121; *Reinhard on Agency*, § 303.

In the present case there is evidence that appellant made the contract sued on, that if he made it as agent he did not disclose his agency, and there is no evidence that appellee knew of any agency of appellant at the time the agreement was made. It may not have been intentional on the part of appellant to bind himself to the payment of damages to appellee; but failing to inform her of his agency, and she having no actual knowledge of that fact, under the well-known rule of law, he cannot now escape liability and be relieved of the burden of his own contract by claiming that he was in fact acting for the railway corporation. If he had made known such fact to appellee, she might not have entered into such a contract with the railroad company, as, for example, she might have been willing to accept appellant for the performance of such contract, knowing him to be responsible, while she would not have been willing to enter into the same with the railroad company, not being acquainted with its financial responsibility. The evidence sufficiently bears out the allegations of the complaint.

Appellant asked that certain interrogatories be propounded to the jury, which proceed on the theory that if the work was done by

the railway company, and under its orders, appellant is not liable. They were rightly refused, as under the allegations of the complaint it is immaterial who did the work, so long as they were authorized by appellant. And, if all the interrogatories presented had been answered in the affirmative, these answers would not have availed appellant, as the fact would still remain fully proven that the agreement sued on was made personally with appellant and in his individual capacity, and not as agent for any one, so that it mattered not who performed the actual labor of completing the agreement made with appellee.

Error is also assigned in refusing to give certain instructions requested by appellant. The condition of the record is not entirely satisfactory; but we should be unduly technical to hold that the instructions were not in the record, and were not to be considered. Certain of these proceed upon the same theory upon which the interrogatories were drawn, that the work was done by the railroad company, of which appellant was but an officer. For reasons already given, they were rightly refused, and for the further reason that the court had already instructed the jury that the plaintiff could not recover unless she proved that appellant made and entered into the contract with her in his own individual capacity.

[2] Instruction 2, requested by appellant, was wrong and was therefore properly refused. If given, the court would have told the jury that appellee could not recover any damages unless she owned in fee simple the real estate injured.

The owner of a life estate is entitled to damages for injuries done to his estate as well as the remainderman. The same act may be injurious to both, and they are entitled to recover in separate actions for their several damages; the holder of the life estate for damages on account of loss to the present enjoyment of the estate; and the remainderman for the more permanent injury to the property. The amount of loss sustained might not be the same, but the legal right to redress is the same.

It will be observed that appellee did not aver the nature of her title to the land in question, and the cause proceeded to trial without requiring the nature of her title to be disclosed, and, although counsel in his brief claims that the proof shows only a life estate in appellee, yet the instruction would have been erroneous because it would tend to deprive her of all relief for injuries she might have suffered to her use, possession, and enjoyment of the land.

[3] Error is assigned in the admission of certain evidence; but, whether properly admitted or not, the error is not available, since other uncontradicted evidence of the same character and to the same effect was introduced without objection.

No error appearing in the record, the judgment is affirmed.

(48 Ind. A. 33)

CITY OF INDIANAPOLIS v. SLIDER.

(No. 7,265.)

(Appellate Court of Indiana, Division No. 2.
June 8, 1911.)1. MUNICIPAL CORPORATIONS (§ 755*)—PUBLIC
STREETS—INJURIES TO PEDESTRIANS—CITY'S
LIABILITY.

There being no statutory liability for injuries growing out of defects in public streets, such liability must be predicated on negligence imputed to the city from a failure to keep the streets in a reasonably safe condition.

[Ed. Note.—For other cases, see *Municipal Corporations*, Dec. Dig. § 755.*]

2. NEGLIGENCE (§ 58*)—"PROXIMATE CAUSE"—
WHAT CONSTITUTES.

Negligence to furnish the foundation of an action for damages must be the proximate cause of the injury complained of; proximate cause being that which in a natural and continuous sequence, unbroken by any new and independent cause, produces the event, and without which it would not have occurred.

[Ed. Note.—For other cases, see *Negligence*, Cent. Dig. § 71; Dec. Dig. § 58.*]

For other definitions, see *Words and Phrases*, vol. 6, pp. 5758-5769; vol. 8, p. 7771.]

3. MUNICIPAL CORPORATIONS (§ 816*)—STREETS
—DECAYED TREES—INJURIES TO PEDESTRIANS
—COMPLAINT.

A complaint for injuries to a pedestrian by the fall of a decayed tree standing in a public street, alleging that defendant negligently permitted the tree in its dead and decayed condition to stand in a public thoroughfare, and that plaintiff was injured by the fall of the tree and sustained damages as a result thereof, was fatally defective for failure to allege that the tree fell by reason of its dead and decayed condition.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1711-1714; Dec. Dig. § 816.*]

Appeal from Superior Court, Marion County; James M. Leathers, Judge.

Action by Ida Slider against the City of Indianapolis. Judgment for plaintiff, and defendant appeals. Reversed, with directions.

Frederick E. Matson, James D. Pierce, and Crate D. Bowen, for appellant. George Burkhardt, for appellee.

ADAMS, J. Appellee recovered judgment against appellant for damages growing out of injuries alleged to have been received by the falling of a dead and decayed tree, located within the limits of a street of the appellant city. The complaint, as originally filed, was in three paragraphs, to which a demurrer was sustained as to the second and third paragraphs, and overruled as to the first. Upon motion of the appellee, and by leave of court, the first paragraph of complaint was amended, to which paragraph, as amended, the appellant demurred for want of facts sufficient to constitute a cause of action, which demurrer was overruled, and the cause put at issue by answer in general denial. Upon the issue thus formed the cause was submitted to a jury, and a verdict returned for appellee. Motion for a new trial was over-

ruled, and judgment rendered upon the verdict.

The sufficiency of the complaint to withstand demurrer for want of facts is the first and controlling question presented by the assignment of errors. The amended complaint, omitting the caption and conclusion, is as follows: "That the city of Indianapolis is a municipal corporation, incorporated under the laws of the state of Indiana; that North Pennsylvania street is one of the public streets within the corporate limits of said city; that it is the duty of said city to keep its streets and sidewalks in a safe condition for travel, yet said city, in violation of said duty, as aforesaid, authorized, permitted, and negligently allowed a dead, rotten, and decayed tree to stand near the sidewalk on the east side of said street, between Vermont and East New York streets, and between the sidewalk and the roadway of said street; that the defendant city negligently allowed, permitted, and authorized said dead, decayed, and rotten tree to so stand and remain near said sidewalk for a long period of time, to wit, four weeks, after it had notice of its dangerous condition, or by the exercise of reasonable care could have known of its dangerous condition; and that said defendant city could, by the exercise of reasonable diligence, have removed said tree within said period of four weeks, and that said defendant, with full knowledge of the dangerous nature of said tree, negligently and carelessly allowed said tree to so stand, without placing around or at the same any safeguards or railings to give notice of its dangerous character, and to prevent persons who might walk upon said sidewalk from being damaged or injured; that the defendant had, or by the exercise of reasonable care could have, known of the dead, decayed, and rotten character of said tree; that the plaintiff on the 8th day of October, 1906, as aforesaid, was lawfully walking upon said sidewalk, and without any notice of the dead, rotten, and decayed character of said tree, or its dangerous nature, and without negligence and in the use of all due care, when said dead, rotten, and decayed tree fell with great force and violence upon this plaintiff, by reason whereof the plaintiff was injured, in this, to wit, that she was knocked unconscious; that her back was torn, lacerated, and bruised; that the ligaments of her back were torn, wrenched, and permanently injured; that her nervous system was shocked and permanently injured; that she suffered other serious and permanent injuries; that she suffered great pain and mental anguish and at all times continues to suffer great pain and mental anguish. All on account of which she was confined to her bed many weeks, and was compelled to expend large sums of money for doctor bills and nurse hire, and was prevented from working for a long time; that she has suffered, and

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes

continues to suffer, great pain and mental anguish on account of said injuries. Wherefore," etc.

[1] There is no statutory liability in this state against cities for injuries growing out of defects and dangers in public streets. Cities are, however, required to respond in damages to one injured in such public place, but, where a liability is claimed, it must be predicated upon negligence imputed to the city for failure to keep its streets in safe condition for travel. *Grove v. Ft. Wayne*, 45 Ind. 429, 15 Am. Rep. 262.

[2] Negligence of any kind to furnish the foundation of an action for damages must be the proximate cause of the injury complained of; the maxim of the law being *causa proxima, non remota, spectatur*. 1 Thompson on Negligence, § 44. Proximate cause must be taken to mean that which in a natural and continuous sequence, unbroken by any new independent cause, produces the event, and without which the event would not have occurred. *Shearman & Redfield, Negligence* (5th Ed.) § 26. "It is an undisputed rule of law in cases of this kind that recoverable damages are confined to causes which flow from injuries which are traceable directly and proximately to the negligence of the defendant." *Roots Co. v. Meeker*, 165 Ind. 132, 136, 73 N. E. 253; *Sirk v. Marion St. Ry. Co.*, 11 Ind. App. 690, 682, 39 N. E. 421; *Indianapolis St. Ry. Co. v. Ray*, 167 Ind. 236, 245, 78 N. E. 978. The rule of pleading at common law is that the facts must be set forth with certainty, by which is meant a clear and distinct statement of the facts which constitute the cause of action or the ground of defense, and by the repeated decisions of this state the same degree of certainty in pleading is required under the Code as at common law. A plaintiff will be presumed to state his case as strongly as the facts warrant, and courts are not justified in resorting to inferences where the question involved pertains to the sufficiency of the pleading. The material facts necessary to constitute a cause of action must be directly averred, and cannot be left to depend upon or to be shown by mere recitals or inferences. *McElwaine-Richards Co. v. Wall*, 159 Ind. 557, 561, 65 N. E. 753; *Southern R. Co. v. Sittasen*, 166 Ind. 257, 266, 76 N. E. 973; *Erwin v. Central Union Tel. Co.*, 148 Ind. 365, 371, 46 N. E. 667, 47 N. E. 663; *Baltimore, etc., R. Co. v. Young*, 146 Ind. 374, 377, 45 N. E. 479; *Avery v. Dougherty*, 102 Ind. 443, 449, 2 N. E. 123, 52 Am. Rep. 690; *Ohio, etc., R. Co. v. Engler*, 4 Ind. App. 261, 263, 30 N. E. 924; *Peerless, etc., Co. v. Wray*, 10 Ind. App. 324, 325, 37 N. E. 1058.

[3] In the complaint before us, the negligence of the appellant in permitting a dead and decayed tree to stand in a public thoroughfare is sufficiently shown by direct averments. The injury to the appellee caused by the falling of the tree and the damages result-

ing are likewise shown by direct averments. But it does not appear from any averment in the complaint that the tree fell by reason of its dead and decayed condition, and no causal connection is disclosed between the negligence charged and the injury suffered. The wrong of the appellant is not averred to have been the direct and proximate cause of the injury to the appellee. It is the settled law of this state that, where an action for damages is founded upon negligence, the negligent acts must be the direct and proximate cause of the injury, and, where the complaint fails to connect the negligence with the injury, the same will be held bad on demurrer for want of sufficient facts. *City of Logansport v. Kihm* (1902) 159 Ind. 69, 72, 64 N. E. 595; *Pittsburg, etc., R. Co. v. Conn*, 104 Ind. 64, 68, 3 N. E. 636; *Corporation of Bluffton v. Mathews*, 92 Ind. 213, 216; *Pennsylvania Co. v. Hensil*, 70 Ind. 569, 574, 36 Am. Rep. 188; *Pennsylvania Co. v. Gallentine*, 77 Ind. 322, 325; *City of Greencastle v. Martin*, 74 Ind. 449, 457, 39 Am. Rep. 98. Upon the authority of the foregoing cases, we are compelled to hold that the complaint before us does not state facts sufficient to constitute a cause of action, and that the trial court erred in overruling the demurrer thereto.

The judgment is therefore reversed, with instructions to the trial court to sustain the demurrer to the complaint, with leave to amend.

(48 Ind. A. 36)

SCHRADER et al. v. MEYER et al.

(No. 6,878.)

(Appellate Court of Indiana, Division No. 1.
June 8, 1911.)

APPEAL AND ERROR (§ 756*)—BRIEFS—REQUISITES.

Where appellants' brief on appeal did not contain an assignment of errors, a motion for a new trial, or the grounds thereof, and did not set out the complaint or its substance, the cause of demurrer and a condensed recital of the evidence in narrative form, as required by Court of Appeals Rule 22 (55 N. E. vi), and no error appeared on the record proper, the judgment would be affirmed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3091; Dec. Dig. § 756.*]

Appeal from Superior Court, Tippecanoe County; H. H. Vinton, Judge.

Action by Alice Meyer, as guardian of Edith Schrader, and another, against John Schrader and others. Judgment for plaintiffs, and defendants appeal. Affirmed.

Wilson & Quinn, for appellants. Edgar D. Randolph and Edgar G. Collins, for appellees.

FELT, J. This is an appeal from Tippecanoe superior court from a judgment of \$690 in favor of Alice Meyer, guardian of Edith and Henry Schrader, minor heirs of William Schrader, deceased.

The appellants in the preparation of their brief have failed to comply with rule 22 of

this court (55 N. E. ¶) in several particulars: (1) The errors assigned are not set out or shown in any way. (2) The motion for a new trial relied upon is not set out or its grounds stated. (3) Neither the complaint nor the substance thereof is shown. (4) The cause of the demurrer is not stated. (5) There is no condensed recital of the evidence in narrative form.

The rules require "the errors relied upon for a reversal" to be shown in appellant's brief; but here there is not only a failure to set out the errors assigned, but there is not so much as a reference by page or line to the record where the same may be found.

The assignment of errors in appellate procedure, bears the same relation to the appeal that the complaint bears to the original suit, and, when not shown in the brief, the errors, if any, are not available.

The primary purpose of the rules is to expedite the business of the court, and the briefs properly prepared enable the judges, other than the one to whom the record has been distributed, to become familiar, from the briefs, with the merits of the questions presented on appeal.

In the absence of briefs which comply with the rules, the questions cannot be decided unless the judges do that which the rules require of the attorneys, and if this is done by them it results in placing a hardship upon the litigants whose cases must wait while time is thus unnecessarily consumed. These rules have been so long promulgated and so frequently passed upon by the courts that little excuse can be found for failure to substantially comply with them.

In the case at bar the failure is of such character, that to attempt to ascertain and decide the questions presented would be to abrogate the rules, and this we cannot do. *Chi., I. & L. Ry. Co. v. Newkirk* (Ind. App. Feb. 3, 1911) 93 N. E. 860; *Buehner Chair Co. v. Feulner*, 164 Ind. 375, 73 N. E. 816; *Howard v. Adkins*, 167 Ind. 186, 78 N. E. 665; *Indpls. St. Ry. Co. v. Marschke*, 160 Ind. 497, 77 N. E. 945; *Miller v. Collier et al.*, 35 Ind. App. 176, 73 N. E. 925; *I. U. T. Co. v. Heller*, 44 Ind. App. 387, 89 N. E. 419; *State v. Lukins*, 43 Ind. App. 341, 87 N. E. 246; *Inland Steel Co. v. Smith*, 39 Ind. App. 650, 75 N. E. 852.

Judgment affirmed.

(48 Ind. App. 43)

KERBAUGH v. NUGENT et al. (No. 6,983.)

(Appellate Court of Indiana, Division No. 1.
June 9, 1911.)

1. BILLS AND NOTES (§ 427*)—PAYMENT—TIME.

While a note made payable at a particular time and place does not impose on the payee or his assignee the necessity of averring or proving a demand at the time and place fixed in the note, but the payor may show readiness to pay at the time and place, the maker of the note

payable at bank cannot discharge the obligation by depositing in the bank funds with which to pay the note, unless the holder has deposited the note in the bank for collection.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. § 1243; Dec. Dig. § 427.*]

2. MORTGAGES (§ 401*)—MATURITY OF DEBT—CONSTRUCTION.

A provision in a real estate mortgage that, on failure of the mortgagor to pay any one of the notes secured by the mortgage at maturity, all of the notes should become due and collectible, was not in the nature of a provision for penalty or forfeiture, but was to be regarded as an agreement between the parties fixing the time and conditions on which the whole debt should mature.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 1160-1165, 1208, 1209; Dec. Dig. § 401.*]

3. MORTGAGES (§ 401*)—MATURITY OF DEBT—RELIEF OF MORTGAGOR.

Time was of the essence of a provision of a mortgage that, if the mortgagor defaulted in the payment of any one of the notes as it matured, the whole debt should mature, so that a court of equity would not relieve the mortgagor from the default, unless a valid excuse was given.

[Ed. Note.—For other cases, see Mortgages, Dec. Dig. § 401.*]

4. MORTGAGES (§ 401*)—FORECLOSURE—MATURITY OF DEBT.

Defendant executed a mortgage securing four notes, the mortgage providing that, if any one of the notes was not paid at maturity, all of them should become due and collectible. Complainant did not deposit the first note in a bank for collection, though defendant had on general deposit there more than enough to pay the note, and accrued interest on each of the others, and on the day the note matured defendant's agent instructed the bank that it was to be used for that purpose. Defendant's agent kept a lookout for complainant during the day in order to pay the note and interest but was unable to find him, and it was not presented to the bank, either on that day, or on the next, on which complainant remained at his house practically all day, and was not seen by defendant's agent until about 5 o'clock in the afternoon, when he went to the office of an attorney and consulted him about his rights as to the note and mortgage. On the next day complainant presented the note for payment at the bank, and was informed that defendant had on deposit enough money to pay the note and interest, but that the bank had no authority to make payment, but that defendant's agent could draw a check to do so, whereupon defendant directed foreclosure proceedings for the whole debt, and, when defendant's agent saw complainant later on the same day, complainant refused to accept payment except of the entire debt, whereupon defendant deposited the money in court as a tender. *Held*, that complainant's failure to receive payment was due to his own efforts to avoid it, and that he was therefore not entitled to foreclose the mortgage for the whole debt.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 1160-1165, 1208, 1209; Dec. Dig. § 401.*]

Appeal from Circuit Court, Boone County; S. R. Artman, Judge.

Action by Justus Kerbaugh against Thomas Nugent and others. Judgment for plaintiff for less than the relief demanded, and he appeals. *Affirmed*.

Darnell & Darnell and S. M. Ralston, for appellant. Terhune & Adney, for appellees.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

HOTTEL, J. Action by appellant against appellee on four promissory notes of \$1,000 each, and to foreclose a mortgage given to secure the same. The mortgage contains a provision "that, upon the failure to pay any one of said notes at maturity, then all of said notes are to become due and collectible." An alleged default in this provision gives rise to this suit. The complaint is in one paragraph, and contains the customary averments of a complaint on a series of notes and the foreclosure of mortgage given to secure the same, with the added averments that the mortgage in suit contained the provision above quoted, and that the appellee failed to pay the first note at maturity. An affirmative answer in one paragraph was filed, to which there was a reply in general denial. On the issues thus formed, there was a trial by the court and a special finding of facts and conclusions of law, to each of which appellant at the time excepted. Appellant filed a motion for new trial, which was overruled and exceptions saved, and thereupon the court rendered judgment for appellant in the sum of \$1,248, and for appellee for costs, and that appellant "take nothing by his action on foreclosure of mortgage herein."

The errors assigned and relied upon by appellant are: (1) The court erred in its first conclusion of law. (2) The court erred in its second conclusion of law. (3) The court erred in overruling appellant's motion for a new trial.

The answer filed by appellee admits the execution of the note and mortgage sued upon, but avers affirmative facts in the way of present ability and readiness to pay at the time and place fixed in the notes, and a tender before suit of the amount due on the first note and interest on the others. The averments of this answer upon the questions here involved are substantially the same as the facts found by the court in its special finding of facts hereinafter set out; and, inasmuch as no question as to the sufficiency of this answer is presented to this court by any assignment of error, we deem it unnecessary to extend this opinion by a copy of the same. In this connection, however, it should be observed that appellant's counsel are now insisting that the answer filed was only in abatement and not in bar of the action, and is bad because it purports to answer the entire complaint and in fact answers but a part. But, as above indicated, the insufficiency of this answer is not presented to this court by any assignment of error, and, in any event, the finding of facts being in substance the same as the averments of the answer, the same question arises on the exceptions to the conclusions of law on the facts specially found, and in such case the sufficiency of the pleading is not important. *Scanlin v. Stewart et al.*, 138 Ind. 574, 575, 37 N. E. 401, 38 N. E. 401; *Woodward et al. v. Mitchell et ux.*, 140 Ind. 406, 407, 408, 39 N. E. 437; *Smith, Trustee, et al. v. Wells*

Mfg. Co., 148 Ind. 333, 335, 46 N. E. 1000; *Lake Erie, etc., R. Co. v. Hoff*, 25 Ind. App. 239, 242, 243, 56 N. E. 925.

A correct understanding of the questions presented by the appeal necessitates a statement of the substance of the special finding of facts and the conclusions of law thereon. The findings, after finding all the facts with reference to the ownership by appellant of certain flouring mill property in Boone county, its description and sale to appellee, and the execution by appellee of the notes in suit in payment therefor, and the execution of the mortgage in suit given to secure the same, the finding setting out in full a copy of each of the notes and mortgage, which copy contains the provision heretofore set out in this opinion, then proceeds, in substance, as follows: That said notes, with the accrued interest thereon, amount to the sum of \$4,274.66, and a reasonable attorney's fee for their collection is \$250; that by the terms of said note they were each payable at "the Citizens' State Bank at Jamestown, Indiana"; that said note, falling due on said 25th day of February, 1908, was at no time deposited at said bank; that appellant was absent from the town of Jamestown during all of said day until after 10 o'clock that night; that on said day the defendant had upon general deposit in said Citizens' State Bank, subject to check, over \$1,250 in money, being more than enough to pay the note falling due on said day, with accrued interest thereon, and one year's interest upon each of the other three notes; that appellee on said day, and prior thereto and since has, resided in the city of Washington, Daviess county, Ind., and was conducting his milling business in the town of Jamestown by and through one Henry Turner, his agent, all of which was well known to the plaintiff on said day and long prior thereto; that one week prior to said day said Turner, as the agent of appellee, in a personal conversation with appellant, ascertained when the first note would be due and the amount that would be due as principal and interest on said note, and the interest on the other three notes, but did not at that time learn that said notes were payable at said bank; that prior to said day appellee had notified said bank that so much of his general deposit in said bank as was necessary for that purpose was to be applied to payment of plaintiff's note and interest, and at said time arranged to secure additional money from said bank with which to conduct his business, if necessary; that on said date said Turner, as agent of appellee, went into said bank and ascertained the amount of money that appellee then had on deposit in said bank, and informed the officers of said bank that there was sufficient money of appellee on deposit to pay the note and interest due appellant, and that he would have a surplus remaining; that appellee's place of business was near said bank, being three minutes' walk therefrom, and his business

was immediately across the street and about 80 feet from appellant's residence; that during all of said day said Turner, as agent for appellee, kept a lookout for appellant in order to pay said note and interest, and was unable to find him; that said note was not presented at said bank either on the 25th of February or 26th day of February for payment; that during the 26th day of February, 1908, appellant remained at his house practically all day, and was not seen by said Turner; that about 5 o'clock, on the evening of said 26th, appellant went to the office of a lawyer in said town of Jamestown, and consulted him as to his rights in reference to said notes and mortgage; that on the 27th day of February, 1908, at about 11:30 o'clock a. m., plaintiff again went to the office of said lawyer, and in company with him went to said bank and presented said note falling due February 25, 1908, and demanded payment thereof; that the officers of said bank, who had been informed by the appellee and Henry Turner that said deposit of appellee was to be applied to the payment of appellant's said note and interest, then informed said appellant that the defendant had sufficient money on deposit to pay the note presented, but that they had no express authority or order directing them to make payment, but that defendant's agent, Henry Turner, was authorized to draw a check for the amount; that, immediately after receiving said information, the appellant and his attorney left said bank, and appellant thereupon directed his attorney to institute suit upon said notes and to foreclose said mortgage, and said attorney left Jamestown on the 27th of February, 1908, for the city of Lebanon to file suit on said notes; that upon appellant's return to his residence from the bank said Turner saw him, and told him that he desired to see him, but appellant excused himself saying that he would see Mr. Turner after dinner; that about 12:45 p. m. on said 27th appellant went to appellee's place of business immediately across the street from his residence, and saw said Turner, who at the time informed appellant that he desired to pay the note due February 25th, with the interest thereon and one year's interest on each of the other notes, and asked appellant if he would accept the money; that appellant informed said Turner that he would not; that said Turner thereupon importuned said appellant to accept the money and permit him to draw a check in payment of said note and interest, but appellant refused and told said Turner that he would not accept money or check; that, under the provisions of the mortgage, the notes were all due, and that the attorney had left Jamestown on the 12:40 car for Lebanon to file a suit upon said notes and to foreclose said mortgage; that on the same day, and prior to the filing of the answer herein, the defendant paid to the clerk of the Boone circuit court, as a tender of the principal of said note and the inter-

est thereon until that day and one year's interest on each of the other notes, the sum of \$1,248 in standard gold coin of the United States, which sum is still in the hands of the clerk of this court as a tender to the plaintiff in payment of the principal of said note and the interest thereon until the day of filing said answer, and one year's interest on each of the other notes; that on the 25th, 26th, and 27th days of February, 1908, and upon each of the same and during the whole of each of said days, the appellee had upon general deposit in said bank, subject to check, a sum of money in excess of \$1,250, and prior to either of said days the bank had been informed by appellee that so much of said deposit as might be necessary to pay first note and interest due on February 25, 1908, was to be applied to such payment; "that the plaintiff failed to present said note due by date on February 25, 1908, to said bank on said day for payment and remained away from Jamestown on said date to avoid the said Henry Turner, and prevent payment on said day, with the wrongful and deliberate purpose and intent of making a default in the payment of said note and interest, when due, in order to render all of said notes due, so as to authorize a suit thereon; that the defendant Rose Nugent is the wife of the defendant Thomas Nugent."

The court stated in its conclusions of law upon the facts found, as follows: "(1) That plaintiff is entitled to a judgment against the defendant Thomas Nugent for \$1,248 and an order upon the clerk of this court to apply the money in his hands as a tender to the payment of said judgment; (2) that each of the defendants are entitled to a judgment against the plaintiff for costs."

In the determination of the controlling question presented by this appeal, the appellant has in his favor the statute and certain general principles declared and recognized by the decisions of this and the Supreme Court.

[1] 1. A note made payable at a particular time and place does not impose upon the payee or his assignee the necessity of averring or proving a demand at the time and place fixed in the note; but the payor may show a readiness to pay such demand at such time and place. Section 374, Burns 1908; *Glatt v. Fortman*, 120 Ind. 384, 22 N. E. 300; *Eaton, etc., R. Co. v. Hunt*, 20 Ind. 457; *Brown v. McElroy*, 52 Ind. 404, 406; *Dillingham v. Parks*, 30 Ind. App. 61, 69, 70, 65 N. E. 300. It follows from the above that the maker of a promissory note, payable at a particular bank, cannot discharge such obligation by depositing in such bank the funds with which to pay said obligation, and that money so deposited in such bank cannot be deemed to be deposited with the payee's agent, except, of course, that, in the case the holder of such note deposits the same at such bank for collection, he thereby constitutes such bank his agent for such

purpose. *Glatt v. Fortman*, supra, at pages 385, 386, 120 Ind., 22 N. E. 300; *Wallace v. McConnell*, 13 Pet. 136, 10 L. Ed. 96; *Dillingham v. Parks*, supra.

[2] 3. Provisions in a mortgage of the kind here in question are not in the nature of penalties or forfeitures, "but are to be regarded as agreements between the parties fixing the time and conditions upon which the whole debt may become due." *Moore v. Sargent*, 112 Ind. 484, 14 N. E. 466; *Jones on Mortgages* (6th Ed.) § 76.

[3] 4. In such provisions time is the essence of the contract, and a court of equity will not relieve the mortgagor from a default, unless he can show some good excuse for it. *Moore v. Sargent*, supra; *Jones on Mortgages* (6th Ed.) § 1179. On the other hand, there are holdings which throw light upon this question from appellee's viewpoint. Upon the subject of appellee's conduct with reference to the default and the effect of his depositing the money at the place of payment, the courts of our own and other states have expressed the opinions following: In the case of the *Bedford Bank v. Acoam*, 125 Ind. 584, at page 587, 25 N. E. 713, at page 714, 9 L. R. A. 560, 21 Am. St. Rep. 258, the court says: "While we are not inclined to the view that a promissory note negotiable and payable at a bank in this state is in all respects the equivalent of a check drawn by the maker against a fund on deposit in the bank, so as to require the banker to pay the note on presentation out of funds applicable to that purpose, we can conceive of no valid reason why a note or bill thus drawn should not be held to authorize the banker to pay, and thereby become subrogated to all the rights of the holder to the same extent as if it had purchased the paper after maturity." In the case of *Wallace v. McConnell*, supra, at page 150, 13 Pet., 10 L. Ed. 95, the court says: "And when a note or bill is made payable at a bank, as is generally the case, it is well known that, according to the usual course of business, the note or bill is lodged at the bank for collection; and, if the maker or acceptor calls to take it up when it falls due, it will be delivered to him, and the business is closed. But, should he not find his note or bill at the bank, he can deposit his money to meet the note, when presented, and, should he be afterwards prosecuted, he would be exonerated from all costs and damages upon proving such tender and deposit." This court in the case of *Dillingham v. Parks*, supra, at page 70 of 30 Ind. App., at page 303 of 65 N. E., says: "Where the maker has no defense to the note, and has money on general deposit at such bank, it may in this state in good faith apply such funds in payment of the note upon the presentation thereof by the holder at maturity, and may set off the amounts so paid against the demand of the maker for the money so on general deposit. * * * The failure to

make presentment at the bank does not relieve the maker from his promise to pay, but only relieves him from damages in case he is ready at the bank to pay, and there is no one there to receive the money. Such facts are regarded as equivalent to a tender of the sum payable; and an answer showing such tender and payment of the money due into court will bar a recovery of interest and costs, but will not bar the causes of action on the note." To the same effect is the case of *Bedford Bank v. Acoam*, supra.

[4] Upon the subject of the default being caused by the acts or conduct of the payee of the obligation and the effect thereof, our own and other courts have expressed themselves as follows: In the case of *Moore v. Sargent*, supra, the court says: "Or if the default was induced by the fraudulent or inequitable conduct of the creditor, or by any agreement or promise upon which the debtor might rely which operated to mislead or throw the debtor off his guard, a court of equity would interfere to stay proceedings or the action might be abated upon the facts being properly pleaded." In the case of *Eaton, etc., R. Co. v. Hunt*, supra, the court says at page 468 of 20 Ind.: "But if the maker on the trial proves that the money was at the place, ready to be applied in payment when the note fell due, he will not be subject to costs. *Indiana & Illinois R. Co. v. Davis*, 20 Ind. 6 [83 Am. Dec. 303]." In the case of *Glatt v. Fortman*, supra, the court says: "The readiness to pay at the place designated constitutes a defense if properly followed up." In the case of *Noyes v. Clark et al.*, 7 Paige (N. Y.) 179, at pages 180, 181, 182, 32 Am. Dec. 620, the court says: "A court of equity, however, will not permit the mortgagee or his assignee to take an unconscientious advantage of the mortgagor who is willing to pay at the time prescribed, but who is unable to do so in consequence of the act of the other party. * * * In this case it is evident that the defendant Clark was both ready and willing to pay the interest on his bond and mortgage on the day it became due. And, if the assignee did not intentionally deprive him of the power of doing so by keeping out of the way and concealing his place of residence, he transacted the business of the assignment in such an unusual manner as to produce the same result. * * * The case of *Johnson v. Houlditch* (Burrow's Rep. 578) is in point to show the authority of the court to interfere and stay the proceedings in such a case. There the plaintiff had kept out of the way to prevent a tender of the debt, and the court, upon the ground that the suit was oppressive, ordered the suit to be stayed upon payment of the amount due, without costs, although a technical right of action existed when the suit was brought." In the case of *Bell v. Romaine*, 30 N. J. Eq. 24, at page 28, the court says: "If the complainant has given further day of payment

or in any other way waived the payment, according to the letter of the bond, the default contemplated and provided against has not happened." *De Groot v. McCotter*, 19 N. J. Eq. 531. *Pomeroy* in his *Equity Jurisprudence* says upon this same subject: "It seems, also, that a court of equity may relieve against the effect of such provision where the default of the debtor is the result of accident or mistake, and, a fortiori, when it is procured by the fraud or other inequitable conduct of the creditor himself." We might quote from the decisions of courts of other jurisdictions language similar to that above expressed, but we think we have quoted sufficiently to show that the general tendency of the decisions of the courts upon this subject is to hold that a suitor may not come into a court of equity and successfully invoke the aid of such court to enforce and foreclose a lien and subject to sale the property of another on the account of a default for which such suitor is himself responsible, especially when the alleged defaulter himself stood ready and willing at the agreed time and place to prevent the default.

Appellant concedes that "if nothing were involved in this case but the right to recover upon the first note the judgment is right," but insists that "it having been agreed in the mortgage that the failure to pay any one of said notes at maturity should cause all of said notes to become due and collectible, the court is wholly without authority to say that the readiness of the appellee to pay any of said notes at maturity should prevent the remaining notes from falling due." It must be conceded that this position of appellant is strongly supported by the authorities, *supra*, if he be right in his assumption that the finding of facts shows no more than a mere readiness of appellee to pay the first note at maturity and the interest on the others at the time and place fixed in said note for its payment; but it is in this assumption that counsel is in error. The findings show more than a readiness on the part of appellee to pay. They show that he actually placed and kept on deposit in the bank where said note was made payable the money for the purpose of making such payment with instructions to the bank that the money on deposit was for such purpose, and that payment was prevented on the day it was due by and on account of the failure of the appellant to present said note with the intent and purpose of causing a default in such payment, in order to render all of said notes due so as to authorize suit thereon. Under such facts, to conclude other than as the lower court concluded in this case would be to run counter to the rules of equity, and permit the mortgagee to take an unconscionable advantage

of the mortgagor who was ready and willing to pay at the time and place prescribed in his agreement, but was prevented from so doing by the acts of the mortgagee. But appellant insists that, where the mortgagor fails to pay at the time fixed, he can be relieved from such default in payment only by showing that such payment was prevented "by accident, mistake, or fraud of the creditor," and that neither of such facts is found by the special findings in this case. If, in the absence of a finding of accident or mistake as the cause of the default, it was necessary to find that the same was caused by the fraud of the payee, appellant's contention would be supported by authority, because there is in the finding in this case no finding of fraud, and we recognize the rule that requires fraud to be found as a fact and not left to inference where it is relied upon as a cause of action or defense. But we do not regard the holdings, *supra*, as requiring that fraud shall be proved in case accident or mistake is not proved. The decisions, *supra*, include all inequitable conduct on the part of the payee that causes the default. The payee is just as much bound by the terms of the provisions upon which the default rests as is the payor. Such provision is not intended as a means whereby he may at his own option take advantage of the payor and by his own conduct force a default; but, if he by his own act causes the default whether the act on his part be by deceit and fraud, or by some other means, he may in no event take advantage of the default which he himself so caused. For these reasons, we are of the opinion that there is no error in the conclusions of law on the facts found. Appellant insists that neither the decision of the court nor either of the facts found are sustained by sufficient evidence; but an examination of the evidence in the record convinces us that there was evidence tending to support each finding of facts and that neither of the several grounds of the motion for new trial presenting this question in different form presents any reversible error.

The only other ground for the motion for new trial presented by the points and authorities of appellant relates to the exclusion of certain offered evidence of appellant on cross-examination. We are of the opinion that no error was committed in the exclusion of this evidence; but in any event our view of the case, as above expressed, upon the question of there being no necessity for a finding of fraud in this case, eliminates any prejudicial or controlling influence resulting from the exclusion of the evidence offered. We find no error in the record.

Judgment affirmed.

(49 Ind. App. 254)

LESH v. BAILEY. (No. 7,231.)¹(Appellate Court of Indiana, Division No. 1.
June 1, 1911.)**1. REMOVAL OF CAUSES (§ 75*)—AMOUNT IN CONTROVERSY.**

Though a party may allege facts in his complaint from which it appears that more than \$2,000 is due him, yet, if he limit his demand to less than that amount, the cause cannot be removed to the federal court on the ground of diverse citizenship.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. § 132; Dec. Dig. § 75.*]

2. REMOVAL OF CAUSES (§ 79*)—AMENDED COMPLAINT—WAIVER.

The right to remove a cause to the federal court for diversity of citizenship may be waived; hence any such right under an amended complaint was waived by defendant proceeding to make up the issues and try the case, taking his chances on a favorable outcome with the jury before applying for removal.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. § 154; Dec. Dig. § 79.*]

3. REMOVAL OF CAUSES (§ 79*)—AMOUNT—AMENDED COMPLAINT—WAIVER—STATUTORY PROVISIONS.

Under Act Cong. March 3, 1887, c. 373, § 3, 24 Stat. 554, as amended by Act Cong. Aug. 13, 1888, c. 806, § 3, 25 Stat. 436 (U. S. Comp. St. 1901, p. 582), providing that a party desiring to remove a cause to the federal court must file his petition at the time, or any time before the defendant is required, by the laws or rules of the forum where the suit is brought, to answer or plead, after permitting plaintiff to amend his complaint to conform to the evidence, it was not error for the court, of its own motion, to fail to take up defendant's application to remove the cause, made on the original complaint and denied where defendant had himself waived his right by making up the issues and partly trying his case.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. § 149; Dec. Dig. § 79.*]

4. PAYMENT (§ 17*)—PLEADING (§ 249*)—AMENDED COMPLAINT—CHANGING CHARACTER OF SUIT—PAYMENT BY NOTE.

Where, so far as disclosed by the evidence, a note was not negotiable under the law merchant, and was nothing more than a duebill or an item to be considered in the accounting, its execution did not amount to payment of the amount evidenced by it, in the absence of an agreement that it should so operate; hence, by permitting plaintiff to amend his complaint to show the giving of the note, the character of the suit as for an accounting was not changed.

[Ed. Note.—For other cases, see Payment, Cent. Dig. §§ 70-77; Dec. Dig. § 17.* Pleading, Dec. Dig. § 249.*]

5. PARTNERSHIP (§ 318*)—PLEADING (§ 249*)—AMENDMENT OF COMPLAINT—PARTNERSHIP ACCOUNTING—CHANGE OF NATURE OF ACTION.

A suit for a partnership accounting is an equitable action, and any item connected with the accounting of partnership business may properly be adjudicated in such suit, and the character of the action is not changed to one at law because defendant's nonnegotiable note in the form of a duebill entered into the finding and judgment of the court, even without amendment of the complaint, as it is but an item to be considered in the accounting, and incidental to, rather than controlling as to the nature of the action, and hence an amendment of the complaint to show the giving of such note, made to conform to proof brought out by defendant, can-

not be objected to as changing the nature of the suit.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 735-738; Dec. Dig. § 318.* Pleading, Cent. Dig. §§ 710-729; Dec. Dig. § 249.*]

6. PLEADING (§ 34*)—CONSTRUCTION—GENERAL SCOPE.

The court will construe a pleading according to its general character and scope, and on the facts stated, and, if possible, so as to give full force and effect to all of its material allegations.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 66-75; Dec. Dig. § 34.*]

7. APPEAL AND ERROR (§ 1027*)—REVERSAL—CASE TRIED ON MERITS.

When it affirmatively appears from the record and the evidence that the merits of the cause have been fairly tried and determined, the judgment will not be reversed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4023; Dec. Dig. § 1027.*]

Appeal from Circuit Court, Huntington County; S. E. Cook, Judge.

Action by John Bailey against Will H. Lesh. From a judgment for plaintiff, defendant appeals. Affirmed.

U. S. Lesh and Eben Lesh, for appellant.
C. W. Watkins and T. G. Smith, for appellee.

FELT, P. J. This action was brought by appellee against appellant for dissolution of partnership and an accounting of the partnership assets. The court found for appellee and rendered judgment against appellant for \$607, from which this appeal is taken. Appellant has assigned numerous errors, raised in different ways, but those relied upon in the briefs, for reversal, relate to the refusal of the court to transfer the cause to the federal court and to certain amendments which the court permitted appellee to make to his complaint.

The judgment in this case was rendered on the amended second paragraph of complaint, which, in substance, before amendment, alleged that in 1895 appellant and appellee entered into a partnership agreement to operate a hotel in the state of Missouri; that appellee paid his full portion of the purchase money and fully performed his part of said partnership agreement; that said business was successful, and the profits therefrom amounted to a large sum of money, one-half of which belonged to appellee, but which appellant refused to pay to him, except the sum of \$110; that shortly after beginning business, in violation of their partnership agreement, appellant excluded appellee from said hotel and business, over his objection, and retained money due him in the sum of many thousand dollars. The original complaint was filed on September 14, 1907, and on September 21, 1907, appellant filed his verified petition to remove the cause to the federal court, on the ground of diverse citizenship, and tendered his bond therewith. The petition for removal averred facts showing that the amount in dispute was over

¹For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep.'s Indexes

²Rehearing denied. Second petition for rehearing denied. Transfer denied.

\$2,000, and that appellant was a resident of the state of Missouri. Pending the ruling on this application, the appellee withdrew his first paragraph of complaint, and by leave of court, over appellant's objection, filed his second paragraph of complaint, which demanded less than \$2,000. Thereupon the court denied the petition to transfer. In October following, by leave of court, appellee filed an amended first paragraph of complaint, averring substantially the facts above shown, but stating that appellee, in purchasing said hotel, furnished \$2,000 in cash and conveyed 18 acres of real estate of the value of \$1,000; that, by the terms of the partnership agreement, the profits of the business were to be divided equally at the end of each month; that the profits of the first month amounted to \$400. Several paragraphs of answers and replies were filed, and the case was put at issue. Appellant moved for a trial by jury, and the court thereupon submitted to a jury certain interrogatories which were answered by the jury for the guidance of the court. These answers show that appellee put into the purchase of the hotel \$2,000 in cash and 18 acres of real estate, and that appellant paid nothing on the purchase, but the firm of Lesh & Bailey executed three \$500 notes, which were paid from the proceeds of the business; that, soon after beginning business, appellant excluded appellee from the hotel and refused to account to him for his part of the profits; that the profits during the term the hotel was operated amounted to \$6,000, of which amount appellee received \$110 and appellant \$5,890; that appellant had never settled with appellee, and there was due him the sum of \$4,620. The jury returned their answers to interrogatories on October 26, 1907, and on November 7, 1907, appellant again filed his petition to transfer the cause to the federal court, which was overruled. Thereupon appellant moved the court to find the facts specially and state its conclusions of law thereon. Appellee then asked and was granted leave to amend his complaint to conform to the proof and thereupon filed his amended second paragraph of complaint, which only differed from the original by averring in substance that appellant executed in the name of Ella J. Bailey, for the use and benefit of appellee, his promissory note dated on or about October 23, 1907, for \$400, which was due and unpaid; that a copy thereof was not set out because the note was in the hands of appellant and, upon demand, he refused to surrender same to appellee; that said note was given to reimburse appellee for money invested in said hotel. At the January term, 1908, the court filed his special findings of facts, the substance of which is as follows: That appellant and appellee, in 1895, formed a partnership to engage in the hotel business in Missouri, each to receive one-half of the net profits; that they began business on January 1, 1896, at Trenton, Mo.,

and appellee invested therein \$1,000 in cash; that on October 23, 1907, after a sale of the hotel business, they had a partnership settlement, by which appellee obtained a reconveyance of the 18 acres of real estate and said note for \$400, which was payable to Ella J. Bailey, appellee's wife, but was to secure the balance due appellee in said settlement, and was not, in fact, the property of said Ella J. Bailey, but was the property of appellee; that the note was unpaid, and there was due thereon \$607. Upon this finding, the court stated his conclusions that the law is with appellee and he is entitled to recover said amount from appellant. To these conclusions appellant excepted.

[1] Though a party may allege facts in his complaint from which it appears that more than \$2,000 is due him, yet, if he limit his demand to less than that amount, the cause cannot be removed to the federal court on the ground of diverse citizenship. *L. E. & W. Ry. Co. v. Juday*, 19 Ind. App. 436, 49 N. E. 843.

[2] The above authority clearly meets the question as it arose on the first application to transfer; but it is further contended by appellant that the authority does not justify the ruling on the second application made after the filing of the amended first paragraph of complaint. It will be observed, however, that, after this paragraph of complaint was filed, appellant, without renewing his application to transfer, proceeded to, and did, make up the issues and moved for a jury trial, and tried the case before a jury upon certain interrogatories submitted by the court for his information upon controverted questions of fact. Appellant claims, and appellee denies, that the amended first paragraph of complaint demands, or puts in controversy, more than \$2,000. Be this as it may, the right to transfer may be waived, and we hold that the right to transfer, if any existed by reason of the amended first paragraph, was waived by appellant by proceeding to make up the issues and try the case, at least in part, taking his chances on a favorable outcome with the jury and then, after seeing their answers, renewing his application. *Pence v. Garrison et al.*, 93 Ind. 345, 351, 353.

Black's *Dillon on Removal of Causes*, § 15, says: "A party to a suit in a state court may, so far as concerns that particular litigation, waive his right to remove the same to the federal court. * * * Parties may not go to trial on the merits, and take their chances on the result, and afterwards question the jurisdiction of the court on any ground which could be waived."

[3] By section 3 of the act of Congress of March 3, 1887 (chapter 373, 24 Stat. 554), as corrected by the act of August 13, 1888 (chapter 866, § 3, 25 Stat. 436 [U. S. Comp. St. 1901, p. 582]), it is provided that a party desiring to remove a cause from a state to the federal court must file his petition "at the time, or any time before the defendant is

required by the laws of the state or the rule of the state court in which such suit is brought to answer or plead to the declaration or complaint of the plaintiff." *Desty's Removal of Causes*, § 105s; *K. C., F. S. & M. R. Co. v. Daughtry*, 138 U. S. 298, 11 Sup. Ct. 306, 34 L. Ed. 963; *Wadleigh v. Standard Life, etc., Ins. Co.*, 76 Wis. 439, 45 N. W. 109; *Kaitel et al. v. Wylie et al.* (C. C.) 38 Fed. 865; *Browning v. Reed* (C. C.) 39 Fed. 625.

The above authorities fully answer appellant's contention that, after permitting appellee to amend his complaint to conform to the evidence, the court, of its own motion, should have taken up and sustained the application to remove the cause, for certainly if such duty is incumbent upon a trial court in any case, which we do not assert, it was not its duty where the party had himself waived his right, as in this case.

[4] By permitting the appellee to amend his complaint so as to show the giving of the \$400 note, the character of the suit was not changed, but remained one for accounting. So far as disclosed by the evidence, the note was not negotiable under the law merchant, was nothing more than a due bill or an item to be considered in the accounting, and its execution did not amount to payment of the amount evidenced by it, in the absence of an agreement that it should so operate. 22 *Am. & Eng. Enc. Law* (2d Ed.) p. 555; *Krohn v. Bantz*, 68 Ind. 277, 284; *Alford et al. v. Baker et al.*, 53 Ind. 279, 285.

[5] Furthermore, the suit for an accounting being an equitable action, the whole case is drawn into equity, and any item connected with the accounting of the partnership business may properly be adjudicated in such suit, and the character of the action is not changed to one at law, because a note of the character here indicated enters into the finding and judgment of the court. Such note is but an item to be considered in the accounting and, on the facts of this case, is incidental to, rather than controlling, as to the nature or character of the action. This is consistent with our Code and the policy of our law not to multiply suits. Section 249, *Burns* 1908; *Pomeroy on Eq. Jurisprudence*, §§ 180, 181, 231, 242; *Towns et al. v. Smith et al.*, 115 Ind. 480, 16 N. E. 811; *Palmer Steel & Iron Co. v. H. L. & P. Co.*, 160 Ind. 232, 238, 66 N. E. 690; *Monnett et al. v. Turple et al.*, 132 Ind. 482, 485, 32 N. E. 328; *Hoosier Const. Co. v. Nat. Bank, etc.*, 35 Ind. App. 270, 274, 73 N. E. 1006.

[6] In *Hoosier Construction Co. v. National Bank, etc.*, supra, on page 274 of 35 Ind. App., on page 1007 of 73 N. E., this court said: "The rule in this state is that the nature of an action must be determined from the general character and scope of the pleading, disregarding isolated and detached allegations not essential to the support of its main theory." *M. S. Huey Co. v. Johnston*, 164 Ind. 459, 73 N. E. 996.

The court will construe the pleading as most clearly outlined by the facts stated and, if possible, so construe it as to give full force and effect to all of its material allegations and such as will afford the pleader full relief. *Monnett et al. v. Turple et al.* 132 Ind. 482, 32 N. E. 328; *Monnett et al. v. Turple et al.*, 133 Ind. 424, 427, 32 N. E. 328.

In *Orr v. Leathers*, 27 Ind. App. 572, at page 575, 61 N. E. 941, at page 942, this court said: "It was long ago held that a judgment or verdict in favor of a plaintiff would not be set aside upon the ground that the action had not been framed with technical precision," and quoted approvingly from a Massachusetts case in which it was said that, though the action was misconceived and wrong in form, where it clearly appeared that justice had been done, they would not disturb the judgment, "especially where, in adjusting the demand, the defendant had every advantage which he could have had, under any other form of action." Our statutes give great liberality on the subject of variance between the allegations and the proof (sections 400, 401, 402, *Burns* 1908), and in the amendment of pleadings (section 403), where the party is not misled or deprived of any substantial right, and the ends of justice are subserved. *C., C., C. & St. L. Ry. Co. v. Miles*, 162 Ind. 647, 70 N. E. 985; *Toledo, St. L. & K. O. R. R. Co. v. Stephenson*, 181 Ind. 203, 30 N. E. 1082; *Burns et al. v. Fox*, 113 Ind. 205, 14 N. E. 541; *Judd v. Small*, 107 Ind. 398, 8 N. E. 284; *Citizens' St. R. R. Co. v. Heath*, 29 Ind. App. 395, 62 N. E. 107.

In the case at bar the appellant, to meet the case made against him by appellee, brought out the fact of the existence of this note before the amendment was asked or made, and he cannot now be heard to say that he was in any sense misled by the proof or harmed by the amendment. Indeed, in such equitable action, the note being connected with the subject of the litigation and proof of it coming from appellant himself, he could not complain if the court had considered the note in his final adjudication of the matters in controversy, without any amendment of the pleading. The principal reason for the amendment, on such state of facts, is to have the record show that the note was included in the finding and judgment.

Section 700, *Burns* 1908, provides that no judgment shall be reversed "where it shall appear to the court that the merits of the cause have been fairly tried and determined in the court below."

In view of the finding of facts by the jury, it is apparent that, looking to the merits of the controversy, the only one having cause to complain is the appellee, who recovered \$607 where the jury find due him \$4,620. Where the complaining party is not harmed but benefited by the finding of the court, and the court renders judgment upon such find-

ing, he cannot successfully urge the reversal of such judgment on account of some intervening error. *World B. L. & I. Co. v. Martin*, 151 Ind. 630, 637, 52 N. E. 198; *Hartwell Bros. v. Peck & Co.*, 163 Ind. 357, 71 N. E. 958; *Enger v. Ohio & Miss. Ry. Co.*, 142 Ind. 618, 625, 42 N. E. 217.

[7] It has been held repeatedly by our Supreme and by this court that, when it affirmatively appears from the record and the evidence that the merits of the cause have been fairly tried and determined, the judgment will not be reversed. The facts of this case show, beyond question, that appellant is not harmed, and that he could not reasonably hope for a more favorable outcome if he obtained a new trial. From the facts disclosed by the record, it is doubtful if the partnership settlement found by the court would stand if an issue was so formed as to directly assail it, and this settlement alone, so far as the record discloses, limits the recovery to the amount of the judgment rendered. *Shedd v. Webb et al.*, 157 Ind. 535, 591, 61 N. E. 233; *Latschaw v. State ex rel.*, 156 Ind. 194, 206, 59 N. E. 471; *La Plante v. State ex rel.*, 152 Ind. 80, 85, 52 N. E. 452; *Wortman v. Minich et al.*, 28 Ind. App. 31, 62 N. E. 85; *Orr v. Leathers*, *supra*.

There is no available error shown by the record.

Judgment affirmed.

(47 Ind. App. 698)

RYAN v. PARKER. (No. 7,264.)

(Appellate Court of Indiana, Division No. 2.
May 31, 1911.)

1. PLEADING (§ 367*)—BILL OF PARTICULARS—SUFFICIENCY.

Under the Code providing that a complaint conveying to defendant full information of the facts relied on and sufficient to bar another action on the same set of facts is sufficient, a complaint in an action for work performed and materials furnished in the construction and repair of buildings which includes a bill of particulars, naming the parties, the nature and kind of work performed, the materials furnished, the buildings constructed and improved, the price of the various items agreed on and the value of those not agreed to, the several amounts paid, and the balance due, is sufficient as against a motion to make the bill of particulars more definite and certain.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. §§ 1173-1193; Dec. Dig. § 367.*]

2. WORK AND LABOR (§ 24*)—ISSUES.

Where the complaint states a good cause of action on a common count for work done and materials furnished, findings of an express agreement are within the issues under the rule that, where parties have agreed on the compensation for labor which has been performed, the agreed price may be recovered under a common count for work done.

[Ed. Note.—For other cases, see *Work and Labor*, Cent. Dig. §§ 43-46; Dec. Dig. § 24.*]

Appeal from Circuit Court, Knox County;
O. H. Cobb, Judge.

Action by Irwin M. Parker against George

L. Ryan. From a judgment for plaintiff, defendant appeals. Affirmed.

Jos. S. Pritchett and Cullop & Shaw, for appellant. John Downey and H. R. Lewis, for appellee.

IBACH, J. Appellee, Irwin M. Parker, brought this action against appellant, George L. Ryan, to recover for work performed and material furnished in constructing and repairing certain buildings and houses for him. The body of the complaint alleges "that the defendant is indebted to the plaintiff in the sum of \$2,340.30 for work performed for and materials furnished to said defendant by the plaintiff at the request of the said defendant, a bill of particulars of which is filed herewith, made a part hereof, and marked 'Exhibit A.' Said work and labor was performed and said materials were furnished in building and repairing certain buildings and houses. Said sum of \$2,340.30 is just, due, and wholly unpaid." By agreement of the parties, the case was referred for trial to Sherman G. Davenport, an attorney of the Knox county bar, who filed special findings of fact and conclusions of law, on which judgment was rendered by the court against appellant for \$1,501.78.

The errors relied on for reversal are, first, overruling the motion to require the bill of particulars to be made more definite and certain; and, second, overruling the motion for a new trial for the reason that the finding and decision of the referee were contrary to law.

It appears from the record that the bill of particulars contains the following, omitting the caption: "July 8, 1907. First contract to build 2 story store building, \$2,800.00." Immediately following this item appear eight items under the head of, "Extras to Said Building Under First Contract." Below this statement of extras appears: "Aug. 10, 1907, second contract to build 2 story building, \$8,000.00." Then follows itemized statement of "extras to building under second contract. Then appears: "Nov. 25. Third contract. Boiler room, \$250.00." Following is a statement of "extras on said boiler room." "Sept. 15. Moores Store Building and Warehouse," giving statement of items with month and year. Then follow the names of various buildings, and itemized accounts below each, giving dates. There appears the gross sum for the construction of the original building under the three contracts mentioned, together with extras claimed. There is an itemization of work done on the other buildings, and the materials furnished therefor, the account embracing 161 items. Then follows the total amount of payments made, and the difference between the two sums is alleged to be \$2,340.30, which is the amount sued for.

[1] This bill of particulars appears to be

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

reasonably definite and certain. It names the parties; the nature and kind of work performed, the materials furnished, the buildings constructed and improved, the price of the various items agreed upon, and the value of those not agreed to, the several amounts paid, and alleges the balance due. It is only necessary under our Code that a complaint be so framed and the allegations sufficiently clear as to convey to the person sued full information of all the facts which are relied upon to recover in the action and to bar another action upon the same set of facts. The complaint, including the bill of particulars, in the present case seems to comply with this rule, and the court did not commit error in overruling appellant's motion to require the bill of particulars to be made more definite and certain. Without going into detail, it is set forth in substance among other findings of the referee that appellant and appellee entered into certain oral agreements (designated in the bill of particulars as first, second and third contracts) by which appellee was to do certain specified building work for appellant at an agreed compensation.

[2] Appellant urges that by these findings the items in the bill of particulars designated as first contract, second contract, and third contract are stated in the special findings to have been express agreements between the parties; and, since there are no allegations in the complaint of express contracts, the finding to the extent of these items comprehended matters not embraced within the issues and was therefore contrary to law. We cannot agree with appellant in this contention. The complaint stated a good cause of action upon a common count for work and labor and material furnished, and the findings of the referee were within the issues, for it has been repeatedly held by the courts of this as well as other states that where the parties have agreed upon the compensation for labor, and it has been performed, the agreed price may be recovered under a common count for work and labor done. *Scott v. Congdon*, 106 Ind. 268, 6 N. E. 625; *Peden v. Scott*, 35 Ind. App. 371, 73 N. E. 1099; *Board, etc., v. Gibson*, 158 Ind. 471, 484, 63 N. E. 982; *Jenney Electric Co. v. Branham*, 145 Ind. 314, 41 N. E. 448, 33 L. R. A. 395; *Shilling v. Templeton*, 66 Ind. 585; *Brown v. Perry*, 14 Ind. 32; *Kerstetter v. Raymond*, 10 Ind. 199.

The findings do not show that the recovery was allowed upon a different state of facts from that alleged in the complaint. There does not appear to be a fatal variance, but rather it appears that the various items set out in the bill of particulars are supported by the special finding of facts; and, the conclusions of law having been properly stated, we find no error.

The judgment is affirmed.

(250 Ill. 354)

THOMAS v. THOMAS.

(Supreme Court of Illinois. April 19, 1911.

Rehearing Denied June 19, 1911.)

1. DIVORCE (§ 101*)—CROSS-BILLS—CUSTODY OF CHILDREN.

In a divorce suit, a cross-bill lies for custody of children, and is not demurrable as not germane to the bill.

[Ed. Note.—For other cases, see Divorce, Dec. Dig. § 101.*]

2. EQUITY (§ 195*)—PLEADING—CROSS-BILLS—SUBJECTS.

A cross-bill may be filed purely as a matter of defense based on facts arising after the cause is at issue; such defense not being available by plea or answer.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 446-449; Dec. Dig. § 195.*]

3. EQUITY (§ 359*)—DISMISSAL OF BILL—EFFECT OF CROSS-BILL.

The statute which provides that, after a cross-bill has been filed, complainant shall not dismiss without defendant's consent (*Hurd's Rev. St. 1909, c. 22, § 36*), applies only to cross-bills asking affirmative relief.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 752; Dec. Dig. § 359.*]

4. EQUITY (§ 195*)—CROSS-BILLS—SUBJECTS.

A cross-bill cannot be filed for an object equally available by answer.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 446-449; Dec. Dig. § 195.*]

5. DIVORCE (§ 101*)—CROSS-BILLS—PROPERTY.

In a divorce suit, a cross-bill which merely sought custody of the children was improper; the matter being properly raised by answer.

[Ed. Note.—For other cases, see Divorce, Dec. Dig. § 101.*]

6. EQUITY (§ 195*)—CROSS-BILLS—DISMISSAL.

A cross-bill seeking no discovery and no affirmative relief not obtainable by answer should be dismissed on answer, motion, or demurrer.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 446; Dec. Dig. § 195.*]

7. DIVORCE (§ 289*)—CHILDREN—CUSTODY—JUDICIAL POWER.

In a divorce suit, so far as the children are concerned, the court, under the statute, can make orders only concerning their custody pending the suit or upon granting a divorce.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. § 773; Dec. Dig. § 289.*]

8. EQUITY (§ 199*)—CROSS-BILLS—ESSENTIALS.

A cross-bill which is filed merely as a mode of defense to bring into the case matters occurring after the cause is at issue requires no equity to support it, but a cross-bill which seeks affirmative relief is in the nature of an original bill seeking further aid of the court beyond the mere defense, and the relief sought must be such as the court in point of jurisdiction is competent to administer.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 463, 464; Dec. Dig. § 199.*]

9. EQUITY (§ 195*)—CROSS-BILLS—ESSENTIALS.

While a cross-bill seeking affirmative relief must be germane to the original bill, it is in fact a separate suit.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 448; Dec. Dig. § 195.*]

10. EQUITY (§ 39*)—RELIEF—SCOPE.

A court of equity having obtained jurisdiction upon an equitable ground will retain ju-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

jurisdiction to avoid more than one suit, and to do justice between the parties, though it becomes necessary to establish purely legal rights, or to grant legal remedies, but there must be some substantial ground of equitable jurisdiction.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 104-114; Dec. Dig. § 39.*]

11. INFANTS (§§ 18, 33*)—RIGHTS IN COURTS.

Where a chancery suit concerned an infant's person or property, he is treated as a ward of the court, and his rights will not be allowed to be prejudiced by his own or another's act, his rights being properly protected through a guardian ad litem or otherwise as may be necessary; but the jurisdiction can be exercised only when acquired according to equity practice.

[Ed. Note.—For other cases, see Infants, Cent. Dig. §§ 18, 65; Dec. Dig. §§ 18, 33.*]

12. GUARDIAN AND WARD (§ 8*)—APPOINTMENT—POWER.

Equity courts can appoint guardians for infants.

[Ed. Note.—For other cases, see Guardian and Ward, Cent. Dig. § 14; Dec. Dig. § 8.*]

13. DIVORCE (§ 294*)—CUSTODY OF CHILDREN.

On dismissal of a bill for divorce, it was error to grant defendant custody of the children under his cross-bill.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. § 777; Dec. Dig. § 294.*]

Carter, J., dissenting.

Error to Appellate Court, First District, on Appeal from Superior Court, Cook County; Farlin Q. Ball, Judge.

Suit by Sallie M. Thomas against M. S. Thomas. From a judgment of the Appellate Court of the First District (155 Ill. App. 619) affirming a decree for defendant, plaintiff brings error. Reversed and remanded, with directions.

Follansbee, McConnell & Follansbee and Clyde E. Shorey, for plaintiff in error. C. H. Poppenhusen and Joseph L. McNab (S. S. Gregory, of counsel), for defendant in error.

CARTWRIGHT, J. On July 17, 1908, plaintiff in error, Sallie M. Thomas, filed her bill for divorce in the superior court of Cook county against defendant in error, Morris St. P. Thomas, on the ground of desertion. An answer was filed on August 21, 1908, denying the charge of desertion, but no mention was made in the bill or answer of the existence of any children of the marriage. On October 29, 1908, the defendant filed his cross-bill, reciting evidence tending to show that he had not deserted his wife, but that she had deserted him, which was followed by a statement that she had deserted him and averments that two boys were born of the marriage, Benjamin M. Thomas, then 13 years old, and Carr M. Thomas, 10 years old, and that Benjamin was living with Mr. Thomas, and the younger boy, Carr, was with his mother. The cross-bill did not seek a divorce, but prayed for the care, custody, education, and control of the two children, and

that Mrs. Thomas be enjoined from interfering therewith, and for such other and further relief as equity might require. Mrs. Thomas answered the allegation of the cross-bill that she had deserted her husband by denying it and demurred to the remainder, which set forth the birth of the children and matters relating to them and their custody. The court overruled the demurrer, and, Mrs. Thomas electing to stand by it, the cross-bill was ordered to be taken as confessed. When the cause was reached for hearing on the original bill and answer thereto and the cross-bill taken as confessed, Mrs. Thomas moved the court to dismiss her bill without prejudice for want of prosecution, but Mr. Thomas objected, and the motion was denied. Mrs. Thomas offered no evidence in support of her bill, and the cause was heard upon the cross-bill taken as confessed, but her solicitor appeared and contested the right to a decree on the cross-bill. The solicitor for Mr. Thomas informed the court that a divorce was not wanted, and the relief sought by the cross-bill was the custody of the children. The court entered an order finding that Mr. Thomas was a fit person to have the custody, control, and education of the children, and giving him the same, and enjoining Mrs. Thomas from interfering therewith, and ordering her to bring or send the boy Carr into the state and deliver him to her husband within 30 days. She did not comply with that order, and a final decree was entered dismissing her original bill for divorce, granting the prayer of the cross-bill, and adjudging the costs of the suit against Mrs. Thomas. She prayed an appeal to the Appellate Court for the First District, which was allowed and perfected. The Appellate Court affirmed the decree (155 Ill. App. 619), and we granted a writ of certiorari, in pursuance of which, the record is now under review.

[1] The original bill prayed for a divorce on the ground of desertion. The cross-bill stated in detail that Mrs. Thomas had gone on a visit to Wisconsin and had not returned to the family home, but set up a separate establishment a few blocks distant and had afterward gone to Sioux Falls, S. D., all of which was intended to show that the separation was her act, but the cross-bill did not ask for a divorce. Its prayer and its purpose were merely to obtain the care, custody, control and education of the two boys, and so much of the cross-bill as alleged facts concerning them and asked for their custody was demurred to on the ground that such matters were not germane to the original bill. Because the original bill stated nothing about the existence of any children of the marriage, it was insisted, by demurrer, that matters concerning their custody could not be made the subject of a cross-bill. The facts set up in the cross-bill were germane

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

to the subject of the original bill in the sense that they related to the same matter. The custody of the children was necessarily comprehended within the scope of the original bill although nothing was said about them. The filing of the original bill for divorce brought within the jurisdiction of the court the minor children of the parties by virtue of the statute, which authorizes the court, on application, to make such order concerning the custody and care of children during the pendency of the suit as may be deemed expedient and for the benefit of the children, and if a divorce shall be decreed the court may make such order touching the care, custody and support of the children, or any of them, as from the circumstances of the parties and the nature of the case shall be fit, reasonable, and just. The cross-bill was not bad on account of the reason alleged in the demurrer, and when the demurrer was overruled Mrs. Thomas was still prosecuting her suit for divorce. The court did not err in overruling the demurrer, but the situation was afterward changed by the motion of Mrs. Thomas to dismiss her bill and her refusal to prosecute it further, and if the court could not grant the relief sought by the cross-bill regardless of the prosecution of the original bill, the decree must be reversed.

[2-6] The statute provides that after a cross-bill has been filed the complainant shall not be permitted to dismiss his bill without the consent of the defendant, and when Mrs. Thomas attempted to dismiss her bill the court denied her motion. A cross-bill may be filed purely as a matter of defense based upon facts arising after the cause is at issue. In such a case a defendant cannot avail himself of the defense by plea or answer, but must make it the subject of a cross-bill for the same reason that a complainant can only bring into the suit matters occurring after the filing of his bill by a supplemental bill. *Jenkins v. International Bank*, 111 Ill. 462. The cross-bill in this case was not filed purely as a matter of defense to the bill for divorce based upon facts arising after the filing of the original bill, and if it had been it would not have justified the court in refusing to allow Mrs. Thomas to dismiss her bill. The statute only applies to a cross-bill asking for affirmative relief, since it would be absurd to say that one who is merely defending can insist that the complainant shall remain in court in order that he may make a defense. The court could not compel Mrs. Thomas to prosecute her action for divorce against her will merely in order that Mr. Thomas should have an opportunity to prevent her obtaining it. The cross-bill was for the purpose of obtaining the custody of the children, and a defendant will not be permitted to file a cross-bill for an object which is equally available by an answer. *Pritchard v. Littlejohn*, 128 Ill. 123, 21 N. E. 10. Any question relating to the custody of the children could have been raised by Mr. Thomas

by his answer, and at any time after the original bill was filed such questions could have been brought before the court by an application for such custody, and upon granting a divorce the court could have awarded the custody to either party. Mr. Thomas could have fully set forth in his answer everything that was required for the protection of his rights as father of the children, and so far as the powers of the court under the divorce statute are concerned, the cross-bill was useless. If a defendant should file a cross-bill when he seeks no discovery and no affirmative relief that he cannot obtain by answer to the original bill, his cross-bill will be dismissed either on answer or motion or demurrer. *Edgerton v. Young*, 43 Ill. 464; *Morgan v. Smith*, 11 Ill. 194; *Wing v. Goodman*, 75 Ill. 159; *Akin v. Cassidy*, 105 Ill. 22; *Newberry v. Blatchford*, 106 Ill. 584; *Howe v. South Park Com'rs*, 119 Ill. 101, 7 N. E. 333. If the court had no other jurisdiction to award the custody of the children in controversy between the parents than that conferred by the divorce statute, the cross-bill interposed no obstacle to the dismissal of the original bill because Mrs. Thomas declined to prosecute her action for divorce and the cross-bill did not ask for a divorce and none was granted.

[7] In England matrimonial causes were never under the jurisdiction of courts of equity, and in this country the jurisdiction is conferred by statute, which prescribes and limits the powers of the court. So far as the children are concerned, a court can, by virtue of the statute, only make orders concerning their custody during the pendency of the suit, or upon a final hearing where the divorce is decreed. Some courts have held that the custody of children can be granted to one of the parties to a divorce suit where a divorce is denied, or not granted, which is the same thing, but the decisions rest either upon a statute conferring such power or upon supposed general equity powers of the court. In Alabama there is a statute giving courts of chancery power, in all cases of separation between husband and wife where neither party shall obtain a divorce, to give the custody and education of the children either to the father or mother, as may seem right and proper, and it was held that such an order could be made where there was an ineffectual attempt to procure a divorce. *Cornelius v. Cornelius*, 81 Ala. 479. We have no such statute, but our divorce statute is to the contrary, and in this case there was not even an attempt to procure a divorce. In *Nelson on Divorce and Separation* (volume 2, p. 979) the author says that it is not denied that a court has jurisdiction to fix the custody where a divorce is denied in a subsequent proceeding by habeas corpus, and that it seems to him useless to deny the relief in a divorce suit and grant it in another suit for the same purpose in states where the different forms of action are abolished. That

opinion, of course, has no application to the courts of this state, where the law-making power has not thought it wise to abolish all distinctions between habeas corpus and bills for divorce nor to authorize courts of equity to administer purely legal remedies. In *Power v. Power*, 85 N. J. Eq. 93, 55 Atl. 111, it was held that when a wife has been denied a divorce the court may award the custody of the children if the bill contains a prayer for such relief, but it is quite clear that the court cannot grant such relief under a statute which limits the power of the court to cases where a divorce is granted. The courts generally hold that where a divorce is denied or not granted the court cannot consider or pass upon the question of the custody of the children. *Simon v. Simon*, 6 App. Div. 469, 39 N. Y. Supp. 573, affirmed on the opinion below 159 N. Y. 549, 54 N. E. 1094; *Keppel v. Keppel*, 92 Ga. 506, 17 S. E. 976; *Garrett v. Garrett*, 114 Iowa, 439, 87 N. W. 282. Mr. Thomas could not have maintained his cross-bill by virtue of any provision of the divorce act, and if he could not have maintained it under the general equity powers of the court, it was error to refuse leave to dismiss the original bill because the cross-bill had been filed, and the final decree was also erroneous.

[8-10] A cross-bill which is filed merely as a mode of defense to bring into the case matters occurring after the cause is at issue requires no equity to support it, but a cross-bill which asks affirmative relief is in the nature of an original bill asking further aid of the court beyond the mere defense, and the relief sought must be such as the court, in point of jurisdiction, is competent to administer. *Tobey v. Foreman*, 79 Ill. 489; *Morrison v. Morrison*, 140 Ill. 560, 30 N. E. 768. While such a bill must be germane to the subject-matter of the original bill, it is, in fact, a separate and distinct suit commenced by the filing of the cross-bill. *Ballance v. Underhill*, 3 Scam. 453. It is an auxiliary suit concerning the same matters involved in the original bill, which is permitted in order that complete justice may be done between the parties in one proceeding. After a court of equity has obtained jurisdiction upon any equitable ground, it will retain such jurisdiction for the purpose of avoiding more than one suit and doing justice between the parties, although in doing so it may be necessary to establish purely legal rights or to grant legal remedies (*Longshore v. Longshore*, 200 Ill. 470, 65 N. E. 1081); but in order to authorize relief which can be obtained in a suit at law there must be some substantial ground of equitable jurisdiction and if there is no equitable ground of jurisdiction and the remedy sought can be as well obtained in an action at law, the court cannot retain jurisdiction and grant a purely legal remedy. *Brauer v. Laughlin*, 235 Ill. 265, 85 N. E. 283.

Mrs. Thomas refused to prosecute her suit for divorce, which she had a right to control,

and asked the court to dismiss her bill, which the court could only refuse to do because the cross-bill had been filed. As already shown, the court could not refuse to dismiss the original bill, under the provisions of the divorce statute, because a cross-bill had been filed which was unnecessary and asked for relief which could not be granted unless the original bill was prosecuted to a decree for divorce. The court proceeded to hear the cause upon the cross-bill, which asked for affirmative relief, by granting to the complainant therein the custody of the children; and if a husband cannot maintain a suit in equity against his wife for such a purpose the court was without jurisdiction and the decree was erroneous.

[11] No case where such a bill has ever been filed in England or this country has been discovered by the careful research of the able counsel who have argued this case, and while the fact that it has never been done is not conclusive that it cannot be, it is satisfactory evidence that no solicitor has thought that it could be done. The argument in favor of such jurisdiction is upon the ground that courts of equity have a broad and comprehensive jurisdiction over the persons and property of infants. The existence of such jurisdiction has been frequently asserted in the strongest language, but such declarations are not different from like statements made with reference to jurisdiction over trustees and others occupying fiduciary relations. The jurisdiction can only be exercised when it has been acquired as to the particular person and subject-matter in accordance with the practice in courts of equity, which is by the commencement of some sort of recognized proceeding in the court. What has been so often said respecting the jurisdiction does not mean that courts of equity take upon themselves the care, custody, education, and maintenance of all the children within the territorial limits where they exercise their powers, but when a suit is instituted in a court of equity relative to the person or property of an infant he is treated as a ward of the court, and the court will not allow its rights to be prejudiced by any act, either of his own or of any other person. The court will protect the infant through a guardian ad litem or otherwise, as may be necessary, and will look to his interests, and see that the guardian discharges his duty. *Lynch v. Rotan*, 39 Ill. 14; *Hartmann v. Hartmann*, 59 Ill. 103; *Aliman v. Taylor*, 101 Ill. 185; *Ames v. Ames*, 148 Ill. 321, 36 N. E. 110. Where some proceeding is instituted in which an infant is a party, either as plaintiff or defendant, the controversy and decision of the court relate to his rights and property, and the court will see that he is represented by guardian, next friend, or in some proper manner, who is entitled to assign error on an improper decision of the court, and in such a proceeding the infant becomes a ward of the court. In *Greenman*

v. Harvey, 53 Ill. 386, it was said that an infant who was a party defendant did not become the ward of the court until service of process upon her. The jurisdiction so exercised respecting the rights or property of infants is a part of the general equity jurisdiction, but this case is not within those limits. The cross-bill was filed by a husband against his wife to enforce an alleged right of the husband to the custody of the children. The attempt was to have the court consider and determine the relative rights of the parents to such custody, which is not an equitable but a legal right. It is true that where the court has jurisdiction the legal right will not be enforced to the detriment of the child, and the guiding motive of the court will be to conserve and protect the best interests of the child. But the right in question is that of a parent. Neither a want of harmony between a husband and wife relating to the management of their children, nor the right of either to their custody, control, support or education, involves any equitable title or question of an equitable nature. The principles upon which equitable powers are exercised do not sustain the claim that a husband and wife may litigate with each other in a court of equity over the question which one shall have the custody of their children.

[12] There is another power which courts of equity have concerning infants and their property, and that is the appointment of guardians. *Hohenadel v. Steele*, 237 Ill. 229, 86 N. E. 717. The source of this jurisdiction is quite uncertain. Whether the power was originally a mere usurpation, or was legally delegated to the chancellor by the crown as *parens patriæ*, or grew out of the practice of appointing guardians *ad litem*, the jurisdiction exists here by inheritance from the English courts of chancery, and not because equitable rights or titles are involved. Like the power of any other court to appoint a guardian, that jurisdiction may be exercised upon a proper petition or application for the appointment of a guardian. But the cross-bill in this case cannot be regarded as such a petition or application. In *Cowls v. Cowls*, 3 Gilman, 435, 44 Am. Dec. 708, where the parties had been divorced, the court said that the Legislature, in providing that when a divorce is decreed the court may award the custody of the children, conferred no new power on the court, which was correct in the sense that the power is of the same nature as a pre-existing power; but the court did not intimate that the power had ever been or could be exercised in a litigation between a husband and wife relating only to the custody of the children.

[13] We conclude that the court had no jurisdiction to award the custody of the children to Mr. Thomas, and that the Appellate Court erred in affirming the decree of the superior court.

The judgment of the Appellate Court and

the decree of the superior court are reversed, and the cause is remanded to the superior court, with directions to dismiss the original bill and cross-bill.

Reversed and remanded, with directions.

CARTER, J. (dissenting). I do not concur in the reasoning or conclusion of the foregoing opinion. Our statute provides that the court in which divorce proceedings are instituted may make orders, pending such proceedings, as to the custody of the children, and if a decree of divorce is granted, make such further orders as to their care and custody, from time to time, as their interests may require. In *Cowls v. Cowls*, 3 Gilman, 435, 438 (44 Am. Dec. 708), this court long ago said: "It becomes clear, then, that our Legislature, by providing that 'when a divorce shall be decreed it shall and may be lawful for the court to make such order touching the alimony and maintenance of the wife, the care, custody, and support of the children, or any of them, as from the circumstances of the parties and the nature of the case shall be fit, reasonable and just,' has conferred no new authority or jurisdiction upon the court. It was by its original jurisdiction clothed with the same powers before. The cases provided for in this statute are necessarily embraced in that broad and comprehensive jurisdiction with which the court of chancery is vested, over the persons and estates of infants and their parents who are bound for their maintenance." It is the well-settled law in this jurisdiction that a court of chancery is vested with "broad and comprehensive jurisdiction" over the persons and estates of all minors within the limits of its jurisdiction. *Hartmann v. Hartmann*, 59 Ill. 103; *Wilkinson v. Deming*, 80 Ill. 342, 22 Am. Rep. 192; *Dodge v. Cole*, 97 Ill. 338, 37 Am. Rep. 111; *In re Ferrier*, 103 Ill. 367, 43 Am. Rep. 10; *Ames v. Ames*, 148 Ill. 321, 36 N. E. 110; *Van Matre v. Sankey*, 148 Ill. 536, 36 N. E. 628, 23 L. R. A. 665, 39 Am. St. Rep. 196; 3 *Pomeroy's Eq.* § 1303.

It is insisted that the cross-bill is not germane to the matters raised by the original bill. The custody of the minor children was necessarily comprehended within the scope of the original bill, although they were not mentioned therein. *Snover v. Snover*, 10 N. J. Eq. 261. Under our statute it would seem that upon the filing of the bill herein the minor children of the marriage became, in a sense, wards of the court, and hence any suggestions as to their custody, in a cross-bill, would be germane and relevant. If it becomes necessary to grant affirmative relief in order to dispose of the matters in controversy and do complete justice between the parties, a cross-bill may be filed, in which such relief may be granted and circuitry of action avoided. *Longshore v. Longshore*, 200 Ill. 470, 65 N. E. 1081. It is a familiar rule that when a court of equity acquires juris-

diction for one purpose it will retain it for all purposes, in order to do full and complete justice between all the parties. *Wehrhelm v. Smith*, 226 Ill. 346, 80 N. E. 908; *King v. King*, 215 Ill. 100, 74 N. E. 89. Equity abhors a multiplicity of suits. *Morrison v. Morrison*, 140 Ill. 560, 30 N. E. 768. Suits for divorce based upon purely statutory grounds are of an equitable nature, and subject to the rules and maxims of courts of equity rather than those of the English ecclesiastical courts. The fact that the Legislature gave the power, in such cases, to the chancery courts of this state rather than to courts of law supports this view. "The equitable nature of the suit being established, and it being brought in a court of equity, it should be dealt with upon the same equitable principles as other suits founded upon ordinary equities." *Rooney v. Rooney*, 54 N. J. Eq. 231, 34 Atl. 682. It is not necessary for children to be brought personally into court in order to give jurisdiction over them in these proceedings. *Power v. Power*, 65 N. J. Eq. 93, 101, 55 Atl. 111, 115. The court in the case last cited held that the writ of habeas corpus was entirely out of place when divorce proceedings are started in order to decide as to the custody of minor children and that the cross-petition upon that question was germane in divorce proceedings, the chancellor saying: "I think, under the practice of New Jersey adopted in these cases, that it was perfectly germane to the petition of the wife for the husband to set up this kind of a petition, so as to get affirmative relief against her negative relief. Without that he would only have got negative relief, but with that cross-petition he is entitled to affirmative relief. It is germane to the suit; just as germane as a cross-petition for divorce would be."

The precise question here raised has never been passed on by this court. It is plain from the majority opinion that there are authorities that uphold its conclusion. Under the varying statutes and systems of procedure the courts have not all agreed on this question. But where, as in this state, the court having jurisdiction of divorces has also general chancery jurisdiction, in my judgment it would be not only for the best interests of the minor children, but in accord with sound public policy, for the court to retain jurisdiction in this proceeding for the purpose of making any orders as to the welfare of the children that justice may require. Unless prohibited by statute or well-settled principles of law, a court of equity has always the power to do that which justice in a case requires. The chancellor in the superior court does not cease to be such because he sits to hear divorce cases. The statute regulating these proceedings does not purport to define fully the authority of the court. It commits thereto, subject to cer-

tain specific limitations, jurisdiction in all matters incidental to divorce. This statute is highly remedial and ought not to be strictly construed against the interests of the minors. A learned author has stated that while it may be necessary, in order to give a court of equity jurisdiction over infants, to have them made wards of the court, a suit was not necessary to that end; that any proceeding in or application to a court of chancery relating directly to the infant was sufficient. 3 *Pomeroy's Eq.* § 1305, note 1. While the divorce proceedings were pending in the superior court, no other court, by habeas corpus or otherwise, could interfere with its custody of the children. In *re Morgan*, 117 Mo. 249, 21 S. W. 1122, 22 S. W. 913. Certainly the chancery court had jurisdiction in respect to the subject-matter of its decree. The only doubtful question is whether it obtained such jurisdiction regularly. There being no settled practice in this state to the contrary, it appears to me most unwise to turn the parties out of court and invite them to come again into the same court for the same relief now sought. The parties being before a court of equity, what more proper time can there be to adjudicate the rights of the parents to the custody of the children? 2 *Nelson on Divorce and Separation*, p. 979. The court having acquired jurisdiction of the subject-matter and the parties to the suit at the instance and by the prayer of plaintiff in error, I cannot reach any other conclusion than that, on the plainest principles of equity, she should be precluded from questioning the jurisdiction of the court which she herself has invoked.

(200 Mass. 173)

TOWN OF WAKEFIELD v. AMERICAN SURETY CO.

(Supreme Judicial Court of Massachusetts.
Suffolk. May 19, 1911.)

1. REFERENCE (§ 99*)—EFFECT OF AUDITOR'S REPORT.

An auditor's report, making a simple finding in favor of a party, without reporting the evidence, is *prima facie* evidence, so that, unless evidence is put in outside of it to control the finding, it must be accepted by court and jury; and where but one conclusion is possible as matter of law, verdict must be directed.

[Ed. Note.—For other cases, see *Reference*, Cent. Dig. §§ 148-156; Dec. Dig. § 99.*]

2. EVIDENCE (§ 588*)—DISBELIEF OF DENIALS.

Disbelief of denials of facts which a party must prove is not the equivalent of affirmative testimony in support of such facts.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. § 2437; Dec. Dig. § 588.*]

3. ASSIGNMENTS (§ 127*)—CONSENT—WAIVER—EVIDENCE.

That plaintiff's officers knew of defendant's assignment of its contract to do work for plaintiff, and of the doing of the work by the assignee, is not enough to show their assent to the assignment, or waiver of the provision of the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

contract that it could not be assigned without plaintiff's consent, in view of correspondence between plaintiff's attorney and defendant, in which he repeatedly asserted that plaintiff would not assent, except on conditions which were never complied with.

[Ed. Note.—For other cases, see Assignments, Cent. Dig. § 234; Dec. Dig. § 187.*]

4. PRINCIPAL AND SURETY (§ 123*)—DUTY OF OBLIGEE TO SURETY.

The obligee in a bond for faithful performance of a contract is not obliged to keep the surety constantly advised as to the state of the work under the contract; but the surety must protect his own interest by seeing that his principal performs the contract.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. §§ 304-311; Dec. Dig. § 123.*]

5. PRINCIPAL AND SURETY (§ 117*)—RELEASE OF SURETY—ADVANCE PAYMENT ON CONSTRUCTION CONTRACT.

Where a contract to construct a sewer for a city, stipulating that each month the city's engineer should make an approximate estimate of the value of the work done, and that thereon payments should be made, provided that the engineer should be the referee to decide on the amount of work to be paid for under the contract, and that his estimates and decisions should be final and conclusive, his making in good faith too large an estimate for a certain month, in consequence of which the payment for that month was too large, but for which deductions were made in subsequent months, was binding on all parties, so that the payment thereon could not be considered an advance, with the effect of releasing the surety on the contractor's bond.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. §§ 283-285; Dec. Dig. § 117.*]

Exceptions from Superior Court, Suffolk County.

Action by the Town of Wakefield against the American Surety Company. Verdict was directed for plaintiff, and defendant excepted. Exceptions overruled.

M. E. S. Clemons, for plaintiff. John P. Leahy, Jos. C. Pelletier, and Francis T. Leahy, for defendant.

RUGG, J. This is an action brought for the breach of three bonds, each executed by Minehan & Costa, partners, as principals, and the defendant as surety, to secure faithful performance by said partners of contracts between them and the plaintiff to construct portions of its sewer system. The execution of the contracts and bonds was admitted. The case was sent to an auditor, who found that the work to be done under the contract was abandoned by said partners, and that thereby there was a breach of the condition of each of said bonds. Each contract provided that the copartners "will not assign any portion of said work, unless by the previous consent of the board [of sewer commissioners of the plaintiff town] to be signified by indorsement of this agreement." The auditor found that no previous assent to any assignment was so given, and that no assent was indorsed on said contracts or given in any manner, and that said contracts

were in fact assigned by said partners to the Conway Construction Company. He also found that there had been no advance payment made by the plaintiff to said partners, and found generally for the plaintiff. The case was then tried with a jury in the superior court. In addition to the auditor's report testimony was introduced from several witnesses to the effect that after the assignment of the contract neither of the partners were upon the work or had anything to do with it, but that it was prosecuted to the knowledge of and without objection by the sewer commissioners wholly by the assignee claiming under the assignment. After the assignee had been at work about six months, the work was stopped by notice to the effect that it was not being prosecuted as required, and that it would be completed by the plaintiff as provided in the contract. The work was so completed at a cost greater than the contract price. At the close of the evidence in the superior court, the defendant having admitted that proper notices of discontinuance of the work by Minehan & Costa and of claim for excess cost over contract price were sent and no question being raised as to the amount of the damages, verdict was directed for the plaintiff.

[1] Since it was admitted that proper notice of discontinuance of the contract was given, a decisive point is whether there was an assignment of the contract by the partners assented to by the plaintiff. Upon this issue the auditor, as above stated, made definite findings in favor of the plaintiff to the effect that there had been assignments which were never at any time assented to by the plaintiff. It is plain under the terms of the contract that an assignment without such assent constituted a breach of the contract. The auditor does not set out the facts or evidence upon which he based this finding. The effect of an auditor's report under such circumstances is stated in *Anderson v. Metropolitan Stock Exchange*, 191 Mass. 117, at page 121, 77 N. E. 706, at page 707, by the present Chief Justice as follows: "The auditor's report finding generally for the plaintiff and finding specially these facts is prima facie evidence, which requires a verdict for the plaintiff, unless there is other evidence, either in the report or outside of it to control the findings." In substance the same proposition was laid down in *Phillips v. Cornell*, 133 Mass. 546, in these words: "While the burden of proof is not shifted by the auditor's report, yet as it makes out a prima facie case, it is incumbent on the other party to meet and control it or it will be conclusive against him." To the same effect is *Fisher v. Doe*, 204 Mass. 34-40, 90 N. E. 592. The result of these decisions is that where the auditor makes a simple finding in favor of one party without reporting the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

testimony, and there is no other evidence, a verdict should be directed in accordance with his finding. The case does not stand as it does upon uncontradicted evidence of witnesses, for there the jury may disbelieve the testimony. The statute has clothed an auditor's report with a special evidential character; which in the absence of controlling evidence either stated in the report or put in outside the report, must be accepted by court and jury as final. Where only one conclusion is possible as matter of law, a verdict must be directed.

[2] The question presented is whether there was any evidence to control the auditor's finding to the effect that the contracts had been assigned by the original contractors, and that at no time had such assignments been assented to by the plaintiff. If this finding stands there was a breach of the contract. The plaintiff's officers knew of the assignments, and they permitted work to proceed by the assignee. But there was a considerable correspondence between the attorney for the plaintiff and the defendant, in which the former repeatedly asserted that the town would not assent to the assignments except upon conditions which never have been complied with. The checks of the town in payment for work done all were made to the order of the original contractors, and none to the assignee. There was no evidence of any express assent. Disbelief of denials of facts which a party must prove is not the equivalent of affirmative testimony in support of those facts. *Loneragan v. Peck*, 136 Mass. 361; *Hyslop v. B. & M. R. R.*, 94 N. E. 310.

[3] Knowledge on the part of the officers of the plaintiff of the assignments and of the performance of the work by the assignee is all that remains. But this under the circumstances disclosed is not enough to show their assent to the assignment of the contracts, in the face of the correspondence refusing to assent. The highest effect which can be attributed to this fact is that, pending negotiations as to an assent to the assignments by the town, the assignee went on with the work. Whatever may have been the effect of the assignments as between the parties to them, they did not affect the rights of the plaintiff. *Pike v. Waltham*, 168 Mass. 581, 47 N. E. 437; *Fuller v. N. Y. Fire Ins. Co.*, 184 Mass. 13, 67 N. E. 879. For the same reasons there was no evidence of waiver of this clause of the contract, novation, or substitution of the assignees for the assignor. *Paris v. Hamburg-Bremen Fire Ins. Co.*, 204 Mass. 90-94, 90 N. E. 420; *Moore v. Dugan*, 179 Mass. 153-158, 60 N. E. 488; *Stowell v. Gram*, 184 Mass. 562, 69 N. E. 342; *Illinois Car Co. v. Linthroth Wagon Co.*, 112 Fed. 737, 50 C. C. A. 504.

It becomes unnecessary to consider whether the auditor's finding as to abandonment was met in any way.

[4] There was no obligation on the part of the plaintiff to keep the defendant as surety

constantly advised as to the state of the work under the contract. The surety must protect his own interest to the extent of seeing that his principal performs the duty which he has guaranteed. *Watertown Ins. Co. v. Simmons*, 181 Mass. 85, 41 Am. Rep. 196; *Welsh v. Walsh*, 177 Mass. 555, 59 N. E. 440, 52 L. R. A. 782, 83 Am. St. Rep. 302.

[5] The defendant contends that there was a payment made by the plaintiff to the original contractors in advance of any that was due under the contract, and that its security being in some degree diminished thereby he is discharged under the principle laid down in *Oulvert v. London Dock Co.*, 2 Keen, 638, and *Prairie State Bank v. U. S.*, 164 U. S. 227, 17 Sup. Ct. 142, 41 L. Ed. 412. The auditor found that there was no such advance, but reported some of the evidence upon this point. In addition to the auditor's report there was testimony from one Morgan, upon whose certificate as chief engineer of the plaintiff the payment now claimed to be an advance payment was made. The contract provided that on or before the 10th day of each month the engineer should make an approximate estimate of the value of the work done, and that upon this payments should be made. In one such estimate was included an item for excavation, and also an item for lumber used as sheeting in trenches under a clause in the contract which required payment for "all lumber in trench used for sheeting and shoring left in place by order of the engineer." The amount certified had not been so left in place and all the excavation had not been completed by the units required by the contract, although a very large amount of work had been done. In subsequent estimates, deductions were made for these payments, so that ultimately the town received the value for all payments. The contract provided that the engineer should be "the referee in all cases, to decide upon the amount, quality, acceptableness and fitness of the several kinds of work and materials which are to be paid for under this contract, and upon all questions which may arise as to the fulfillment of the contract, * * * and his estimates and decisions shall be final and conclusive." The auditor found that the contested estimate was given by the engineer in good faith, and the defendant did not claim that he was actuated by bad faith. Under these circumstances those estimates were binding upon all the parties, and it cannot be contended that they were advancements. *Handy v. Bliss*, 204 Mass. 513-520, 90 N. E. 864, 184 Am. St. Rep. 673, and cases cited; *Lofus v. Jorjorian*, 194 Mass. 165, 80 N. E. 235. There was no issue of fact open in this regard not concluded by the auditor's report.

Several questions of evidence are raised. They all become immaterial in view of the ground upon which the decision is based. But it does not appear that any error of law was committed in respect of them.

Exceptions overruled.

(176 Ind. 40)

WALKER et al. v. STATE ex rel. STINSON,
County Auditor. (No. 21,495.)

(Supreme Court of Indiana. June 9, 1911.)

1. APPEAL AND ERROR (§ 1040*)—HARMLESS ERROR—OVERRULING DEMURRER.

Any error in overruling a demurrer to the original complaint for insufficiency was harmless, where an amendment supplied any defect, and the findings were based on the amendment.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4089-4105; Dec. Dig. § 1040.*]

2. COUNTIES (§ 98*)—TREASURERS—BONDS—LIABILITY.

Under Burns' Ann. St. 1908, § 9476, requiring a county treasurer to receive, keep, and disburse the funds of his office, it is no defense by his sureties on a bond securing faithful performance of his duties that, in taking over the funds from his predecessor, he accepted his own notes as cash.

[Ed. Note.—For other cases, see Counties, Cent. Dig. §§ 141-143, 147; Dec. Dig. § 98.*]

3. PRINCIPAL AND SURETY (§ 66*)—LIABILITY OF SURETY—EXTENT.

The liability of sureties is not to be extended by implication beyond the terms of their contract.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. §§ 108-110; Dec. Dig. § 66.*]

4. COUNTIES (§ 98*)—TREASURERS—BONDS—SHORTAGE—APPLICATION OF FUNDS.

Payment in his second term by a defaulting county treasurer, covering items of shortage arising in his first term, should be credited on the first term's shortage, and charged against the second term as affecting apportionment of liability between the sureties on his bonds for the separate terms.

[Ed. Note.—For other cases, see Counties, Cent. Dig. §§ 141-143, 147; Dec. Dig. § 98.*]

5. COUNTIES (§ 98*)—TREASURERS—BONDS—FUNDS—NATURE.

Funds held by a county treasurer in one general deposit constitute money of the county, and not of several municipalities for which it is held, as affecting liability of his sureties on his official bonds.

[Ed. Note.—For other cases, see Counties, Cent. Dig. §§ 141-143, 147; Dec. Dig. § 98.*]

6. COUNTIES (§ 98*)—TREASURERS—BONDS—SHORTAGE—APPLICATION OF PAYMENTS.

A county treasurer having embezzled funds during two terms from the general amount in his hands, sureties on his first-term bond are not entitled to credit for payments on warrants and orders made by him in due course of business during the second term.

[Ed. Note.—For other cases, see Counties, Cent. Dig. §§ 141-143, 147; Dec. Dig. § 98.*]

7. COUNTIES (§ 98*)—TREASURERS—BONDS—SHORTAGE—APPLICATION OF PAYMENTS.

A county treasurer, having defaulted during two terms to an uncertain amount, turned over property to a company which secured his second-term bond to indemnify the company. The property was converted into cash, and the proceeds received by the county. Later it appeared that the payment exceeded the second term's shortage. *Held*, that the excess should be applied to reduce the first term's shortage.

[Ed. Note.—For other cases, see Counties, Cent. Dig. §§ 141-143, 147; Dec. Dig. § 98.*]

8. APPEAL AND ERROR (§ 1040*)—HARMLESS ERROR—CROSS-COMPLAINT—SUSTAINING DEMURRER—PROPRIETY.

In an action on a defaulting county treasurer's successive bonds, it was harmless error to sustain demurrers to a cross-complaint by the sureties on the first bond to reach property purchased with funds abstracted during the first term, where affirmative relief was asked only against the surety on the second bond, and the relief sought by the cross-complaint was available under the answer.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4089-4105; Dec. Dig. § 1040.*]

9. APPEAL AND ERROR (§ 1040*)—HARMLESS ERROR—SUSTAINING DEMURRER TO CROSS-COMPLAINT.

Any error in sustaining the second surety's demurrer to the cross-complaint was harmless; the second surety being solvent, and the issue being determinable in an independent action.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4089-4105; Dec. Dig. § 1040.*]

Appeal from Circuit Court, Gibson County; Frank H. Hatfield, Judge.

Action by the State, on relation of Harry Stinson, Auditor of Vanderburgh County, against John P. Walker and others. From a judgment for plaintiff, certain of the defendants appeal. Reversed, with instructions.

Charles Martindale and Geo. A. Cunningham, for appellants. Miller, Shirley & Miller, Samuel Dowden, Oscar R. Luhring, Chas. W. Wittenbraker, Daniel Ortmeier, and Robinson & Stilwell, for appellee.

COX, J. The appellee relator brought this action upon two successive bonds, given by John P. Walker, as treasurer of Vanderburgh county, to secure the faithful performance of his duties as such treasurer. The first-term bond, covering the term from January 1, 1904, to December 31, 1905, was executed by Walker as principal and appellants, other than Constanza Lauenstein, and the since deceased husband of the latter, who took his property by will, as sureties. The second-term bond, covering the term from January 1, 1906, to December 31, 1907, was executed by Walker as principal, and appellee Federal Union Surety Company as surety. Before the close of his second term, Walker was found to be a defaulter, and at the request of the board of commissioners of Vanderburgh county resigned as such treasurer January 28, 1907. An examination of his books as treasurer disclosed that at the close of his first term he had failed to turn over to himself as his own successor a part of the public moneys that had come into his hands as such treasurer during that term, and that at the time he resigned and his successor was appointed he had failed to account to his successor for a part of the public moneys that had come into his hands as such treasurer during his second term. This action was brought by the state, on the rela-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

tion of the county auditor, against Walker and the sureties on the two bonds, to recover the amount due from Walker as such treasurer and for which he had failed to account. The complaint was in two paragraphs, appellant's demurrers to which were overruled. Appellee the Federal Union Surety Company answered the complaint by general denial and plea of payment, and also filed a cross-complaint setting up its suretyship. Walker answered the general denial, was defaulted on the trial, and formally declined to join in the appeal, and in using the term "appellants" in this opinion it is meant to indicate those charged with a liability on his first-term bond other than himself. Appellants answered the general denial and pleas of payment and partial payment, and they also filed a cross-complaint setting up their suretyship. On these issues and pleadings the issues were closed by replies of general denial. The trial was by the court, who made special findings of facts and stated conclusions of law thereon.

The court found, in substance, the execution of the first-term bond for the period and with the sureties above mentioned, and that during that term Walker received by virtue of his office and converted to his own use \$54,152.49, and that said sum had not been repaid or any part thereof. The court further found the execution of the second-term bond for the period and with the surety above mentioned; that he resigned as such treasurer on the 26th day of January, 1907, and a successor was appointed; that during his second term Walker received by virtue of his office and converted to his own use \$11,951.84; that the board of commissioners gave Walker credit for \$2,310.93, as a credit on the second-term shortage, leaving the amount of \$9,640.88, which Walker received by virtue of his office and converted to his own use during the second term; that the Federal Union Surety Company on February 22, 1907, tendered to the county \$17,749.15 in full settlement of any liability on the second-term bond; that this amount was by certified check and was accepted by the treasurer of the county on February 28, 1907, in full settlement of all liability on the second-term bond provided it should be found the shortage for that term did not exceed that amount; that, before the above payment by the Federal Union Surety Company was made, Walker had transferred to the vice president of the surety company certain property under a written agreement that the company should sell the property and apply the proceeds to the second-term shortage, the balance, if any, to be turned back to Walker; that all of this property was purchased by Walker with money collected as treasurer during his first term, except one-half of \$2,000, which he paid for certain trust company stock with money collected as treasurer during his second term,

and \$1,000, which he paid on another piece of property with money collected as treasurer during his second term; that a part of this property transferred by Walker to the surety company was, subsequent to the payment by the surety company of the sum of \$17,749.15 into the treasury as above stated, sold, and the surety in reimbursement received as the proceeds thereof \$17,307.99, the unsold part of the property being returned to Walker.

As conclusions of law the court stated that appellee relator is entitled to a judgment against the appellants in the sum of \$54,152.49, which, with interest and penalty thereon, amounted to \$66,912.68, together with costs; and that the relator was not entitled to any judgment against the Federal Union Surety Company.

It may be said at the outset that nothing in this appeal raises any question of the right of appellee relator to recover on the two bonds the sum of the shortages found to exist in the respective terms. The questions all turn on the sums to be recovered from the sureties on each bond.

[1] Under assignment of error questioning the sufficiency of the complaint, counsel for appellants are satisfied merely to assert in their brief that "the complaint did not allege that the funds alleged to have been received and collected were received and collected by virtue of his office," and that "the original complaint does not aver that in the first term there was any breach of the bond." No elaboration of these points is made by argument, and no authority is cited. It is sufficient answer to these vague objections to say that as the amended second paragraph of complaint is open to neither of the objections made, and as it clearly and conclusively appears that the special findings of facts are based on this paragraph, the overruling of the demurrer to the original or first paragraph, even if an erroneous ruling, was a harmless one. *Robinson v. Dickey* (1896) 143 Ind. 205, 42 N. E. 679, 52 Am. St. Rep. 417; *Marvin v. Sager* (1896) 145 Ind. 261, 44 N. E. 310; *Conner v. Andrews, etc., Co.* (1904) 162 Ind. 336, 70 N. E. 378; *Kelley v. Bell* (1909) 172 Ind. 590, 88 N. E. 58; *United States, etc., Co. v. Cooper* (1909) 172 Ind. 599, 88 N. E. 69; *Pittsburgh, etc., R. Co. v. Sudhoff* (1909) 173 Ind. 314, 90 N. E. 467.

[2] Counsel for appellants assert that the trial court committed error in fixing the amount of recovery against the first-term sureties, in that it is larger in several particulars than the evidence warrants. The first of these claims grows out of the following facts: Walker, on taking office on January 1, 1904, having theretofore given the bond in suit on which appellants are sureties, was entitled to receive as treasurer, and his predecessor was bound to pay over to him, the sum of \$184,305.77 in money, which sum represented the balance in the various funds

of which the treasurer was custodian. Settlement was made between them on that day, and Walker executed his receipt to his predecessor for the sum stated. At the time this transaction took place, Walker was individually indebted to his predecessor in the sum of \$10,489.90, for which the latter held his notes, and these notes were delivered to Walker but not assigned, and were accepted by him as so much cash and went to make up the total sum for which his receipt was given. On the day of the settlement and transfer of the office, Walker's predecessor was ready and willing to pay to him the full amount of these notes in cash, together with the balance of the total sum of \$184,805.77 with which he was chargeable; but Walker insisted on taking them as cash in the settlement. Upon these facts counsel state their contention to be that the misapplication of funds was made by the predecessor of Walker, and that the defalcation was his, and not Walker's; that Walker not having taken into his possession money to the amount of the sum of his notes, his failure to pay this sum to his successor at the end of his first term is not a delinquency on his part for which appellants as sureties on his first term bond are liable, and that there therefore to that extent the recovery adjudged against them is too large. This unqualified contention is not urged with much earnestness, but it is insisted that the complaint is drawn on the theory alone that Walker *did* collect and receive from his predecessor this sum and failed to pay over a sum actually collected, while the proof shows that he *did not* collect and receive the sum in question, and that to permit a recovery to the extent of this sum would be to violate the rule that a plaintiff must recover, if at all, on the theory of his complaint. This latter contention is based on the assumption that the breach of the bond alleged in the complaint is as narrow as counsel have stated, as above indicated. It is broader than that. It is alleged in the complaint "that said John P. Walker, as treasurer of said county of Vanderburgh, in the term beginning on the 1st day of January, 1904, and ending on the 1st day of January, 1906, received and collected and was charged with and had in his possession as such treasurer the sum of \$45,152.49 of the moneys, funds, and revenues of and belonging to said county; * * * and that the conditions of said bond have been violated, in this, that the said John P. Walker, as such treasurer, has in no way paid over said sum of money or any part thereof," etc. The bond in question contains the obligation, required in official bonds by section 9111, Burns 1908, and binding upon principals and sureties, for the faithful discharge of all the duties required by law of Walker as treasurer. The first of these duties was the duty to take charge of the funds of the office when tendered to him by the outgoing treasurer. It would

seem to be clear that, having the opportunity to take from his predecessor money to the amount of the funds in the treasury, he nevertheless took part of the sum in something other than money, an obligation for the payment of money such as his own notes; he fell short of faithfully discharging his duty. And it would seem to be equally clear that he was properly chargeable with money on hand by virtue of his office to the amount represented by such notes.

[3] It is true that the liability of sureties is not to be extended by implication beyond the terms of the contract, but such rule is not applicable in this instance. With respect to the funds of the office, the treasurer's duties are to receive, to keep, and to disburse. Burns 1908, § 9476. And a breach of the duty to receive the funds of the office when proffered, as in this case, by taking notes as cash, which places him in a position which renders him unable to account, is as expressly covered by his bond as a wrongful abstraction or appropriation of the funds in his care which likewise prevent a full and proper accounting at the close of his term. At the time of this transaction between Walker and his predecessor, Walker was treasurer. The bond in suit on which appellants were sureties had been theretofore given and approved, and was conditioned for the faithful performance and discharge of all of the duties of the office under the law. His predecessor was not short, for he was ready with money to the amount of Walker's notes to pay over in the settlement, and it was Walker's act as treasurer that made it possible for a shortage to exist in the public funds of which he was the custodian. There is no suggestion of fraud on the part of the outgoing treasurer in making the settlement.

The taking over from his predecessor of the funds belonging to the office of treasurer was as clearly one of the duties of Walker, as treasurer, as keeping them safely, properly disbursing them, and accounting for the balance at the end of the term. Without the giving of a bond, he could not have assumed the office, could not have become qualified to hold it, nor could he have received the funds in the hands of his predecessor, and appellants by becoming his sureties made it possible for him to discharge his duty. He thereupon became invested with the right, as treasurer, to take this money into his keeping and to refuse to take other than money. The election to take his own notes, as part of the money he was entitled to receive as treasurer, was his volition as treasurer, and the act was done both under color of the office and by virtue of it, and with this character of treasurer the act of appellants in making his bond had clothed him. Had Walker refused to take his own notes in the settlement, and had Euler, his predecessor, been unable to pay the money, Walker's sureties, of course, would not have

been chargeable and Euler's would have been. Had Euler paid the amount of these notes to Walker in cash, and had Walker immediately returned to Euler a sufficient amount to cover them and had then received his notes from Euler, the substance of the transaction would have been the same as that which actually took place. Whatever fraud or moral turpitude there might have been involved in either case would have been Walker's, and not that of his predecessor.

Walker himself, manifestly, would be liable to account for the amount of the shortage in the funds of his first term represented by the amount of his notes. He could not rely on the claim that the funds to this extent were not paid to him by his predecessor, and that such predecessor was in fact the defaulter, and such defense is one which comes within the provision of our statute (Burns 1908, § 9117) that sureties may not set up as a defense.

Having received his own notes as cash, Walker became chargeable as treasurer, as with that amount of money received, and to account for it at the end of the term. Failure to so account was a breach of his bond for which appellants, as the sureties thereon, are equally liable with him.

In the case of County of Montmorency v. Wiltsie, 125 Mich. 47, 83 N. W. 1010, a county treasurer received from his predecessor as cash certain township orders and duebills held against saloon keepers, and it was held, in an action on his bond, that both he and his bondsmen were bound by his action and were liable for any loss occurring by reason of a failure to realize on the orders or duebills. For other cases holding a treasurer and the sureties on his bond chargeable as for money received where he receives choses in action instead of money, see Board v. Robinson, 81 Minn. 305, 84 N. W. 105, 83 Am. St. Rep. 374; Bush v. Johnson County, 48 Neb. 1, 66 N. W. 1023, 32 L. R. A. 223, 58 Am. St. Rep. 673; State v. Mill, 47 Neb. at pages 522, 523, 66 N. W. 541; Board v. Fennimore, 1 N. J. Law, 242; Parks v. Bryant, 142 Ala. 627, 38 South. 180.

[4] The second instance of the claim that the recovery awarded against appellants is excessive and contrary to the evidence arises from the failure of the court to allow a claim of payment to the amount of \$8,708.27, on the shortage shown by the books of \$4,152.49, at the end of Walker's first term. It appears that it was the usage of the treasurer's office under Walker to make cash advancements out of county funds in his hands to officials, clerks, contractors for supplies and work, and others in anticipation of the issuing of warrants therefor, and to carry memoranda of these advancements on tickets or yellow slips of paper as cash, and to deduct the amount of each individual advancement from the warrant in favor of the person to whom the advancement was made when such warrant was presented. Like

memoranda of other use of the public funds for other than strictly lawful purposes were also carried as cash. At the end of Walker's first term, it appears that the sum of \$8,708.27 of the public funds had been used in this manner, and upon the claim that the various items making up this sum had been paid into the treasury after the close of the first term and before his resignation, and to that extent swelled the receipts of the second term, rests the contention that part payment was made to this amount on the shortage of the term and that the recovery was therefore too great to this extent. This sum was not taken into account either as a credit on the first term or a charge against the second. If payment as claimed were clearly shown by the evidence, appellants' contention would have to be sustained. The effect would be, not to decrease the total shortage, but to decrease that of the first term and to proportionately increase that of the second. A thorough search of the record does not disclose any evidence warranting the conclusion that this sum had been paid in full. It is true that the experts who examined the books, in their report to the county board gave credit for this full sum; but it is also true that they all testified that, so far as they knew, no payment of any part of it had ever been made. But there is evidence from the testimony given by Walker that nothing was ever realized on these cash items, except that there was collected on them and turned into the treasury, between the close of his first term and the date of his resignation, the sum of \$1,262.35. This evidence is not contradicted by any other evidence given in the cause, except to the extent that the books, as testified by the experts who examined them, failed to show any repayment of any of the items making up the sum of \$8,708.27.

It is conceded by all parties that, deducting the lawful disbursements of the first term from the receipts of that term, including the amount which Walker should have taken over from his predecessor, he should have had at the end of his first term a cash balance of \$150,034.46, but that his actual cash balance at that time was \$95,881.97, leaving an apparent shortage at the end of his first term of \$54,152.49. It is likewise agreed that, deducting the lawful disbursements of that part of his second term served up to the time of his resignation on January 26, 1907, from the receipts of the same period, together with what he should have taken over from his first term, he should have had when he resigned a cash balance of \$89,515.16, but that his actual cash balance at that time was \$23,410.83, leaving an apparent total shortage during his entire occupancy of the office of \$66,104.33. Deducting from this the apparent first-term shortage of \$54,152.49, we have an apparent shortage for that part of the second term served of \$11,951.84. Credits against this apparent second-term short-

age, which consisted in part of money diverted during the second term in the same manner and evidenced by memoranda on tickets or yellow slips as in the case of the \$8,708.27, mentioned above, were claimed on account of the payment of part of the items, and were allowed in the sum of \$2,310.93, which left the second-term shortage as found by the court to be \$9,840.88, and the total actual shortage of both terms to be \$63,793.37, which all parties to the cause concede to be the correct amount of the total shortage. It is true that the evidence of the books of the office show that the total shortage had not been reduced by payment, but the books would not necessarily show that this sum of \$1,262.35 had not been paid into the treasury during the second term and augmented the receipts from which the disbursements of that term being subtracted would fix the shortage of that term. If such payment was made by cashing warrants during the second term against which were cash tickets which were deducted from the cash paid on the warrants, this would not appear from the books. As the uncontradicted evidence shows, as above stated, that \$1,262.35 of the items making up the first-term shortage was paid into the county treasury during the second term, this, of course, should be credited on the first-term shortage and charged against the second term, for in that term it was paid into the treasury and became a part of the funds of that term upon which the shortage of that term was determined. *Rogers v. State ex rel.* (1884) 99 Ind. 218, 225; *Goodwine v. State ex rel. Fleming* (1881) 81 Ind. 109, 112. So it must follow that the actual shortage of the first term would be \$52,890.14, and that of the second term \$10,903.23. Walker himself gave testimony repeatedly that these latter sums represent, respectively, the actual shortage of his first and second terms, and thereby sustained his testimony that the sum of \$1,262.35 was paid into the treasury during his second term. The position of appellee relator that there was a gross shortage for both terms of \$63,793.37 is correct and is not involved in this conclusion, for in either case the gross shortage remains the same. It is apparent, and we hold, that the finding of the court, as to the actual shortage of the first term, is in excess of the amount shown by the evidence to the amount of \$1,262.35, and that as to the actual shortage of the second term the finding is deficient in that sum, and to that extent appellants' contention must be sustained.

It is not intended to hold, and we do not, that the trial court's conclusion of law that the relator was not entitled to judgment against the appellee surety company was wrong. Payment had, as stated in the court's finding, been made on account of the shortage of that term in the sum of \$17,749.15 by that surety, and this sum more than covered the augmented shortage as above stated.

Again, it is urged that, as certain warrants or orders drawn in Walker's favor during his first term for salary and fees for collecting delinquent taxes during that term, but not then paid for want of funds, were paid during the second term, and the amount, \$1,949.13, credited to the disbursements of that term, this was an error against appellants; it being insisted that the credit of this sum should have gone to reduce the shortage of the first term. The proper application of this sum was a matter to be determined from the evidence, and as there is evidence in the record, which is sufficient so far as this appeal is concerned, showing that Walker took credit for these warrants as cash in making up the amount of funds in his hands at the beginning of his second term, it was proper for the court in crediting the disbursement in paying the warrants to that term.

[5] It is next urged, in great detail, and with much earnestness, by appellants' learned counsel, that the evidence shows without contradiction that payments were made by Walker during his second term which practically settled the shortage of that term. The process by which counsel have reached this conclusion that payment has substantially been made, and that the finding against appellants was therefore excessive, is interesting and ingenious, but, we must conclude, unsound and unsupported by authority. The funds, which Walker was the custodian of as treasurer, were not kept separate according to the amount properly credited to each particular fund and municipality, but were all commingled into one deposit or amount representing the total of all the funds, and from this total sum the amount representing the first-term defalcation was abstracted at different times during that term. Without going into minute detail, it may be stated that in substance it is the contention of counsel that this is not a deficit due to the county, but that it is a proportional deficit due to each separate fund and municipality in severalty in that percentage of each fund which the whole shortage bears to the whole amount with which Walker was at the end of his term chargeable. It is urged that the funds belong to the various municipalities, and not to Vanderburgh county, and in effect that the shortage in each fund constituted a separate embezzlement. And it is claimed that, as the uncontradicted evidence furnished by the books in the treasurer's office shows that money equal to substantially all of the ledger balances of the various funds at the end of Walker's first term was paid by him during his second term, in the due course of official business on warrants or orders, to the various persons and officers entitled thereto, this worked a payment of these balances—a restitution of the moneys misappropriated by him during such first term, even if paid out of the taxes or other

receipts coming into his hands during the second term. That this, to the extent of such payment, exonerated the first-term sureties and made those of the second responsible.

It is true, as established by cases cited by counsel, that each municipality whose funds the treasurer is charged with the duty of collecting and paying over is a separate entity; that the county treasurer is not such an agent of the county as renders the county liable under the doctrine of respondeat superior to the minor subdivisions of the state within the county entitled to the respective funds which the treasurer is required by law to distribute to them. But it does not follow that the title to the money in the hands of the county treasurer becomes vested in the several municipalities whenever the treasurer's books show a balance in their favor. It is, for the purpose of such a case as this, in bulk and in its entirety, the money of the county, and as such a treasurer is held liable on his bond. The abstraction of any part of it is an embezzlement of the funds of the county. *Armstrong v. State*, 145 Ind. 609, 43 N. E. 866; *Hollingsworth v. State*, 111 Ind. 289, 12 N. E. 490. The amount recovered on a treasurer's bond, of course, must needs be applied in such a manner as to put the various funds in the same relative condition that they would have been in had no misappropriation occurred.

[6] The misapplication of the funds by Walker was from the general amount in his hands. In diverting the money, he took no account of funds. That there was any actual restitution from outside resources is not claimed. The payment of warrants was made in due course of the business of the office, inferentially from funds coming in from time to time; it appearing that collections were made of practically \$150,000, during the first quarter of the second term. It does not appear that any warrants were paid except such as were regularly and properly drawn on the respective funds to the persons entitled thereto, and therefore, on the basis of a percentage of shortage in the funds, the same deficit in each that existed at the end of the first term must have continued, except as augmented by further misapplication in the second. Clearly it was never lessened. The facts must lead to the conclusion that appellants claim exoneration through the payment of regular orders by Walker without any specific intent to cover up one embezzlement with another. We know of no case sustaining their contention. Their position is contrary to the rule that the sureties on successive official bonds of such an officer as county treasurer are liable for defaults only for the term covered by their bond—a rule that rests on just and equitable considerations and is well settled. *Lowry v. State ex rel.* (1878) 64 Ind. 421;

Ohning v. State ex rel. (1879) 66 Ind. 59, 63; *Parker v. Medsker* (1881) 80 Ind. 155; *Goodwine v. State ex rel. Fleming* (1881) 81 Ind. 109, 112; *Rogers v. State ex rel.* (1884) 99 Ind. 218; *Detroit v. Weber* (1874) 29 Mich. 24; *Township of Paw Paw v. Eggleston* (1872) 25 Mich. 36; *Board v. Robinson* (1900) 81 Minn. 305, 84 N. W. 105, 83 Am. St. Rep. 374, and note page 379.

Practically all of the cases cited by counsel to sustain their position recognize with approval the rule stated above.

The case of *Goodwine v. Fleming*, *supra*, which is relied on by appellants to sustain their position, does not do so, but is against them. In that case a township trustee was a defaulter at the end of his first term, to the extent of \$2,246, which he had converted and invested in stock for his farm. During his second term he sold this stock and applied the proceeds, \$2,400, to the use of his office in reimbursement of the public funds; but, notwithstanding this, he was still a defaulter at the end of his second term by reason of additional misapplication of funds during that term. In a suit against the second-term bondsmen, it was said in the opinion of this court that the trustee was a defaulter at the end of his first term because "he did not have in his hands to turn over, and did not turn over, to his successor (himself), the amount for which he was then accountable, and, had he never made good this defalcation, his prior bondsmen, and not the appellants, would have been responsible therefor. He did, however, make it good, as the facts show." The case shows an actual restitution from sources outside the public funds coming in. The case under consideration does not.

The opinion of the court in the case of *Cook v. State ex rel.* (1859) 13 Ind. 154, relied on by counsel, it is true, approved an instruction charging the jury that: "If Cook (the treasurer), at the expiration of his first term, was a defaulter, and, being his own successor, used funds that came into his hands during his second term to pay the balance against him at the end of his first term the securities in the first bond are discharged, and the sureties in the second bond are liable for the money thus appropriated." But the approval of the instruction is put upon the ground that the condition of the bond was that the treasurer should pay over, according to law, all moneys coming into his hands during that term, and that the instruction was pertinent to the case made by the record. The opinion does not disclose what facts were involved, and no authority is cited in support of the ruling. Neither the language of this instruction nor an expression of similar import in the opinion in the case of *Rogers v. State ex rel.*, 99 Ind. at page 228, can be approved as sound statements of the law as applied to the facts in this case. Here there was no specific application of the funds in Walker's possession

during his second term with an intent to make good a deficit of his first term.

Had a stranger succeeded Walker at the expiration of his first term, the honoring of warrants by the successor, coming to him in due course, out of the public money in his hands, could not be considered a vicarious restitution for Walker, nor transfer the liability of sureties from the term of Walker to that of the successor. Neither the principles involved in this case nor their proper application can be affected by the fact that Walker succeeded himself. The terms are distinct, and each of the bonds covers some default or breach of duty occurring in the term for which it was given.

[7] Appellants answered the complaint by special answers of partial payment, in which it was averred that Walker during his first term invested the public funds coming into his hands, by authority of his office, to the amount of \$40,000 in real estate and in personal property, taking the title thereto in his own name, a particular description of all of which real estate and personal property is to the defendants unknown. Certain of the real estate and personal property is then specifically described. It avers that, by the purchase of said property and the payment therefor by Walker with the public funds in his possession and under his control as treasurer as aforesaid, the said property became and was charged with a trust in favor of said county of Vanderburgh and various distributees of the various sums so diverted and invested by said treasurer and in favor of the plaintiff as their legal representative and by subrogation in favor of the defendants as sureties on the bond covering the period during which said public funds were so misappropriated and misapplied and invested as aforesaid, and that by reason of the premises the county of Vanderburgh was and is, and the plaintiff as its representative and these defendants by subrogation are, entitled to follow the funds so misapplied and misappropriated and invested as aforesaid into the loans so made by him out of said funds as aforesaid and to have the same applied upon the shortage, if any, occurring during the period or term covered by the bond executed by them as aforesaid. It avers that the Federal Union Surety Company, on or about the 18th day of January, 1907, learned that the shortage existed in the accounts of John P. Walker, as aforesaid, and that he was a defaulter to a considerable amount in both his first and second terms, and entered into negotiations with him, and by promising to aid him in every way possible to escape punishment for embezzlement of which he was guilty as aforesaid, and by other means to the defendants known, induced him, the said Walker, to, like the said Walker did, on or about January 18, 1907, at the request and by the procurement of said Federal Union Surety Company, convey all of the above-described

real estate, and assigned and delivered the above-described personal property, including the unpaid balance due on said loans, and also other like real estate and personal property purchased by said John P. Walker with public funds in his hands as treasurer during his first term, the exact description whereof is unknown to defendants, to one Clarence Abbott, then and there an officer and employé of said Federal Union Surety Company; that said conveyance, transfer, and assignment to the said Abbott in trust as aforesaid were made without consideration; that at the times when said property was so purchased by said Walker and paid for with public funds in his hands as treasurer during his first term, and at the time of the conveyance, sale, and transfer thereof to said Abbott, and at all times thereafter, the said John P. Walker was and now is wholly insolvent and unable to pay his debts, and had not at said times, and has not now, sufficient property subject to execution to repay to Vanderburgh county and to the various owners thereof the public funds which he as aforesaid misappropriated and misapplied in payment for said property and in making said investments and loans. It is further averred that, immediately after the execution of said conveyance to said Abbott, and the sale and transfer to him of said personal property, he took possession of the same in trust for the defendant Federal Union Surety Company. The said Federal Union Surety Company proceeded at once, either through said Abbott or otherwise, to collect the balance on said loan, and that said Federal Union Surety Company and said Abbott took and appropriated all of said property, both real and personal, and converted the same to their own use and benefit. It is averred that out of the proceeds of said property the Federal Union Surety Company paid into the treasury of Vanderburgh county \$17,749.15, and the defendants say that thereby the alleged defalcation of Walker existing at and subsequent to the end of his term of office for first term was, prior to the commencement of this action, to the extent of said sum of \$17,749.15, paid, discharged, and accounted for to his successor in office.

Demurrers were overruled to these answers, and the facts alleged in them and the relief sought by them were a part of the issues tried.

Appellants also filed a cross-complaint and counterclaim against appellee relator, which set forth the same facts as are averred in these answers, and asked that Abbott be made a party, and prayed that the plaintiff and Federal Union Surety Company be required to answer as to the property described and any and all other property purchased by said John P. Walker during his first term and conveyed, sold, transferred, and assigned to Clarence M. Abbott as aforesaid; that the Federal Union Surety Company be required to answer as to the disposition made by it

or said Clarence M. Abbott, by its direction, of any or all of the real estate and personal property which was sold and conveyed to said Abbott as aforesaid; that a trust be declared in favor of the cross-complainant as well as the plaintiff in and to all of the real estate and personal property of every kind purchased by said John P. Walker and paid for out of the public funds coming into his hands and in his possession and under his control as treasurer between January 1, 1904, and January 1, 1906; that the defendant Federal Union Surety Company be required to answer concerning, and to account for, the proceeds of all of said property, real and personal, hereinabove described, and any other property sold or conveyed by said John P. Walker to said Clarence M. Abbott or any other person for its benefit as aforesaid; that said Federal Union Surety Company be required to account for the full value and to pay into the treasury of Vanderburgh county the full value of all property so purchased by said John P. Walker during his first term and paid for with public funds as aforesaid and conveyed to Clarence M. Abbott for the benefit of said Federal Union Surety Company; that the value of said property be declared, as between these cross-complainants and said Federal Union Surety Company, to be a credit upon the shortage, if any, occurring during the term covered by the bond executed by them as aforesaid; that said Clarence M. Abbott be made a party defendant hereto and required to answer concerning, and account for, all property, real and personal, received by him from said John P. Walker; that the same be subject to sale for the satisfaction of any balance of the shortage, if any, occurring during said first term that may remain unpaid after the application of the credits to which these cross-complainants are entitled as aforesaid; that the sum of money paid into the treasury of Vanderburgh county by said Federal Union Surety Company as aforesaid be declared to be a credit and payment upon the shortage, if any, of the said John P. Walker during his first term; for judgment against the defendants Federal Union Surety Company and Clarence M. Abbott for \$40,000; and for all other proper relief in the premises. Demurrers of the relator and of the Federal Union Surety Company were sustained to this pleading.

It is contended by appellants' counsel that the finding and judgment against their clients should have been reduced, under the evidence given on the issue formed by the above answers of partial payment, in the amount of the payment found to have been made by the appellee surety company. And it is finally contended that the court erred in sustaining the demurrers to the cross-complaint set out in substance above. With the consideration and determination of these questions all questions presented will have been disposed of.

It is shown by the evidence that, shortly before his resignation, Walker's defalcation became known, with some uncertainty as to the total amount and the proper division of it between the two terms; that the appellee surety company early learned of the conditions, and through its agent and vice president, Abbott, procured Walker to turn over his property to him for such surety company to indemnify it for any loss it might incur as surety for Walker in his second term. Under the agreement by which this was done, enough of this property was to be sold and converted into cash to cover and pay the second-term shortage, and the balance was to be turned back to Walker, or to some one designated by him, and the company was to and did surrender to Walker two contracts of his agreeing to indemnify it from loss in becoming his surety on his second-term bond. This was a part of a plan then under consideration by Walker and his friends to raise money, on his property and otherwise, to make good his total defalcation. It was his desire to devote all of his property to the payment of his entire shortage so far as it would go. As shown by the evidence and stated in the court's findings, all of this property so turned over to appellee surety company was purchased with funds of the county in Walker's custody during his first term, except in two instances in which money taken during the second term in sums of \$1,000 each was so used. After securing itself in this manner, the appellee surety company, before this action was brought, paid into the treasury of Vanderburgh county for itself and Walker, out of its own funds, this sum of \$17,749.15; all the parties then believing that this was the amount of the second-term shortage and that the first-term shortage was correspondingly less. This sum the county accepted on the condition that the second-term liability should not be found to be greater than this, otherwise that it should be payment pro tanto, and it still retains the amount. After this payment, and before the trial, the surety company turned certain of the real estate and personal property procured from Walker into cash, reimbursed itself to the amount of \$17,309.99, and returned what remained to Walker. It appears from the evidence that this remaining property was being held by Walker at the time of the trial to be applied towards the payment of any judgment which might be rendered, and, indeed, so far as the real estate was concerned, such judgment would become a lien on it as of the date of the beginning of the cause of action. Burns 1908, § 636.

That appellants can have no claim on the excess of \$17,749.15, the sum paid in on the first-term shortage, over \$17,309.99, the sum realized by the appellee surety company on that part of Walker's property converted into cash by it amounting to \$439.16, is clear, for, in any view of the matter, this at least was the money of the surety company. We

think it equally clear that, as to the excess of the sum of \$17,309.99 over the actual amount of the second-term shortage, as hereinbefore stated in this opinion, the sum of \$10,903.23, which excess amounts to \$6,406.76, the appellee the Federal Union Surety Company can make no just claim, and Walker is making none as against relator or appellants. While the total sum paid in by that company was in reality, at the time the payment was made, its own money, yet it was then amply secured against the payment by the fact that it then held property of Walker of a far greater value than the sum paid. The payment was made, as the record shows, by it and by Walker together. It was shortly afterwards reimbursed out of Walker's property to the extent of \$17,309.99. The claim of counsel for the surety company that it was a bona fide purchaser for a valuable consideration of the property of Walker which it sold, in that it agreed to and did pay his second-term shortage and released him from liability on his indemnifying contracts with it, and that therefore it had a right to retain the proceeds of the property sold by it, if tenable so far as the sum paid on its liability is concerned, is unconscionable as applied to the excess and against the letter and spirit of its contract with Walker, without giving consideration to the equities of appellants. If it gave value for that part of Walker's property which would be necessary to satisfy its responsibility for him on his second-term bond, by the very terms of its agreement with him by which it measures its rights it was bound to turn back to him all not necessary for that purpose. This sum was paid as a restitution by Walker on a defalcation, believed, it is true, to be that of the second term. He desired to devote all of his property to the reduction of his entire shortage. The fact that for its own exoneration the appellee surety company was vigilant and hurried Walker to a payment out of his own property of a sum greater than necessary for its exoneration cannot deprive him and appellants, as his first-term sureties, of the benefit of that part of the sum paid, over the amount of the second-term liability, on which it had no claim whatever. In legal contemplation, when the surety company was reimbursed, we think the payment of the excess over the second-term liability at least became the payment of Walker to that extent, and that the excess in the sum stated above should have been credited to the amount found to be due at the end of the first term. The county had retained the amount and applied it to a reduction of the total defalcation. We think there could be no possible doubt that had the actual liability of the appellee surety company been known when the payment was made by it, and it had paid in that sum and no more, retaining for itself the excess, the county could have compelled it to account for that excess. It would just as certainly be true that, upon payment by appellants of their lia-

bility as first-term sureties, they would be subrogated to the rights of the county to such excess. Then it must follow that, this sum having been paid in, the application of it should be ordered without indirection, for equity regards that as done which ought to have been done. With this view of the matter, if the amount of the second-term shortage was, as found by the court, \$9,640.88, this would make an excess of \$7,669.11, or the additional sum of \$1,262.35, to be applied to the reduction of the first-term shortage of \$54,152.49 as found by the court, which would bring the same result in reducing the amount for which judgment should have been given against appellants under the issue made by these answers of partial payment.

[8] We are finally to consider whether the record affirmatively shows that appellants were harmed by the action of the trial court in sustaining the demurrers of appellees to the cross-complaint. It is stated by counsel for appellants "that the object of the cross-complaint was to prevent a loss and injury accruing to the appellants as sureties on the bond of Walker during his first term, which loss would be irreparable unless the property into which Walker had converted the public funds in his first term was applied to the exoneration of the appellants as his sureties." It seems that by the pleading they were merely attempting to bring property purchased by Walker with funds which Walker abstracted during his first term, and which the county would have a right to follow, within reach of a judgment against him and appellants as his sureties for that term, to the end that the judgment, which established the suretyship of appellants and directed that Walker's property be first exhausted, might be effective for their exoneration. All of the affirmative relief asked is against the surety company; none is asked against the appellee relator, and counsel do not point out wherein in any way the sustaining of the relator's demurrer to the cross-complaint was harmful to their clients, and we see none. It is conceded by counsel that appellee relator was entitled to his judgment against their clients, but contend that he could not proceed with execution upon it until the rights as between the principal and surety were determined according to equity, and until provision was made by which the property of the principal would be first exhausted before going upon the property of the surety. That is, it is conceded that the relator might proceed to trial and judgment upon his complaint against the principal and sureties on the bonds fixing the amounts to be recovered. The right of the appellee relator to a judgment was not dependent in any way upon the result of a trial of the issues between the sureties. The county was not required to follow the misapplied funds into the property in which it was invested, whatever its right to do so, but could rely on the bonds. The effect of the facts pleaded in the cross-complaint, so far as the relator was concerned,

would be merely upon the application of the money paid in. This relief was open to appellants under the answers which have been considered. No error was committed against appellants in sustaining relator's demurrer to the cross-complaint.

[9] In considering whether appellants were harmed by the sustaining of the demurrer of the appellee surety company to their cross-complaint, we are to keep in mind their own interpretation of their pleading and designation of its object. That, in effect, it was to prevent from becoming lost to them that part of it which they would be entitled to follow by the equitable principles of subrogation to the rights of the county, after the county had its judgment against appellants, and to keep it within reach of their rights. Before the filing of this cross-complaint or the sustaining of the demurrer to it, that part of the property of Walker transferred and conveyed to the surety company not converted into money by it and paid to the county had been by it returned to Walker, and was held by him to be subject to the payment of any judgment rendered against him and appellants. In his testimony given in the trial, Walker expressed his entire willingness, in answers given by questions propounded by appellants' counsel, to convey and transfer this property as the court might direct for this purpose. So far as the real estate was concerned, the statute (section 636, Burns, supra) had fastened a lien on it to the extent of the liability of the first-term bond. It was out of the hands and control of the appellee surety company. The judgment of the lower court established the suretyship of appellants and provided that the property of Walker should be exhausted before resorting to that of appellants. As to this property, no relief could be given appellants against the surety company. We have seen that appellants are entitled to the application on the liability of the first term of the excess of \$7,669.11 left of the proceeds of that part of Walker's property sold by the surety company. The cross-complaint, in any event, then, could reach only the proceeds of Walker's real estate to the extent of \$9,640.88. Of this sum at least \$2,000 was the proceeds of property purchased by Walker with money taken during his second term, and the appellee surety company, as the surety on the bond of that term, should be relieved by this amount, rather than appellants, who can have no claim on it by subrogation or otherwise. The appellants' cross-complaint, then, if it had been sufficient in all of its essential allegations against appellee surety company to set aside the conveyance or recover the proceeds of Walker's property for their own exoneration, would have been good for relief at most to the sum of \$7,640.88. The surety company is solvent and responsible, and appellants, if they have a cause of action against it for

this sum, may bring it and determine it with as much assurance after they have paid as they might have done in this action. The facts do not justify a fear of irreparable or irretrievable loss which would invoke a remedy in the nature of a bill quia timet as the only sure relief to appellants. We cannot see that the doctrine of *Barnes v. Sammons* (1891) 128 Ind. 596, 600, 27 N. E. 747, that a surety who has not paid the debt cannot bring suit to set aside a fraudulent conveyance of real estate made by the principal debtor and have the land declared subject to the payment of the debt, is not applicable to this case as the record presents it.

We do not mean to hold that, had an issue been formed in this case on a proper and sufficient cross-complaint to try the equitable rights of appellants on one side, and appellee surety company on the other, to that part of the money received by the latter from property of Walker paid for out of the funds of his first term, and the matter correctly determined, such determination would have been unauthorized and premature. It would have been in harmony with the spirit of our practice to have the rights of all the parties in the matter in controversy settled in one action.

But the question before us is whether appellants were harmed to a degree justifying a reversal of this cause and also compelling an expensive retrial of the whole case to the delay and detriment of public and private interests, when appellants, upon discharging their contract obligations, still have as ample a remedy before them as they had when they presented their cross-complaint for the consideration of the court in this action.

It being manifest that the record presents a case which does not justify a retrial, the cause is reversed, with instructions to the lower court to restate its conclusions of law to the effect that:

The sum due from said Walker and the liability of appellants on his bond at the end of his first term, December 31, 1905, is the sum of	\$54,152 49
Interest thereon from January 1, 1908, to February 28, 1907.....	8,790 67
Making a total to time of partial payment, February 28, 1907.....	\$57,943 16
From which sum there should be deducted partial payment as hereinabove indicated.....	7,669 11
Leaving	\$50,274 05
Interest thereon from March 1, 1907, to November 23, 1908, the date of the judgment.....	4,960 87
Making total of principal and interest	\$55,234 42
Together with 10 per cent. damages thereon	5,523 44
Making the total amount of the judgment which should be rendered against Walker and appellants as of the date of November 23, 1908	\$60,757 86

And the lower court is ordered and directed to enter judgment for said sum in favor of appellee relator and against John Walker and appellants as of that date for said sum; the same to draw interest at the rate of 6 per cent., from said date until paid, together with costs, all to be levied and collected without relief from valuation and appraisal laws, and that the property of Walker be first exhausted before resorting to that of appellants. The costs of this appeal are ordered taxed and adjudged against the appellee the Federal Union Surety Company.

76 Ind. 16)

PITTSBURG, C. C. & ST. L. RY. CO. v. CITY OF ANDERSON. (No. 21,911.)

(Supreme Court of Indiana. June 6, 1911.)

MUNICIPAL CORPORATIONS (§ 27*)—BOUNDARIES—ENLARGEMENT AND CONTRACTION.

Alteration of the boundaries of municipal corporations is a legislative function which may be exercised by the General Assembly without the consent and against the remonstrance of those interested.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 64; Dec. Dig. § 27.*]

MUNICIPAL CORPORATIONS (§ 57*)—POWERS—CONSTRUCTION.

Municipal corporations possess and can exercise such powers only as are granted by the legislature in express words or are fairly implied or incident to the powers expressly granted and those essential to the declared objects and purposes of such corporations, and doubtful claims to power are resolved against the corporations.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 144-148; Dec. Dig. § 57.*]

MUNICIPAL CORPORATIONS (§ 33*)—CHANGE OF BOUNDARIES.

Municipal corporations may not alter the boundaries except as prescribed by the legislative authority, and hence, where no application for disconnection was made as required by Burns' Ann. St. 1901, § 4230 (Rev. St. 1881, § 48; Acts 1877, c. 14), the common council had power to disannex the property.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 81-97; Dec. Dig. § 33.*]

Appeal from Circuit Court, Madison County; J. F. McClure, Judge.

Action by the Pittsburg, Cincinnati, Chicago & St. Louis Railway Company against the City of Anderson. From the judgment, plaintiff appeals. Affirmed.

Transferred from the Appellate Court under section 1405, Burns' Ann. St. 1908.

J. O. Pickens and Walker & Foster, for appellant. Ryan & Ryan, for appellee.

MONKS, J. This action was brought by appellant to recover money paid to appellee taxes on appellant's right of way owned by it in fee simple across certain territory alleged to have been "disannexed at the time said taxes were levied and collected."

Appellee's demurrer to the complaint for want of facts was sustained, and, appellant failing and refusing to plead further, judgment was rendered against it.

The only error assigned calls in question the action of the court in sustaining said demurrer. The question to be determined is whether or not that part of appellant's right of way upon which said taxes were assessed and collected was legally disannexed from the city of Anderson. If it was, the court erred in sustaining said demurrer, and the judgment must be reversed; if not, the judgment must be affirmed.

It is claimed by appellant that said territory was disannexed in 1896 by the common council of said city under the provisions of section 4230, Burns 1901; section 3248, R. S. 1881; Acts 1877, p. 22. Said section reads as follows: "The common council of any city or the board of trustees of any incorporated town of this state is hereby authorized and empowered, at any regular meeting of the same, on the application of any owner of any suburban lot or tract of land not laid out in lots, by a two-thirds vote of such common council or board of trustees, so to modify the boundaries of such city or incorporated town, as to exclude therefrom such lots or tracts of land, upon such terms as such common council or board of trustees may impose."

[1] It is settled that the enlarging or contraction of the boundaries of municipal corporations is a legislative function, which may be exercised by the General Assembly without the consent and against the remonstrance of those interested. *Woolverton v. Town of Albany*, 152 Ind. 77, 78, 79, 82 N. E. 455, and cases cited.

[2] In this state municipal corporations possess and can exercise such powers only as are granted by the Legislature in express words and such powers as are fairly implied or incident to the powers expressly granted and those essential to the declared objects and purposes of such corporations. Doubtful claims to power or any doubt or ambiguity in the terms used by the Legislature are resolved against the corporation. *Pittsburg, etc., R. Co. v. Town of Crown Point*, 146 Ind. 421, 422, 45 N. E. 537, 85 L. R. A. 684, and authorities cited.

[3] The municipal authorities can in no case alter the boundaries unless the power so to do is conferred upon them by the Legislature; such power, when conferred, must be exercised under the circumstances and in the manner prescribed. 20 Am. & Eng. Ency. of Law (2d Ed.) 1151; 28 Cyc. 194-197, 198-200. Section 4230 (3248), supra, under which appellant claims said right of way was disannexed, requires the owner of the real estate to be disannexed, to make application to the common council for such disannexation.

For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep't Indexes

The complaint shows that appellant did not make any such application and was not a party to any proceeding under said section and had no notice or knowledge thereof. It is evident therefore, under the authorities cited, that the common council of said city had no authority or power to disannex appellant's said right of way, and that the court did not err in sustaining the demurrer to the complaint.

Judgment affirmed.

(175 Ind. 630)

CHICAGO, I. & L. RY. CO. v. RAILROAD COMMISSION OF INDIANA.
(No. 21,641.)

(Supreme Court of Indiana. May 23, 1911.)

1. CARRIERS (§ 18*)—REGULATION OF RATES—ORDERS OF RAILROAD COMMISSION—ACTIONS—COMPLAINT.

A complaint in an action by a railroad company maintaining a physical connection with another railroad company in a city to enjoin the Railroad Commission from enforcing an order establishing switching tariffs for the city for the movement of all commodities in car load lots from the interchange track to the points of loading and unloading, which alleges that in constructing the facilities at the city the company has only provided sufficient facilities to accommodate its own business, and that it does not have facilities to handle the business of the other company, is not objectionable as indefinite and as relating merely to the arrangements for handling the business to and from the tracks where freight is to be loaded and unloaded, in the absence of a motion to make the complaint more definite and certain.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 18.*]

2. CARRIERS (§ 12*)—ORDERS OF RAILROAD COMMISSION—EFFECT.

Where a railroad company maintaining a physical connection with another railroad company in a city, filed with the Railroad Commission its terminal tariff regulating the switching of car load traffic at the junction of the city, but it at no time had any switching charge tariff or terminal rate at the city whereby coal in car load lots could be switched and it maintained no switching rate on stone, an order of the Commission fixing a flat switching rate per car on all intrastate traffic destined to the city and covering not only that governed by the former tariff, but that not included therein, rendered on a finding of the Commission that the rates filed were unreasonable and discriminatory, was not sustainable on the ground that it did not require the railroad company to do anything more than to desist from charging the old rates and to substitute therefor new rates.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 12.*]

3. INJUNCTION (§ 16*)—ADEQUACY OF LEGAL REMEDY.

An injunction will not issue where there is an adequate legal remedy.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 15; Dec. Dig. § 16.*]

4. CARRIERS (§ 18*)—ORDERS OF RAILROAD COMMISSION—JUDICIAL REVIEW—ADEQUACY OF OTHER REMEDY.

Burns' Ann. St. 1908, § 5206, empowering the Railroad Commission after hearing to relieve any carrier from switching car load freight at terminal points for delivery on its public delivery tracks, when the facilities are only

sufficient to care for the business originating and terminating on the carrier's line at such point, empowers the Commission fixing switching charges between two railroad companies maintaining physical connection at a city to grant relief on the application of one of the companies on the ground that it does not have facilities sufficient to handle the business of the other company, and where the uncontradicted evidence does not show that such company's facilities are insufficient for switching cars destined to industries on private tracks, the court properly refused to restrain the enforcement of the order in the absence of any application to the Commission for relief.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 18.*]

5. CARRIERS (§ 18*)—ORDER OF RAILROAD COMMISSION—JUDICIAL REVIEW—ADEQUACY OF OTHER REMEDY.

Burns' Ann. St. 1908, § 5537c, empowering the Railroad Commission to grant a rehearing in any case in which it has made a final order, or to modify any final order made by it, vests unlimited power in the Commission to vacate or modify any order and correct its own errors, and the court will not grant relief in the first instance where relief is within the power of the Commission to give on proper application therefor.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 18.*]

6. CARRIERS (§ 18*)—ORDERS OF RAILROAD COMMISSION—JUDICIAL REVIEW—ADEQUACY OF OTHER REMEDY.

Burns' Ann. St. 1908, § 5537c, providing that the orders of the Railroad Commission shall take effect not more than 30 days after entry thereof, unless suspended or modified by the Commission, impliedly authorizes the Commission to suspend the taking effect of any order pending a petition for rehearing or modification thereof, and a party aggrieved by an order of the Commission cannot resort to the courts merely on the ground that a petition for rehearing will not probably be acted on by the Commission before the time fixed by the statute for the taking effect of the order unless suspended by the Commission.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 18.*]

7. CARRIERS (§ 15*)—REGULATION—MOVING OF CARS FROM CONNECTING LINE TO PUBLIC TRACKS—POWER OF RAILROAD COMMISSION.

Burns' Ann. St. 1908, §§ 5206, 5533, 5540, requiring carriers to deliver to any consignee on his private track, or on their public delivery tracks all car load freight, empowering the Railroad Commission to relieve a carrier from switching car load freight for delivery on its public delivery tracks, when its facilities are inadequate, authorizing the Commission to require railroads to receive cars and transport them over lines to junction points to a consignee on his private track, to supervise all railroad freight tariffs, and to adopt rules covering the transportation and switching of cars from one road to another at junction points, and requiring railroads for all services for which charges are made to file with the Commission a tariff of rates, impliedly authorize the Commission to require a carrier to move a car from a connecting line to its public tracks.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 15.*]

8. CARRIERS (§ 12*)—ORDERS OF STATE RAILROAD COMMISSION—OPERATION.

Where the petition of shippers filed with the State Railroad Commission prayed for an order requiring railroads maintaining a physical connection in a city to file reasonable rates for the switching of car load traffic between their

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

lines, an order of the Commission fixing a tariff per car load for the movement of all commodities in car loads in the switching service, must be construed as applicable only to intrastate commerce.

[Ed. Note.—For other cases, see *Carriers*, Dec. Dig. § 12.*]

9. CONSTITUTIONAL LAW (§ 61*) — DEPARTMENTS OF GOVERNMENT—INVASION OF LEGISLATIVE POWER.

The statute creating the State Railroad Commission with power to supervise freight and passenger tariffs and not contemplating that the courts shall exercise any legislative power, but only to determine whether or not rates fixed are reasonable, is not in conflict with Const. art. 3, dividing the government into three departments, and providing that no officer charged with official duties under one department shall exercise any functions of another, since the court in determining whether a rate fixed by the Commission is reasonable, merely exercises judicial functions possessed before the enactment of the statute.

[Ed. Note.—For other cases, see *Constitutional Law*, Cent. Dig. §§ 103-107; Dec. Dig. § 61.*]

10. CONSTITUTIONAL LAW (§ 297*)—CARRIERS (§ 2*)—DEPRIVATION OF PROPERTY WITHOUT DUE PROCESS OF LAW—ORDERS OF STATE RAILROAD COMMISSION.

Under Burns' Ann. St. 1908, §§ 5206, 5533, authorizing relief by the State Railroad Commission when there is a congestion of business on a carrier's public tracks, and protecting a carrier as to return of cars, and providing for the compensation for the use of cars for over detention, and authorizing a carrier to collect a reasonable transportation charge for switching services, etc., an order of the State Railroad Commission fixing switching rates between railroad companies maintaining a physical connection at a city and requiring a company to receive at the city freight carried there by the other company, and deliver it to industries located on its public and private tracks, is not invalid as depriving the company of its property rights in violation of the fourteenth amendment to the federal Constitution, on the theory that it need not switch loaded cars from the other company consigned to industries on its tracks, where it has by reason of the location of such industries the right to such business, which right is a property one which cannot be lawfully taken away.

[Ed. Note.—For other cases, see *Constitutional Law*, Cent. Dig. §§ 832-834; Dec. Dig. § 297;* *Carriers*, Dec. Dig. § 2.*]

Appeal from Superior Court, Marion County; Jno. L. McMaster, Judge.

Action by the Chicago, Indianapolis & Louisville Railway Company against the Railroad Commission of Indiana. From a judgment for defendant, plaintiff appeals. Affirmed.

E. C. Field, H. R. Kurrie, and William L. Taylor, for appellant. Hanly McAdams & Artman and C. V. McAdams, for appellee.

MORRIS, J. Certain shippers at Bloomington, Ind., filed with the State Railway Commission their petition against appellant and the Indianapolis Southern Railway Company, in which it was alleged that there is a physical connection between the lines of respondents in that city, and praying for an order requiring them to publish and file with

the Commission just and reasonable rates for switching car load traffic between their lines and all the industries of the city, and that they be required to apply the same for two years to the movement of all traffic destined on either line at Bloomington from points in Indiana. Afterward on May 25, 1909, the petition was heard by the Commission, and it entered a finding and order in which it found respondent's switching tariffs unreasonable and discriminatory, as alleged in the petition and ordered respondents to issue, publish, and file with the Commission switching tariffs for the city of Bloomington, of \$3 per car load for the movement of all commodities, which order was to be in effect for two years commencing June 11, 1909; the order was to apply to the movement of all commodities in car loads from respondents' interchange track, in the city, to the several points of loading and unloading of the several industries, located along the tracks and sidings of respondents, as indicated in their tariffs, and the order was also to apply for such time, to the movement of such traffic from all such industries, etc., to such interchange track. On June 14, 1909, appellant filed in the superior court of Marion county its complaint against the Commission, in which it was alleged that the above order was void, and praying that it be so declared, and that the appellee be enjoined from taking any action to enforce it. While this complaint was pending, the Commission issued an order supplemental to the one issued on May 25th, by which it was provided that neither of said respondents should be required, under the order, to furnish cars for outbound traffic loaded on their respective lines, destined over the line of the other company, but in such cases the line which was to perform the transportation should furnish empty cars to the switching line at the junction point, to be by it taken to the point of loading and returned to the junction point; and provided, also, that the carriers should not be required to perform such switching services in any case where such carrier can transport the freight to destination and point of delivery with reasonable dispatch, and at the same rate as the line offering the car, and at the time shall be prepared to perform the service. Appellant thereupon amended its complaint, setting out therein the above modification of the original order.

To this complaint the Commission filed an answer of general denial. There was a trial, and special finding of facts, and conclusions of law thereon by the court and judgment for defendant, from which this appeal is prosecuted. The errors assigned are based on the action of the court in overruling appellant's motion for a new trial, and on each of its conclusions of law stated. Among the many facts found, the following are the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.

most important: Appellant for many years, before the bringing of the action, owned and operated a line of steam railroad extending from Michigan City through Bloomington to New Albany; also one from Hammond to Indianapolis, one from Orleans to French Lick Springs, one from Bedford to Linton, and from Wallace Junction to Linton, all in Indiana; that 75 per cent. of appellant's traffic moves in interstate commerce; that appellant's railway is crossed by many other railways in Indiana, and physical connections have been made at such crossings for the interchange of car load traffic; physical connection was made between respondents in the year 1905, since when car load traffic has been interchanged there. On April 28, 1909, appellant published and filed a switching tariff rate applicable to Bloomington Junction. At that time two industries were located on the Indianapolis Southern. Since January 1, 1907, there has been a car service rule in effect at Bloomington fixing a charge of \$1 per day for detention of car in loading or unloading, over 48 hours. There were joint rates on coal in effect before the order of the Commission was made; there are on appellant's line, three coal mines which produce bituminous coal, and are served alone by appellant. There are coal mines on the Indianapolis Southern. There are also mines on the Vandalia Railroad in Indiana, which, in connection with the Indianapolis Southern carries coal from such mines to Bloomington on a joint rate with the Southern. That at no time has there been in effect any switching rate, whereby coal in car loads arriving at Bloomington, on the Southern, on its local rate, or on the joint rate with the Vandalia, could be switched from the junction point to industries on appellant's line at Bloomington, and no such coal has been switched; neither has any stone been switched. On appellant's line at Bloomington are located industries that used great quantities of coal in car load lots. The coal produced on the line of the Vandalia is somewhat superior, in quality, to that on appellant's line, but in the market and commercially the two kinds are substantially the same. That there are 15 siding and spur tracks connecting with appellant's main line at Bloomington. That 10 of these tracks are known as private tracks though maintained by appellant, and are used by appellant and industries located thereon solely for the purpose of serving the various mills, yards, and factories located thereon respectively. That the remaining five tracks are variously designated in railroad parlance as "team tracks," "hauling tracks," and "public tracks," and are used in serving a few industries located thereon, and those who have no place of business on the tracks, and the public generally; that the several mills, yards, factories and other industries—twenty-eight in number—located on appellant's sidings are wholly dependent on appellant to deliver to and take from them car load traf-

fic coming in, or departing, over the Southern railway. Appellant and the Indianapolis Southern are in active competition at Bloomington for traffic, and rates fixed by them are substantially the same. The court found that the switching rates ordered by the Commission were fair and reasonable. Under the assignment of error in overruling appellant's motion for a new trial it asserts that the lower court erred in failing to find that the facilities of appellant are insufficient to handle the business. The court made no finding on this matter.

The direct evidence on this subject was confined to two of appellant's witnesses, C. T. McHugh, trainmaster, and A. K. Helton, appellant's station agent at Bloomington. The former, among other things, testified that "we have got all we can take care of with our present facilities—to take care of our own business; * * * the conditions are badly congested." Helton testified that appellant's facilities at Bloomington are not sufficient to handle the business of appellant, and have not been for three or four years. But he further testified that appellant did not use the tracks named in the tariff (private tracks) for storing purposes. "We do not intend to disturb these tracks. The lack of facilities complained of by appellant is track room."

[1] Appellee contends that the lower court did not err because the complaint is too vague and indefinite, and, strictly construed, it could not be held to relate to anything else than the arrangements for handling the business to and from the tracks, where it is to be loaded or unloaded. The part of the complaint relating to this subject is as follows: "The plaintiff also avers that, in constructing the facilities at Bloomington, it has only provided sufficient facilities to accommodate its own business, and it does not have facilities sufficient to handle the business of the Indianapolis Southern." In the absence of a motion to make the complaint more definite and certain, in this particular, it is sufficient.

[2] In the second place appellee contends that the order of the Commission does not require the appellant to do anything except to desist from charging the old rate, and to substitute therefor the new rate, for switching; that the Commission found appellant at work, and merely fixed the price of its labor, and left it at work. This statement is not accurate. The court in its finding states that on April 28, 1909, plaintiff published and filed with the Commission its terminal tariff regulating the switching of car load traffic at the junction of Bloomington, and that at no time had in effect any switching charge tariff, or terminal rate, at Bloomington, whereby coal in car loads, arriving at Bloomington on the Indianapolis Southern railway, on its local fifty cent rate, or on the sixty cent rate with the Vandalia railway, could be switched, from the Junction point at Bloomington, to industries located on the

line of the plaintiff company. There was no switching rate on stone. In the order of the Commission, which it is here sought to vacate, the Commission finds that "the rates complained of * * * are unreasonable, excessive, and discriminatory. * * * That the exception, by the respondents, from such traffic, and their operation, and application, of certain commodities in car loads, as shown by such tariffs, while the said tariffs are applied to all other commodities in car loads, constitutes unlawful discrimination."

[3-5] The order fixes a flat switching rate of \$3 per car on all intrastate traffic destined to Bloomington, and covering not only that governed by the former tariff, but that not included therein, and, to that extent at least, impliedly requires appellant to switch loaded cars that it had never before so moved. In the next place appellee maintains that appellant cannot complain because the evidence and the court's findings disclose that there are 15 sidings and spur tracks, of all kinds, connected with appellant's main line at Bloomington; that 10 of these tracks are used for the accommodation of the industries located thereon; that the 5 remaining tracks, in railroad parlance, are designated as "public tracks," and are used, in whole or in part, for the receipt and delivery of car load traffic from and to parties having no place of business on the company's line, for holding empty or loaded cars, being handled in the switching service, and as leads to its local freight house, where parcel freight is received and discharged from cars; that the only congestion existing, if any, relates to these five public tracks; and appellant's remedy, if any, is under section 5206, Burns' Stat. 1908. The second proviso of the above section is as follows: "Provided, that the Railroad Commission of Indiana, after a full hearing of all parties interested, may relieve any such carrier from so switching car load freight at terminal points, which is to be delivered upon its *public delivery tracks* (italics ours) at such terminal, when it appears that the facilities of such carrier at such point are only sufficient to care for the business originating and terminating on its line at such point." Injunctions will not be granted where there is an adequate legal remedy. Where the Commission has power to grant relief, application therefor must be made to it. *Southern Indiana Ry. Co. v. Railroad Com.*, 172 Ind. 113, 87 N. E. 966; *Prentiss v. Atlantic etc.*, 211 U. S. 210, 29 Sup. Ct. 67, 53 L. Ed. 150; *Texas, etc., v. Abilene*, 204 U. S. 426, 27 Sup. Ct. 350, 51 L. Ed. 553; *Interstate Com. Com. v. Illinois Cent. Ry. Co.*, 215 U. S. 452, 30 Sup. Ct. 155, 54 L. Ed. 280. The Commission here has full power to grant relief, as to the inadequacy of facilities on the public delivery tracks. Appellant has made no application to the Commission for such relief. The uncontradicted evidence does not show that appellant's facilities are

insufficient for switching cars destined to industries on the private tracks, and consequently the lower court did not err in failing to make any finding in regard to lack of track facilities. Moreover, there is another reason why appellant's position is untenable, and this would apply to inadequacy of facilities as to both public and private tracks. Burns' R. S. 1908, § 5537 (c), provides that "the Commission shall have authority to grant a rehearing in any case in which it has made a final order, or to alter, change or modify any final order made by it." This section vests unlimited power in the Commission to vacate, alter, change or modify any order, and thus to correct its own errors, and we perceive no good reason why the courts should be appealed to, in the first instance, to grant relief which it is within the power of the Commission to give.

[8] Counsel for appellant suggest that not more than 30 days is given by the statute from the time the order of the Commission is made to bring action in the courts, and in the meantime a petition for rehearing would probably not be acted upon by the Commission. The same section (5537) provides that the orders of the Commission shall take effect not more than 30 days after entry thereof, "unless suspended, or set aside, or modified by the Commission," which clearly implies the power to the Commission to suspend the taking effect of the order pending a petition for rehearing or modification thereof. It follows that, before the courts have power to act, the party aggrieved must exhaust his remedies, given in the statute, by application to the Commission.

[7] Appellant's counsel earnestly contend that the order exceeds the power of the Commission in this: That it requires appellant to deliver cars from junction point with the Indianapolis Southern to consignees on appellant's public tracks; that while clause M. section 5533, Burns' Statutes 1908, authorizes the Commission to require railroads to receive cars and transport them from lines at junction points to a consignee "on his private track," such clause, nor any other law, authorizes the Commission to make an order requiring such transportation to a consignee on one of its public tracks; that the Commission is of statutory creation, and if it exceeds the powers therein granted, or if it proceeds by any method other than that designated by the statute, its resultant order is void. Section 4 of what is commonly known as the "Shippers Act," the same being section 5206, Burns' 1908, provides, among other things, that "all carriers * * * shall deliver to any consignee on his private track, or track used by him for loading or unloading, or on their *public delivery tracks* (italics ours), and shall receive from any connecting carrier, at any terminal point in the state, for the purpose of delivery to points located on its line at such terminal, or to points reached over and through its lines

at such terminals, all car load freight tendered it by any such connecting line, and shall deliver the same to the consignee on its private tracks or on its tracks." It is provided in this section that the Commission may relieve such carrier from switching car load freight to be delivered on its public delivery tracks when it appears that its facilities are inadequate. It seems to be appellant's theory that while the law requires delivery to be made to consignees on public tracks, unless relieved by the Commission under the power above given, that the Commission, while authorized to relieve the carrier from the operation of the law in the above contingency, has no power to order the enforcement of the law in the absence of such contingency. Whether or not this view is tenable, considering only the sections of the statutes above referred to, it is unnecessary to decide, because of other provisions of the law relating to the Commission. It may be stated, as a general proposition, that railroad companies must, for all services for which charges are made, file with the Railroad Commission, a tariff of rates. Burns' Stat. 1908, § 5540. Section 5533, Burns' Stat. 1908, authorizes the Commission to supervise all railroad freight tariffs, and to adopt rules to govern the transfer and switching of cars from one road to another at junction points, and, upon the failure of the railroad companies so to do, to fix and establish joint rates of freight, transfer, and switching charges, and to make new rates when necessary to prevent injustice or discrimination. Paragraph J of the above section declares that all carriers shall transfer and deliver all freight cars, loaded or empty, tendered by a connecting line, destined to any point on its line. While the statute in precise terms does not authorize the Commission to require a carrier to move a car from a connecting line to its public tracks, we have no doubt that such power is vested in the Commission by necessary implication. Therefore the Commission did not exceed its statutory power in making this order. Chicago, etc., R. Co. v. R. R. Com., etc., 38 Ind. App. 439, 78 N. E. 338, 79 N. E. 520.

[8] Appellants' next contention is that the order is void because it purports to interfere with interstate commerce. The order requires a tariff of \$3 per car load for the movement of all commodities in car loads in the switching service. There is nothing in the order limiting its application to intrastate commerce. Before the shippers' petition was filed with the Commission, appellant had filed with the Commission its terminal tariff in connection with the Indianapolis Southern. This tariff applied to both state and interstate commerce, and was the only rate sheet controlling such services at Bloomington. In the shippers' petition, the prayer for relief was for an order requiring defendants to issue and file just and rea-

sonable rates "for the switching of all car load traffic between their lines and all the industries at Bloomington, Indiana, and that the respondents be required to apply the same for two years, as required by law, to the movement of all traffic destined on either line at Bloomington, Indiana *from points in Indiana.*" (Italics ours.) The petitioners further prayed that the Commission determine what are just rates for switching services in interstate traffic, at that point, and recommend to respondents to apply such rate, and in case of failure to apply it, that the Commission apply to the Interstate Commerce Commission for relief on behalf of petitioners.

On the above petition the order was made. Of course the State Commission had no power to adjust rates for interstate traffic. Appellee contends that the court is not warranted in construing the order as having such application. There is nothing in appellant's complaint to show that the Commission or shippers are contending for the application of the commission rates to interstate commerce, except the language of the order itself. No doubt, on motion by appellant, the order would have been so modified by the Commission as to expressly limit the rates to intrastate traffic. Such motion was not made. In New York Central, etc., R. Co. v. Interstate Com. Com'n (C. C.) 168 Fed. 131, the court considered the effect of an omission of time limit in an order of the Interstate Commission. It was held that the law read the limitation into the order; that the Interstate Commerce Commission is an administrative tribunal, dealing with practical problems, and that strict rules of pleading should not be held applicable to it. Construing the order in the light of the petition, and the limits on the power of the Commission, imposed by both the federal Constitution and the statute creating it, we do not feel warranted in construing the order as intending to apply to interstate commerce. Pittsburg, etc., R. Co. v. Railroad Com., 171 Ind. 189, 86 N. E. 328; Chicago, etc., R. Co. v. Railroad Com., 173 Ind. 469, 87 N. E. 1030, 90 N. E. 1011; Stone v. Farmers' Loan & Trust Co., 116 U. S. 307, 6 Sup. Ct. 334, 388, 1191, 29 L. Ed. 638.

[9] Appellant asserts that the Indiana statute creating the Railroad Commission is in conflict with article 3 of the Indiana Constitution, which divides the powers of government into three departments, and provides that no officer charged with official duties under one department shall exercise any functions of another, in that the statute makes the decision of the Commission conclusive, unless set aside by the courts, on complaint of the carrier; and that the effect of this is to require the courts to exercise legislative power, not only in deciding whether or not the rate is reasonable, as an existing one, but also, as a rate to govern two years in the future. Appellant specially relies on Prentiss v. Atlantic, etc., 211 U. S. 210, 29 Sup. Ct.

67, 53 L. Ed. 150, in support of the above proposition. That case arose under the present Constitution of Virginia, which is peculiar in that it unites the legislative and judicial power in a single hand, with reference to fixing railroad rates. This Constitution vested in the State Corporation Commission both legislative and judicial power, by authorizing it to fix rates, and enforce its own orders. It also provides for an appeal from the order of the Commission to the state Supreme Court of Appeals, and if that body reverses the action of the Commission, it shall *substitute such order as, in its opinion, should have been made*. This provision clearly invests the Supreme Court of Appeals with legislative power to fix rates.

In the Prentis Case, the State Commission had made an order fixing a rate. The railroads, instead of appealing to the Supreme Court of Appeals of Virginia, filed a bill of equity in the Circuit Court of the United States, alleging that the rate so fixed was confiscatory, and therefore was void because in violation of rights guaranteed the carrier under the 14th amendment of the Federal Constitution. The Supreme Court of the United States reversed the action of the Circuit Court in allowing the bill, and held that a bill would not lie until the carrier had first appealed from the order of the Commission to the state Supreme Court of Appeals. In its opinion the court said: "No rate is irrevocably fixed by the state, until the matter has been laid before the body having the last word. It may be that that body will adhere to the old rate, or will establish one that will not be open to the charge of violating the contracts" etc. It appears further in that case, that the Virginia Commission claimed that in fixing the rate, it acted judicially, and therefore the courts of the United States were without authority to enjoin it, but its action could be reviewed only by appeal or writ of error. The court denied this contention, saying: "But we think it equally plain that the proceedings drawn in question here are legislative in their nature, and none the less so that they have taken place with a body which at another moment or in its principal or dominant aspect is a court such as is meant in section 120. A judicial inquiry and investigation discloses and enforces liabilities as they stand on present or past facts, and under the law, supposed already to exist. This is its purpose and end. Legislation, on the other hand, looks to the future, and changes existing conditions by making a new rule to be applied thereafter to all or some part of those subject to its power. The establishment of a rate is the making of a rule for the future, and therefore is an act legislative, not judicial in kind."

And speaking of the character of authority exercised by the courts sitting in review of the order of the Commission, the learned judge in this case says: "The nature of the final act determines the nature of the pre-

vious inquiry. As the judge is bound to declare the law he must know or discover the facts that establish the law. So when a final act is legislative, and decision which induces it cannot be judicial in the practical sense, although the question considered might be the same that would arise in the trial of a case. If the state Constitution should provide a hearing before any law should be passed and should declare that it should be a judicial proceeding in rem and the decision binding upon all the world, it hardly is to be supposed that the simple device could make the constitutional law res judicata if it subsequently should be drawn in question before a court of the United States. And all that we have said would be equally true if an appeal had been taken to the Court of Appeals and it had affirmed the rate. Its occasion in doing so would not have been judicial, although the question debated by it might have been the same that might come before it as a court, and would have been discussed and passed upon by it in the same way that it would deal with them if they arose afterwards in a case properly so called." The court also says: "Litigation cannot arise until the moment of legislation is passed."

We think counsel for appellant have misapprehended the effect of the decision in the Prentis Case. It does not follow that because the State Commission and Court of Appeals, in Virginia, under that Constitution, in fixing rates, acted in a legislative capacity, that the courts of Indiana, in reviewing where proper, the acts of our Commission, exert any other than judicial power. Of course, under our Constitution, our courts may not exercise any legislative function. They cannot fix any rate, and it is not so contemplated by the statute. In determining whether a rate fixed by the Commission is reasonable or confiscatory, the courts exercise no different power than they did before the enactment of the statute in controversy. *L. E. & St. L. v. Wilson*, 132 Ind. 517, 32 N. E. 311, 18 L. R. A. 105; *Chicago, etc., R. Co. v. Railroad Com.*, 38 Ind. App. 439, 78 N. E. 338, 79 N. E. 520. The courts cannot inquire into the wisdom of the action of the Commission, or modify its action. They will review such action, however, and if beyond the authority granted by statute, or in violation of any constitutional guarantee, strike it down. *Southern Ind. Ry. Co. v. R. R. Com.*, 172 Ind. 113, 87 N. E. 966; *Chicago, etc., R. Co. v. R. R. Com.*, supra. The act does not violate article 3 of the Constitution of Indiana.

[10] The appellant asserts that the order violates its property rights saved by the fourteenth amendment to the Constitution of the United States, because it requires it to receive at Bloomington freight carried there by the Indianapolis Southern, and deliver it to industries located on its public and private tracks.

The appellant claims that where its freight rates are the same as that of its competitor, on inbound business, it has a right to serve the industries located on its public and private tracks at Bloomington, and to the earnings for such service; that it is not bound to switch loaded cars from the Indianapolis Southern consigned to industries on its tracks, but that it has, by reason of the location of such industries the right to such business, which right is a property one, which cannot be lawfully taken away. It appears from the evidence that there are 28 industries located on its public and private tracks in the vicinity of Bloomington, and, now but one industry is similarly located on the Indianapolis Southern.

Counsel for appellant rely on *Louisville, etc., R. R. Co. v. Central Stock Yards*, 212 U. S. 132, 29 Sup. Ct. 246, 53 L. Ed. 441, in support of this proposition. The decree in that case required the railway company to deliver its own loaded cars to the Southern Railway at Louisville to be taken to the Central Stock Yards on that line for unloading.

The facts in that case were that the Bourbon Stock Yards were located on the line of the Louisville & Nashville Company, and the Central Stock Yards were on the line of the Southern Company, at Louisville. There was physical connection between the roads. There was a station on each line at the stock yards. The Constitution of Kentucky required any carrier to switch empty or loaded cars coming to or going from any point where there is a physical connection between it and another line. The decree appealed from required the appellant to deliver its own cars to another road, and the court held this requirement void under the fourteenth amendment to the federal Constitution as an unlawful taking of property. The court based its decision on the ground that the Constitution of Kentucky, under the terms of which the decree was entered, made an indiscriminating requirement of the carrier, without respect to its paramount needs, and without regulations for its protection from the loss or undue detention of cars. The court intimated, however, that if the Kentucky law had made proper provisions for the protection of the carrier, the action might have been sustained. The court, in the same case, held that another portion of the decree was invalid, which required appellant to transfer and deliver from the Central Stock Yards all live stock consigned from that point to any one at the Bourbon Stock Yards, because the requirement of acceptance of cars at an arbitrary point, near the terminus of a competing road would enable the latter to get the use of costly terminals of its competitor,

and thus take its property in a very effective sense.

The laws of Indiana meet the objections of the United States Supreme Court to the Kentucky Constitution. Section 4 of the shippers' bill (Burns' Stat. 1908, § 5206) authorizes relief by the Commission when there is a congestion of business on the carrier's public tracks. As to outbound traffic, carriers are not required to do switching service, if they are able and willing to transport the freight, with reasonable dispatch, at the same rate as that of the competitor. Paragraph M of section 5533, Burns' Stat. 1908, fully protects the carrier in respect to return of cars. Paragraph F of the same section provides for compensation for the use of cars for overdetention. For switching service a carrier is authorized to impose and collect a "reasonable transportation charge," and this would include more than the labor cost in moving the car, and might include also the element of a return on the capital invested in terminal facilities. There is no complaint in this cause that the switching rate fixed by the Commission is unreasonable, and does not include the above elements. We do not believe the decision in the case of *Louisville, etc., R. R. Co. v. Central Stock Yards*, supra, is applicable to the facts here. As was said before, in this opinion, the court cannot consider the question of congested terminals, because relief for that must first be sought from the Commission.

The claim of appellant's counsel that "we have the right to the business of these industries into Bloomington, and that no order can be enforced to take it from us so long as we are prepared to handle it at the same rates, or less than those imposed by our competitors," might commend itself to the appellant's stockholders, but is not consistent with the duties that carriers owe to shippers and the general public, and is untenable under the statutes of Indiana. *Southern R. Co. v. Railroad Com.*, 42 Ind. App. 90, 83 N. E. 721; *Southern R. Co. v. Railroad Com.*, 172 Ind. 117, 87 N. E. 966; *Chicago, etc., R. Co. v. Railroad Com.*, 38 Ind. App. 439, 78 N. E. 338, 79 N. E. 520; *Chamber of Commerce v. Rock Island R. Co.*, 15 Interst. Com. Com'n, 460; *Missouri Pac. R. Co. v. Larabee Mills*, 211 U. S. 612, 29 Sup. Ct. 214, 53 L. Ed. 352.

The order of the Commission does not, in the particulars claimed by appellant, violate any right guaranteed it by the fourteenth amendment to the federal Constitution. There is no error in the record.

Judgment affirmed.

(48 Ind. A. 67)

CUMBERLAND TELEPHONE & TELEGRAPH CO. v. KRANZ. (No. 7,244.)(Appellate Court of Indiana, Division No. 2.
June 9, 1911.)**1. TRIAL (§ 395*)—SPECIAL FINDING—REQUISITES.**

The province of a special finding is to find the ultimate facts essential to a recovery.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 927-934, 939; Dec. Dig. § 395.*]

2. NEGLIGENCE (§ 142*)—ISSUES—FINDINGS—QUESTIONS OF LAW.

Where, in a negligence case, the facts have been found by the jury returning a verdict setting forth the principal contested facts or by the court specially finding the facts, the court must determine the issue of negligence as a matter of law.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 400-403; Dec. Dig. § 142.*]

3. NEGLIGENCE (§ 136*)—PROXIMATE CAUSE—QUESTIONS OF LAW.

Where the facts in a negligence case are undisputed, what constitutes a proximate or remote cause of the injury is for the court.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 277-353; Dec. Dig. § 136.*]

4. APPEAL AND ERROR (§ 1071*)—HARMLESS ERROR—ERRONEOUS CONCLUSIONS OF LAW.

Where a proper judgment has been rendered, the error of the court in stating conclusions of law or in failing to properly state such conclusions is harmless.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4234; Dec. Dig. § 1071.*]

5. ELECTRICITY (§ 16*)—INJURIES INCIDENT TO PRODUCTION AND USE—NEGLIGENCE.

A telephone company knowingly permitted its unguarded wires to remain suspended near an unguarded trolley wire carrying a powerful current of electricity under such conditions that, if the telephone wire should break, it would rest on the trolley wire and become charged with electricity. The telephone wire, in consequence of a thunder and wind storm, was detached from a tree, and came in contact with the trolley wire and heavily charged with electricity. *Held*, that the telephone company was guilty of actionable negligence in the maintenance of its wire under the rule that one employing electricity must exercise a very high degree of care.

[Ed. Note.—For other cases, see Electricity, Cent. Dig. § 9; Dec. Dig. § 16.*]

6. ELECTRICITY (§ 14*)—INJURIES INCIDENT TO PRODUCTION—LIABILITY.

An electric company guilty of negligence in failing to properly maintain and guard its wires is liable for injuries occasioned on private property to persons or animals having a right to be on such property.

[Ed. Note.—For other cases, see Electricity, Cent. Dig. § 7; Dec. Dig. § 14.*]

7. ELECTRICITY (§ 16*)—INJURIES INCIDENT TO PRODUCTION—NEGLIGENCE—"PROXIMATE CAUSE."

A telephone company negligently permitted its wires to remain suspended near a trolley wire carrying a powerful current of electricity. During a storm the telephone wire became detached from a tree, and came in contact with the trolley wire becoming heavily charged. A driver, exercising proper care, drove his horses against the telephone wire, and they were killed by electricity. *Held*, that the negligence of the telephone company was the proximate cause of the death of the horses, the "proximate cause" of an injury being the responsible cause, the

cause which is the active, operative, continuing, and natural source of the injury, or that which is the moving cause and without which the injury would not have occurred, though subsequent events aided in bringing about the result.

[Ed. Note.—For other cases, see Electricity, Cent. Dig. § 9; Dec. Dig. § 16.*]

For other definitions, see Words and Phrases, vol. 6, pp. 5758-5769; vol. 8, p. 7771.]

8. ELECTRICITY (§ 19*)—INJURIES INCIDENT TO PRODUCTION—CONTRIBUTORY NEGLIGENCE—BURDEN OF PROOF.

One suing for the negligent death of horses coming in contact with telephone wires heavily charged with electricity, has the burden of proving freedom from contributory negligence.

[Ed. Note.—For other cases, see Electricity, Cent. Dig. § 11; Dec. Dig. § 19.*]

9. ELECTRICITY (§ 19*)—INJURIES INCIDENT TO PRODUCTION—CONTRIBUTORY NEGLIGENCE—EVIDENCE.

A finding that at a loose telephone wire, heavily charged with electricity, was resting on the ground, covered with a growth of weeds tending to obscure the same from the view of a driver over the place, and that horses were carefully driven by a competent driver, and that the death of the horses by coming in contact with the wire, arose without the fault of the driver, sufficiently found freedom from contributory negligence.

[Ed. Note.—For other cases, see Electricity, Cent. Dig. § 11; Dec. Dig. § 19.*]

Appeal from Circuit Court, Clark County; Harry C. Montgomery, Judge.

Action by Leonard Kranz against the Cumberland Telephone & Telegraph Company. From a judgment for plaintiff, defendant appeals. Affirmed.

M. Z. Stannard and Jonas G. Howard, Jr., for appellant. J. K. Marsh, for appellee.

IBACH, J. This was an action in tort brought by Leonard Kranz, appellee, to recover damages against the Cumberland Telephone & Telegraph Company, appellant, and the Louisville & Northern Railway & Lighting Company, for the alleged negligent killing of two horses, the property of appellee. Appellant owned and operated a telephone line. Its codefendant company owned and operated an electric railway. During a windstorm appellant's telephone wire fell and rested in part on the railway company's trolley wire, and in part on the ground, and by contact with the trolley wire the telephone wire became charged with an electric current. As the telephone wire was thus resting on the ground charged with the current from the trolley wire, appellant's servant attempted to drive the horses across it, and they received an electric shock from the telephone wire which killed them. The case was tried by jury and a verdict returned in favor of the defendant railway company, but against the defendant telephone company. Appellant's motion for a new trial was granted, and the issue between appellee and appellant was tried a second time by the court without jury. The court made a special finding of facts and statement of conclu-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

sions of law thereon. It is assigned for reversal of the judgment that the court erred in each of its conclusions of law stated upon the special finding of facts.

We set out herein in abridgement the substance of the special finding of facts; the twenty-fourth, twenty-fifth, twenty-seventh, twenty-eighth, twenty-ninth, and thirtieth findings being set out in full. (1) The Louisville & Northern Railway & Lighting Company, hereinafter designated as the railway company, operated an electric railway in Clark county, Ind. (2) Appellee owned a tract of land adjacent to the main line of this railroad, on which (3) prior to April, 1907, he established a cold storage plant located 1,300 feet west of the main line of the railroad, which plant he was operating on July 11, 1907. (4) Prior to April, 1907, he arranged with the railroad company to build a switch from their main line to his storage plant, and agreed to convey to the company a strip of ground 40 feet wide for a right of way, (5) which right of way was surveyed by the railroad company and stakes were set along it. (6) During April, 1907, appellant, the Cumberland Telephone & Telegraph Company, hereinafter designated as the telephone company, at plaintiff's request, constructed a branch telephone line leading to the cold storage plant, and continued to operate this line until after July 11, 1907. (7) In constructing this line, the telephone company attached its wire to a telephone pole which stood north of the 40-foot strip of ground, and to a cherry tree which stood about 75 feet south of this strip, and to other trees south of the cherry tree, (8) the distance between the telephone pole and the cherry tree being about 125 feet, and between the cherry tree and the next tree south to which the wire was attached about 300 feet. (9, 10) The telephone wire extended transversely across the 40-foot strip of ground, and was suspended from 7 to 10 feet above ground where it crossed, without support of any character between the pole and the cherry tree, in which condition it remained until changed by the railway company, as hereinafter described. (12) In May, 1907, appellee conveyed by deed according to his agreement the 40-foot strip of ground to the railway company for a right of way, and (13) in June, 1907, that company began the construction of a switch, in pursuance of their agreement, and (14) notified the telephone company to remove its wire at the point where it crossed the right of way, which the telephone company failed to do. (15) In June, 1907, the railway company constructed the switch, and in so doing erected a line of trolley poles along their right of way, and (16) strung upon these poles a trolley wire at the height of 25 feet above ground, and (17), without detaching the telephone wire from the telephone pole or the cherry tree, raised said wire to a

point 18 inches above the trolley wire, and attached the same to the arm of one of the trolley poles. (18) This wire was then 26½ feet from the ground, 18 inches above the trolley wire, and the two wires remained in such condition with the knowledge of the two companies, until the telephone wire fell as hereinafter described. (19) At the point where the wires crossed neither of them was insulated, and no guard was placed about them to prevent the telephone wire resting on the trolley wire, in the event of its falling. (20) The wires could have been so guarded as to prevent such resting in such event, and could have been so insulated that an electric current transmitted through the trolley wire could not have been communicated to the telephone wire, in case of its falling and resting on the trolley wire. (21) In June, 1907, the railway company began to operate cars on the switch by electric power, (22) transmitted through its said trolley wire at a current strength of 500 volts, and the same was being so operated on July 11, 1907, at the time when the appellee's horses were killed. (23) At about 4 p. m., July 11, 1907, a thunder and wind storm occurred in the vicinity of the switch, cold storage plant, and telephone line. (24) "During said storm said branch telephone wire became detached from one of the trees located south of said cherry tree, and having become so detached became so slackened that one portion thereof rested on said trolley wire and another portion thereof, which was between said cherry tree and the next tree south thereof, laid and rested upon the ground." (25) "At the place where said portion of said branch telephone wire so rested on the ground, the ground was covered with a growth of grass and weeds, which tended to obscure the same from the view of one driving over said place." (26) On July 11, 1907, plaintiff was the owner of two horses and a wagon, which horses were of the value of \$——, and had in his employ a competent driver. (27) "On said 11th day of July, 1907, and after said storm had subsided, and while said branch telephone wire was so resting in part on said trolley wire and in part on the ground, and while said trolley wire was by said Louisville & Northern Railway & Lighting Company so charged with an electric current of 500 volts, and while plaintiff's said horses, * * * hitched to said wagon, were by plaintiff's said driver being carefully driven across said land from said cold storage plant to a public highway and across the place where said branch telephone wire was so lying upon the ground, said horses came in contact with that part of said branch telephone wire which was so lying upon the ground, and by reason thereof received an electric shock from which they were then and there instantly killed." (28) "The electric shock, by reason of which said horses were killed, was the same which was

so transmitted through said trolley wires by said Louisville & Northern Railway & Lighting Company and from said trolley wires communicated to and transmitted through said branch telephone wire." (29) "Said horses on said occasion were so driven by said driver in a careful and prudent manner, and said injury to said horses, from which their death so resulted, arose without the fault or negligence of the plaintiff." (30) "By reason of the death of said horses plaintiff has sustained damages in the sum of four hundred dollars, which sum is due and unpaid."

And as conclusions of law the court states:

"First. That the defendant, Cumberland Telephone & Telegraph Company, by suffering its branch telephone wire to be and remain above the trolley wire of the Louisville & Northern Railway & Lighting Company, without being insulated or guarded, was guilty of negligence.

"Second. That the negligence of the Cumberland Telephone & Telegraph Company in permitting its branch telephone wire to be and remain above the trolley wire of the Louisville & Northern Railway & Lighting Company without being insulated or guarded, and while said trolley wire was heavily charged with an electric current, was the proximate cause of the death of plaintiff's horses, and that by reason thereof plaintiff has sustained damages in the sum of \$400.

"Third. That plaintiff was not guilty of contributory negligence.

"Fourth. That plaintiff's driver, who was in charge of plaintiff's horses at the time they were killed, was not guilty of contributory negligence."

Appellant objects that the first conclusion of law is not supported by the finding of facts, claiming that the negligence of appellant should have been found as an inferential fact. To the second conclusion of law he makes a similar objection, urging that the findings of fact should have stated as an inferential fact that the alleged negligent act was the proximate cause of the injury.

[1] The province of a special finding is to find the ultimate facts of the case, not conclusions of law or fact therefrom. But every fact necessary to the plaintiff's recovery must be embraced within the special finding.

[2] Negligence is sometimes a question of fact, sometimes of law, sometimes a mixed question of law and fact. But where the facts are undisputed, as where the jury have agreed upon and returned a verdict setting forth the principal contested facts, or where the court has found the facts specially, it then becomes the province of the court to settle the question of negligence as a matter of law. *Conner v. Citizens' St. Ry. Co.*, 105 Ind. 62, 4 N. E. 441, 55 Am. Rep. 177; *Louisville, etc., R. Co. v. Roberts*, 18 Ind. App. 538, 47 N. E. 839; *Lake Shore, etc., R. Co. v. Brown*, 41 Ind. App. 435, 84 N. E. 25;

Cleveland, etc., R. Co. v. Hass, 35 Ind. App. 626, 74 N. E. 1003; *Pittsburg, etc., R. Co. v. Selvers*, 162 Ind. 234, 67 N. E. 680, 70 N. E. 183.

[3] And, where the facts are undisputed, what constitutes a proximate or remote cause of an injury is a question of law for the court. *Haskell v. Przedziankowski*, 170 Ind. 1, 83 N. E. 626, 14 L. R. A. (N. S.) 972, 127 Am. St. Rep. 352; *Roots v. Meeker*, 165 Ind. 132, 73 N. E. 253.

[4] If the court states an erroneous conclusion of law or fails to properly state his conclusions of law, it is not available as error by an exception to the conclusions of law, if a proper judgment has been rendered on the facts. If error has been committed in the conclusion of law, the rendering of a proper judgment on the facts makes this error harmless. *Krug v. Davis*, 101 Ind. 75; *White v. Chicago, etc., R. Co.*, 122 Ind. 317, 23 N. E. 782, 7 L. R. A. 257; *Nelson v. Cottingham*, 152 Ind. 185, 138, 52 N. E. 702; *Woolen's Tr. Proc.* § 4350.

[5] We shall now consider the facts found in the present case, and determine whether on these facts appellee should recover. The negligence charged against appellant is the maintenance of its wire suspended above the trolley wire under the circumstances set forth above without insulation or guard. Under the best authority we must hold appellant negligent. It knowingly allowed its wire to remain suspended at a very short distance from the trolley wire carrying a powerful and deadly current of electricity, under such conditions that if the telephone wire should break, or become loosened, an occurrence likely to happen, it could scarcely fail to rest on the trolley wire become charged with the current from that wire, and become a thing of menace and danger. Electricity is an agency of the greatest danger, and of a secret deadly character, and those persons who employ it must use care to prevent injury proportionate to the dangerous character of the agency, thus imposing upon them a very high degree of care. The wire in the present case could have easily been guarded.

[6] It makes no difference that appellee's horses were on private property when killed, and not in a public highway, for an electric company is liable for injuries occasioned on private property by its negligence, if the person or animal injured had a right to be on such private property the duty of maintaining its wires in a reasonably safe condition. *Central Union Tel. Co. v. Sokola*, 34 Ind. App. 429, 73 N. E. 143.

[7] The negligence of appellant in maintaining its wire unguarded in close proximity to the trolley wire under the circumstances set out in the special findings was the proximate cause of the death of the horses. The proximate cause of an injury is the responsible cause, the cause which is

the active, operative, continuing, and natural source of the injury. *Pittsburg, etc., R. Co. v. Cozatt*, 39 Ind. App. 682, 79 N. E. 584. The proximate cause of an injury is that which is the moving cause, and that without which it would not have occurred, although subsequent events or agencies may have helped to bring about the result. The real test of what is a proximate cause when there are intervening agencies is whether the result is such as might have reasonably been expected as the consequence of the original negligence, and, if it is such, the liability continues in spite of an intervening cause or causes. 29 Cyc. 499; *Central Union Tel. Co. v. Sokola*, supra; *Mize v. Rocky Mountain Bell Tel. Co.*, 38 Mont. 521, 100 Pac. 971, 129 Am. St. Rep. 659. When the telephone company allowed their wire to remain suspended above the trolley wire without guard or insulation, as found in the present case, they might reasonably expect that the wire might become loosened or broken, rest on the trolley wire, and become charged with electricity, and that injury to persons or animals who came in contact with the wire might result therefrom. Below we cite cases in which a telephone or telegraph company has been held liable for injuries caused by its broken or sagging wires, which had become dangerously charged with electricity by coming in contact with wires carrying a higher electric current. *Central Union Tel. Co. v. Sokola*, supra; *Mize v. Rocky Mountain Bell Tel. Co.*, supra; *Western Union, etc., Co. v. State*, 82 Md. 293, 33 Atl. 763, 31 L. R. A. 572, 51 Am. St. Rep. 464; *McKay v. Southern Bell Tel. Co.*, 111 Ala. 337, 19 South. 695, 31 L. R. A. 589, 56 Am. St. Rep. 59; *City Electric R. Co. v. Conery*, 61 Ark. 381, 38 S. W. 428, 31 L. R. A. 570, 54 Am. St. Rep. 262; *Ahern v. Oregon Tel. Co.*, 24 Or. 276, 33 Pac. 403, 35 Pac. 549, 22 L. R. A. 635; *Hennings v. Western U. Tel. Co. (C. C.)* 41 Fed. 864; *Western U. Tel. Co. v. Thorn*, 64 Fed. 287, 12 C. C. A. 104. We therefore conclude on the facts found that the appellant was negligent, and that this negligence was the proximate cause of the death of appellee's horses.

[8] Before appellee could recover, the burden of proof was upon him to prove his freedom from contributory negligence.

[9] The court found as facts that at the point where the loosened wire was resting on the ground the ground was covered with a growth of grass and weeds which tended to obscure the same from the view of one driving over the place, that the horses were being carefully driven by a competent driver in a careful and prudent manner, and that the injury from which their death resulted arose without the fault or negligence of the appellee. This is a sufficient finding that appellee and his driver were free from contributory negligence.

It thus appears from the special finding of facts that appellant was negligent in its maintenance of its wire, that this negligence was the proximate cause of the death of appellee's horses, and that appellee was not guilty of contributory negligence. On this state of facts the law is with appellee, and he should recover; and as a proper judgment was rendered on the facts, and the conclusions of law were properly stated, the judgment is affirmed.

(51 Ind. App. 145)

MOORE v. CITY OF BLOOMINGTON.
(No. 7,262.)¹

(Appellate Court of Indiana, Division No. 2
June 6, 1911.)

1. MUNICIPAL CORPORATIONS (§ 762*)—STREETS—LICENSED USE FOR DISCHARGE OF FIREWORKS—LIABILITY FOR INJURY.

Where a city expressly authorized persons to give a display of fireworks in a street, a use foreign to the purposes of a street, and intrinsically dangerous, such use may be found to constitute a nuisance, making the city liable for injury to one in the street from the discharge of the fireworks, negligently handled by inexperienced persons in charge; it not being necessary to make a city liable for injury from a licensed use of a street that the act authorized results in a change in the physical condition of the street.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1605-1611; Dec. Dig. § 762.*]

2. MUNICIPAL CORPORATIONS (§ 821*)—STREETS—INJURY FROM DISCHARGE OF FIREWORKS—CONTRIBUTORY NEGLIGENCE.

The mere fact that one in a street, injured by a display of fireworks therein, is not using the street for the purpose of travel, but has come there to see the fireworks, does not make her guilty of contributory negligence as matter of law, especially where she is of tender years.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1745-1757; Dec. Dig. § 821.*]

Appeal from Circuit Court, Lawrence County; Jos. B. Wilson, Judge.

Action by Josephine Moore, by next friend, Joseph C. Moore, against the City of Bloomington. Judgment for defendant. Plaintiff appeals. Reversed, with directions for new trial.

Miers & Corr, for appellant. Duncan & Batman and Martin & Pearson, for appellee.

LAIRY, C. J. By this action, appellant, Josephine Moore, a minor, by her next friend, seeks to recover damages from the city of Bloomington for personal injuries sustained by her while attending a public exhibition of fireworks given in the streets of said city, under the control and direction of a committee of the labor unions, as a part of the Labor Day celebration held in the city of Bloomington on the 3d day of September, 1906. The common council of the city had, prior to that date, passed and entered of record an order granting to said la-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes
¹Rehearing denied. Transfer to Supreme Court denied.

bor unions the free use of the streets for the purpose of holding their celebration, and further granting them the privilege to give a display of fireworks in the streets in the evening. The display was given in the street near the courthouse square in the presence of a large crowd of people. The appellant, Josephine Moore, was present, and, while standing in the street near the platform from which the fireworks were being discharged, she was struck in the face by a skyrocket and seriously injured. It is alleged that the rocket which struck and injured the appellant was negligently ignited and discharged by those in charge of the display. The complaint on which the case was tried consisted of two paragraphs, the first and third; a demurrer having been sustained to the second. The averments of the first and third paragraphs are similar, except that in the third the negligent acts and conduct of those in charge of the display were particularly described. After hearing the evidence, the trial court directed the jury to return a verdict in favor of the defendant, and the question here presented is whether, under the facts shown by the pleadings and proof, a case was made out which should have been submitted to the jury for determination.

The sufficiency of the complaint was questioned below by demurrer, and the action of the court in overruling the demurrer to the first and third paragraphs of complaint is presented here by assignment of cross-error. The appellant assigns as error that the court erred in directing a verdict for appellee and also in overruling the motion for a new trial. As the questions presented by the several assignments of error can be all determined by the application of the same legal principles, it will not be necessary to discuss them separately.

The precise question here presented has never been decided by either the Supreme or Appellate Court of this state, and the decisions of the courts of other states are not entirely uniform. It is therefore proper and necessary to consider and apply the principles of law governing the liability of cities for torts under circumstances similar to those involved in this case.

The courts have uniformly held that a city is not liable for a failure to exercise powers of a purely governmental character. They are not liable for a failure to provide adequate appliances for extinguishing fires, or for failure to furnish a sufficient police force, or for a failure to enact proper ordinances, or for a failure to properly enforce the laws of the state or the ordinances of the city enacted for the protection of the lives and property of its citizens. Such powers are governmental and discretionary, and the failure to exercise them cannot be made the basis of an action for damages. *City of La Fayette v. Timberlake*, 88 Ind. 330; *Robinson v. City of Evansville*, 87 Ind. 334, 44 Am. Rep. 770; *Brinkmeyer v. City of Evans-*

ville, 29 Ind. 187; 2 Dillon, *Munic. Corp.* § 754; *Griffin v. Mayor, etc.*, 9 N. Y. 456, 61 Am. Dec. 700; *Hill v. Board*, 72 N. C. 55, 21 Am. Rep. 451; *Rivers v. City Council*, 65 Ga. 376, 38 Am. Rep. 787; *City of Logansport v. Wright*, 25 Ind. 512; *Mills v. City of Brooklyn*, 32 N. Y. 489; *Hill v. City of Boston*, 122 Mass. 344, 23 Am. Rep. 332; *Kennedy v. Lansing*, 99 Mich. 518, 58 N. W. 470.

By an application of this principle, the courts have held that a city is not liable for damages caused by persons while making use of the streets for an illegal and unauthorized purpose. The failure of the city in such case to prevent or suppress such illegal use of the streets does not render it liable to respond in damages. So, it has been decided that a city is not liable for damages caused by persons coasting in a street in violation of a city ordinance. *City of La Fayette v. Timberlake*, *supra*. The fact that the unauthorized and illegal act is carried on openly and in the presence of the police officers of the city does not change the application of the rule. *Faulkner v. City of Aurora*, 85 Ind. 130, 44 Am. Rep. 1. In the absence of a statute, a city is not liable for injuries to person or property caused by the acts of a mob which the city authorities failed to suppress.

It is clear, from an application of this principle, that a city cannot be held liable for an injury to person or property caused by the explosion of fireworks in its streets by a person or society of persons without the authority, consent, or license of the city. If the pleadings and proof disclosed such a case here, there would be no difficulty in reaching a decision; but in this case it appears from the pleadings and the evidence that the common council of the city of Bloomington, in response to a request of a committee of the labor unions of said city, made and entered of record an order granting to said labor unions the free use of the streets of said city for their Labor Day celebration, including a display of fireworks at night, and that the exhibition of fireworks at which appellant received her injuries was held by the labor unions as a part of their celebration under the permission and license so granted by said city. We cannot, therefore, determine this case by the application of the principle just announced; but we are required to consider and determine the effect of the express permission and license given by said city, as bearing upon the question of its liability for damages resulting from such authorized display of fireworks. In considering this question, it is necessary to discuss briefly the duties of the city in reference to keeping its streets in a safe condition for use.

It is well settled that where a fixed, certain, and absolute duty of a purely ministerial character is imposed upon a city by statute, and means are provided whereby such duty may be discharged, it is under ob-

litation to perform; and it will be held answerable in damages for its failure to perform, or for its negligent performance of such duty. By the application of this principle, cities in this state have been held liable for a failure to keep their streets in a safe condition for travel and for negligently permitting such streets to become obstructed or out of repair so as to be dangerous. *City of Logansport v. Dick*, 70 Ind. 65, 36 Am. Rep. 166; *City of Indianapolis v. Doherty*, 71 Ind. 5; *Town of Monticello v. Kennard*, 7 Ind. App. 135, 34 N. E. 454; *Lyon v. City of Logansport*, 9 Ind. App. 21, 35 N. E. 128; *City of Anderson v. Fleming*, 160 Ind. 597, 67 N. E. 443, 66 L. R. A. 119.

If a person, without the knowledge of the city and without license or authority from it, makes an excavation in a street or places an obstruction therein, whereby the condition of the street is made dangerous, the city is not liable for injury resulting from such dangerous condition, unless it appears that the city had either actual or constructive notice of such condition in time to have taken precautions to prevent the injury. In such a case, the only negligence that can be charged against the city is that it failed to take proper precaution to prevent injury after notice of the dangerous condition of the street. On the other hand, if the city by contract or license authorizes an excavation to be made in a street, or an obstruction to be placed therein, which from its character and location will necessarily or probably produce injury to those using the street unless precautionary measures are taken to prevent it, such city will be liable in damages to a person injured by reason of the want of necessary precautionary measures to make it safe. To render the city liable in such a case, it is not necessary to show that it had notice that the person who had placed the obstruction or made the excavation in its street pursuant to such authority or license had failed to guard it or to light it, or to take other precautions necessary to make it safe, and that after such notice the city had time to have taken such precautions before the injury occurred. The duty to see that such precautions are taken rests primarily upon the city, and it cannot absolve itself from such duty by delegating it to another. *Park et al. v. Board of Com'rs*, 3 Ind. App. 536, 30 N. E. 147; *City of Indianapolis v. Marold*, 25 Ind. App. 428, 58 N. E. 512; *Dillon on Municipal Corporations*, § 1027.

In the case last cited the city of Indianapolis had let a contract for lowering a bridge. The execution of the work contemplated by the contract necessarily resulted in a condition of the street which would be dangerous unless properly lighted or guarded. The contractor failed to properly light or guard the place, and the city was held liable to the person injured by reason of the defect so created. The court held in this case that, as the improvement contracted for contem-

plated the creation of a condition of the street which was dangerous unless precautions were taken to make it safe, the duty primarily rested on the city to see to it that such precautions were taken, and that notice to the municipality of the absence of such precautions or guards was not required to make the city liable. In the case of *City of Indianapolis v. Doherty*, supra, the same principle was applied to a case where a person had created an obstruction in the street by placing building material therein, under the authority of a building permit issued by the city.

[1] We can see no reason why the principle announced and applied in these cases should not apply to a case where a city expressly grants a permission or license authorizing the use of a street for a purpose which, in its nature, is intrinsically dangerous, and which necessarily or ordinarily renders the use of the street unsafe unless precautions are taken to prevent the danger ordinarily incident to such use, especially where the use authorized is an extraordinary and unusual use and one that is foreign to the purpose for which the street was dedicated. Counsel for appellee concedes that these principles apply where the act authorized results in an excavation or obstruction in the street or any other change in its physical condition which makes it unsafe for use; but it is urged that they should not apply when the act authorized or licensed does not change or affect the physical condition of the street, and which amounts only to a temporary use of the street, which may or may not be dangerous, according to the amount of care used. No court has recognized such a distinction so far as we have been able to learn from our investigation of the question, and we know of no sound reason upon which such a distinction could rest. There may be uses to which a street might be appropriated or subjected which would make it more unsafe for travel than it could be made by any obstruction or change in its physical condition.

In the case of *Little v. City of Madison*, 42 Wis. 643, 24 Am. Rep. 435, it was held that the city, by authorizing the exhibition of bears in the street, became liable to a person who sustained damage by reason of his horse taking fright at the animals so exhibited. In the case of *Wheeler v. City of Fort Dodge*, 131 Iowa, 566, 108 N. W. 1057, 9 L. R. A. (N. S.) 146, the Supreme Court of Iowa held that a wire stretched across the street from the top of a building on one side to a point near the ground on the other, for the purpose of giving an exhibition known as "the slide for life," was a nuisance, and the city was held liable in damages to a person in the street who was injured by the performer falling upon him while engaged in giving the performance. In the opinion the court says: "That the city may be held liable for permitting conditions which endanger travelers, but do not consti-

tute any defect in the street surface or obstruct travel thereon, has been expressly held by this court. * * * This duty extends not merely to the surface of the street or walk, but to those things within its control which endanger the safety of those using the street or walk properly. * * * If we are not to abandon this principle so just and reasonable in itself, there is no escape from the conclusion that the presence in the streets of defendant city of the apparatus erected for the so-called 'slide for life' was a nuisance. But even if for any purpose, or in any exceptional sense of the word, the existence of the naked wire stretched across the public way can be said not to constitute a nuisance, yet, when it is considered, as it should be considered, with reference to the purpose of its erection, and the use to which it was to be subjected, its unlawful character is placed beyond a reasonable doubt. There are various reasonable and proper uses to which a street may be temporarily put, which may for the time being obstruct or interrupt its public use. But the right to make or cause such interruption must have some foundation in the necessity or in the reasonable enjoyment of the use of adjacent property."

Appellee cites and relies upon the case of *Wheeler v. City of Plymouth*, 116 Ind. 158, 18 N. E. 532, 9 Am. St. Rep. 837. From the facts in that case it appears that the mayor of said city had granted permission to certain persons to fire an anvil on a vacant lot within the corporate limits of said city, and that, as a result of the firing of such anvil, stones were thrown which broke a plate glass. The owner sued the city for the damage to the glass, and it was held that he could not recover. The court said: "The act of the mayor in granting permission to fire the anvil did not create a liability against the city. The utmost that can be granted is that the act of the mayor constituted the wrongdoers the licensees of the corporation, and granting this, but by no means so deciding, the city is not liable for their act, because it is not shown that it was intrinsically dangerous. It is quite well settled that a municipal corporation is not liable for the acts of its licensees unless it is shown that they were authorized to perform an act dangerous in itself. *City of Warsaw v. Dunlap*, 112 Ind. 576, 580, 11 N. E. 623, 14 N. E. 568; *Dooley v. Town of Sullivan*, 112 Ind. 451, 14 N. E. 566, 2 Am. St. Rep. 209; *Ryan v. Curran*, 64 Ind. 345, 31 Am. Rep. 123. Here there is nothing to show that the authorized act was intrinsically dangerous; on the contrary, the danger arose from the negligent manner in which the licensees performed the act."

This case can be distinguished from the case at bar. The act authorized was not to be done in a street of the city, but on a vacant lot, and the duty which is imposed upon the city to keep its streets in a safe con-

dition for use could not be invoked in favor of the plaintiff for that reason. It is stated in the opinion that there was nothing in that case to show that the authorized act was intrinsically dangerous, and the city is excused from liability on this ground. This is a recognition of the principle that the city would have been liable, if it had appeared that the act authorized had been of such a character as to be dangerous in itself.

A city is liable for erecting or maintaining a nuisance the same as an individual. *Valparaiso v. Moffitt*, 12 Ind. App. 250, 38 N. E. 909, 54 Am. St. Rep. 522; *City of New Albany v. Slider*, 21 Ind. App. 392, 52 N. E. 626. Any permanent obstruction in a street or highway is a nuisance per se. *State v. Berdette*, 73 Ind. 185, 38 Am. Rep. 117; *Hildrup v. Town of Windfall City*, 29 Ind. App. 592, 64 N. E. 942.

A temporary obstruction or use of a street may or may not be a nuisance in fact. Whether such use is a nuisance in fact must depend upon the circumstances of each particular case. In determining the question, it is proper to consider the character of the use, as to whether it is necessarily or ordinarily incident to the uses and purposes for which the street is intended as well as the danger or inconvenience to the public occasioned thereby. Where the particular use of the street authorized by the city cannot be said as a matter of law to constitute a nuisance, but, when it is of such a character, when considered in reference to surrounding conditions and circumstances, that it may or may not constitute a nuisance in fact, the question should be submitted to the jury for determination under proper instructions by the court. *Speir v. Brooklyn*, 139 N. Y. 6, 34 N. E. 727, 21 L. R. A. 641, 36 Am. St. Rep. 664; *Landau v. City of New York*, 180 N. Y. 48, 72 N. E. 631, 105 Am. St. Rep. 709; *Johnson v. City of New York*, 186 N. Y. 139, 78 N. E. 715, 116 Am. St. Rep. 545.

The cases last cited are directly in point and furnish express authority for our decision in this case. In the first case the city of Brooklyn was held liable for an injury to a spectator caused by a display of fireworks which the city had authorized to be held in its streets. In the second case the plaintiff was injured by a display of fireworks in the streets of the city held for the purpose of celebrating a political victory under permission from the city authorities. A nonsuit was granted by the trial court, and the case was reversed on appeal; the court holding that the case should have been submitted to the jury.

We are not to be understood as holding that a city can be held liable for every injury which results from a use of the streets which such city has authorized. Before the city can be held liable, it must appear that the act to be done under the authority of the city, or the use to which the street was to be subjected under such authority, was in-

herently dangerous, or that the condition of the street created thereby was dangerous in itself, under the conditions and circumstances of the case. If the act authorized is of a character that is necessarily or usually safe where proper care is used, and which can become dangerous only by a failure of the persons in charge to use ordinary precautions, the city cannot be held responsible for the negligence of the persons in charge in failing to use such precautions; but, if the act which the city authorizes to be done in its street, or the use to which it is subjected under such authority, is of such a character as to be necessarily or usually dangerous, and which can be made ordinarily safe only by the use of certain precautions, the city owes the duty to see that such precautions are used. *Norwalk Gaslight Co. v. Norwalk*, 63 Conn. 495, 28 Atl. 32; *Bailey v. Troy*, 57 Vt. 252, 52 Am. Rep. 129; *Bower v. Peate* (1876) L. R. 1 Q. B. Div. 321; *Thompson v. Lowell, L. & H. R. Co.*, 170 Mass. 577, 49 N. E. 913, 40 L. R. A. 345, 64 Am. St. Rep. 323.

The cases cited as to the last proposition apply the rule therein stated so as to hold a person liable for the acts of an independent contractor, where the work to be done under the contract was of such a character as to be intrinsically dangerous unless precautions were exercised to make it safe. We can see no reason why the same rule should not apply as against a city which has, by contract or license, authorized an act to be done in its streets which is inherently dangerous. *City of Indianapolis v. Huffer*, 30 Ind. 235; *Elliott, Roads & Streets*, § 634.

As an illustration, we may assume that a city for a consideration has granted a license to the owner of an automobile authorizing him to operate it in the streets of the city. It would scarcely be contended that the city would be liable to a person injured on the streets by reason of the negligent operation of such automobile. The reasons are manifest. In the first place, the use as authorized and licensed is one of the recognized modes of travel and is in no way foreign to the purposes for which the street is intended; and, in the second place, the use authorized is one which is ordinarily safe where proper care is used, and becomes dangerous only by a failure to use proper precautions. If, however, the city of Indianapolis should grant permission to an automobile club to hold races on Washington street in said city, it could hardly be claimed that such races, if held, did not constitute a nuisance. *Johnson v. City of New York*, supra.

The facts in this case show that a display of fireworks was made from a platform placed on a wagon near the corner of the public square in the city of Bloomington; that this was in the heart of the city; that a large crowd of people had assembled to see the display; that Roman candles and skyrockets, heavily charged, were used in making such

display; and that the person in charge had never had any experience in handling fireworks of this character. The discharge of fireworks of this kind in a large crowd of people is dangerous unless precautions are used, and the exercise of such precautions is the only thing that can make it reasonably safe. The question as to whether or not the fireworks as authorized and conducted constituted a nuisance for which the city was liable should have been submitted to the jury. As was said in *Landau v. City of New York*, supra: "Fireworks exhibited on an extensive scale in a large thoroughfare, in the midst of a large city, where a vast multitude of people is assembled, if not a nuisance as a matter of law, may properly be found such as a matter of fact. This was so adjudged in the *Speir Case*, which is controlling in principle. While such displays are sometimes tolerated, they are not authorized, and whoever is responsible for them must run the risk of liability for the consequences, so far as they result in injury to person or property."

[2] It appears from the evidence in this case that appellant was not using the street for travel at the time of her injury, but that she had come to the place solely for the purpose of watching the fireworks. Under such circumstances, it is insisted that she assumed the risk of injury and cannot recover for that reason, and the case of *Scanlon v. Wedger*, 156 Mass. 462, 81 N. E. 642, 16 L. R. A. 395, is cited as sustaining this proposition. The case cited fully sustains the proposition; but its weight as an authority is considerably weakened by a dissenting opinion by Morton, J.

The contrary doctrine is announced in *Vermont*, where it is decided that the presence of a person on a public street in a crowd of people who have been invited there by an exhibition of fireworks did not constitute contributory negligence. *Bradley v. Andrews*, 51 Vt. 530.

The Supreme Court of Missouri has also decided that a person is not guilty of contributory negligence by attending a display of fireworks. *Dowell v. Guthrie*, 99 Mo. 653, 12 S. W. 900, 17 Am. St. Rep. 598.

In the case of *Johnson v. City of New York*, supra, it was held that a person who was injured while attending an automobile race held in the streets of the city was not, as a matter of law, guilty of contributory negligence, but that the question of his contributory negligence was one of fact for the jury.

We cannot say from the facts in this case that appellant was guilty of contributory negligence as a matter of law. It appears that she was a girl of tender years, and she may not have known or fully appreciated the danger she was encountering. She may have had no knowledge of the dangerous character of the fireworks which were being used or of the inexperience of the per-

son in charge. We have often held that, where the undisputed facts bearing upon the question of contributory negligence are of such a character that impartial men may differ as to the inference to be drawn therefrom, the question should be submitted to the jury. *Rush v. Coal Bluff Mining Co.*, 131 Ind. 135, 30 N. E. 904; *Cleveland, etc., R. Co. v. Harrington*, 131 Ind. 426, 30 N. E. 37.

The motion for a new trial should have been sustained.

The judgment is therefore reversed, with directions to sustain the motion for a new trial, and for other proceedings not inconsistent with this opinion.

(84 Ohio St. 21)

S. WEISBERGER CO. v. BARBERTON SAVINGS BANK CO.

(Supreme Court of Ohio. March 23, 1911.)

(Syllabus by the Court.)

BANKS AND BANKING (§ 148*)—PAYMENT OF CHECK—FORGED INDORSEMENTS—LIABILITY OF DRAWEE BANK.

W., being indebted to R., whose place of business W. knew to be 48 Walker street, New York City, drew a check on his local bank of deposit in favor of R. for the amount of the debt, without designating therein his place of business, and inclosed the check with a letter in an envelope which he through mistake addressed to R., 48 Walker street, *Cleveland, Ohio*, and caused the envelope and contents so addressed to be mailed in the usual way, and it arrived in Cleveland in due course of mail, where the letter carrier found no one of that name on Walker street of that city, but found a man whose name was R. on Henry street, and to whom the carrier delivered the letter. He opened it and took possession of the check, and by indorsing the name R. on the back thereof obtained the cash from an acquaintance, who indorsed and deposited said check in his bank of deposit in Cleveland. The latter bank indorsed it over to another bank in the same city, guaranteeing prior indorsements, and this bank indorsed it payable to any bank or bearer, guaranteeing all prior indorsements, and in this condition it was presented to the drawee bank, and by it paid and charged to W.'s account, it having no knowledge of said mistake in addressing the letter. W. afterwards discharged his debt to the New York creditor by other means, and brings suit against the drawee bank to recover the amount of the check so charged to his account.

Held, the drawer of the check was first in fault, and as his negligence contributed directly to its wrongful and fraudulent appropriation, he is not entitled to recover.

[Ed. Note.—For other cases, see *Banks and Banking*, Cent. Dig. § 442; Dec. Dig. § 148.*]

Error to Circuit Court, Summit County.

Action by the S. Weisberger Company against the Barberton Savings Bank Company. Judgment for defendant was affirmed by the circuit court, and plaintiff brings error. Affirmed.

The parties to this case are corporations doing business in the village of Barberton, Summit county, Ohio; the plaintiff in error being engaged in mercantile business, and the defendant in error engaged in a general

banking business. The former brought suit against the latter, and for cause of action alleged in substance: That on or about January 13, 1906, and prior thereto, it had deposited with the said bank an amount of money in excess of \$122.13, which sum was on deposit on said day subject to check in excess of any liability or claim against the same. That on that day the plaintiff drew a check upon the bank for the sum of \$122.13, payable to Max Roth of New York City. That said check so drawn was fraudulently indorsed in blank by a person purporting to be Max Roth of Cleveland, Ohio, and that said check so fraudulently indorsed was delivered to one B. Schoenfeld, and by him indorsed in blank and deposited with the Cleveland Trust Company, of Cleveland, Ohio, and by the latter said check was indorsed with the following indorsements: "Pay to the Union National Bank of Cleveland, or order; prior indorsements guaranteed. The Cleveland Trust Co., Perry Office, C. O. Patch, Secy.-Treas." The said check was further indorsed by the Union National Bank of Cleveland, as follows: "Pay to the order of any bank or bearer; all prior indorsements guaranteed. Jan. 10, 1906. Union National Bank, Cleveland, Ohio, E. R. Fancher, Cashier." It is alleged that said check, with the forged indorsement thereon of Max Roth, and with the other indorsements thereon as stated, was wrongfully accepted and paid by the defendant bank, at Barberton, on or about the 23d day of January, 1906, and afterwards was wrongfully and without authority from the plaintiff charged against its account with said defendant bank. It is alleged that when plaintiff discovered the forged indorsement and the wrongful payment aforesaid, and on or about February 7, 1906, plaintiff demanded that defendant correct said account, and not charge said check against its account, which defendant refused to do, and refused to pay the plaintiff the amount of the check so wrongfully paid, and it prays judgment for the amount.

The answer admits most of the allegations made in the petition, but denies that said check was made payable to Max Roth, of New York City. The answer avers that said check was indorsed by Max Roth, and by the said Max Roth delivered to one B. Schoenfeld, and by him was indorsed in blank and deposited with the Cleveland Trust Company, of Cleveland, Ohio, and that this trust company indorsed the check to Union National Bank of Cleveland, or order, and it indorsed the same payable to the order of any bank or bearer, on the day and in the form alleged in the petition. The Union National Bank presented the check so indorsed to the defendant bank, at Barberton, for payment, and it paid the same and charged it to plaintiff's account. The defendant further

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

alleges that said check was paid to Max Roth, of Cleveland, Ohio, without any information or knowledge to show that it was paid to any one else, and that, if said plaintiff has been damaged, it occurred by reason of its own negligence in misdirecting said check and mailing the same to Max Roth, at Cleveland, Ohio, instead of Max Roth, of New York City. It is then averred that plaintiff did not act promptly when it discovered its mistake and inform defendant in time to protect itself against any fraud committed.

The new matter of the answer is denied by reply. The parties waived a jury and submitted the case on the facts to the court, who found for the defendant. A judgment on the finding was affirmed by the circuit court. Error is prosecuted here to reverse both judgments.

Musser, Kimber & Huffman, for plaintiff in error. J. A. Kohler, Arthur S. Mottinger, and Charles E. Smoyer, for defendant in error.

PRICE, J. (after stating the facts as above). At the trial in the court of common pleas, some of the facts were agreed upon, and they show that, at the date of the check mentioned in the petition, the plaintiff in error was indebted to one Max Roth, of New York City, in the sum of \$122.13, and that his place of business at that time was No. 48 Walker street of that city. To pay the above indebtedness, the plaintiff in error, on the 13th day of January, 1906, drew its check for said amount, on the defendant in error, in favor of and payable to Max Roth, in the following words: "Barberton, O., 1—13, 1906. Pay to the order of Max Roth (\$122.13/100) one hundred twenty-two 13/100 dollars. The S. Welsberger Co. To the Barberton Savings Bank, Barberton, Ohio." This check, with a letter signed by the firm, was placed in an envelope, which was addressed to Max Roth, 48 Walker street, Cleveland, Ohio, instead of Max Roth, 48 Walker street, New York City. The letter, so addressed and containing the check, shortly after it had been mailed to Cleveland, was delivered by the post office authorities to one claiming to be Max Roth, who lived or roomed on Henry street in the city of Cleveland. It appears that his name was Max Roth, but not the Max Roth to whom plaintiff was indebted, and whose place of business was 48 Walker street, New York City. The Cleveland Max Roth, to whom the letter containing the check was delivered, took the check to a saloon keeper in Cleveland, with whom he was acquainted, and after indorsing his name, Max Roth, on the back of the check, received the cash for the same from the saloon keeper, whose name is B. Schoenfeld. The latter indorsed and delivered it to the Cleveland Trust Company, which later indorsed and deposited it with the Union Na-

tional Bank of that city, by which the check was presented to defendant bank for payment, and it was paid and charged to the account of plaintiff. It never reached the Max Roth of New York for whom it was intended, and plaintiff, afterwards and by means of another check, discharged its indebtedness to the New York creditor. As between the parties hereto, who should bear the loss sustained?

It is not necessary that we consider the many authorities presented by the plaintiff in error concerning the liability of a bank to one of its depositors for paying a forged check, nor to discuss the general rule that such bank is bound to know the signature of its depositor. Those authorities may be regarded as sound on the facts of each case there found, and still the judgment of the lower court be free from error. There is one view of this case sufficiently clear to sustain the judgment, without conflict with any authority cited in the brief or oral argument. It stands out boldly in the plaintiff's case—in its petition and in its evidence—that it was first at fault, if not first and solely negligent. It was a business concern, keeping an account with the defendant bank. It knew that its creditor, Max Roth, resided in New York City, doing business at 48 Walker street, and, desiring to pay its debt to him, drew the check payable to him, not designating therein either the place of residence or business, and thoughtlessly or negligently inclosed it with a letter in an envelope which it addressed to Max Roth, 48 Walker street, Cleveland, Ohio, and, so addressed, the plaintiff caused it to be mailed. Bearing that address, the letter could not properly go to New York City, but could and properly did go to the city of Cleveland. Perhaps there is no Walker street in Cleveland; but the postal service, after diligent effort, found a Max Roth, or a man who claimed to be of that name, and the letter containing the check was delivered to him. Up to this point of time, no one connected with the check was negligent, except the plaintiff, unless it be the letter carrier who delivered the letter. The act of the Max Roth of Cleveland, who received the letter, was criminal, and he forged the name of the real party for whom the check was intended by indorsing his name thereon.

The carelessness of the plaintiff put it within the power of the Cleveland man to perpetrate a fraud and obtain the proceeds of the check, which he did at the hands of Schoenfeld, his acquaintance. Then it took the customary course on its way to the bank of defendant upon which it was drawn. Schoenfeld, believing the indorsement of the Cleveland acquaintance legitimate, deposited the check in his bank of deposit, having indorsed his name on the back thereof. This bank indorsed and transferred it to the Union National Bank, guaranteeing prior indorsements; and it in turn indorsed it payable to

any bank or bearer, guaranteeing all prior indorsements. These were Cleveland banks, which made the indorsements and transfers; but it is not alleged in the petition that the defendant bank had any information or knowledge as to the residence or place of business of Max Roth, the plaintiff's creditor, and therefore the location of these indorsing banks was not calculated to put the defendant on inquiry or excite its suspicion. They had severally guaranteed prior indorsements. It was not practicable for the defendant to interview Max Roth, to ascertain whether he was the lawful holder of the check. While it is true that a forged indorsement transfers no title to the check, we cannot avoid a comparison of the negligent conduct of the plaintiff with the apparent good faith of the defendant, acting as it did under the circumstances narrated. The misdirected letter was the source of possibilities that became realities in this case. In other words, the plaintiff was first at fault, and its mistake made possible what in fact has transpired. If we admit, as we do, the ordinary rule that a bank is bound to know the signature of its depositor, it is a rule to protect the rights of the depositor. But where his carelessness has contributed directly to the deception of the bank, he may not be in position to enforce such general rule.

In the case at bar, it appears that neither the depositor nor the bank intended to commit any wrong, and we may apply a rule the substance of which is that, where one of two innocent parties must suffer because of a fraud or forgery, justice imposes the burden upon him who is first at fault and put in operation the power which resulted in the fraud or forgery. We decide this case on its own peculiar facts, and make no search for or examination of reported cases, and affirm the judgment of the lower court.

Judgment affirmed.

SPEAR, C. J., and DAVIS, SHAUCK, JOHNSON, and DONAHUE, JJ., concur.

(84 Oh. St. 63)

STATE v. SAPPPIENZA.

(Supreme Court of Ohio. March 28, 1911.)

(Syllabus by the Court.)

CRIMINAL LAW (§ 330*)—BURDEN OF PROOF.

Where, in the trial of an indictment for robbery, it is proved beyond a reasonable doubt that the defendant was present at the time and place of the crime and participated in the acts which constitute the robbery, and the defendant for his defense interposes a plea of duress, the burden is not on the state to disprove such plea, but is on the defendant to maintain his plea by a preponderance of the evidence.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 721; Dec. Dig. § 330.*]

Error to Circuit Court, Cuyahoga County. Grasuldo Sappienza was convicted of robbery. In common pleas the conviction was reversed in the circuit court, and the State brings error. Reversed.

At the April term, 1910, of the court of common pleas of Cuyahoga, the defendant in error, Grasuldo Sappienza, with four others, was indicted for the crime of robbery. A plea of not guilty having been entered by the defendant, he was put upon trial June 27, 1910, and convicted of robbery as charged in the indictment. Motion for new trial having been overruled, the defendant was sentenced to the penitentiary for 15 years, and ordered to pay the costs. On error to the circuit court, the judgment of the common pleas was reversed for error in the charge of the court to the jury, and the cause ordered remanded to the court of common pleas for a new trial. The state, availing itself of section 13764 of the General Code, authorizing such proceedings, brings error in this court seeking a reversal of the judgment of the circuit court and an affirmance of the judgment of the common pleas. Further facts essential to an understanding of the point decided will be found in the opinion.

John A. Cline, Pros. Atty., and Charles H. Olds, Asst. Pros. Atty., for the State. B. D. Nicola, for defendant in error.

SPEAR, C. J. Sallient facts appearing with respect to the robbery are that on June 15, 1910, the defendant with four other men went out a few miles from Cleveland and lay in wait for the paymaster of the Cleveland Trinidad Paving Company, who was expected to pass with the pay roll and money for the men. That person was joined by the foreman, and they started to travel to the place of work, when five men, all armed with large caliber revolvers, suddenly leaped from the bushes at a lonely spot, and conducted the paymaster and foreman into a near woods, bound, and blindfolded them, and took from them \$1,192 in money, and made way with it. One Consolo was captured. The defendant on information obtained from Consolo was arrested a day or two later. The evidence of the state at the trial showed that Sappienza and others associated with him had planned the robbery some days before its commission. The defendant set up as a defense at the trial that, although present, he did not want to commit the robbery; and testified that his life was threatened, and that the only reason he went with them was through fear of his life. Two others who had been apprehended testified in corroboration. The defendant's counsel presented to the court several requests to charge, all bearing upon the effect in law of the defense, as to the burden of proof regarding the plea of duress. The court declined to give them, but did charge the jury upon

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

that branch of the case as follows: "The defendant in this case makes the defense that he withdrew in the first instance from the conspiracy or common design to perpetrate this robbery; but that he was coerced and acted under duress. On this subject I say to you that this is the defense made by the defendant and the burden of proof is upon him. It is not necessary, gentlemen of the jury, so far as this defense is concerned, that it should be proven beyond a reasonable doubt. It is sufficient in law if it should be shown by the preponderance of proof. By preponderance I do not mean that more witnesses should testify on one side or the other; but if you believe from the whole testimony that the preponderance of proof is with the defendant, with reference to the question of defense I have spoken about, then you may say that he has maintained that issue. On that subject I say to you this, it is the law that if a man has determined to commit a crime, and is engaged in carrying out his purpose, he has a right at any time before the consummation of the offense to withdraw. He may repent of his purpose and desist, and, if he does and stops short of the final act that completes the crime, he is guilty of no crime. In this case, though the defendant set out or joined with others to commit the crime charged in the indictment, yet, if in good faith he withdrew from the purpose, and participated, to the extent that he did participate, because he was under duress and coercion because he was in fear of his life, then he would not be guilty and your verdict should be for the defendant."

It is not deemed necessary to specially notice the requests to charge. The charge as given presents the real question in controversy, and, if correct, the special instructions asked would at least have been misleading. It seems to be conceded that the charge was a correct presentation of the law bearing on the case, other than on the question of duress, including a proper rule as to the element of reasonable doubt generally, leaving the real error insisted upon the instruction regarding the burden of proof as to duress. The question, therefore, is whether or not the plea of duress is an affirmative defense, which imposes upon the defendant the burden of establishing it by a preponderance of the evidence. It was the opinion of the trial court that it is such affirmative defense; but the circuit court held otherwise, and hence the judgment of reversal by that court, which was only on the ground of error in the charge in that respect.

This court is of opinion that the charge of the common pleas is supported by reason as well as authority, and embodies the proper rule of law with respect to duress. The provision of statute under which the indictment was found (section 12,432, General Code) is as follows: "Whoever, by force or violence, or by putting in fear, steals and takes from the person of another anything of value is guilty of robbery, and shall be imprisoned

in the penitentiary not less than one year nor more than fifteen years." Upon making proof, therefore, beyond reasonable doubt, that the defendant, with others, by force or violence, or by putting in fear, had stolen and taken from the person of the individuals named in the indictment, against their will, something of value, the state had made its case one justifying a verdict of guilty, unless the defendant on his part produced evidence which exculpated him. The state did not need to go into the question of intent on the part of the robbers because of the universal rule, as a presumption of fact, that the natural and probable consequences of every act deliberately done were intended by the person who did them. It is not denied that the defendant participated in the acts which constituted the robbery, nor is it seriously claimed, at least it cannot be reasonably claimed, that he did not intend to aid in doing the very acts which constituted the robbery, the full force of the exculpatory claim being that his intent was controlled by an outside force; that is, duress. In the nature of things this was an affirmative defense, one which it was incumbent on the defendant to make out by a preponderance of the evidence. This was so because the principle that the burden of proof is on the state in criminal cases has reference to the establishment of the corpus delicti, and the defendant's complicity; but, when the defendant relies upon distinct substantive matter for exemption or immunity, the burden of proving such matter is on the defendant. *Ellis v. State*, 30 Tex. App. 601, 18 S. W. 139. This rule is also involved in *State v. Arnold*, 35 N. C. 184, that, when the defense on an indictment for murder is that the prisoner was under the age of presumed capacity, the onus of proof lies upon the prisoner. A like principle is involved in the ruling in *Commonwealth v. Zelt*, 138 Pa. 615, 21 Atl. 7, 11 L. R. A. 602, that one charged with illegally selling liquor was acting as agent for a foreign importer is a matter of defense to be established by competent evidence sufficient to throw a reasonable doubt on the case of the prosecution. There is applicable, also, the more general rule, as held in *State v. McGlynn*, 34 N. H. 422, that where the subject-matter of a negative averment in an indictment relates to the respondent personally, or lies peculiarly within his knowledge, the averment will be taken as true unless disproved by him.

The principle involved is not different in character from that determined in *Kelch v. State*, 55 Ohio St. 146, 45 N. E. 6, 39 L. R. A. 737, 60 Am. St. Rep. 680, and in *State v. Austin*, 71 Ohio St. 317, 73 N. E. 218, 104 Am. St. Rep. 778, relating to the defense of insanity, the holdings being based on the rule, now thoroughly established in this state, though doubted in some jurisdictions, that as the law presumes sanity to be the normal condition, and insanity an abnormal condition, the

burden rests upon him who sets up the defense to support it by a preponderance of the evidence. The same principle is applied with respect to the defense of self-defense, in a trial for murder, in *Silvus v. State*, 22 Ohio St. 90, and with even more pertinency, as we think, in *Weaver v. State*, 24 Ohio St. 584, where the crime charged was malicious shooting with intent to kill. These cases embody the settled law of the state on the questions involved, and we perceive no reason to disturb them.

We think these authorities dispose of the question. As remarked by White, J., in the *Silvus Case*, referring to the adoption of the opposite rule, "what is recognized in the books as a defense would cease to be such in any just sense, because the burden would be cast on the state of disproving its existence in order to support the indictment." The case at bar is wholly different from that of an alibi. That defense relates to the claimed denial by defendant of any participation whatever in the acts which constituted the crime charged, while in our case the record forecloses against defendant the facts of his presence and participation in the acts which constituted the crime.

Attention is called to *Jones v. State*, 51 Ohio St. 331, 38 N. E. 79, opinion by Bradbury, J., and it is strenuously insisted by counsel for defendant that it rules the case at bar against the state. At first blush it might seem that there is some ground for counsel's claim, but we think a careful examination of the case dispels that impression. The accused was charged with murder, and it was essential to a conviction that the state prove, beyond a reasonable doubt, the intent to kill. The defendant requested a charge embodying the proposition that the burden of proof is not on the defendant that the gun was discharged by accident, but the state must establish beyond a reasonable doubt that the defendant deliberately discharged the gun with premeditation and motive before the jury could convict. The material element of the ruling is that, where the state has shown that the death was the result of design, the motion of accident is necessarily excluded. That which is designedly accomplished cannot in the very nature of things be accidental. Therefore, when the plaintiff in error introduced evidence tending to prove that the gun was accidentally discharged, he was merely controverting the truth of the averment in the indictment that it was purposely discharged.

To sum up the case, it stands thus: The record shows that the robbery was committed as charged, that the defendant participated in it, and is therefore guilty as charged and was properly convicted unless he produced evidence which exculpated him; that is, he is proven guilty of doing the act. The

usual presumption follows. His plea is not that he did not participate in the robbery, did not intend to do the act, but that his intent was controlled by an outside force, viz., duress. This being an affirmative defense, the burden of proving it was on the defendant, and the trial court did not err in refusing to put that burden on the state. This conclusion requires a reversal of the judgment of the circuit court and an affirmance of that of the common pleas.

Reversed.

DAVIS, SHAUCK, PRICE, JOHNSON, and DONAHUE, JJ., concur.

(34 Oh. St. 81)

MILLS-CARLETON CO. v. HUBERTY et al.
(Supreme Court of Ohio. April 18, 1911.)

(Syllabus by the Court.)

1. SALES (§ 363*)—CONTRACT—EVIDENCE.

In harmonizing apparently conflicting clauses of a contract, they must be construed so as to give effect to the intention of the parties as gathered from the whole instrument; and, where the object to be accomplished is declared in the instrument, the clause which contributes most essentially to that object will control.

[Ed. Note.—For other cases, see *Sales*, Cent. Dig. § 1064; Dec. Dig. § 363.*]

(Additional Syllabus by Editorial Staff.)

2. SALES (§ 71*)—CONSTRUCTION OF CONTRACT —"ESTIMATE."

Where defendant in writing agreed to pay for lumber to be furnished for a building a certain sum "on basis of your estimate," the word "estimate" taken in its ordinary meaning excludes the idea of an exact detailed schedule of material, not to be increased or diminished as the building progressed, but, on the contrary, was an approximate calculation of the lumber required.

[Ed. Note.—For other cases, see *Sales*, Dec. Dig. § 71.*]

For other definitions, see *Words and Phrases*, vol. 3, pp. 2492-2494.]

Error to Circuit Court, Cuyahoga County.

Action by the Mills-Carleton Company against George Huberty and others. Judgment for defendants as affirmed by the Supreme Court, and plaintiff brings error. Reversed.

The Mills-Carleton Company brought suit in the common pleas court of Cuyahoga county against George Huberty on an account for lumber and building material which it claimed to have sold and delivered to Huberty. A second cause of action is contained in the petition, in which plaintiff set up a mechanic's lien on certain real estate belonging to Huberty to secure the account referred to. The answer of defendant denies the averments of the petition, and then alleges that on August 9, 1905, "he entered into a written agreement with plaintiff whereby he guaranteed the account of H. G. Schmitt, who was then under contract with this defendant for the erection of a certain

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

building on the premises described in the petition, limiting his guaranty to the amount of \$3,844, which was the original estimate for the lumber and which was all he agreed to pay. Said defendant states that he has paid plaintiff the aforesaid sum of \$3,844; that he never contracted with them for lumber other than his agreement to guarantee the account of said Schmitt who purchased said lumber and to whom all of said lumber was delivered." The cause was tried to a jury, and, at the conclusion of the plaintiff's evidence, the court, on motion of defendant Huberty, directed the jury to return a verdict in his favor. Judgment on this verdict was affirmed by the circuit court, and this proceeding is brought to reverse the judgments of the courts below. Other pertinent facts are stated in the opinion.

Treadway & Marlatt, for plaintiff in error.
Hidy, Klein & Harris, for defendants in error.

JOHNSON, J. (after stating the facts as above). The lumber furnished by the plaintiff company was used in the construction of a factory in Cleveland. Before any of the lumber was delivered there was the following correspondence between the parties:

"Cleveland, Ohio, Aug. 9, 1905. The Mills-Gray-Carleton Co., City—Dears Sirs: You can charge to my account and I will pay you for all lumber delivered to H. G. Schmitt for use in construction of a building on my lots, Beiden Street, lumber to be delivered and charged on basis your estimate of August 4th, No. 134, amounting to \$3,844.00, for which said Schmitt has given you an order date of August 8th ult. I will pay you on or before the 10th of each month, taking advantage of the usual 2 per cent. discount for all lumber delivered and accepted the preceding month. [Signed] Geo. Huberty. Witness: A. J. Gregory, Agt."

To this the Mills-Carleton Company, the Mills-Gray-Carleton Company, replied as follows: "Cleveland, Ohio, Aug. 10, 1905. Mr. Geo. Huberty, 838 St. Clair St., City—Dear Sir: Mr. Gregory has handed to us a letter from you authorizing us to charge to your account the lumber for your new building, as per our estimate of August 4th, \$3,844.00, to be used by H. G. Schmitt in erecting a building on your property. We thank you for this letter as it puts the matter in a shape which is very satisfactory to us. Yours truly, [Signed] The Mills-Gray-Carleton Co., by C. H. Carleton, President."

The contention of the plaintiff is that by the contract thus made Huberty became liable to pay plaintiff for all of the lumber furnished by it which was used in construction of the building; while the defendant contends that his liability was conclusively limited to the sum of \$3,844, and that for any other or additional material plaintiff would have to look to the contractor, Schmitt.

The testimony offered by plaintiff showed that as the work progressed certain changes were ordered by Huberty in the construction of the building. These required additional lumber and the reworking of some of the lumber covered by the estimate referred to. Some of the lumber covered by the estimate was not needed, and was not delivered. From time to time Huberty made payments to plaintiff, and when these payments amounted to \$3,844, which was after all of the material had been delivered, he refused to make any further payments. The total value of the lumber furnished by plaintiff, which was used in the construction of the building, was \$344.51 in excess of the amount which defendant paid. Testimony was tendered by plaintiff tending to show that extras were ordered by Huberty himself and that statements were rendered by plaintiff to him as the work progressed for the material furnished, the bills for material which was in addition to that originally estimated being marked "extra"; that Huberty made no objection to any of these charges until after the material was furnished.

The courts below sustained the contention of defendant that his liability was conclusively limited to the amount stated in his letter of August 9, 1905, and that the subsequent matters referred to did not change or add to that limit. The letter of defendant of August 9th opens with the explicit statement, "You can charge to my account and I will pay you for all lumber delivered to H. G. Schmitt for use in construction of building on my lots," etc. The concluding sentence is the promise: "I will pay you on or before the 10th of each month, * * * for all lumber delivered and accepted the preceding month." This language is not uncertain or ambiguous, and leaves no room for discussion as to its meaning. The contract must be construed with reference to its object and as one entire contract. It will be observed that the material was to be charged to account of Huberty himself, and the promise was to pay for all lumber delivered. The object to be accomplished as expressed in the contract was the construction of the building, in which the material was to be used. It is a matter of common knowledge that few, if any, buildings are carried to completion without changes which either increase or diminish the requirements of material.

[1, 2] But it is claimed that the clause, "lumber to be delivered and charged on basis your estimate of August 4th, amounting to \$3,844.00," is conclusive in its legal effect, and cuts down the comprehensive terms in the rest of the letter. The word "estimate" is defined in Webster's Dictionary as follows: "A rough or approximate calculation, as an estimate of the cost of a building or the quantity of water in a pond." The use of the word "estimate" in this contract taken in its ordi-

nary meaning and import excludes the idea of an exact detailed schedule or list of material which schedule or list was by the agreement not to be increased or diminished as the building progressed. On the contrary, the use of the word "estimate," in connection with the other language of the contract, and the object to be accomplished, clearly leads to the conclusion that the basis referred to in the contract, on which the amount of \$3,844 was arrived at, was an approximate calculation or estimate of the lumber required and which might be altered in the carrying out of the work. This construction harmonizes and gives effect to the entire instrument, a result enjoined by familiar rules. We are strengthened in this view by the conduct of the parties subsequent to the making of the contract. As already shown, defendant ordered additional lumber himself. Statements were rendered to him for all material furnished as the work progressed, and the bills for extra material were marked "extra," all without objection from him. And, even if the contract had explicitly limited Huberty's liability for lumber furnished on Schmitt's original order to the amount named, he would nevertheless be responsible for material which he personally purchased in addition thereto.

We think, therefore, that the common pleas court erred in directing a verdict for defendant and the judgments of the courts below will be reversed.

Judgment reversed.

SPEAR, C. J., and DAVIS, SHAUCK, PRICE, and DONAHUE, JJ., concur.

(84 Oh. St. 12)

FRANKLIN BANK et al. v. BRUNS.

(Supreme Court of Ohio. March 28, 1911.)

(Syllabus by the Court.)

INTEREST (§ 22*)—JUDGMENT—FUND IN COURT—LIABILITY OF CLAIMANTS.

Where a particular fund is paid into court in compliance with its order of interpleader, and various claimants litigate between themselves as to their rights to the fund, a decree distributing the fund will not bear interest, and an intervening claimant who prosecutes error to that decree in good faith, and gives a supersedeas bond to stay execution, cannot be compelled, in a suit on the bond, to pay interest on the fund or any part of it.

[Ed. Note.—For other cases, see Interest, Cent. Dig. §§ 43-53; Dec. Dig. § 22.*]

Error to Circuit Court, Hamilton County.

Action by George H. Bruns against the Franklin Bank and others. Judgment for plaintiff, and defendants bring error. Reversed.

The action in the court below was founded on two supersedeas bonds, given by the plaintiffs in error, in a suit between the same parties and others; one when the cause was

taken on error from the superior court of Cincinnati at special term to the general term of that court, and the other when the cause was taken on error to this court.

The petition, in substance, avers: That these bonds were given in a proceeding, brought by the Franklin Bank, against the city of Cincinnati and others, including George H. Bruns, the defendant in error here, in which the Franklin Bank asserted a lien upon a certain fund claimed to be due by the city of Cincinnati to the bank and other claimants, including Bruns. That in that proceeding the city of Cincinnati in accordance with an order of the court for interpleader in the case paid to the clerk of that court the sum of \$8,560.32, and was discharged from all further liability to any of the parties, on account of the claims or liens set forth. That thereafter the claims of the bank and of Bruns, and the other claimants to the fund, or any part of it, were litigated in the superior court. That on final hearing the court found in favor of the following named defendants in said proceeding in the amounts stated, and ordered the sum distributed without priority as follows: (1) The costs of the suit taxed at \$189.45; (2) to John Mueller \$1,489.95; (3) to Henry F. Kemp \$373.30; (4) to George H. Bruns the sum of \$5,650.21; (5) to T. F. McClure \$859.17; and the city of Cincinnati was dismissed. That the Franklin Bank took exceptions to said findings, judgment, and orders, and prosecuted error to the superior court in general term, and on July 20, 1900, filed the first supersedeas bond referred to. That thereafter, on the 3d day of December, 1900, said court in general term affirmed the findings, judgments, and orders rendered in the special term of said court, and gave judgment for costs against the plaintiffs in error. That said bank prosecuted error to the Supreme Court of Ohio to reverse said judgment, and upon the 29th of December, 1900, executed the second bond referred to in the sum of \$16,000 which was duly approved by the clerk of the superior court of Cincinnati. That thereafter, on October 1, 1901, the said judgments were finally adjudicated and affirmed by the Supreme Court of Ohio. Plaintiff further alleges that, pursuant to said orders and judgments, the clerk of the superior court on October 12, 1901, made payments to the said several parties, in the amounts stated, in accordance with the order of the court; that on that day there had accrued on plaintiff's judgment interest for one year, three months and ten days, to wit, the sum of \$433.18. He further alleges that the amount paid to him, Bruns, by the clerk, was the amount of his original judgment, \$5,650.21, which with the amounts due to the other parties and costs consumed the fund so deposited with the clerk. Plaintiff therefore prays judgment for the said sum of \$433.18,

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

being the amount of interest between the first day of the special term at which judgments were rendered and the date of payment, October 12, 1901.

In their answer to this petition the defendants aver, in substance, that no judgment or decree was rendered in favor of the plaintiff against the defendant the Franklin Bank for the sum as set forth in the plaintiff's petition, or for any other sum whatever, and they set out in words and figures the decree that was rendered by the superior court of Cincinnati in the original proceeding of the Franklin Bank against the city of Cincinnati and others, including Bruns. That decree recites that the city of Cincinnati in compliance with an order of interpleader "made herein on June 3, 1899, had paid to the clerk of this court the sum of \$8,560.32, which sum is now in the hands of said clerk to be distributed among the plaintiffs, and the remaining defendants, according to the priority of their liens upon said fund, and the court further find that the city of Cincinnati having complied with said order should be fully discharged from any liability to any of the parties herein." The decree then proceeds to make findings in the amounts due the several parties, including George H. Bruns, defendant in error; the amount due him being \$5,650.21.

The answer further avers that the said bank gave a bond to stay proceedings in said cause, not to the said Bruns alone, but for the use and benefit jointly and not severally of all of the defendants in said original proceeding, and, further, that, after said judgments had been affirmed by the superior court in general term, the defendants gave a second bond to stay proceedings in said cause; that said second bond was not given to the plaintiff alone, but for the use and benefit jointly and not severally of the city of Cincinnati and the other defendants named.

The answer further avers that the plaintiff received on his judgment the sum of \$5,650.21, being the full amount due and payable to him under the decree of the superior court aforesaid, and that upon receipt thereof all of his rights were fully satisfied. The answer further denies that the plaintiff is entitled to the interest, claimed from the 20th of July, 1900, to the 12th of October, 1901. The plaintiff demurred to this answer on the ground that it did not state facts sufficient to constitute a defense. This demurrer was sustained, and the defendants not desiring to plead further, judgment was rendered against them, and this judgment was affirmed by the circuit court of Hamilton county, and the proceeding here is to reverse the judgments below.

Burch & Johnson, for plaintiffs in error.
A. J. Cunningham and Lloyd P. Baen, for defendant in error.

JOHNSON, J. (after stating the facts as above). It will be observed that the case of

the plaintiff below is based on the claim that defendants were liable on the bonds for interest on the amount of his claim from the first day of the term at which the decree was entered in the superior court until the day of payment to him, by the clerk, after the affirmation of the decree by the Supreme Court. Both of the bonds set out in the petition are signed by the same parties, and any rights which the plaintiff might have could be enforced in an action on the last bond alone. *Hayes v. Weaver*, 61 Ohio St. 55, 55 N. E. 172.

It is shown in the pleadings that in the original proceedings there was an order of interpleader entered, directing the city of Cincinnati to pay to the clerk of the court the amount claimed by the Franklin Bank \$8,560.32, and that the city, having complied with the order, was discharged from all further liability to any of the parties to the action; that thereupon the remaining parties interpleaded as between themselves. On the final hearing the court found the amounts due the several interpleading defendants, and directed the clerk to pay the same without priority out of the fund so deposited after paying the costs. The amount ordered to be paid to Bruns by the clerk was \$5,650.32. Under the order there was nothing left to apply on the bank's claim, and it prosecuted error and gave the bonds sued on in supersedeas. Bruns and the bank were opposing claimants to a particular fund, deposited in court under the order of interpleader. Neither had or asserted any claim against the other. No judgment or decree was rendered against the Franklin Bank in favor of Bruns in that case.

The court ordered its clerk to distribute a definite particular fund, of which the court had possession and control, and the Supreme Court simply affirmed that order. "At common law judgments did not bear interest nor would they do so in Ohio, in the absence of statutory provision on the subject." *Marietta Iron Works v. Lottimer*, 25 Ohio St. 627; *Neil v. Bank*, 50 Ohio St. 193, 33 N. E. 720. The statutory provisions in Ohio on the subject are contained in sections 3180 and 3181, Revised Statutes. Section 3180 prescribes the rate of interest to be computed on all judgments rendered on instruments of writing. Section 3181 provides: "And upon all judgments, decrees and orders of any judicial tribunal for the payment of money, arising out of a contract hereafter made or other transaction which hereafter occurs, the creditor shall be entitled to interest at rate of six per cent. per annum and no more." As above shown, there was no judgment, decree, or order against the Franklin Bank for the payment of money. Bruns was not a "creditor" of the bank, and did not claim to be. There was no privity of contract between any of the lienholders who were parties to the suit. The provision of the statute under which

execution may be stayed is found in section 6718, Revised Statutes, which provides that "no proceeding to reverse, vacate or modify a judgment or final order rendered," etc., shall operate to stay execution, unless the clerk of the court in which the record of such judgment or final order is made shall take a written undertaking to be executed on the part of plaintiff in error to the adverse party, with sufficient surety as follows: "When the judgment or final order sought to be reversed directs the payment of money, the written undertaking shall be in double the amount of the judgment or final order, to the effect that the plaintiff in error will pay the condemnation money and costs, if the judgment or final order be affirmed in whole or in part." Manifestly the condemnation money and costs referred to mean that which the plaintiff in error was directed to pay. The condemnation money and costs covered by the bond is only such as had been legally adjudged against the principal obligor on the bond in the original proceeding in which execution was stayed. The decree itself must bear interest before those giving the bond to stay it can be required to pay interest. In 22 Cyc. 1559, the proposition is stated that where a fund is in litigation, or the amount of a disputed claim is deposited in court, or subject to its order, interest is not recoverable thereon during the time it remains so deposited. The rule is stated in 2 Black on Judgments, (2d Ed.) § 983, viz.: "In respect to interest, a decree has the same force as a judgment when it contests with other liens or claims for money. But this refers only to a decree in personam binding all the property of the debtor, and rendered against the defendant without reference to the sale of particular property and the distribution of the fund arising therefrom." And this principle is approved in *National Bank of Augusta v. Heard*, 65 Ga. 189. In *Van Gordon v. Ormsby Bros. & Co.*, 60 Iowa, 510, 15 N. W. 306, the court say: "The money was paid into court to await the order of the court. It does not appear that the interveners acted otherwise than in good faith, and we do not think they should be made to pay interest as punishment simply because they failed to establish their right to the money." This rule was followed in *Anderson v. Wilkinson*, 18 Miss. (10 Smedes & M.) 601. The fund in this case might on the motion of Bruns or any lienholder have been invested under the order of the court.

For these reasons, we conclude that, where a specific fund is paid into court in compliance with its order of interpleader and various claimants litigate their rights to the fund between themselves, a decree distributing the fund is not a judgment, or decree, within the statutes of Ohio governing interest, and that an intervening claimant

who prosecutes error to that decree, in good faith, and gives a supersedeas bond to stay its execution, cannot be compelled to pay interest on the fund or any part of it.

It follows from these conclusions that the demurrer to the answer of the bank should have been overruled, and the judgments below are reversed. Judgments for plaintiffs in error.

Judgment reversed.

SPEAR, C. J., and DAVIS, SHAUCK, PRICE, and DONAHUE, JJ., concur.

(34 Oh. St. 51)

RAYMOND et al. v. BUTTS.

(Supreme Court of Ohio. March 28, 1911.)

(Syllabus by the Court.)

1. WILLS (§ 6*)—DEVISABLE ESTATE.

A contract executed and delivered by the owner of real estate and binding himself, his heirs and legal representatives, to convey the real estate to the second party upon his fulfillment of conditions named, and providing that, if the party of the second part shall die before completion of said agreement, then and in that case his estate shall have such equitable interest in the lands as the amount of his fulfillment is to the whole value of the land, but in no event less than \$3,000, confers upon the party of the second part a substantial interest which is enforceable in equity, and which is property which may be devised.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 5-10; Dec. Dig. § 6.*]

2. DESCENT AND DISTRIBUTION (§ 12*)—TITLE BY DEVISE—ANCESTRAL PROPERTY.

Where the party who has such equitable interest dies before complete performance of such contract on his part, leaving a will in which he devises such interest, together with other real estate which he owns in fee simple, upon condition that his devisees shall complete his said contract, and the other party to the contract consents to and ratifies the devise, and in the same instrument quitclaims and releases all of his right and interest to the devisees, the title invested in the latter is a title by way of devise and not of purchase, and will descend as ancestral property.

[Ed. Note.—For other cases, see Descent and Distribution, Cent. Dig. § 50; Dec. Dig. § 12.*]

Error to Circuit Court, Portage County.

Action by Sophronia Raymond against Charles Butts. On the death of plaintiff, her heirs and devisees were substituted. From the decree, both parties appeal. The decree was affirmed by the circuit court, and plaintiffs bring error. Reversed.

This action was originally instituted by Sophronia Raymond, now deceased, claiming to be the sole owner in fee simple by survivorship, and in actual possession thereof, under the last will and testament of her brother, Leonard L. Raymond, deceased, of a certain described tract of land, 138 acres, and also of a certain described tract of land, 33 acres; and alleging that the defendant, Charles Butts, claims to be the owner in fee

simple of the one undivided half of said lands, and praying that she may be adjudged to be the owner in fee simple of said lands freed from all claims of an estate or interest therein of the defendant, and for all proper relief. On the death of Sophronia Raymond, the present plaintiffs as her only heirs and devisees were substituted as plaintiffs. The defendant denied that plaintiff has any title in the 138-acre tract under the will of Leonard L. Raymond, deceased, and alleges that he is seised in fee simple as son and heir at law of H. H. Butts, deceased, of one undivided half of said tract and is entitled to the immediate possession thereof; that said H. H. Butts inherited said lands from his wife, Sophia (Raymond) Butts, who died without issue and intestate; that he is entitled to one undivided half of the 33-acre tract, subject to a life estate of Sophronia Raymond, the plaintiff, as provided in the will of Leonard L. Raymond, deceased, and he accordingly prays for partition of his said interest, and for all proper relief. Upon the hearing in the court of common pleas, a decree was entered, finding that defendant is the owner in fee simple of the one undivided half of the 138-acre tract, and that he has no interest in the 33-acre tract, and partition was ordered accordingly. Both parties appealed, and in the circuit court substantially the same decree was entered. The plaintiffs claim error in the decrees as to the 138-acre tract, and the defendant claims error in the decrees as to the 33-acre tract.

The following are the essential facts, as they appear in an agreed statement which is embodied in the bill of exceptions allowed by the court: Silas Raymond, on the 18th day of May, 1872, was the owner of the 138-acre tract of land described in the petition, and on that date sold the same to his son, Leonard, as evidenced by a written instrument executed as a conveyance; that is, the same was signed, sealed, witnessed, acknowledged, and delivered. This instrument contained the terms of an agreement by which Leonard was to pay to other children of Silas sums of money aggregating \$2,800 and was to support his father and mother during their lives and the life of either. This instrument also contained a clause, as follows: "And it is by said parties further agreed that, in case said Leonard shall die before the completion of said agreement above, then and in that case his estate shall have such equitable interest in said premises as the amount of his fulfillment is to the whole value of the place, but in no event to be less than \$3,000, which is not to be carved out of the general property until after the death of my said father and mother." The mother died first, and Leonard died December 27, 1880, leaving a will, which was duly probated, by which he gave his interest in these lands and the 33-acre tract to his

two sisters, Sophia and Sophronia, jointly during the life of both and then to the survivor and her heirs, as follows, to wit: "First. I bequeath all my right and interest in an agreement between Silas Raymond and myself (recorded August 31, 1872, Deed Volume 105, pages 457, 458, 459), also all my interest in land deeded to me by Mary Ann and Benjamin Waters (recorded February 18, 1878, Volume 120, page 318), all of the above to be conveyed to them, Sophia and Sophronia Raymond, their heirs and assigns, on condition that they hold it together jointly during their lives and in case of death of either the use of the above to revert to the survivor, her heirs or assigns (unless otherwise provided by the deceased)." A few months after the death of Leonard, on January 8, 1881, Silas, the father, and these two daughters, executed an instrument of writing, which recited the contract with Leonard and the will of Leonard devising his interest to his sisters, and these were ratified, and then the said Silas "on the above conditions and considerations granted and released unto said Sophia and Sophronia Raymond and their heirs and assigns all his right, title, and interest in and to said real and personal property." This instrument was also formally executed by signing and sealing in the presence of witnesses and was duly acknowledged and delivered. November 11, 1881, Silas died. In 1887 Sophia married one H. H. Butts, who had a son by a former marriage, and is the defendant in this action, and in 1906 Sophia died, leaving her sister, Sophronia, surviving. H. H. Butts died in 1907, and the defendant claims as his heir at law through his stepmother, Sophia (Raymond) Butts.

I. T. Siddall and S. F. Hanselman, for plaintiffs in error. R. S. Webb and R. J. Webb, for defendant in error.

DAVIS, J. (after stating the facts as above). [1] From the time that Silas Raymond entered into the agreement with his son, Leonard, in respect to the 138-acre tract in controversy here, the latter had a substantial equity in the land, an equity which grew in value with the lapse of time. By the express terms of the agreement, in case of the son's death before complete performance on his part, it was provided that the equitable interest of his estate in the premises should be in proportion as the amount of fulfillment by him is to the whole value of the land, but in no event to be less than \$3,000. This equitable interest, as between the parties to the agreement and their privies in estate and all parties having knowledge of the conditions of Leonard's possession, was such that so long as he continued to perform his contract Silas could not convey the legal title free from the equity, and

this interest of Leonard was clearly property which he could devise.

[2] At the time of Leonard's death, he had been in possession of the land and had faithfully performed the conditions on his part for a period of eight years and seven months. Meantime his mother had died, and, as the event proved, he needed only to have performed his agreement 10½ months longer, when he would have fully performed and would have been entitled to have his equity merged in the legal title. But this was not to be, and he met the situation with his last will and testament. He had acquired the 33-acre tract by deed and this tract, together with all his interest in the 138-acre tract under the agreement with his father, he devised and bequeathed to his two sisters, Sophia and Sophronia and their heirs and assigns, "on condition that they hold it together jointly during their lives and in case of death of either the use of the above to revert to the survivor, her heirs or assigns (unless otherwise provided by the deceased)." The clause in parenthesis merely gave to the devisee dying first a power of disposition by will, at least that is the only intelligible meaning which we have been able to give to it. Sophia died before Sophronia and without having exercised the power of appointment; so that under the will Sophronia and her heirs and assigns succeeded by survivorship to the ownership of the 33-acre tract and the equities of Leonard, the testator, in the 138-acre tract. It was not in the power of Silas, the father, to thwart or prevent the succession under the will except by refusal to accept the fulfillment of Leonard's contract by his devisees; but this he did not do. On the contrary, both he and the devisees consented to and ratified the conditions of the will in the contract of January 8, 1881; and the sisters could not take both under and against the will. That is to say, they could not take the 33 acres by devise and claim the 138 acres by purchase. Therefore the quitclaim by Silas in the last-mentioned contract was not a conveyance of the 138 acres upon a new and distinct consideration and so a deed of purchase, but was in fact and was intended to be a conveyance in subordination to the will of Leonard and to carry out its true intent and purpose. Our conclusion is that the defendant in error never acquired any interest whatever in either tract of land; and in accord with these views the judgment of the circuit court is reversed as to the 138 acres, affirmed as to the 33 acres, the cross-petition dismissed, and judgment is given for the plaintiffs in error.

Reversed.

SHAUCK, PRICE, JOHNSON, and DONAHUE, JJ., concur.

(34 Ohio St. 1)

LYTLE et al. v. BALDINGER et al.

(Supreme Court of Ohio. March 28, 1911.)

(Syllabus by the Court.)

1. FRAUDULENT CONVEYANCES (§ 263*)—ACTION TO SET ASIDE—PETITION.

A petition to set aside a fraudulent sale or transfer, made in violation of the provisions of section 6343, Revised Statutes, which does not aver that the person to whom the sale, conveyance, transfer, mortgage, or assignment is made knew at the time of the transaction of the fraudulent intent on the part of the debtor, does not state facts sufficient to constitute a cause of action.

[Ed. Note.—For other cases, see *Fraudulent Conveyances*, Cent. Dig. § 779; Dec. Dig. § 263.*]

2. FRAUDULENT CONVEYANCES (§ 51*)—LIFE INSURANCE POLICY—TRANSFER TO WIFE—"ASSIGNMENT OF PROPERTY IN FRAUD OF CREDITORS."

A transfer by an insolvent husband to his wife of a policy of insurance then in force on the life of the husband is not an assignment of property in fraud of creditors or to hinder or delay creditors within the contemplation of section 6343, Revised Statutes.

[Ed. Note.—For other cases, see *Fraudulent Conveyances*, Cent. Dig. § 117; Dec. Dig. § 51.*]

3. FRAUDULENT CONVEYANCES (§ 51*)—ASSIGNMENT OF LIFE INSURANCE POLICY—REMEDY OF CREDITOR.

In such case the only remedy of the creditor is found in the provisions of section 3628, Revised Statutes.

[Ed. Note.—For other cases, see *Fraudulent Conveyances*, Cent. Dig. §§ 114-117; Dec. Dig. § 51.*]

Error to Circuit Court, Cuyahoga County.

Action by Lytle and others against the Equitable Life Insurance Company and others. The Insurance Company paid into court the amount of certain insurance policies and was dismissed, and Emma C. Baldinger, administrator of the estate of the insured, was made a party defendant. Decree for plaintiffs as to part of the policies in issue, and plaintiffs and Emma C. Baldinger both appeal to the circuit court. Appeals were consolidated and petition was dismissed, and judgment rendered for defendants, and they bring error. Affirmed.

This action was brought in the court of common pleas by the persons now plaintiffs in error against the Equitable Life Insurance Company of Iowa, Emma C. Baldinger, and Frederick D. Baldinger, a minor. The object of the action was to have the court declare fraudulent as against creditors of A. F. Baldinger, deceased, certain assignments made by him of policies of life insurance issued on his life by defendant life insurance company and assigned by him to his wife, Emma C. Baldinger, and his minor son, Frederick D. Baldinger, and to secure the application of the proceeds of said policy to the payment of a debt due the plain-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

tiffs and to the debts of the other creditors of said Baldinger, deceased. The petition averred the indebtedness of A. F. Baldinger to Rebecca J. Price, which indebtedness was evidenced by a promissory note dated July 23, 1896, calling for \$3,000 with interest, and signed by A. F. Baldinger. It further averred the death of Rebecca J. Price and the terms of her will, by which the plaintiffs in error were her beneficiaries, and the assignment by her executor of this note to these plaintiffs in error as a distribution to them in kind of part of the estate of said Rebecca J. Price. It further avers the issuing of the policies to A. F. Baldinger, and that while he was still indebted upon this note, and no part thereof having been paid, he assigned said policies to Emma C. Baldinger and Frederick D. Baldinger, a minor, under the age of 14 years; that at the date of said assignments of said policies A. F. Baldinger was wholly insolvent, and had not sufficient property aside from these policies to pay and discharge his indebtedness, and at the date of his death said Baldinger had no property or estate whatever aside from said policies, and said assignment of said policies was wholly without consideration and in fraud of the rights of the plaintiffs and other creditors of said A. F. Baldinger, and prayed that said assignment of said policy may be held and decreed to be fraudulent and the same set aside and held for naught, and for such other and further relief to which they might be found to be entitled. The Equitable Life Insurance Company paid into court the sum of \$10,000, being the sum of the three policies issued by it on the life of A. F. Baldinger, and was dismissed from the action. Emma C. Baldinger was appointed administratrix of the estate of A. F. Baldinger and made a party defendant in her representative capacity.

Emma C. Baldinger filed a general demurrer to the plaintiffs' petition, which demurrer was overruled by the common pleas court, and she thereupon filed an answer, and also answered in her representative capacity as the administratrix of the estate of A. F. Baldinger. Upon the issues joined between the plaintiffs and Emma C. Baldinger, a decree was rendered by the common pleas court in favor of plaintiffs as to part of said policies and in favor of Emma C. Baldinger as to others. The plaintiffs and Emma C. Baldinger both appealed from this judgment of the common pleas court. The two appeals were consolidated in the circuit court, and that court sustained the general demurrer of Emma C. Baldinger to the plaintiffs' petition, and, the plaintiffs not desiring to amend or further plead, the petition was dismissed and judgment rendered against the plaintiffs for costs.

It was suggested upon oral argument of this cause that this transfer was made to Emma C. Baldinger, wife of A. F. Baldinger,

and now his widow, and that Frederick D. Baldinger was not one of the assignees, and that this petition should be considered the same as if his name did not appear therein.

Blandin, Rice & Ginn, Hidy, Klein & Harris, and Charles G. Reynolds, for plaintiffs in error. William Howell and T. J. Ross, for defendants in error.

DONAHUE, J. (after stating the facts as above). The general demurrer of Emma C. Baldinger to the plaintiffs' petition presents two questions:

(1) Is it necessary to aver in a petition filed for the purpose of setting aside a sale or transfer claimed to be in fraud of creditors that the person or persons to whom the sale, conveyance, transfer, mortgage, or assignment is made in violation of the provisions of section 6343, Revised Statutes, as amended in 1902, knew of the fraudulent intent on the part of the debtor or debtors?

(2) Do the provisions of sections 3628 and 3629, Revised Statutes of Ohio, permit a transfer to a wife of a policy of insurance then in force on the life of the husband, the husband at the time of making the transfer being insolvent?

[1] It would appear that section 6343, as amended May 12, 1902, is sufficient answer to the first proposition. The presumption is that every amendment of a statute is made to effect some purpose. That purpose may be either to add new provisions and conditions to the section as it then stands, or for the purpose of making plain the meaning and intent thereof. Whether this amendment changes the construction of the statute or simply makes its construction plain is of little importance, the result must be the same, and every person seeking to avail himself of the provisions of this section must by his pleading and proof bring himself within the provisions of this statute, including, as a matter of course, the amendment of May 12, 1902, which is as follows: "Provided, however, that the provisions of this section shall not apply unless the person or persons to whom such sale, conveyance, transfer, mortgage or assignment be made knew of such fraudulent intent on the part of such debtor or debtors." This provision of the section as it now stands would require an averment in the petition that the person making such purchase, or receiving such conveyance, transfer, mortgage, or assignment knew of such fraudulent intent on the part of such debtor or debtors at the time of the transaction complained of.

[2] It would also appear that section 3628 and section 3629, Revised Statutes, construed together sufficiently answer the second question presented by the demurrer. It would seem to be the policy of the law not only to permit, but to encourage, every husband to provide by insurance upon his life for the maintenance and support of his widow and

children after his death. At the same time the law protects his creditors to the extent of the funds actually diverted from his estate by reason of the procuring and keeping in effect such insurance. It would not appear that the creditor could be injured, delayed, or defrauded beyond the amount of money actually expended in the purchase of this insurance. A debtor is under no legal obligation to insure his life for the benefit of his creditors. All that the law requires of him is that the property and means of which he is possessed, saving and excepting certain property exempt by law from execution, shall be honestly applied to the payment of his debts, and he is not permitted to give away that which in justice belongs to his creditors. So that, when the law provides for the return to his estate of the money used in the purchase of this insurance, it gives to the creditor everything he is entitled to have, or could have reached by any process of law.

The same reasoning equally applies to the assignment to the wife of a policy then in force, for there is no provision requiring the debtor to keep that policy in force or to pay any further premiums thereon. The creditor cannot reach the policy by any process of law. It would only become available to his estate upon the death of the insured, then, of course, it would be applicable to the payment of his debts. But the possibilities of it ever becoming assets of his estate are so remote and so dependent entirely upon the will and the pleasure of the debtor, and not upon any legal obligation that he owes to his creditors to keep the insurance in force until his death, that the assignment of the same to his wife cannot be held to be an assignment in fraud of creditors, nor could such assignment in any way, manner, or form hinder or delay his creditors in the collection of their debt, for there is no process known to the law that could reach the proceeds of this policy until by the terms of the policy itself it becomes an absolute obligation on the part of the insurance company to pay. The proposition that the failure of the insured to keep this policy of insurance in force by the annual payment of dues would be in fraud of creditors, and hinder and delay creditors, is just as tenable as the proposition that they have been defrauded, hindered, and delayed by the assignment of the same to his wife.

[3] The statute under consideration is even broader than above stated, for it also provides that if any person, other than the husband, either effects or transfers insurance upon his life to a married woman, that such insurance cannot be reached either by the person effecting the insurance on his own life in her behalf, or transferring the same to her after it has been effected, nor can it be reached by his creditors. From these statutes it would clearly appear that the only relief the

creditor could have is that provided in section 3628, Revised Statutes of Ohio.

Judgment affirmed.

SPEAR, C. J., and DAVIS, SHAUCK, PRICE, and JOHNSON, JJ., concur.

(209 Mass. 79)

MULLEN v. BOSTON ELEVATED RY.

(Supreme Judicial Court of Massachusetts.
Suffolk. May 19, 1911.)

1. STREET RAILROADS (§ 117*)—COLLISION WITH PEDESTRIAN—CONTRIBUTORY NEGLIGENCE—JURY QUESTION.

Whether a 12 year old child, struck by a street car, was guilty of contributory negligence, *held*, under the evidence, a jury question.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 255-257; Dec. Dig. § 117.*]

2. STREET RAILROADS (§ 98*)—PEDESTRIANS—RIGHTS.

A pedestrian could assume that a motorman would use ordinary care to avoid striking her.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 204-208; Dec. Dig. § 98.*]

3. STREET RAILROADS (§ 117*)—COLLISION WITH PEDESTRIAN—NEGLIGENCE—JURY QUESTION.

Whether the motorman was negligent toward a pedestrian struck by a street car *held*, under the evidence, a jury question.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. § 253; Dec. Dig. § 117.*]

4. STREET RAILROADS (§ 85*)—OPERATION OF CARS—PUBLIC RIGHTS.

A street car has no exclusive right of way, being subject to the exigencies of public travel.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. § 193; Dec. Dig. § 85.*]

Exceptions from Superior Court, Suffolk County.

Action by Margaret Mullen against the Boston Elevated Railway. Verdict for plaintiff, and defendant brings exceptions. Exceptions overruled.

Jos. P. Walsh and Wm. Flaherty, for plaintiff. John E. Hannigan, for defendant.

BRALEY, J. [1] The evidence is irreconcilable. But the jury could have found, from the plaintiff's testimony, that she was walking on the crosswalk over the plaintiff's track, after having looked when at the curbstone and seen the car some distance away on the inward track, which appeared to be "slowing down," and a heavy team approaching from the opposite direction on the outward track. It was not, as matter of law, negligence for her to attempt to cross from one side of the street to the other. *Wood v. Boston Elev. Ry.*, 188 Mass. 161, 74 N. E. 298; *Silva v. Boston Elev. Ry.*, 183 Mass. 249, 66 N. E. 808; *Coleman v. Lowell, Lawrence & Haverhill St. Ry.*, 181 Mass. 591, 64 N. E. 402; *Creavin v. Newton St. Ry.*, 176 Mass. 529, 57 N. E. 994; *Driscoll v. West End St. Ry.*, 159 Mass. 142, 34 N. E.

171. [2] And the plaintiff had the right to assume that the motorman, and the driver of the team, would use reasonable care to avoid running her down. *Jedrey v. Boston & Northern St. Ry.*, 198 Mass. 232, 234, 84 N. E. 316; *Hennessey v. Taylor*, 189 Mass. 583, 586, 76 N. E. 224, 3 L. R. A. (N. S.) 345; *Finnick v. Boston & Northern St. Ry.*, 190 Mass. 382, 386, 77 N. E. 500; *Murphy v. Armstrong Trans. Co.*, 167 Mass. 199, 201, 45 N. E. 93. It further could have been found that the plaintiff would have passed ahead of the wagon, and over in safety, if the driver had not suddenly whipped up his horses just as she reached the inward track, and placed her in a dangerous position where she hesitated whether to go forward, or to turn back, and while in doubt she was struck by the car. The occurrence was not extraordinary, but merely an instance likely to arise in the concurrent use of our streets by different classes of travellers, where street cars also are operated. The plaintiff was twelve years of age, and it was for the jury to determine if when thus beset, she acted with reasonable prudence. *O'Brien v. Lexington & Boston St. Ry.*, 205 Mass. 182, 184, 91 N. E. 204. [3] The question of the defendant's negligence was also for the jury. [4] The view of the motorman was unobstructed, and the car was being operated, not with an exclusive right of way, but subject to the exigencies of public travel. *Eustis v. Boston Elevated Ry.*, 206 Mass. 143, 144, 91 N. E. 881, and cases cited.

Exceptions overruled.

(209 Mass. 53)

ANDERSON v. SMITH.

(Supreme Judicial Court of Massachusetts.
Suffolk. May 19, 1911.)

MASTER AND SERVANT (§ 182*) — FELLOW SERVANTS—PERSONS ENGAGED IN SUPERINTENDENCE—WHO ARE—"SUPERINTENDENT."

A teamster, who worked with a laborer, even though directing his work and exercising a sort of superintendence over him in obedience to the orders of the master's superintendent, is a fellow servant of the laborer, and not one acting as "superintendent" with the authority of the master, within Rev. Laws, c. 106, § 71.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 371; Dec. Dig. § 182.*

For other definitions, see Words and Phrases, vol. 7, p. 6792.]

Report from Superior Court, Suffolk County.

Action by Johan O. Anderson against J. N. Smith. There was a directed verdict for defendant, and, on report from the superior court, exceptions were overruled. The action is one for injuries received by plaintiff, who as defendant's servant, in company with others, was loading manure at defendant's dump; the defendant's superintendent hav-

ing directed Sullivan, a teamster, to take the defendant to the dump and load manure.

C. H. Johnson, for plaintiff. W. I. Badger, W. H. Hitchcock, and C. M. Pratt, for defendant.

HAMMOND, J. The first count of the declaration was waived and the case went to trial solely on the second.

The evidence tended to show that while the plaintiff, being in the employ of the defendant, was attempting to hitch a leading horse to a cart, and was in the act of coupling the whiffletree to the loop underneath the pole by means of a hook and chain, one Sullivan, who as the defendant's servant was handling the reins, struck the horse with his whip, causing the horse to jump, by reason whereof the plaintiff's right index finger was caught between the hook and the loop or ring and was crushed.

The question is whether the evidence would warrant a finding that for this act of Sullivan the defendant is answerable to the plaintiff. It is very plain he is not. Even if, without deciding, it be assumed in favor of the plaintiff that, in directing the plaintiff to hitch the horse to the pole, Sullivan was exercising a kind of superintendence, still it is perfectly obvious that he was not a person "whose sole or principal duty was that of superintendence." See *O'Neil v. O'Leary*, 164 Mass. 387, 41 N. E. 662. Nor can it be said that he was a person who "in the absence of such superintendent was acting as superintendent with the authority or consent" of the defendant. *Carney v. A. B. Clark Co.*, 207 Mass. 200, 93 N. E. 647. Dodd was the regular superintendent and was acting as such. He was not absent within the meaning of Rev. Laws, c. 106, § 71, cl. 2. If there was any negligence it was that of Sullivan, the plaintiff's fellow servant, for which neither at common law nor under the statute was the defendant answerable. *O'Connor v. Roberts*, 120 Mass. 227; *Carney v. A. B. Clark Co.*, ubi supra.

Exceptions overruled.

(209 Mass. 105)

WORCESTER COLOR CO. v. HENRY WOOD'S SONS CO.

(Supreme Judicial Court of Massachusetts.
Norfolk. May 19, 1911.)

1. ACCORD AND SATISFACTION (§ 27*)—CHECK IN FULL—TENDER AND SATISFACTION—QUESTION FOR JURY.

Whether a buyer, at the time of sending a check on which was written "in full to date," and whether the seller, on receiving and depositing the check, understood, or ought to have understood, as reasonable men, that the check was in accord and satisfaction of all outstanding claims between them, or whether the seller,

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep't Indexes

on receiving the check, had a right to believe that it was sent in payment of a reduced bill for specified goods amounting to the exact amount of the check, *held* for the jury.

[Ed. Note.—For other cases, see *Accord and Satisfaction*, Dec. Dig. § 27.*]

2. ACCORD AND SATISFACTION (§ 11*)—ACCEPTANCE AND COLLECTION OF CHECK PROFFERED IN FULL PAYMENT.

The acceptance and collection of a check, proffered on condition that it is in full settlement of all unliquidated claims, though accompanied by protestations that it is not so received, bars any attempt to collect the balance, and constitutes an accord and satisfaction.

[Ed. Note.—For other cases, see *Accord and Satisfaction*, Cent. Dig. §§ 75-83; Dec. Dig. § 11.*]

3. ACCORD AND SATISFACTION (§ 11*)—CHECKS—ERASURE—EFFECT.

Where plaintiff received defendant's check, on which was written the words "in full to date," plaintiff's erasure of such words before depositing the check was unauthorized, and did not affect the question whether its proffer and acceptance constituted an accord and satisfaction.

[Ed. Note.—For other cases, see *Accord and Satisfaction*, Cent. Dig. §§ 75-83; Dec. Dig. § 11.*]

4. ACCORD AND SATISFACTION (§ 27*)—RECEIPT—"IN FULL TO DATE"—CHECKS—QUESTIONS FOR JURY.

The acceptance and deposit of a check, on which is written the words "in full to date," or an equivalent phrase, does not constitute an accord and satisfaction of a controverted claim as a matter of law.

[Ed. Note.—For other cases, see *Accord and Satisfaction*, Cent. Dig. § 83; Dec. Dig. § 27.*]

For other definitions, see *Words and Phrases*, vol. 4, pp. 8473, 8474.]

5. ABATEMENT AND REVIVAL (§ 39*)—DISSOLUTION—"SUITS"—CONTINUATION—"PENDING."

St. 1907, c. 290, effective April 13, 1907, relating to the dissolution of certain corporations, provided (section 2) that nothing in the act should affect any suit pending by or against any corporation mentioned in the first section thereof. *Held*, that the word "suit," as used in such section, included every proceeding in a court of justice by which a person might pursue a remedy afforded by law, including an action at law, and that the word "pending" was descriptive of the action from the date of the writ, so that, the writ in a suit by a corporation having been dated April 9, 1907, the suit was pending, and was not abated by the dissolution of the corporation under such act, notwithstanding the reference in section 1, to St. 1903, c. 437, §§ 52, 53, continuing the corporate existence of dissolved corporations, for three years only, to prosecute and defend suits.

[Ed. Note.—For other cases, see *Abatement and Revival*, Cent. Dig. §§ 194-204; Dec. Dig. § 39.*]

For other definitions, see *Words and Phrases*, vol. 6, pp. 6276-6279; vol. 8, p. 7750; vol. 7, pp. 6769-6778; vol. 8, p. 7809.]

Exceptions from Superior Court, Norfolk County.

Action by the Worcester Color Company against the Henry Wood's Sons Company. Judgment for plaintiff, and defendant brings exceptions. Overruled.

Spaulding & Lewis and P. M. Lewis, for plaintiff. H. S. Davis, for defendant.

RUGG, J. This is an action of contract to recover for two bills of merchandise. There is no controversy between the parties that the goods were sold and delivered and the prices charged were fair. The only defense is that there has been an accord and satisfaction. The course of dealings between the parties was this: On March 19, 1906, the defendant ordered of the plaintiff 6 barrels of Milori blue, and on March 21, 1906, 228 pounds of Chinese blue, which were shipped on these days respectively. On March 28, 1906, a written contract was made by which certain machinery and other chattels were sold by the plaintiff to the defendant for \$5,000 to be paid in installments. On the same date but by a separate transaction the defendant agreed to buy of the plaintiff a lot of pulp blue. The pulp blue was invoiced and shipped on April 16, 1906, in three different items, the prices charged aggregating \$532.07. Thereafter the defendant claimed that the shipments of March 19th and 21st were included in the contract of March 28th, and that the \$5,000 therein stipulated was to pay for the earlier sales. It further claimed that the pulp blue was larger in quantity and poorer in quality than had been represented, while the plaintiff asserted that it corresponded with the representation both as to quality and quantity. There were communications between representatives of the plaintiff and defendant touching these matters. Ultimately the defendant paid the \$5,000 called for by the written contract of March 28, 1906, but did not pay for the invoiced goods. On December 24, 1906, the plaintiff sent the defendant a corrected bill for the pulp blue, reducing it by \$210.76, and making the total \$321.31, together with a letter explaining that the reduction was made in accordance with a letter of May 1, 1906, from plaintiff to defendant, in which it was stated that the reduction in price was made "with the understanding that all other payments for material will be paid for according to invoices and contract." On January 11, 1907, the plaintiff wrote the defendant again asking for a remittance. The defendant made no reply to either of these communications until March 13, 1907, when it returned the corrected bill for the pulp blue invoice of April 16, 1906, showing the amount due to be \$321.31, together with a check for that sum, on which was written "in full to date" and a letter saying, "Enclosed please find check for your account in full \$321.31." The letter did not refer specifically to the invoices of March 19 and 21, 1906. Thereupon the president of the plaintiff after consultation with his attorney drew a pen through the words upon the check, "in full to date," collected it in ordinary course and sent the receipted bill

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

to the defendant with a letter in which he said that the check was in settlement of the April 16, 1906, invoice and was not in full for all claims and asking remittance for the items here in litigation.

[1] In this posture of the evidence, the presiding justice instructed the jury as matter of law that the sales of March 19 and 21, 1906, being the subject of this action, were not included in the written agreement of sale of March 28, 1906. This was plainly right, and it is not now contended otherwise by the defendant. He further ruled in substance that the defendant was honest in its claim that the goods here sued for were included in the written contract of March 28th. Unless this was assented to by both parties, it was too favorable to the defendant, for whether the dispute was genuine or not, especially in view of the correct ruling of law that they were not so included, was a question of fact, which was for the jury unless by agreement there was no issue about it. He also left it to the jury to say whether there had been an accord and satisfaction. He ruled that it was a question of fact to be decided upon the testimony, correspondence, and all the circumstances, whether the defendant at the time the check was sent and the plaintiff at the time it was received and deposited understood or ought to have understood as reasonable men that it was an accord and satisfaction of all outstanding claims between them, and that if the defendant made known to the plaintiff that the payment was on the condition that it should be received in full satisfaction of both its claims against the defendant, or if the plaintiff ought reasonably to have understood that this check was sent to be used only upon that condition, the plaintiff having accepted it, could not recover. The language of the letter of the defendant which transmitted the check and the words written upon the check in the light of all the transactions between the parties was not so plain and unequivocal as to warrant a ruling of law that any rational person ought to have understood that they meant an offer of the check upon condition that if accepted it would be in full settlement of all disputed claims. There had been two subjects of controversy between the parties: One was whether the invoices of March 19th and 21st were included in the written contract of March 28th for an entire price. About this the parties were wholly at variance, and there had been no suggestion of compromise, each having endeavored by correspondence to convince the other of its error. This disagreement was about the construction of the terms of a written contract and was a question of law. The other controversy related to the price which should be charged for some pulp blue. This controversy did not relate to liability, for the defendant admitted its liability, but to the amount for which it

was liable and was wholly a question of fact. The defendant asserted its readiness to pay this account when a corrected bill was sent to it. After such a bill had been sent, the defendant returned it to the plaintiff with the check which was for the precise amount of this bill, together with the letter, which did not refer in terms to any other matter than the bill. There is much to be said in support of the contention that the fair inference from the use of the words "for your account in full" in the defendant's letter and "in full to date" on the check, read in the light of the previous relations of the parties and of the fact that statement for the pulp blue alone was inclosed referred only to the pulp blue account. It was at least susceptible of this construction.

[2, 3] But it is strongly urged that the action of the president of the plaintiff and his letter acknowledging the check show clearly that he understood it to be tendered by the defendant upon condition that it was in full satisfaction of all outstanding claims, and that by acceptance and collection of it the plaintiff became bound to the condition upon which it was offered. The proposition that the acceptance and collection of a check, proffered upon condition that it is in full settlement of an unliquidated claim, even though accompanied by protestations that it is not so received, bars any attempt to collect the balance, is supported by the great weight of authority. See *Seeds, Hay & Grain Co. v. Conger*, 83 Ohio, 169, 93 N. E. 892, and cases collected in 1 Enc. L. & P. 629 et seq. But see, also, 17 Harv. L. Rev. 459-469, and *Day v. McLea*, 22 Q. B. D. 610. The letter and testimony of the plaintiff's manager does not go so far as to amount to an admission as matter of law that he came within this principle. It may be assumed that his erasure of the words "in full to date" from the check was unauthorized and did not affect the rights of the defendant. *Hull v. Johnson*, 22 R. I. 66, 46 Atl. 182; *Gribble v. Raymond Van Praag Supply Co.*, 124 App. Div. 829, 109 N. Y. Supp. 242; *Hussey v. Crass* (Tenn. Ch.) 53 S. W. 986. His words and actions are capable of the construction that he understood that the check was in full only of the theretofore disputed pulp blue account, inasmuch as it was for the exact amount of the bill for those goods with which alone it was inclosed, and that he was cautiously guarding against any possible misconception which might be attached to the situation later.

[4] It is not every use of the words "in full to date" or equivalent phrase which constitutes an accord and satisfaction in connection with the payment of a controverted claim. Many cases have arisen where the conditions have been such as make it a question of fact whether there has been an accord and satisfaction, even though these words have been used where a payment has

been made. This case falls within that class.¹

It is rarely that a court can rule as matter of law that a burden of proof, depending upon inferences from circumstances and oral testimony has been made out. Usually a question of fact is presented. Here the defendant was bound to make out its defense of accord and satisfaction, and it cannot be said that the jury had no right to find that the president of the plaintiff, when he received the defendant's check and letter, understood that it was sent for the pulp blue bill, which accompanied it and which was much smaller than at first claimed. In the opinion of a majority of the court the defendant's requests for instructions, so far as not given in substance, were rightly refused, and the charge was sufficiently favorable to it upon this branch of the case.

[5] After the verdict which was returned on January 18, 1910, and after the filing of the bill of exceptions, but before it was allowed, the defendant filed a motion to dismiss the action on the ground that the plaintiff corporation was dissolved by St. 1907, c. 290, which took effect on April 13, 1907. Section 2 of this act provided that "nothing in this act shall be construed to affect any suit now pending by or against any corporation mentioned in the first section of this act." "Suit" is used in this statute as a comprehensive word "to apply to every proceeding in a court of justice by which a person pursues that remedy which the law affords" and includes an action at law. *Kohl v. U. S.*, 91 U. S. 367-375, 23 L. Ed. 449. See *Boston v. Turner*, 201 Mass. 190-196, 87 N. E. 634. This writ was dated on April 9, 1907, and this action was therefore commenced before the statute went into effect. It was pending within the meaning of that word in section 2. Although in some connections "pending" is not properly descriptive of an action until it is entered in court (*Com. v. Churchill*, 5 Mass. 174, 180; *Federhen v. Smith*, 3 Allen, 119), commonly an action is pending from the date of the writ. The effect of the language quoted from section 2 was to keep alive any suit then pending, notwithstanding the reference in section 1 to St. 1903, c. 437, §§ 52, 53, which continues the corporate existence of dissolved corporations for three years only (*inter alia*) for the purpose of prosecuting and defending suits. Hence

Thornton v. Marginal Freight Ry., 123 Mass. 32, does not govern. *Pomeroy's Lessee v. Bank*, 1 Wall. 23, 17 L. Ed. 500; *Taylor v. Bowker*, 111 U. S. 110-116, 4 Sup. Ct. 397, 28 L. Ed. 368.

Exceptions overruled.

(209 Mass. 186)

ATTORNEY GENERAL v. STONE

(Supreme Judicial Court of Massachusetts.
Suffolk. May 19, 1911.)

1. TAXATION (§ 861*)—SUCCESSION TAX LAW—RETROSPECTIVE OPERATION.

St. 1902, c. 473, regulating assessment of taxes on collateral legacies and successions as to estates limited after preceding estate, operated retrospectively as well as prospectively.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. § 1676; Dec. Dig. § 861.*]

2. TAXATION (§ 856*)—SUCCESSION TAX—NATURE.

The tax imposed upon collateral legacies and successions, limited as to estates over after a preceding estate, provision for assessment of which is made by St. 1902, c. 473, is an excise tax, imposed not only upon the right of the owner of property to transmit it after his death, but also upon the privilege of his beneficiaries to succeed to the property thus dealt with.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. § 1673; Dec. Dig. § 856.*]

3. CONSTITUTIONAL LAW (§ 229*)—EQUAL PROTECTION—SUCCESSION TAX LAW.

St. 1902, c. 473, providing that collateral inheritance tax shall not be assessed, as to estates limited over after a preceding estate, until right of possession accrues, is not unconstitutional, as a deprivation of equal protection of the law, though the method of assessment is changed over the former method.

[Ed. Note.—For other cases, see *Constitutional Law*, Cent. Dig. § 685; Dec. Dig. § 229.*]

4. CONSTITUTIONAL LAW (§ 100*)—TAXATION (§ 859*)—SUCCESSION TAX LAW—VALIDITY.

Nor is the statute invalid, as impairing vested rights, as to testamentary dispositions made before its enactment, nor because it changes the time for assessing and paying the tax, nor because a personal liability for the tax is imposed.

[Ed. Note.—For other cases, see *Constitutional Law*, Cent. Dig. § 206; Dec. Dig. § 100.* *Taxation*, Cent. Dig. § 1674; Dec. Dig. § 859.*]

5. TAXATION (§ 891½*)—SUCCESSION TAXES—LIABILITY.

The commonwealth, not being a party to an administrator's accounts, is not precluded from enforcing payment of the succession tax, provision for assessment of which is made by St. 1902, c. 473, by action of the probate court on such accounts.

[Ed. Note.—For other cases, see *Taxation*, Dec. Dig. § 891½.*]

6. TAXATION (§ 860*)—SUCCESSION TAX LAW—SCOPE.

Under St. 1909, c. 527, § 10, making the provision, by sections 2 and 4, that liability for succession tax shall accrue one year after receipt of the property, applicable where the tax remains unpaid when the act was passed, such provision extends to taxes, provision for the assessment of which is made by St. 1902, c. 473, as well as to those provided for by St. 1907, c. 563.

[Ed. Note.—For other cases, see *Taxation*, Dec. Dig. § 860.*]

¹ *Laroe v. Sugar Loaf Dairy Co.*, 180 N. Y. 367, 73 N. E. 61; *Dames Vacuum Brake Co. v. Prosser*, 157 N. Y. 289-299, 51 N. E. 986; *Krauser v. McCurdy*, 174 Pa. 174, 34 Atl. 518; *Mortlock v. Williams*, 76 Mich. 568, 43 N. W. 592; *Rosenfield v. Fortier*, 94 Mich. 29-34, 53 N. W. 930, 54 N. W. 640; *Louisville, New Albany & Chicago Ry. Co. v. Helm*, 22 Ky. Law Rep. 964, 59 S. W. 323, 109 Ky. 388; *Rapp v. Giddings*, 4 S. Dak. 492, 57 N. W. 237; *McKay v. Myers*, 168 Mass. 312, 47 N. E. 98; *Nathan v. Ogdens*, 93 L. T. N. S. 553, s. c. 94 L. T. N. S. 127.

Case Reserved from Supreme Judicial Court, Suffolk County.

Proceeding by the Attorney General against Ralph Edgarton Stone to enforce a succession tax on reservation. Decree for the Attorney General.

J. M. Swift, Atty. Gen., and F. T. Field, Asst. Atty. Gen. S. R. Wrightington, for respondent.

SHELDON, J. E. F. Stone died in 1893. By his will he bequeathed the residue of his estate to a trustee, and provided that the income thereof should be expended for the education and support of some of his brother's children, and that in 1904, in the events that have happened, the residue itself should be divided equally among that brother's children. The respondent, being one of those children, received on January 1, 1904, into his actual possession from the trustee property to the amount of \$3,750, and on April 12, 1904, to the further amount of more than \$11,000. The Attorney General claims that the respondent is liable for a tax of five per cent. on these amounts with interest from the respective dates stated, under the provisions of St. 1902, c. 473. The respondent denies his liability on the grounds, first, that the statute is, as applied to this case, unconstitutional; and secondly, that recovery against him is barred by reason of the fact that the probate court has allowed the accounts of the administrator of the testator's estate and of the trustee under the will without having required payment of the succession tax.

[1] The case comes within the terms of the statute. That statute reads as follows: "In all cases where there has been or shall be a devise, descent or bequest to collateral relatives or strangers to the blood, liable to collateral inheritance tax, to take effect in possession or come into actual enjoyment after the expiration of one or more life estates or a term of years, the tax on such property shall not be payable nor interest begin to run thereon until the person or persons entitled thereto shall come into actual possession of such property, and the tax thereon shall be assessed upon the value of the property at the time when the right of possession accrues to the person entitled thereto as aforesaid, and such person or persons shall pay the tax upon coming into possession of such property. The executor or administrator of the decedent's estate may settle his account in the probate court without being liable for said tax: Provided, that such person or persons may pay the tax at any time prior to their coming into possession, and in such cases the tax shall be assessed on the value of the estate at the time of the payment of the tax, after deducting the value of the life estate or estates for years; and provided, further, that the tax on real estate shall remain a lien on the real estate on which the same is chargeable until it is paid." St. 1902, c. 473,

§ 1. This was not affected by St. 1908, c. 276, for the second section of that act provided that it should not apply to the estate of any person deceased before its passage. But the act of 1902 did apply to such estates; its operation was retrospective as well as prospective. *Stevens v. Bradford*, 185 Mass. 439, 70 N. E. 425. The bequests for the benefit of the brother's children were liable to a tax under St. 1891, c. 425; and that tax has not been paid. We come therefore to the question of the constitutionality of the act of 1902.

[2] The commonwealth was entitled upon the death of the testator to receive a tax upon the bequests to these children, to be assessed upon their value at that time, and to be paid by the executor, administrator or trustee within two years from his giving bond. By the statute now before us, it was to be assessed upon the value of the property at the time when the right of possession accrued to the beneficiary, and was to be paid by him upon coming into possession. In this case, by reason of an increase in the value of the property, this results in a considerable increase of the amount of the tax. Three changes were made by the statute: The time for the payment of the tax was extended for some years, and the date from which interest would run was correspondingly postponed; the tax was assessed upon a valuation made at a later time, whereby it has been increased; and the liability for its payment was put directly upon the respondent instead of resting upon the administrator.

Certainly the first of these changes was not beyond the power of the Legislature. It was not at all to the detriment, but for the advantage, of the taxpayer. It could not in any event increase the charge upon his property; it might materially diminish the amount of interest to be paid, and so lessen the burden put upon him.

The second change seems to have had a double purpose. It was designed to do away with the injustice which under the existing statutes might be done to a tenant for life whose interest was then not taxable, as was pointed out in *Stevens v. Bradford*, 185 Mass. 439, 441, 70 N. E. 425. It aimed also to do more exact justice both to the commonwealth and to taxable beneficiaries in remainder, by taxing them upon the real value of what they should receive rather than upon a value fixed by estimation which must be determined sometimes many years before their receipt of the property and which could but rarely accord exactly with the real value of what afterwards should come to them, which might sometimes so far exceed that real value as to subject them to an onerous and disproportionate burden, and in other cases might be materially less than that value, and so afford them a partial exemption, all of which might result in such an unjust discrimination as was condemned in *Succession of Pritchard*, 118 La. 883, 886, 43 South. 537. The statute substituted a valuation by the same uniform

standard, the real value when the property came to the beneficiary, for an uncertain valuation to be made in advance of that time. This was within the language of *Parsons, C. J.*, in *Boston & Maine R. R. v. State*, 75 N. H. 513, 517, 77 Atl. 996, that in order to tax all property equally it must be valued by the same standard. Certainty was substituted for uncertainty, just as has been done by this court in the assessment of damages for the taking of land by eminent domain, where juries are told to consider what has been actually done after the taking instead of speculating upon what was likely to be done. *Buell v. Worcester*, 119 Mass. 372; *Woodbury v. Beverly*, 153 Mass. 245, 26 N. E. 851; *Butchers' Slaughtering & Melting Association v. Com.*, 163 Mass. 386, 390, 40 N. E. 176; *Manson v. Boston*, 163 Mass. 479, 490, 40 N. E. 850; *Como v. Worcester*, 177 Mass. 543, 59 N. E. 444. Such an alteration, designed and adapted to bring about uniformity of taxation by assessing the inheritance of each individual according to its value when he receives it, is not of itself beyond the power of the Legislature in such a case as is now presented.

[3] This is an excise tax, imposed not only upon the right of the owner of property to transmit it after his death, but also upon the privilege of his beneficiaries to succeed to the property thus dealt with. *Minot v. Winthrop*, 162 Mass. 113, 124, 38 N. E. 512, 26 L. R. A. 259; *Crocker v. Shaw*, 174 Mass. 266, 267, 54 N. E. 549. The privilege is not fully exercised until the property shall have come into the possession of the beneficiary. This rule underlies the reasoning of *Minot v. Treasurer & Receiver General*, 207 Mass. 588, 93 N. E. 973. And see the cases there cited. Until the full exercise of such privilege and while as yet no tax has been assessed and paid thereon, we see no reason why, by a general rule applicable to all such cases, any pending liability to taxation may not be regulated so as to subject it to a just and uniform method of assessment, even though some change may thereby be made from the method previously adopted. This involves no infringement or impairment of vested rights; it causes no unjust discrimination by substituting a just and equal assessment based upon actual values for the necessarily uncertain and unequal determination by the opinions of appraisers, however expert, of future and contingent values. [4] It does not deny to the respondent the equal protection of the law; it applies the same rule to him as to all other persons in the same situation, and such cases as *James v. American Surety Co.*, 133 Ky. 313, 319, 320, 117 S. W. 411, have no bearing. We cannot regard the statute as unconstitutional by reason of this change.

Nor is it unconstitutional because it applied only to cases in which a succession tax remained unpaid. This is governed in principle by *Minot v. Treasurer & Receiver General*, 207 Mass. 588, 93 N. E. 973, in which

a statute applying only to powers of appointment "derived from any disposition of property made prior to September 1, 1907," was held to be constitutional.

By the third change, a personal liability for the tax is imposed upon the respondent. But this puts no greater burden upon him. Formerly the tax would have been paid by the administrator, and the respondent would have received so much less. By the new statute, he receives the full amount bequeathed to him, and must himself pay the tax. He is required to pay into the public treasury only the additional amount which by the statute he receives directly from the trustee and indirectly from the administrator. He is not harmed by this. Moreover, he is merely subjected to the payment of an excise tax upon the privilege of receiving property bequeathed to him, and is required to pay it only when he is allowed by our laws to have the actual enjoyment of this privilege.

We may add that the constitutionality of this statute, though not in terms passed upon, was referred to by the Attorney General in argument and was assumed by the court in *Stevens v. Bradford*, 185 Mass. 439, 70 N. E. 425. And see to the same general effect *Momt v. Kelly*, 218 U. S. 400, 31 Sup. Ct. 79, 54 L. Ed. 1086; *Oahen v. Brewster*, 203 U. S. 543, 27 Sup. Ct. 174, 51 L. Ed. 310; *Orr v. Gilman*, 183 U. S. 278, 22 Sup. Ct. 213, 46 L. Ed. 196; *Wright v. Blakeslee*, 101 U. S. 174, 25 L. Ed. 1048; *In re Howard's Estate*, 80 Vt. 489, 68 Atl. 513; *Short's Estate*, 16 Pa. 63; *Ferry v. Campbell*, 110 Iowa, 290, 81 N. W. 604, 50 L. R. A. 92; *Gelsthorpe v. Furnell*, 20 Mont. 290, 51 Pac. 267, 39 L. R. A. 170; *Succession of Stauffer*, 119 Ia. 66, 43 South. 992.

[5] The respondent's liability could not be affected or destroyed by the action of the probate court upon the accounts of the administrator or of the trustee. In *re Lander's Estate*, 6 Cal. App. 744, 93 Pac. 202. That action could not operate collaterally to bar the remedy now sought for. Neither the second nor the final account of the trustee was allowed until after the statute before us had taken effect. If the administrator did not comply with the statute in force when he filed his final account, this failure merely left the succession tax upon the residue of the estate unpaid, and so brought it within the operation of the statute of 1902. The commonwealth was not a party to any of these accounts, nor was it made so by the publication of notice. It could not have been made a party without its own consent or in the manner provided by St. 1891, c. 425, § 18, which was then in force. That statute was not complied with; and the decrees of the probate court, whether or not absolutely void, were at least not binding on the commonwealth. *Bartlett v. Slater*, 182 Mass. 208, 65 N. E. 73; *Montgomery v. Gilbertson*, 134 Iowa, 291, 111 N. W. 964, 10

L. R. A. (N. S.) 986; *Lacy v. State Treasurer* (Iowa) 121 N. W. 179.

The New York decisions relied on by the respondent have not commanded assent in this court. Some of them are referred to in *Minot v. Treasurer & Receiver General*, 207 Mass. 588, 593, 93 N. E. 973. The California cases cited in his behalf turned upon the language of the Constitution of that state.

We have examined all the decisions referred to by the counsel for the respondent and have considered all the suggestions made for him in argument; but we entertain no doubt of the conclusions which we have reached.

[6] He contends further that his liability accrues, not from the dates when he received the property, but only from one year after those dates. This is under the provisions of St. 1909, c. 527, §§ 2, 4, which by section 10 are made applicable "to all cases in which the tax remains unpaid at the date" of the passage of that act. The Attorney General argues that this refers only to the taxes imposed by St. 1907, c. 563, and not to the tax imposed by St. 1902, c. 473. But this is too narrow a construction of the later act. It is true that most of its sections are merely amendments of the statute of 1907, and refer only to the taxes imposed by that act. But the statutes of 1907 and 1909 were designed to deal with the whole subject of the taxation of successions. In our opinion, the language of section 2 of the statute of 1909, as extended by section 10 of the same act, should receive the general application which its words naturally import. It follows that the respondent's liability should be taken to accrue and interest must be computed only after the expiration of one year from the times of his acquiring possession of the property bequeathed to him, that is, from January 1st and April 12th respectively, of the year 1905.

The Attorney General is entitled to a decree for the payment by the respondent of the amounts claimed in the information, with interest as above stated.

So ordered.

(209 Mass. 81)

**D'ALMEIDA v. BOSTON & M. R. R.
SAME v. BOOTT MILLS.**

(Supreme Judicial Court of Massachusetts.
Middlesex. May 19, 1911.)

1. MASTER AND SERVANT (§ 106*)—INJURIES TO SERVANT—LIABILITY OF MASTER—DEFECTIVE APPLIANCES.

An employer, having the sole control of the unloading on its own tracks of coal cars consigned to it and left on a side track by the railroad company, uses the cars in its business, and they are a part of its works; and where it provides an unsuitable car, or a car the defects of which would have been discoverable by reasonable diligence, its duty to an employé, killed in consequence of a defective car, has not been

discharged at common law, or under St. 1909 c. 514, § 127, defining the liability of employers to employes for defects in the condition of the ways, works, or machinery used in the business.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 193-198; Dec. Dig. § 106.*]

2. MASTER AND SERVANT (§ 286*)—INJURY TO SERVANT—NEGLIGENCE—QUESTIONS FOR JURY.

Whether the foreman of an employer, supervising the unloading of coal cars on the employer's own track, left on a side track by a railroad company, was guilty of actionable negligence in using defective cars, and so liable for the death of an employé, held under the evidence for the jury.

[Ed. Note.—For other cases, see *Master and Servant*, Dec. Dig. § 286.*]

3. MASTER AND SERVANT (§ 289*)—INJURY TO SERVANT—CONTRIBUTORY NEGLIGENCE—QUESTIONS FOR JURY.

Whether an employé, killed while assisting in unloading coal cars for his employer, was guilty of contributory negligence, held under the evidence for the jury.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 1089-1132; Dec. Dig. § 289.*]

4. DEATH (§ 83*)—ACTION—PERSONS LIABLE—JOINT TORT-FEASORS.

A railroad company, delivering to the mills of an owner defective cars loaded with coal for unloading by the owner, may be liable at common law and under St. 1906, c. 463, pt. 1, § 63, imposing a penalty on railroad corporations for loss of life through negligence, concurrently with the owner for their joint negligence, causing the death of an employé of the owner while unloading cars; and where the proximate cause of the death was a defective car, the railroad or the owner or both could be sued.

[Ed. Note.—For other cases, see *Death*, Cent. Dig. § 49; Dec. Dig. § 83.*]

5. RAILROADS (§ 275*)—INJURIES TO ONE UNLOADING DEFECTIVE CAR—LIABILITY.

A railroad company, selecting, loading, and forwarding cars to a consignee, with knowledge that the employes of the consignee will unload the same, must furnish and deliver a car not defective; and where it delivered a car containing defects not incapable of discovery by inspection of its employes charged with that duty, it is liable for the death of an employé of the consignee caused by such defects while unloading, since in the exercise of reasonable care it must have anticipated that injurious results will follow from such defects.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 873-877; Dec. Dig. § 275.*]

Exceptions from Superior Court, Middlesex County; Jabez Fox, Judge.

Actions by Jayme M. D'Almeida, administrator, against the Boston & Maine Railroad and against the Boott Mills, in tort, to recover for the death of the intestate, killed by the overturning of a dump car belonging to the railroad, but in use under control of the Boott Mills. There was a verdict for plaintiff in each action, and defendants bring exceptions. Overruled.

F. W. & S. E. Qua, for plaintiff. Trull & Wier, for defendant Boston & M. R. R. F. E. Dunbar, J. J. Rogers, and A. C. Spalding, for defendant Boott Mills.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. D'g. Key No. Series & Rep'r indexes

BRADLEY, J. The plaintiff's intestate, while working for the mills as a brakeman in the management of a dump car loaded with coal, suffered injuries by the sudden and premature overturning of the car when in transit, from which after a short period of conscious suffering he died. It is conceded that the car was defective and unsafe, and the questions are whether there was evidence of negligence on the part of the respective defendants, or of his due care.

[1] We first consider the exceptions of the mills. The railroad owned the car, which with other cars filled with coal consigned to the mills had been left on a side track near the premises, and from there they were drawn by horses over a spur track into the defendant's yard, and unloaded at the coal pocket. The work of moving and unloading was under the sole control of the mills, whose employes then returned the cars to the railroad. It also owned, and maintained that part of the spur track where the accident happened. The defendant manifestly was using the car for the purposes of its own business, and it formed part of its works as if it had been constructed or hired for the purpose. *Foster v. New York, New Haven & Hartford Railroad*, 187 Mass. 21, 72 N. E. 331; *McNamara v. Boston & Maine Railroad*, 202 Mass. 491, 89 N. E. 131. If the defendant provided an unsuitable car, or a car the defects in which could have been discovered by reasonable diligence, its duty to the intestate had not been discharged, either at common law or under the statute. *Cormo v. Boston Bridge Works*, 205 Mass. 366, 91 N. E. 313; *Ruddy v. George F. Blake Mfg. Co.*, 205 Mass. 172, 91 N. E. 310; *Feeney v. York Mfg. Co.*, 189 Mass. 336, 75 N. E. 733; *St. 1909, c. 514, § 127*.

[2] This question was properly left to the jury under suitable instructions. The work was performed under the supervision of the foreman of the mills, who the jury could find had been intrusted with superintendence. *Murphy v. New York, New Haven & Hartford Railroad*, 187 Mass. 18, 72 N. E. 330. It was shown that three of the four cast iron hangers on the car, to which the links were attached, were so cracked "as to be in two parts." The links engaged the dogs, and if the dogs did not hold securely, the car which was of the "rocker type" might tip and overturn. It also was in evidence, that the wooden floor beam holding the hanger which gave way appeared to be cracked, old and rotten, and so discolored as to indicate that the split had existed for some time. The defendant's foreman, called by the plaintiff, testified, that as the cars had to turn a sharp curve before reaching the coal pocket, they were given a momentum after leaving the side track, and before arriving at the spur track where the horses were detached, which would cause them "to strike the curve * * * at a speed of seven or eight miles an hour." He further said, that the cars

could not safely be switched, and passed over the curve, unless in charge of an employe whose control of the brake would prevent the car from running into the bumper, or leaving the track as it approached the pocket. The strain from the lateral motion in rounding the curve, and the speed required, were circumstances known and appreciated by the foreman, who was present directing the work. Before the horses were attached, and the car started, he observed that the links at each end engaged the dogs, but made no further effort to ascertain its general condition. It does not seem to have been questioned, at the trial, that a further examination would have been ineffective unless the dumping attachments, which were underneath the car, had been inspected. The jury, however, could have found that the defects were not concealed, and would have been discovered if a thorough examination had been made, and that in failing to take this reasonable precaution before placing the intestate in a position, where if the car, and particularly the dumping apparatus, was not sound he would be exposed to great bodily peril, the foreman was negligent. *Coffee v. New York, New Haven & Hartford Railroad*, 155 Mass. 21, 25, 28 N. E. 1128; *Feeney v. York Mfg. Co.*, 189 Mass. 336, 75 N. E. 733.

[3] The question of the plaintiff's due care was rightly left to the jury, and the defendant's sixth and seventh requests having been waived, the first, second, third and fourth were inappropriate for the reasons stated. *Gaynor v. Old Colony & Newport Railroad*, 100 Mass. 208, 211, 212, 97 Am. Dec. 96; *Prince v. Lowell Electric Light Corporation*, 201 Mass. 276, 87 N. E. 558.

[4] The exceptions of the railroad relate to the rulings and instructions permitting the jury to find that it could be held liable at common law, and under *St. 1906, c. 463, pt. 1, § 63*, with the mills for concurrent negligence, or a joint tort. It is participation in the wrong which establishes liability, and not the amount of damages which may be recovered either at common law, or under our statutes authorizing an action for death caused by the wrongful act of the defendant. *Oulighan v. Butler*, 189 Mass. 287, 293, 295, 75 N. E. 726; *Flynn v. Butler*, 189 Mass. 377, 387, 388, 75 N. E. 730. The proximate cause of the accident having been the defective car, the plaintiff was entitled to maintain her action against each or all who contributed to the injury and death of her intestate, although she could have but one satisfaction in damages. *Koplan v. Boston Gaslight Co.*, 177 Mass. 15, 58 N. E. 183; *Turner v. Page*, 186 Mass. 600, 72 N. E. 329; *Doe v. Boston & Worcester Street Railway*, 195 Mass. 168, 80 N. E. 814; *Feneff v. Boston & Maine Railroad*, 196 Mass. 575, 581, 82 N. E. 705; *Lockwood v. Boston Elevated Railway*, 200 Mass. 538, 86 N. E. 934, 22 L. R. A. (N. S.) 488.

[8] It is urged that the mills having used the car in its business, and as a part of its works, the control was changed, and the liability of the railroad for defects therefore had ended. *Glynn v. Central Railroad*, 175 Mass. 510, 56 N. E. 698, 78 Am. St. Rep. 507; *McNamara v. Central Vermont Railroad*, 202 Mass. 491, 499, 89 N. E. 131. But the defendant owned the car, and did not receive it from a connecting road to be forwarded. The transit apparently began and ended on its own lines. Upon abundant evidence the jury could find that the arrangement for transportation contemplated that the cars were to pass from the defendant's track to the private track in the millyard for the purpose of unloading, and that the defendant authorized the intestate's employer to use the car in question as a means of conveyance. The railroad concedes that the jury would have been warranted in finding that the defects were not incapable of discovery, if the inspection by its employes charged with the duty had been thoroughly made. But with full opportunity to ascertain its condition, the defendant selected, loaded and forwarded a car which it knew would be received by the mills, and operated by its employes selected to unload it. It accordingly was bound to furnish and deliver a car which was not defective. *Ladd v. New York, New Haven & Hartford Railroad*, 193 Mass. 359, 79 N. E. 742, 9 L. R. A. (N. S.) 874; *McNamara v. Boston & Maine Railroad*, 202 Mass. 491, 494, 89 N. E. 131. It was a question of fact whether, having authorized the use of a dangerous instrumentality, the defendant ought in the exercise of reasonable care to have anticipated the injurious results which might follow, and to have guarded against them. *Boston Woven Hose & Rubber Co. v. Kendall*, 178 Mass. 232, 59 N. E. 657, 51 L. R. A. 781, 86 Am. St. Rep. 478; *Hale v. New York, New Haven & Hartford Railroad*, 190 Mass. 84, 76 N. E. 656; *Conroy v. Smith Iron Co.*, 194 Mass. 468, 80 N. E. 488; *Lebourdals v. Vitrified Wheel Co.*, 194 Mass. 341, 344, 80 N. E. 482. The jury to whom this question was submitted under correct instructions have decided adversely to the defendant, and as matter of law we cannot say that they were wrong. In each case the exceptions must be overruled.

So ordered.

(209 Mass. 16)

LYNCH v. FISK RUBBER CO.

(Supreme Judicial Court of Massachusetts.
Suffolk. May 19, 1911.)

1. MUNICIPAL CORPORATIONS (§ 706*)—USE OF STREET BY PEDESTRIANS—CARE REQUIRED.

The failure of a pedestrian to look for approaching teams and vehicles before passing over a crosswalk is not necessarily such negli-

gence as will prevent his recovery for injuries by a passing automobile.

[Ed. Note.—For other cases, see *Municipal Corporations*, Dec. Dig. § 706.*]

2. MUNICIPAL CORPORATIONS (§ 705*)—USE OF STREETS—RECIPROCAL RIGHTS OF PEDESTRIANS AND AUTOMOBILES.

The duties of pedestrians and automobile drivers are reciprocal, to the same extent as in the case of pedestrians and horse-drawn vehicles, and neither may negligently exercise the right of transit.

[Ed. Note.—For other cases, see *Municipal Corporations*, Dec. Dig. § 705.*]

3. MUNICIPAL CORPORATIONS (§ 706*)—USE OF STREETS—ACTION FOR INJURIES—QUESTION FOR JURY.

In an action for personal injuries from being struck by an automobile while plaintiff was crossing a street on foot, evidence held to require submission to the jury of the question as to plaintiff's due care and defendant's negligence.

[Ed. Note.—For other cases, see *Municipal Corporations*, Dec. Dig. § 706.*]

Exceptions from Superior Court, Suffolk County; John F. Brown, Judge.

Action by Nicholas A. Lynch against the Fisk Rubber Company. Judgment for defendant, and plaintiff brings exceptions. Exceptions sustained.

Declan D. Corcoran and Declan W. Corcoran, for plaintiff. Walter I. Badger and Wm. Harold Hitchcock, for defendant.

BRALEY, J. This is an action to recover for personal injuries suffered by the plaintiff from being run over by an automobile, owned and operated by the defendant, while they were concurrently using a public way. In the superior court, at the close of the plaintiff's evidence, a verdict was ordered for the defendant, and the case is here on exceptions. It is the defendant's contention that there was no evidence of the plaintiff's due care, or of its negligence. The plaintiff was employed by marketmen to deliver goods to their customers, which he carried in bundles, either on his shoulders, or in his arms. After making a delivery on the day of the accident he was returning to his place of employment, when it became necessary to pass over the street where he was struck, while on the crosswalk, by the automobile, and the jury could find that before starting he looked in each direction and saw that "everything looked clear." [1] But even if he had not taken this precaution, his conduct under the circumstances would not, as matter of law, have prevented his recovery if he had been injured by a passing team. *Murphy v. Armstrong Transp. Co.*, 167 Mass. 199, 45 N. E. 93. [2] And the fact that the defendant's conveyance was an automobile, instead of a horse-drawn vehicle is immaterial. *Hennessey v. Taylor*, 189 Mass. 583, 76 N. E. 224, 3 L. R. A. (N. S.) 345. [3] The jury further could have found that when the collision occurred the defendant's driver, having been engaged in con-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

versation with an occupant of the car, with his head turned towards his companion, was giving little, if any, attention to travelers in front of him. It was for them to say if this inattention under the circumstances was sufficient proof of his negligence. The case cannot be distinguished in principle from *Donovan v. Bernhard*, 208 Mass. 181, 94 N. E. 276, and should have been submitted to the jury.

Exceptions sustained.

(208 Mass. 579)

WILLIAMS v. EASTMAN, Deputy Sheriff.

(Supreme Judicial Court of Massachusetts.
Middlesex. May 18, 1911.)

1. SHERIFFS AND CONSTABLES (§ 109*)—EXCESSIVE LEVY.

An officer making a willfully excessive attachment of personalty under a valid writ is not protected by the writ.

[Ed. Note.—For other cases, see *Sheriffs and Constables*, Cent. Dig. § 194; Dec. Dig. § 109.*]

2. SHERIFFS AND CONSTABLES (§ 109*)—EXECUTION OF WRIT OF ATTACHMENT—DISCRETION OF OFFICER—LIABILITY.

Rev. Laws, c. 167, §§ 43-45, defining the rights of an officer attaching personalty, contemplates that the officer shall take immediate possession of the property, and hold it so that it can be applied on execution, unless the property is so bulky that it cannot be removed, or defendant requests or consents that the property may remain on the premises in charge of a keeper; but the officer must determine the amount of the property to be taken, in view of its nature and the amount for which it can probably be sold to satisfy the execution at a sheriff's sale.

[Ed. Note.—For other cases, see *Sheriffs and Constables*, Cent. Dig. § 194; Dec. Dig. § 109.*]

3. SHERIFFS AND CONSTABLES (§ 109*)—EXECUTION OF WRIT OF ATTACHMENT—DISCRETION OF OFFICER—LIABILITY.

Where an officer in the exercise of his discretion acts in good faith in determining the amount of property to be taken under an attachment, he is not liable for abuse of process, though he makes an honest mistake of judgment prejudicial to the debtor; and where the estimated valuation of the property attached is not willfully made, the mere fact that the value of the property attached is largely in excess of the amount of the debt is not of itself proof of official misconduct.

[Ed. Note.—For other cases, see *Sheriffs and Constables*, Cent. Dig. § 194; Dec. Dig. § 109.*]

Exceptions from Superior Court, Middlesex County; L. E. Hitchcock, Judge.

Action by Arthur A. Williams against M. Frank Eastman, Deputy Sheriff, for damages for alleged excessive attachment. There was a verdict for plaintiff, and defendant brings exceptions. Sustained.

William R. Bigelow, for plaintiff. Geo. L. Mayberry and Ralph M. Smith, for defendant.

BRALEY, J. [1] If the defendant as a deputy sheriff made a willfully excessive attachment of the plaintiff's personal property as alleged in the first count of the declaration,

he exceeded his authority, and the writ under which he acted, although valid and duly returned to the court from which it issued, does not protect him, or justify his conduct. *Watson v. Todd*, 5 Mass. 271, 272; *Malcom v. Spoor*, 12 Metc. 279, 46 Am. Dec. 675; *Esty v. Willmot*, 15 Gray, 168, 169. [2] It is contemplated by our statutes governing attachments of personal property that the attaching officer shall take immediate possession, and hold it so that it can be seized and applied on the execution, unless so bulky that it cannot be removed, or the defendant requests or consents that the property attached may remain on the premises in charge of a keeper. Rev. Laws, c. 167, §§ 43, 44, 45; *Boynton v. Warren*, 99 Mass. 172, 174; *Cutter v. Howe*, 122 Mass. 541, 544. But the amount of property to be taken must be determined by the officer. It generally would be impossible for him to take just enough personalty to cover the damages demanded in the writ, unless the attachment was of money exposed by the defendant. The nature of the property, the amount for which it probably can be sold to satisfy the execution, not merely in the market, or in the ordinary course of business, but at a sheriff's sale, are all to be considered. It rests with the officer, acting under these fluctuating but important conditions, to decide as best he can if the property attached will prove sufficient to satisfy the plaintiff's claim, while taking proper care that the rights of the debtor, who must yield to his authority, are not infringed by an unreasonable and excessive seizure.

[3] If in the exercise of this discretion, which the law confers upon him, he acts in good faith, but makes an honest mistake of judgment prejudicial to the debtor, he is not liable for abuse of process. *Watson v. Todd*, 5 Mass. 271, 272; *Abbott v. Kimball*, 19 Vt. 551, 47 Am. Dec. 708; *Merrill v. Curtis*, 18 Me. 272; *Davis v. Webster*, 59 N. H. 471. But where the valuation is manifestly so extreme that reasonable men would condemn his action as unnecessary and excessive, the officer may be found to have acted oppressively. *Savage v. Brewer*, 16 Pick. 453, 457, 28 Am. Dec. 255; *Holland v. Anthony*, 19 R. I. 216, 36 Atl. 2. It is a question of fact depending upon the circumstances, and no absolute rule applicable alike to all cases can be laid down. *Bergin v. Hayward*, 102 Mass. 413, 426. The plaintiff's evidence no doubt tended to prove that the defendant took and held possession of goods very largely in excess of the amount he had been commanded to attach. But while this was a circumstance for the consideration of the jury in connection with the other evidence as to the true character of his conduct and course of procedure, yet if they found that the estimated valuation was not willfully made, it was not of itself proof of his alleged official misconduct. Mer-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

rill v. Curtis, 18 Me. 272; Davis v. Webster, 59 N. H. 471. It follows, from what we have said, that the instructions to which the defendant excepted, that if he honestly attached and held the plaintiff's property for a larger amount than the writ specified, he acted at his peril, and without authority, were erroneous.

Exceptions sustained.

(209 Mass. 300)

BAR ASS'N OF CITY OF BOSTON v.
SCOTT.

(Supreme Judicial Court of Massachusetts.
Suffolk. May 19, 1911.)

1. ATTORNEY AND CLIENT (§ 52*)—SUSPENSION AND DISBARMENT—PETITION—FINDINGS—VARIANCE.

Where the proof in a disbarment proceeding substantially followed the petition, a slight variance is immaterial, if the petition advised the respondent of the charges against him; for the technical nicety of the criminal law is not applicable to disbarment proceedings, in which the court inquires into the conduct of its own officers.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. § 69; Dec. Dig. § 52.*]

2. ATTORNEY AND CLIENT (§ 46*)—DISBARMENT—DEFENSE—JUDGMENT.

In a disbarment proceeding against an attorney who, having recovered a judgment, wrongfully collected witness fees by filing fraudulent certificates, the overruling for want of jurisdiction of a motion to vacate that judgment because of the fraudulent certificates was not an adjudication of the attorney's innocence, conclusive in the disbarment proceeding.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. § 71; Dec. Dig. § 46.*]

3. APPEAL AND ERROR (§ 1011*)—FINDINGS—CONCLUSIVENESS.

A finding by the trial court on conflicting evidence is conclusive on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3983; Dec. Dig. § 1011.*]

4. WITNESSES (§ 27*)—WITNESS FEES—ATTENDANCE—WHAT CONSTITUTES.

Attendance, to entitle a witness to fees, must be actual; and hence witnesses, who lost no time save when actually testifying, are not entitled to fees for time spent in occasionally calling on the attorney to learn the state of the case, they having held themselves ready to attend upon notice by telephone.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 56-64; Dec. Dig. § 27.*]

5. APPEAL AND ERROR (§ 977*)—DISCRETIONARY ACTION—SETTING ASIDE VERDICT.

The setting aside of a verdict after there has been a complete trial on the merits is discretionary with the trial court, and cannot be reviewed on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3880-3865; Dec. Dig. § 977.*]

6. ATTORNEY AND CLIENT (§ 58*)—SUSPENSION—PUNISHMENT.

An attorney, who fraudulently and corruptly filed excessive certificates for witness fees, the bulk of which he appropriated, was properly suspended from practice for three years.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 76-78; Dec. Dig. § 58.*]

Exceptions from Superior Court, Suffolk County; Robt. F. Raymond, Judge.

Disbarment proceedings by the Bar Association of the City of Boston against John J. Scott. Judgment of suspension, and defendant excepts and appeals. Exceptions overruled.

Geo. D. Burrage, for petitioner. Jesse M. Gove, Geo. T. Perry, and Grenville S. MacFarland, for respondent.

RUGG, J. This is a petition to disbar the respondent, an attorney at law. It alleges in substance that the respondent as attorney for the plaintiff, in an action entitled O'Halloran v. Boston Elevated Ry. Co., which was tried twice in the superior court, after a final verdict had been rendered in favor of the plaintiff, filed six witness certificates as a basis for the taxation of costs, bearing the names of seven witnesses showing attendance for 33 days each, the aggregate amount of which, including travel, was \$372.90, which certificates were false to the knowledge of the respondent and were not made in good faith, but were illegal and fraudulent; that in making them out and in instructing witnesses to sign them the respondent acted dishonestly and committed a fraud upon the defendant and the court, and that by inadvertence counsel for the defendant did not give notice of a desire to be present at the taxation of costs, and execution issued including the above mentioned amount for witness fees; that thereafter a motion was filed to vacate the judgment on account of these fraudulent certificates, which motion was denied for lack of jurisdiction; and that the respondent paid over to the several witnesses a small part only of the amount of witness fees thus collected and fraudulently and dishonestly retained, and converted to his own use the balance thereof. The respondent filed an answer in which he denied all fraudulent or corrupt acts, or any violation of his oath of office in this regard, and averred that the witness certificates were truthful and in accordance with the facts.

There was a hearing before a justice of the superior court, who made a finding of facts to the effect that while the case of O'Halloran v. Boston Elev. Ry. Co. was upon the list so that it might have been called for trial, the respondent arranged with the witnesses so that they might be reached by telephone, and while some of them occasionally ran into the respondent's office as they were passing to inquire about the case, no one of them lost any time or pay in their regular employments except on the days when they were actually in court not exceeding five days in the aggregate, and that apart from any agreement the respondent could not "fairly and reasonably [have] called the witnesses for more than eight or nine days at most." But he

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

made no finding of bad faith on this point.

He further found that whatever was done in holding witnesses for 31 of the days certified to, the respondent did while "a clear and explicit agreement existed between him" and the attorney for the Boston Elevated Railway Company "that neither party 'needed to get ready' nor 'keep witnesses around' until notified by the other." Upon these facts the justice of the superior court found that "the witnesses' certificates prepared and filed by the respondent 'were false, and were known by the respondent to be false, and were not made in good faith, but were improper, illegal and fraudulent,'" and that in his conduct respecting them "the respondent acted improperly and dishonestly and committed a fraud upon the defendant." The respondent filed certain requests for rulings, some of which were granted and others refused. After the filing of the findings the respondent excepted to certain parts thereof and filed further requests for rulings and a motion for a new trial. These were all overruled or refused and upon the findings an order of court was entered suspending the respondent from his office of attorney for three years. The respondent excepted and appealed.

[1] 1. It is argued that there is a variance between the petition and the findings in that the latter so far as fraudulent conduct is concerned are based wholly upon the agreement between counsel in the O'Halloran Case that parties should not be held for trial and that this specific matter is not alleged in the petition.

The reprehensible conduct charged was the fraudulent collection of excessive witness fees and this was the matter proved. It has been frequently decided that in petitions of this kind the technical nicety of common-law criminal pleading is not required. *Boston Bar Association v. Greenhood*, 168 Mass. 169, 46 N. E. 568; *Boston Bar Ass'n v. Casey*, 196 Mass. 100, 81 N. E. 892. The defendant was fully and fairly informed of the general nature of the charges against him. In a broad sense the proof corresponded with the allegations. The evidence was received without objection. If there had been any suggestion of its incompetency, an amendment to the petition might have been made. There appears to have been a full and fair trial, and testimony bearing upon this and other aspects of the case was introduced by the defendant. Even if there was a slight variation between the proof and the allegations, it would have been immaterial. No special form of procedure is prescribed for such a petition as this is and while courts are always sedulous to see that an attorney at law is given opportunity for a full and fair hearing, it is to be borne in mind that the primary end in view is an inquest into the conduct of one of its officers. In such an inquiry, mere forms not affecting its merits should not stand in the

way of protecting the court and the public by appropriate action after a full hearing. *Randall, Pet'r*, 11 Allen, 473. Moreover it is doubtful if even in a criminal case, such slight discrepancy between allegation and proof would be of any consequence. *Com. v. Graustein & Co.*, 95 N. E. 97.

[2] 2. The request for a ruling that the questions involved had already been adjudicated in the respondent's favor was properly refused. The hearing on the motion to vacate the judgment in *O'Halloran v. Boston Elev. Ry. Co.* appears to have been decided wholly upon a jurisdictional question and did not involve the issues depending upon this petition.

[3, 4] 3. It is argued that the findings of fact made by the superior court justice were not warranted by the evidence. The evidence was conflicting, but the witnesses were seen by the trial court and his determinations of fact under these circumstances are not open to revision in this court. His conclusions based upon personal observation of witnesses, their voice, manner and facial expression in testifying afford him far better opportunities for reaching a correct conclusion than an appellate court can possess. A careful reading of the record, however, convinces us that no error was committed and that the finding was amply warranted. Witness certificates attesting attendance for 33 days under the circumstances here disclosed are of themselves significant of wrongdoing. Most of the witnesses lost no time whatever from their regular employments except on the days of actual trial. Persons who pursue their ordinary occupations without interruption cannot be treated as witnesses merely because they are ready to attend court upon notification. There must be an actual attendance either at the courthouse or near to it under circumstances which involve a real and appreciable interference with their every day conduct. It is attendance as a witness and not mere willingness to attend as a witness which justifies the signing of a certificate. *Reid v. Wright*, 181 Mass. 306, 63 N. E. 886. The testimony of two witnesses was explicit as to the agreement between respective counsel that neither side should be held for trial for most of the days claimed in the certificates. The trial court could believe them if he found them worthy of credence.

[5] 4. The motion for a new trial, after one full hearing had been had, was addressed wholly to the discretion of the trial court, and is not open to revision upon this record. *Reeve v. Dennett*, 137 Mass. 315, 318; *Scanell v. Boston Elev. Ry.*, 94 N. E. 696.

[6] 5. The finding of facts by the court, to which reference has already been made, was a sufficient warrant for the order of the court to the effect that the respondent was guilty of misconduct in his office of an attorney, and for his suspension for a period of three years.

6. We have examined all the other points

raised and find nothing which requires further discussion, and they have not been argued.

Exceptions overruled.

Order affirmed.

(209 Mass. 155)

BOURNE v. WHITMAN.

(Supreme Judicial Court of Massachusetts.
Barnstable. May 19, 1911.)

1. HIGHWAYS (§ 184*)—COLLISIONS—LAW OF THE ROAD.

Under Rev. Laws, c. 54, § 1, requiring persons to drive on the right-hand side of the road, the fact that the defendant was so driving is some evidence of the exercise of due care, and the fact that the plaintiff coming from an opposite direction collided with him is some evidence that plaintiff was negligent.

[Ed. Note.—For other cases, see Highways, Cent. Dig. § 472; Dec. Dig. § 184.*]

2. TRIAL (§ 261*)—INSTRUCTIONS—REFUSAL.

Instructions correct in law, but on detached portions of the evidence on a single issue, may be refused.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 660; Dec. Dig. § 261.*]

3. LICENSES (§ 8*)—AUTOMOBILES—STATUTES—CONSTRUCTION.

St. 1903, c. 473, § 5, provided that, except as "hereinafter" provided, no person shall operate an automobile without a license; and section 6 provided that the provisions of this section shall not prevent the operation of automobiles by unlicensed persons, if riding with or accompanied by a licensed chauffeur or operator. St. 1905, c. 311, § 4, amending St. 1903, c. 473, § 4, inserted in that section the provisions as to unlicensed persons riding with a licensed chauffeur; and section 7, St. 1905, repealed section 6, St. 1903, but the word "hereinafter," used in section 5, was not changed to "herein." *Held*, that failure to make that change was a mere inadvertence, and that an unlicensed person might operate an automobile, if accompanied by a licensed chauffeur.

[Ed. Note.—For other cases, see Licenses, Cent. Dig. §§ 16, 17; Dec. Dig. § 8.*]

4. LICENSES (§ 14*)—AUTOMOBILES—STATUTES—CONSTRUCTION.

The provision in St. 1903, c. 473, § 4, allowing unlicensed persons to operate an automobile when accompanied by a licensed operator, was intended to provide an opportunity for persons to learn to drive an automobile, and does not necessarily mean that the unlicensed operator should be under the legal control of the licensed chauffeur, and, if the unlicensed operator be a person of great skill, the supervision by the licensed operator need not be very close, provided both persons realize that the unlicensed operator is acting under the direction of the licensed one.

[Ed. Note.—For other cases, see Licenses, Dec. Dig. § 14.*]

5. APPEAL AND ERROR (§ 901*)—REVIEW—BURDEN OF SHOWING ERROR.

The burden of showing error is on the excepting party.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3670; Dec. Dig. § 901.*]

6. NEGLIGENCE (§ 6*)—ACTS CONSTITUTING—VIOLATION OF ORDINANCE OR STATUTE.

The violation of a criminal statute is evidence of negligence on the part of the violator, but only with regard to matters to which the

statute relates; for a criminal statute is enacted for the benefit of, and creates a duty to, the public, and if an individual be injured by a violation of such a statute he has a remedy, but individuals have no right of action against one merely because he violates a criminal statute.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 8; Dec. Dig. § 6.*]

7. NEGLIGENCE (§ 76*)—ACTS CONSTITUTING—VIOLATION OF ORDINANCE OR STATUTE.

One violating a criminal law cannot recover for an injury to which his criminality was a directly contributing cause.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 104-107; Dec. Dig. § 76.*]

8. ACTION (§ 12*)—NEGLIGENCE (§ 76*)—RIGHT OF VIOLATOR OF ORDINANCE OR STATUTE.

As punishable misdemeanors are very numerous, the violation of a criminal statute of slight importance should not affect one's civil rights, except when the violation, viewed in reference to the element of criminality intended to be punished, has had a direct effect upon the violator's cause of action; and hence one operating an automobile without a license, in violation of St. 1903, c. 473, § 5, is not without the protection of law merely because violating that statute, but has the same civil rights as any other operator of an automobile, where his criminality is not a contributing cause of an injury, but is only a condition.

[Ed. Note.—For other cases, see Action, Dec. Dig. § 12; Negligence, Dec. Dig. § 76.*]

9. MASTER AND SERVANT (§ 330*)—RELATION—EVIDENCE—ADMISSIBILITY.

In determining whether a son, who was operating his father's automobile, was his father's servant, evidence that he was the regularly employed chauffeur of his father, living in the family, and that the persons he brought to a dance in the evening and carried home again were in the presence of the father and his family at the dance, and that his father told him to light the headlight, was admissible for the consideration of the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1271; Dec. Dig. § 330.*]

Exceptions from Superior Court, Barnstable County; Chas. U. Bell, Judge.

Separate actions by Timothy V. Bourne and by May C. Davis against William P. Whitman, and by the same plaintiffs against Richard P. Whitman. There was a verdict for plaintiffs in each case, to which defendants except. Exceptions sustained.

Chas. F. Choate, Jr., for plaintiffs. Chamberlain & Fletcher, for defendants.

KNOWLTON, C. J. [1] These are actions to recover for injuries received from a collision between two automobiles, in one of which the two plaintiffs were riding. The accident happened late in the evening of August 15, 1908. The defendants asked the court to instruct the jury as follows: "If the jury finds that at the time of the accident, the defendant was driving on the right of the middle of the traveled part of the way, it is evidence of the exercise of due care on his part; and if the jury shall find that the plaintiff Bourne was driving his machine in an opposite direction and collided with the defendant, this is evidence that the plaintiff

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

was acting in violation of R. L. c. 54, § 1, requiring him to drive to the right of the middle of the traveled part of the road, and unexplained, indicates negligence on the part of the plaintiff." There was evidence to which the request was applicable. There was also other evidence bearing upon the questions whether the plaintiffs were in the exercise of due care and whether the defendant was negligent. The request was in accordance with the law as laid down in *Perlstien v. American Express Co.*, 177 Mass. 530, 59 N. E. 184, 52 L. R. A. 959, and in other cases, and it well might have been given. Perhaps the defendants properly might have gone further and asked for an instruction that if the jury found the facts stated in the request, and also found that this violation of the statute was one of the direct and proximate causes of the collision, the plaintiff Bourne could not recover. *Newcomb v. Boston Protective Dept.*, 146 Mass. 596, 16 N. E. 555, 4 Am. St. Rep. 354.

[2] The plaintiff's contention is that the judge was not bound to grant the request, because it asked for a ruling upon the effect of a particular part of the evidence, upon a question on which there was other testimony. It is true that the general subject of the plaintiff's care and the general subject of the defendant's negligence were involved in the two branches of the request, and there was other important testimony bearing upon each of these subjects. Applying the rule strictly, we are of opinion that the judge was not bound to comply with a request in this form, and to select evidential facts that might or might not be found by the jury, and separate them from other parts of the testimony as subjects for a special instruction upon their effect as evidence. *Hicks v. N. Y.*, N. H. & H. R. R., 164 Mass. 424, 41 N. E. 721, 49 Am. St. Rep. 471, and cases cited.

One of the defendants was a father, who owned the automobile, and the other was his minor son 19 years of age, who operated it as his chauffeur a part of each year, without compensation. One of the questions before the court was whether the son, Richard P. Whitman, was acting as his father's servant at the time of the accident, or was running the automobile for himself alone. He had had a license to operate an automobile as chauffeur for his father, William P. Whitman, in 1905, 1906, 1907 and 1908, up to August 14, 1908, when the license expired. He had made an application for another license which was issued to him on August 17th. On August 15, 1908, the day of the accident, he was operating the machine without a license. The evidence tended to show that he was of large experience in this business and presumably thoroughly competent.

The defendants offered to prove that Dr. Harold O. Hunt, who was riding with Richard P. Whitman in the automobile, was the holder of an operator's license which he had with him at the time of the accident. This

evidence was excluded and the judge ruled that the possession of a license by another person riding with him, afforded him no justification.

[3] This brings us to the consideration of the language in St. 1903, c. 473, § 4, as amended by St. 1905, c. 311, § 4, as follows: "The provisions of this section shall not prevent the operation of automobiles by unlicensed persons, if riding with or accompanied by a licensed chauffeur or operator." These words were originally in St. 1903, c. 473, § 6, and this section was repealed by St. 1905, c. 311, § 7. In the repealing statute they were inserted in section 4 of the former act by an amendment of that act, but the word "hereinafter" in section 5 of St. 1903, c. 473, was not changed to "herein," as it should have been when the quoted language which previously had followed this word was now made to precede it by putting it in the earlier section. We are of opinion that the failure to make this change was a mere inadvertence, and that an unlicensed person may operate an automobile, if riding with or accompanied by a licensed chauffeur or operator, under the authority of St. 1903, c. 473, § 4, as amended by St. 1905, c. 311, § 4.

[4] The exclusion of the evidence and the ruling were, at variance with the provision relied on by the defendant, if the language is taken literally and interpreted broadly. What is the meaning of the language? Evidently it was intended to provide an opportunity for persons to learn to use an automobile by running it under the supervision of a licensed person, and thus acquire skill by practice, without which one never could become skillful. It does not necessarily mean that the unlicensed operator shall be under the legal control of the licensed chauffeur, for the operator might be the owner of the automobile, and the chauffeur a person hired by him to give instructions under his direction. But the language of the statute undoubtedly contemplated by the words, "riding with or accompanied by," proximity sufficient to enable the licensed operator to maintain such supervision as might be necessary for safety, and to render assistance, if need be, with reasonable promptness. In a case like the present, where the unlicensed operator was a person of skill and great experience, whose license had expired only the day before and who was expecting another license within a day or two, the supervision and reasonable proximity required by law would not be as close as in ordinary cases, but we are of opinion that the law contemplates at least knowledge on the part of both persons, of the existence of a relation like that of operator without a license, and licensed chauffeur or operator accompanying him, in a position to advise or assist with reasonable promptness, if necessary.

[5] Neither the offer of proof nor the ruling shows plainly what construction was put upon the statute by the judge. He may have

made his ruling on the ground that the defendants did not go far enough in their offer, to bring the case within the authority of the statute. As the burden of showing error is on the excepting party, we are inclined to hold that the offer did not go far enough and that no error is shown. But if the relation between the defendant Richard P. Whitman and Dr. Hunt was that contemplated by the statute and known to both of them, we are of opinion that the defendant was protected, even if it was not expected that any particular supervision would be required, and if they were not in such proximity as would be necessary for safety between a licensed chauffeur and an unlicensed operator just beginning to learn to manage a machine.

At the request of the plaintiffs, the judge instructed the jury that "Richard P. Whitman, at the time of the accident, was a trespasser upon the highway and had no legal right then and there to operate the car." Under the first part of the instruction the plaintiffs owed him no duty except to refrain from inflicting an injury upon him wantonly or recklessly. He had no right to put his car in the way of the plaintiffs, or to interfere with their use of the road in any part which they chose to occupy. The rights and duties of both parties were different from those of ordinary travelers. Presumably the instruction affected the decision, and if it was erroneous, there must be a new trial.

For the discussion of this part of the case, we assume that the defendant Richard, received no protection from Dr. Hunt's license. He was then violating the law in not having obtained another license before running the car. What effect did this violation have upon the right of either party to recover, when there was an accidental collision between his car and that of another driver on the highway?

[6] It is universally recognized that the violation of a criminal statute is evidence of negligence on the part of the violator, as to all consequences that the statute was intended to prevent. It has been said in a general way that such a violation is evidence of negligence of the violator, and it has sometimes been stated that this would show negligence, that can be availed of as a ground of recovery by one who suffers any kind of an injury from him while this illegality continues; but it is now settled that it is not even evidence of negligence, except in reference to matters to which the statute relates. *Davis v. John L. Whiting & Son Co.*, 201 Mass. 91-96, 87 N. E. 199, and cases cited. A criminal statute in the usual form is enacted for the benefit of the public. It creates a duty to the public. Every member of the public is covered by the protecting influence of the obligation. If one suffers injury as an individual, in his person or his property, by a neglect of this duty, he has a remedy, not because our general and criminal laws are divided in their operation,

creating one duty to the public and a separate duty to individuals; but because as one of the public in a peculiar situation, he suffers a special injury, different in kind from that of the public generally, from the neglect of the public duty. As was said by Mr. Justice Matthews in *Hayes v. Michigan Central R. R. Co.*, 111 U. S. 228-240, 4 Sup. Ct. 369, 374, 28 L. Ed. 410: "The duty is not to the city as a municipal body, but to the public considered as composed of individual persons, and each person specially injured by the breach of the obligation, is entitled to his individual compensation and to an action for its recovery." Intimations that there is a separate and distinct duty to individuals under general criminal laws, are not in accordance with sound reasoning or the weight of authority.

[7] If we consider the effect of such a violation of law by a plaintiff, upon his right to recover, the principles that have been recognized are instructive. They were considered long ago in connection with our Sunday law. It has been established from early times that one who is violating a criminal law cannot recover for an injury to which his criminality was a directly contributing cause. It was early held in this state that one traveling in violation of the statutes as to the observance of the Lord's Day could not recover for an injury received while so traveling. *Smith v. Boston & Maine R. R.*, 120 Mass. 490, 21 Am. Rep. 538, and cases cited; *Lyons v. Desotelle*, 124 Mass. 387; *Day v. Highland St. Ry.*, 135 Mass. 113, 44 Am. Rep. 447; *White v. Lang*, 128 Mass. 598, 35 Am. Rep. 402; *McGrath v. Merwin*, 112 Mass. 467, 17 Am. Rep. 119. These decisions on the Sunday law have been much criticised in the opinions of other courts and by writers of text-books. *Broschart v. Tuttle*, 59 Conn. 1, 21 At. 925, 11 L. R. A. 33; *Sutton v. Town of Watwatosa*, 29 Wis. 21, 9 Am. Rep. 534; *Baker v. City of Portland*, 58 Me. 199, 4 Am. Rep. 274; *Baldwin v. Barney*, 12 R. I. 392, 34 Am. Rep. 670; *Johnson v. Town of Irashburgh*, 47 Vt. 28, 19 Am. Rep. 111; *Platz v. City of Cohoes*, 89 N. Y. 219, 42 Am. Rep. 286. The ground of the criticism may be stated in a word, as a supposed failure to distinguish between criminality which is a cause, and criminality which is a mere condition, of an injury for which recovery is sought. But this distinction is now thoroughly established in our law. *Newcomb v. Boston Protective Department*, 146 Mass. 596, 16 N. E. 555, 4 Am. St. Rep. 354; *Farrell v. Sturtevant Co.*, 194 Mass. 431-434, 80 N. E. 469; *Moran v. Dickinson*, 204 Mass. 559-562, 90 N. E. 1150. The Sunday law, so called, has been repealed as to its effect as a bar to recovery in actions of tort showing a violation of it by the plaintiff. *R. L. c. 98, § 17*. The old case of *Gregg v. Wyman*, 4 Cush. 322, as to the effect of the Sunday law in barring a claim in trover against one who had driven a horse hired for service on Sunday to a different place from

that agreed upon, was overruled by this court before the partial repeal of the Sunday law. *Hall v. Corcoran*, 107 Mass. 251, 9 Am. Rep. 30. Other cases have been decided, in which it was held that illegality of the plaintiff was no bar to his recovery for an injury, unless his illegality was a cause directly contributing to the injury. *Damon v. Scituate*, 119 Mass. 66, 20 Am. Rep. 315; *Smith v. Gardner*, 11 Gray, 418; *Dudley v. Northampton St. Ry.*, 202 Mass. 443, 446, 89 N. E. 25, 23 L. R. A. (N. S.) 561; *Moran v. Dickinson*, 204 Mass. 559, 90 N. E. 1150.

[9] The only matter which seems to be left doubtful under our decisions in this class of cases, is what constitutes "illegality," which is sometimes a directly contributing cause of the injury. Some cases have been decided, which seem to imply that if there is an illegal element entering into a plaintiff's act or conduct, and this act or conduct directly contributes to his injury, he cannot recover although the illegal element or the objectionable quality of the act had no tendency to produce the injury, and the consequences would have been the same under the other existing conditions, if the criminal element had been absent. In other cases the decision seems to turn upon whether the criminal element in the act or conduct, considered by itself alone, operated as a direct cause to produce a result that would not have been produced under the same conditions in other respects, if the criminal element had been absent. This latter seems to be the pivotal question in most cases decided in other states.

The fact that the number of punishable misdemeanors has multiplied many times in recent years, as the relations of men in business and society have grown complex with the increase of population, is a reason why the violation of a criminal statute of slight importance should not affect one's civil rights, except when this violation, viewed in reference to the element of criminality intended to be punished, has had a direct effect upon his cause of action. Our decisions seem to have been tending towards the adoption of such a rule. *Welch v. Wesson*, 6 Gray, 505; *Spofford v. Harlow*, 3 Allen, 176; *Steele v. Burkhardt*, 104 Mass. 59, 6 Am. Rep. 191; *Damon v. Scituate*, 119 Mass. 66, 20 Am. Rep. 315; *Hall v. Ripley*, 119 Mass. 135; *Dudley v. Northampton Street Railway*, 202 Mass. 443-446, 89 N. E. 25, 23 L. R. A. (N. S.) 561; *Moran v. Dickinson*, 204 Mass. 559-562, 90 N. E. 1150; *Chase v. N. Y. O. R. Co.*, 208 Mass. 137, 94 N. E. 377-385.

Under particular statutes, we are brought back to the question, what is the legal element which is the essence of the command or prohibition? In most cases, the effect of doing or failing to do that which the law forbids or requires under a penalty, when considered in reference to its relation to one's civil rights in collateral matters, ought to be limited pretty strictly. Take the case of

driving without sleighbells in violation of the law of the road. *R. L. c. 54, § 3*; *Kidder v. Dunstable*, 11 Gray, 342; *Counter v. Couch*, 8 Allen, 437. The requirement of the law is that "no person shall travel on a bridge or way with a sleigh or sled drawn by a horse, unless there are at least three bells attached to some part of the harness." The wrong to be prevented is the failure to have bells while traveling in this way. The traveling in other respects is unobjectionable. The question arises whether the act should be deemed illegal as a whole, in reference to the rule that the courts will not aid one to obtain the fruits of his disobedience of law, or whether in this aspect, its different qualities may be considered separately. It is possible to decide this question either way, but we think it is more consistent with justice and with the course of decision elsewhere, to hold that, in reference to the law of negligence and the rule as to rejection of causes of action that are founded on illegality, an act may be considered in its different aspects in its relation to the cause of action, and if only that part of it which is innocent affects the cause of action, the existence of an illegal element is immaterial. We do not think, under this statute, that one who drives in a sleigh without bells, should be treated as a trespasser on the highway, although he is punishable criminally for the failure to have the bells attached to the harness, and is liable in damages to any member of the public who suffers a special injury by reason of this failure.

Consider *St. 1909, c. 514, § 74*, which forbids, under a penalty, the regular operation of any elevator by a person under the age of 16 years, and the regular operation of any rapidly running elevator by a person under the age of 18 years. If a person under the prescribed age, while employed to operate an elevator, is injured through the negligence of the owner, in leaving it in an unsafe condition, shall his violation of the statute by entering this service before reaching the prescribed age, be treated as criminality, entering into every one of his acts in moving the elevator, so as to prevent his recovery for an injury from the joint effect of his employer's negligence and his own application of the power to raise or lower the elevator? We think it better to hold, if his age and the degree of his competency, which might depend in part upon his age, had no causal connection with the injury, that his criminality was not a direct cause of the injury. In other words, that the punishable element in the act is only disobedience as to age, and although his act in applying the power to the elevator which brought him in contact with the defect, is punishable, and in a sense illegal because of the existence of that element, in determining the relation of his conduct to the cause of action, to see whether the court will aid him in the prosecution of it,

we ought to limit the illegality to that part of his conduct towards which the statute is particularly directed. We are to consider the specific thing at which the statute is aimed, and the immediate effect that it was intended directly and proximately to accomplish by its command or prohibition. A question of this kind arose in *Murphy v. Russell*, 202 Mass. 480, 89 N. E. 107, but it was not referred to in the opinion, as the case was decided on other grounds. Substantially, this question was decided in *Moran v. Dickinson*, 204 Mass. 559, 90 N. E. 1150.

Take the provision in St. 1903, c. 473, § 5, that "no person shall operate an automobile or motorcycle for hire, unless specially licensed by the commission so to do," and the earlier provision in the same section that no person shall "operate an automobile or motorcycle upon any public highway or private way laid out under authority of statute, unless licensed so to do under the provisions of this act." The operating of the automobile in itself is unobjectionable. The illegal element in the act is the failure to have a license. The purpose of the requirement of a license, is to secure competency in the operator. If in any case the failure to have a license, looking to those conditions that ordinarily accompany the failure to have it, is a cause contributing directly to an injury, a violator of the law would be legally responsible to another person injured by the failure; or, if he is injured himself, would be precluded from recovery against another person who negligently contributed to the injury. But we are of opinion that his failure in that respect is only evidence of negligence in reference to his fitness to operate a car, and to his skill in the actual management of it, unless in the case of a plaintiff, it is shown to be a contributing cause to the injury sued for, in which case it is a bar to recovery. We think that the operation of a car without a license, while it is a punishable act, does not render the operator a trespasser on the highway, but that the illegal element in the act is only the failure to have a license while operating it, so that if the operation and movement contributed to the accident with which the want of a license had no connection, except as a mere condition, they would not preclude the operator as a plaintiff from recovery. If the illegal quality of the act had no tendency to cause the accident, the fact that the act is punishable because of the illegality, ought not to preclude one from recovery for harmful results to which, without negligence, the innocent features of the act alone contributed.

The other part of this statute, relative to the licensing of automobiles, has been construed differently. In *Dudley v. Northampton Street Railway*, 202 Mass. 443, 89 N. E. 25, 23 L. R. A. (N. S.) 561, because of the peculiar provisions of the statute and the dangers and evils that it was intended to prevent, it was decided after much consid-

eration, that the having of such a machine in operation on a street, without a license, was the very essence of the illegality, and that the illegality was inseparable from the movement of the automobile upon the street at any time, for a single foot; that in such movement the machine was an outlaw, and any person on the street as an occupant of the automobile, participating in the movement of it, was for the time being a trespasser. Some of us were disinclined to lay down the law so broadly, and the opinion of the court was not unanimous; but the doctrine has been repeatedly reaffirmed and is now the established law of the commonwealth. *Feeley v. City of Melrose*, 205 Mass. 329, 91 N. E. 306, 27 L. R. A. (N. S.) 1156; *Chase v. New York Central Railroad Company*, 208 Mass. 137, 94 N. E. 377-385. The difference between this provision of the statute and that involved in the present case, is in part one of form, but in connection with the form, it is still more the seeming purpose and intent of the Legislature as to permitting such machines upon the public ways without adequate means of identifying them and ascertaining their owner, together with the requirement that the machine itself, as a thing of power, shall have its own registration and legalization, the evidence of which it shall always carry with it. In the last of the cases cited is this language: "Under the decisions, the operation of the unregistered automobile is deemed to be unlawful in every feature and aspect of it. Everything in the conduct of the operator that enters into the propulsion of the vehicle is under the ban of the law. * * * The operator in running it there and thus bringing it into collision with the locomotive engine, is guilty of conduct which is permeated in every part by his disobedience of the law," etc.

We are of opinion that the law of these last cases should not be extended to the provision of the statute requiring every operator to have a personal license to operate the car. The jury should have been instructed that the defendant's failure to have a license was only evidence of his negligence as to the management of the car.

[9] An important question at the trial was whether there was any evidence that Richard P. Whitman was operating the automobile as the servant of his father, at the time of the accident, or only on his own account. The weight of the testimony was that he was using it with his father's permission, solely for his own purposes. But we are of opinion that the circumstances that he was the regularly employed chauffeur of his father, that he lived in his father's family, that the persons whom he brought to the dance in the evening and carried home again just before the accident, were in the presence of his father and his family at the dance, that his father saw him start to take them home from the dance and told him he had

better light his headlights, were proper for the consideration of the jury on the question whether he was representing his father in running the automobile at the time of the accident.

Exceptions sustained.

(209 Mass. 70)

RIDENOUR v. H. C. DEXTER CHAIR CO.

(Supreme Judicial Court of Massachusetts.
Suffolk. May 19, 1911.)

1. APPEAL AND ERROR (§ 978*)—EXCEPTIONS—NEW TRIAL.

The refusal to grant a new trial on defendant's motion, on the ground that the jury must have disregarded the instructions, was discretionary, and cannot be reviewed on exceptions.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3866-3870; Dec. Dig. § 978.*]

2. NEW TRIAL (§ 81*)—NECESSITY OF OBJECTION AT TRIAL — INSUFFICIENCY OF EVIDENCE.

Defendant's request to set aside a verdict, on the ground that on all the evidence the verdict was unwarranted, was properly denied, as it sought to raise a question which should have been raised before verdict.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. § 131; Dec. Dig. § 81.*]

3. TRIAL (§ 250*)—ISSUES.

Where the sole question was whether a corporation orally agreed to apply, in liquidation of notes given by an employé, the reserved salary, and not whether the employé could enforce, under the statute of frauds, the oral agreement, which was executed, the refusal to charge that the agreement was void under the statute of frauds was proper.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 584-586; Dec. Dig. § 250.*]

4. TRIAL (§ 252*)—INSTRUCTIONS.

Where, in an action by an employé of a corporation for commissions under a written contract and an oral agreement, the employé claimed that, while notes given by him for the purchase of corporate stock were outstanding, it was agreed that his salary should be increased, and that the excess should be applied to the payment of the notes, and that the sum reserved was in excess of the amount required to pay the notes and his general account, after proper credits of partial payments made by him, and the auditor found that the employé's claims were true, charges that there was no evidence to warrant the jury to find an agreement increasing the salary, and that there was no evidence that the demands of the corporation had been paid, were properly refused.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 596-612; Dec. Dig. § 252.*]

5. COMPROMISE AND SETTLEMENT (§ 5*)—CLAIMS FOR COMPENSATION—SETTLEMENTS—CONCLUSIVENESS.

Where the treasurer of a corporation, concededly having practically the sole control thereof, agreed to increase the salary of an employé who had given notes in payment for the price of corporate stock bought by him, and to apply the increase to liquidate the notes, the fact that the books of the corporation did not show the reserved salary, did not deprive the employé of what the treasurer conceded to be due; and when the offer of the treasurer to settle the notes and the general account of the employé by waiving a balance was accepted by the employé,

there was a discharge of any debt claimed by the corporation.

[Ed. Note.—For other cases, see Compromise and Settlement, Dec. Dig. § 5.*]

6. APPEAL AND ERROR (§ 231*)—QUESTIONS REVIEWABLE—QUESTIONS RAISED FOR FIRST TIME ON APPEAL.

A party, relying on the fact that an accord and satisfaction was not pleaded, so that evidence thereof could not be received, could not raise the want of pleading for the first time on exceptions to the refusal to give requests, which, without calling the court's attention to the point, required it to rule that the adverse party's defense was not open on the evidence; and this is true, though the exceptions state that reference may be had to the pleadings.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 231.*]

7. TRIAL (§ 253*)—INSTRUCTIONS—IGNORING FINDINGS OF AUDITOR.

A requested instruction, which ignores the explicit finding of the auditor, is properly refused, under the rule that the court need not instruct on a part of the evidence.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 613-623; Dec. Dig. § 253.*]

8. TRIAL (§ 193*)—INSTRUCTIONS—INVADING PROVINCE OF JURY.

A statement, in the charge on the issue whether the salary of an employé had been increased, that the jury could find an increase from all the facts developed at the trial, read in connection with the preceding statement, that there was no increase of salary, unless the jury found a mutual agreement of the parties, was not objectionable, as invading the province of the jury.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 436-438; Dec. Dig. § 193.*]

Exceptions from Superior Court, Suffolk County; R. F. Raymond, Judge.

Action by Louis B. Ridenour against the H. C. Dexter Chair Company. There was a verdict for plaintiff, and defendant brings exceptions. Overruled.

This is an action on a contract for commissions claimed under a written contract and under an oral agreement. The answer was a general denial and payment, and defendant filed a declaration in set-off for moneys claimed to have been paid to plaintiff or on his account. The answer to the set-off was a general denial and payment.

Plaintiff claimed that his annual salary of \$2,200 was increased to \$3,200, the additional \$1,000 to be applied towards liquidating notes given by him for the purchase of stock in defendant. Defendant asked the court to give the following nine instructions, all of which were refused, excepting the seventh and eighth, which were given as requested:

"(1) That upon the evidence as to the law of New York, the alleged contract of 1903 was a contract not to be performed within a year from the time of its making and was null and void because not subscribed by this defendant.

"(2) That under the law of Massachusetts the alleged contract for 1903 would be within the statutes of frauds of an agreement not to be performed within a year and would not be binding upon the defendant.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

"(3) That there is no sufficient evidence in the case to warrant the jury in finding that any agreement was made by the defendant fixing the salary of the plaintiff for the years 1903, 1904, 1905 and 1906 in excess of \$2,200.

"(4) That there is no sufficient evidence in the case to warrant the jury in finding that the plaintiff became entitled to receive from the defendant as compensation for his services for 1903, 1904, 1905 and 1906 any sum in excess of \$2,200 per year and the special commissions with which his account was credited by the defendant.

"(5) That there is no sufficient evidence in the case to warrant the jury in finding that the amount claimed by the defendant in its set-off less the credits admitted by it has been paid.

"(6) That there is no issue upon the pleadings as to whether the note of April 2, 1900, was paid by the defendant company, and the evidence relating to its payment out of a supposed reserved salary is wholly immaterial. If the note was paid by the defendant for account of plaintiff out of reserved earnings not credited to the plaintiff, such payment could not affect in any way the items that were charged upon the books.

"(7) That there is no evidence that the corporation ever held the note of October, 1900, or had any interest therein; that Mr. Dexter as an individual was entirely distinct from the corporation; that the claims of the corporation could not be affected by any arrangements between Dexter as an individual and the plaintiff; and that if the settlement of the October note was between Dexter as an individual and the plaintiff, all the evidence in relation thereto was immaterial.

"(8) That upon all the evidence the jury would not be warranted in finding that any of the items included in the set-off were paid by the settlement of the October note.

"(9) That if the jury should find that the April note was paid by the corporation at plaintiff's request applying to the payment the remittance of \$150 from Washington and the commission credit of \$1,610.36, such payment would not affect the amount due by plaintiff upon his general account and in the absence of further testimony would require a finding for the defendant for the amount of its set-off; but if said sums were not applied by the defendant company to the payment of the April note, but were applied to plaintiff's general account as a payment therein, the defendant would be entitled to a finding upon its set-off of the difference between the two amounts, being \$340.96."

John Comerford, for plaintiff. W. C. Cogswell and J. H. Appleton, for defendant.

BRALEY, J. [1] The refusal to grant a new trial on the defendant's motion, that the jury must have disregarded the instructions, was discretionary, and cannot be reviewed on exceptions. *Lord v. Rowse*, 195 Mass.

216, 219, 220, 80 N. E. 822. [2] Its further request, that upon all the evidence the verdict was unwarranted, sought to raise a question which was not open, as it should have been raised before verdict. *Loveland v. Rand*, 200 Mass. 142, 144, 85 N. E. 948. The exceptions taken at the trial relate to the refusal to rule as requested, and to the instructions. It was conceded, that the amount found by the auditor to whom the case was referred was due the plaintiff, but the defendant having declared in set-off for a much larger sum, the items of which were admitted to be correct, the controversy before the jury was confined to the single issue, as to whether the counterclaim had been discharged by payment. The auditor states at length the business transactions between the parties. In the year of the defendant's corporate organization, the plaintiff, who was in its employment as a salesman, became the owner of 50 shares of the capital stock, which was sold and issued to him by the company. To obtain the money to pay for the stock, he gave two promissory notes, payable on demand to the order of the president, who acted as treasurer and general manager. The notes were discounted by the treasurer at a national bank, who paid the interest as it became due, and charged the payments to the plaintiff in his general account in the company's books. It was the plaintiff's contention, that while the notes were outstanding, it was agreed that his salary should be increased, the excess to be reserved and applied in payment of the notes, and the auditor so found. If the memorandum in writing of the agreement was not signed by the parties, and the contract was oral, and not to be performed within one year from its date, the defendant did not object to the admission of the unsigned agreement or of the auditor's report in evidence, but only sought to control and rebut the report by the evidence of its treasurer, that no agreement was ever made. [3] The question at the trial was not whether the plaintiff could have enforced the contract by an independent suit, if the statute of frauds of the state of New York, or our own statute had been pleaded in bar. It was, whether the defendant agreed to apply in liquidation the reserved salary, even if the agreement might be unenforceable. The contract moreover had been executed and nothing remained to be done except to apply the money in payment. The first and second requests were rightly refused.

[4] It appears from the report, that after much correspondence, and many interviews between the plaintiff and the treasurer as to the plaintiff's contractual relations with the company, his liability on the general account, and the disposition which should be made of the notes, the plaintiff and the defendant's treasurer met to adjust the indebtedness, and settle their differences. If the jury accepted the report, they were warrant-

ed in finding, that the conclusions reached by the auditor, that the general account which is the subject of the set-off, was adjusted in connection with the settlement of the notes were right, and there was nothing due the defendant. We find no error in the refusal to give the third, fourth and fifth requests. [5] The sum reserved appears to have been largely in excess of the amount required to pay the notes and the general account after the partial payments made by the plaintiff upon the first note were properly credited, and the authority of the treasurer to bind the defendant does not seem to have been disputed. Indeed from his own evidence he had practically the sole control of the company, and if the company's books did not show the reserved salary, which the report states had accrued at the date of settlement, the plaintiff could not be deprived of what the treasurer is found to have conceded was justly due him. If the plaintiff had admitted the correctness of the general statement, he was indebted to the defendant for the balance then shown to be due on the account. But he did not admit that he owed anything. The offer of the treasurer to settle the notes, and the general account by waiving the balance, which the auditor finds the plaintiff accepted, accordingly operated as a liquidation and discharge of the debt. *Donohue v. Woodbury*, 6 Cush. 148, 52 Am. Dec. 777; *Tompkins v. Hill*, 145 Mass. 379, 14 N. E. 177.

[6] It is now contended that the settlement could not be shown, as an accord and satisfaction had not been pleaded. But the defendant neither objected to the report which was the only evidence of the settlement, nor suggested that the defense was not open under the answer. If relied upon, it should have been called to the attention of the court, when the plaintiff doubtless would have been given an opportunity to amend. *Oulighan v. Butler*, 189 Mass. 287, 289, 75 N. E. 726. It cannot for the first time, raise a question of pleading in this court on exceptions to the refusal of the presiding judge to give requests which without calling his attention to the point required him in effect to rule, that the plaintiff's defense was not open on the evidence. *Burnett v. Smith*, 4 Gray. 50, 52, 53; *Jones v. Slisson*, 6 Gray, 288, 294; *Jones v. Wolcott*, 15 Gray, 541, 542; *Wall v. Provident Institution for Savings*, 3 Allen, 96, 98; *McLean v. Richardson*, 127 Mass. 339, 344; *Carpenter v. Fisher*, 175 Mass. 9, 14, 55 N. E. 479. Nor is it material that the exceptions state that reference may be had to the pleadings. *Bass v. Edwards*, 126 Mass. 445. [7] It, moreover, may be said of the ninth request, that it ignored the explicit finding of the auditor, and the court was not required to instruct on a part of the evidence. *American Tube Works v. Tucker*, 185 Mass. 236, 70 N. E. 59. The fifth, sixth

and ninth requests could not properly have been given.

[8] No error appears in the instructions to the jury so far as argued. The charge is not fully reported, but the expression, "that they had the right to find an increase from all the facts as they were developed at the trial," should be read with the preceding statement, that there was no increase of salary unless the jury found a mutual agreement of the parties. The province of the jury was not invaded by any expression of opinion by the judge which disclosed a bias in favor of the plaintiff. *Whitney v. Wellesley & Boston Street Railway*, 197 Mass. 495, 84 N. E. 95.

Exceptions overruled.

(208 Mass. 577)

WEISMAN v. FIREMAN'S INS. CO.

(Supreme Judicial Court of Massachusetts.
Bristol. May 18, 1911.)

INSURANCE (§ 612*)—ARBITRATION—ACTION—NOTICE OF AWARD—NECESSITY.

Where an insurance policy provided that no action could be maintained until the amount of loss had been determined by arbitrators, and the insurance company had rejected their determination, the insured cannot support an action without showing that the insurer was given notice of the award.

[Ed. Note.—For other cases, see *Insurance*, Cent. Dig. §§ 1520-1528; Dec. Dig. § 612.*]

Exceptions from Superior Court, Bristol County; Chas. U. Bell, Judge.

Action by Morris Weisman against the Fireman's Insurance Company. There was a verdict for defendant, to which plaintiff excepted. Exceptions overruled.

D. R. Radovsky, for plaintiff. F. W. Brown and W. L. Came, for defendant.

BRALEY, J. The exceptions are meager almost to the point of obscurity, but we assume that the policy was issued under Rev. Laws, c. 118, § 60, and the terms of the policy required, as a condition precedent to any right of action, that the amount of loss should be ascertained by arbitration. But if the judge was satisfied that arbitrators were duly chosen, who met, heard the parties, and prepared and signed an award determining the loss on the plaintiff's stock and furniture, he also found that it was not delivered, or notice of their decision communicated to either party. The form of submission is not before us. It may have been oral or in writing, and may or may not have provided that notice should be given. The company, however, declined to adjust the insurance after notice and proof of loss had been given, and if we infer that thereupon at the plaintiff's request three referees were selected as stated in the record, the purpose of the arbitration clause would be nullified, unless in some suitable form the result of the reference was made known to the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

plaintiff and defendant. The board acts as an arbitral tribunal whose decision, if accepted by the insurer, determines the amount of liability, while, if rejected, the insured may sue at once to recover for the loss. If the award is executed in duplicate, and delivered to each party, it also is published; or delivery to the insured if he prevails, and notice by him to the company, with a demand for payment, is a publication. *Plummer v. Morrill*, 48 Me. 184; *Knowlton v. Homer*, 80 Me. 552; *Rixford v. Nye*, 20 Vt. 132. Or it may be published by the arbitrators reading the award to the parties. *Rundell v. La Fleur*, 6 Allen, 480. But whatever form may be adopted, it is clearly implied, by the clause of arbitration, that to be effective and complete the award must be transmitted to the parties, or published by giving notice to them of the decision. *Kingsley v. Bill*, 9 Mass. 198. The plaintiff having failed to bring himself within the condition, the judge correctly ruled that the action could not be maintained.

Exceptions overruled.

(209 Mass. 111)

CONNERS v. CITY OF LOWELL (two cases).

WALSH v. SAME.

(Supreme Judicial Court of Massachusetts.

Middlesex. May 19, 1911.)

1. TAXATION (§ 754*)—TAX DEEDS—FORM—REQUISITES.

The fact that the Legislature, by St. 1901, c. 519, permitted the use of a form of tax deed for a brief period, and then in substance restored important recitals which had existed in earlier statutes, does not necessarily make it a suitable form for any other time than that expressly authorized; the requirements as to a tax sale being the same before and after 1901.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. §§ 1504, 1505; Dec. Dig. § 754.*]

2. TAXATION (§ 757*)—TAX DEEDS—RECITALS—VALIDITY.

A tax deed, not in the language of the statute, to be valid, must set out, either in precise phrase or by fair intendment to a reasonable certainty, a statement of performance of all the acts essential to a legal cause for selling at the time of sale, and the terms of the deed must satisfy a reasonable mind, without resort to extrinsic evidence, that a valid cause of sale existed.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. § 1507; Dec. Dig. § 757.*]

3. TAXATION (§ 757*)—TAX DEEDS—RECITALS.

The collector of taxes has a naked power to sell real estate to pay taxes, and he must strictly conform with the condition precedent to the exercise of his power, and his deed must contain all recitals of substance which the statute imposes, especially as a tax deed is, under St. 1911, c. 370, prima facie evidence of the facts essential to its validity.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. § 1507; Dec. Dig. § 757.*]

4. TAXATION (§ 760*)—TAX DEEDS—RECITALS—PUBLICATION OF NOTICE OF SALE.

A tax deed, headed "Commonwealth of Massachusetts," and designating by name the newspapers in which the notices of sale were printed as the "Lowell Sun," "Lowell Daily Telegram," and "L'Etoile," without any further assertion

of place of publication than that it was in the county where the real estate is located, sufficiently shows that the "Lowell Sun" and "Lowell Daily Telegram" were published in the City of Lowell, within Rev. Laws, c. 13, § 1; but this is not true of the newspaper called "L'Etoile," because of the absence of anything to indicate the place of its publication.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. § 1509; Dec. Dig. § 760.*]

5. TAXATION (§ 760*)—TAX DEEDS—RECITALS—POSTING OF NOTICE OF SALE—SUFFICIENCY.

A recital in a tax deed of the posting "in the city hall, a public place in the city of Lowell," of the notice of sale, is not fatal to the deed, under Rev. Laws, c. 13, § 40, providing that the notice shall be posted in some convenient public place.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. § 1509; Dec. Dig. § 760.*]

6. TAXATION (§ 760*)—TAX SALES—ADVERTISEMENT—NAMES OF OWNERS.

Under Rev. Laws, c. 13, § 38, providing that the notice of sale of land for payment of taxes shall contain the names of all owners known to the collector, the omission of the names of the owners from the advertisement deprives the collector of any cause for making the sale, and without a statement in the deed of a notice giving the names of the owners the deed fails to show a cause for sale.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. § 1509; Dec. Dig. § 760.*]

7. TAXATION (§ 760*)—TAX SALES—NOTICE—SUFFICIENCY.

A statement in the advertisement for the sale of land for taxes that the sale will be for nonpayment of taxes, while the statutory form provides that the sale will be for the discharge and payment of taxes, is sufficient, and a tax deed stating the terms of the notice is valid.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. § 1509; Dec. Dig. § 760.*]

8. TAXATION (§ 760*)—TAX SALES—VALIDITY.

Under Rev. Laws, c. 13, § 38, requiring that the published notice of tax sales shall contain an accurate description of the several lots of land to be sold, and section 41, requiring a collector to sell the smallest undivided whole of the land which will satisfy the taxes and charges, etc., a tax deed which states that the notice of sale was for the sale of the smallest undivided part of the estate sufficient to discharge the lien, while the sale is of the whole, and not of any undivided part, is defective in the statement of a cause for a sale of the whole, and is invalid.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. § 1509; Dec. Dig. § 760.*]

9. TAXATION (§ 760*)—TAX SALES—DEMAND FOR PAYMENT OF TAXES—RECITAL IN DEED.

Under Rev. Laws, c. 13, §§ 14, 43, requiring the collector to serve a demand for the payment of taxes on every resident assessed, or, in case of heirs of a decedent, on one of them, and to state in the deed the name of the person on whom the demand was made, require the collector to find a resident heir of a decedent, if there is one, and make a demand on him, and then name him in the tax deed; and a tax deed merely reciting that the demand was made on the heirs is insufficient, though the lands were properly assessed to the heirs, under chapter 12, § 21.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. § 1509; Dec. Dig. § 760.*]

10. TAXATION (§ 321*)—ASSESSMENT—OWNERSHIP—HEIRS OR DEVISEES.

Assessors are charged with notice of what may be found on the probate records, in deter-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

mining whether to make an assessment to the heirs or devisees of a decedent.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. § 535; Dec. Dig. § 321.*]

11. TAXATION (§ 660*)—SALES—NOTICE—STATUTES—"PUBLICATION OF ANY NOTICE."

Under Rev. Laws, c. 13, § 1, providing that "publication of any notice" shall mean the act of printing the notice for a successive number of weeks in a newspaper, etc., an advertisement of a tax sale must be published in English in a newspaper printed in English, and a publication in English of a notice in a French newspaper is insufficient.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. §§ 1338-1340; Dec. Dig. § 660.*]

For other definitions, see *Words and Phrases*, vol. 6, p. 5845.]

12. TAXATION (§ 764*)—TAX DEED—DESCRIPTION OF PROPERTY SOLD—SUFFICIENCY.

A tax deed, which describes the property sold as a specified area, rectangular in shape, lying between two streets and between lots of defined owners, is sufficiently definite to enable one to make a reasonable identification of the property.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. §§ 1519-1522; Dec. Dig. § 764.*]

13. TAXATION (§ 658*)—TAX SALES—NOTICE—DESCRIPTION OF PROPERTY.

A description in a tax advertisement must enable both the owner and the bidder, from the terms thereof, to locate with substantial certainty the land to be sold; but it need not be so detailed as to point out its precise boundaries, so that a stranger, unacquainted with the locality and ignorant of the neighbors, might find it without inquiry.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. §§ 1332-1335; Dec. Dig. § 658.*]

14. TAXATION (§ 764*)—TAX SALES—DEED—DESCRIPTION OF PROPERTY.

A tax deed, which merely describes the land by lot numbers, without reference to any plan on which the land may be found plotted, insufficiently describes the land.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. §§ 1519-1522; Dec. Dig. § 764.*]

15. TAXATION (§ 79*)—ASSESSMENT—VALIDITY.

An assessment of land, made to one not in possession, but who holds a tax collector's deed, valid on its face and duly recorded, but who has failed by inadvertence to file in the registry of deeds or with the city treasurer a statement of his residence and place of business, required by Rev. Laws, c. 13, § 45, is sufficient to sustain a sale for taxes.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. §§ 139, 166; Dec. Dig. § 79.*]

16. TAXATION (§ 764*)—TAX DEEDS—DESCRIPTION—SUFFICIENCY.

A tax deed, which describes the land by area in square feet, more or less, the street and side thereof on which it is located, and the number of the lot, without reference to any plan, insufficiently describes the land, though there is a private plan on record at the registry of deeds and a plan at the city engineer's office on which the several lots may be identified.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. §§ 1519-1522; Dec. Dig. § 764.*]

17. TAXATION (§ 79*)—HOLDER UNDER INVALID TAX DEED—"PERSON APPEARING OF RECORD AS OWNER."

One holding under a recorded tax deed, invalid on its face, is not a "person appearing of record as owner," within Rev. Laws, c. 12, § 15, requiring an assessment to the owner of record; for, when a tax deed fails to convey a title,

it fails to convey the rights of the original owner, who remains the only person appearing of record as owner, and a sale founded thereon is void.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. §§ 139, 166; Dec. Dig. § 79.*]

Appeals from Superior Court, Middlesex County; Robert O. Harris, Judge.

Actions by Dennis E. Connors, by Joseph Walsh, and by Edward F. Connors against the City of Lowell. There were judgments granting insufficient relief to plaintiffs, and they and the city appeal. Affirmed in part; reversed in part.

A. S. Howard, for plaintiffs. Wm. W. Duncan, for defendant.

RUGG, J. These are actions under St. 1909, c. 490, pt. 2, § 45 (formerly R. L. c. 13, § 44), to recover money paid for tax deeds which, it is claimed, by reason of error, omissions or informality in the sales, conveyed no title.

[1] 1. The form of tax deed used in several sales was that prescribed in St. 1901, c. 519. This form was in the law less than six months, having been repealed by R. L. c. 227, and supplanted by No. 14 of schedule of forms attached to R. L. c. 13, § 87.¹ The question is whether this form, employed since 1902, was "suitable" under R. L. c. 13, § 87.² The fact that the Legislature permitted its use for a brief period, and then in substance restored important recitals which had existed in earlier statutes, does not necessarily make it a suitable form for any other time than that during which it was expressly authorized. The requirements of law as to a tax sale were the same both before and after 1901.

[2] A tax deed in order to be valid as a suitable instrument of conveyance, when not in the language of the statute, must set out either in precise phrase or by fair intendment to a reasonable certainty a statement of performance of all these acts which are essential to the existence of a legal cause for selling at the time when the sale was made. Although the terms of a tax deed need not show actual compliance to a technical nicety with the minute particulars of statutory requirements in making the sale itself, yet they must satisfy a reasonable mind without resort to extrinsic evidence that a valid cause of sale in fact existed. [3] The collector of taxes has a naked power to sell real estate to pay the lien for taxes, and he must not only strictly conform to all the conditions precedent to the exercise of his power, but his deed must also contain all the recitals of substance which the statute imposes, both for the information of the purchaser and of the owner and of those claiming under each. *Charland v. Home for Aged Women*, 204 Mass. 563, 91 N. E. 146, 134 Am. St. Rep. 696, and cases cited; *Harrington v. Worcester*, 6 Allen, 576; *Lang-*

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes
¹ Now St. 1909, c. 490, pt. 2, § 89, No. 14.
² Now St. 1909, c. 490, pt. 2, § 89.

don v. Stewart, 142 Mass. 576, 8 N. E. 605. Adherence to the somewhat strict rules which have been established as to tax deeds assumes a new importance in view of the sweeping provision of St. 1911, c. 370, to the effect that when duly recorded such a deed "shall be prima facie evidence of all facts essential to its validity." Compare St. 1901, c. 197; R. L. c. 13, § 43; St. 1902, c. 423. Several objections are made to the deeds based on their variation from said form No. 14.

[4] (a) The newspapers in which the notices of sale were printed were described by name as the "Lowell Sun," "Lowell Daily Telegram" and "L'Etoile" without any further assertion as to the place of publication than that it was "in the county where said real estate lies." Although there is no statement in the deed of the city or town within which the real estate lies, it may fairly be inferred from the circumstance that the deed was headed "Commonwealth of Massachusetts," that the Lowell Sun and the Lowell Daily Telegram were published in Lowell in this commonwealth. Newspapers sometimes bear as a part of their title the name of a small country town, although not published there (*Rose v. Fall River Sav. Bank*, 165 Mass. 273, 43 N. E. 93; *Brown v. Wentworth*, 181 Mass. 49, 62 N. E. 984), but no one reading these deeds would have any reasonable doubt as to the fact that these newspapers were published in the city of Lowell. This is not true of the newspaper called L'Etoile. There is nothing about this name to indicate the place of its publication. Although the words of the statute reach only to "the name of the newspaper," yet in order to show the existence of a legal cause of sale the place of its publication as required by R. L. c. 13, § 1, must appear in the deed.

[5] (b) R. L. c. 13, § 40,³ provides that the notice of sale shall be posted "in some convenient and public place." The deeds recite such posting "in city hall, a public place in said Lowell." It is not every public place which would be "convenient" for putting up notices of tax sales. City halls as matter of common knowledge are used generally for such purposes. Halls of this character exist in all municipalities, and the statement in a tax deed, that such a place is convenient for this use, affects no right of the person assessed or of the purchaser, and can add nothing to their knowledge. Under these circumstances failure to follow the prescribed form was not fatal. A quite different case would arise if the public place described was not one commonly known to be convenient for such purposes.

[6] (c) It was a condition precedent to the right of the tax collector to sell that the advertisement should contain "the names of all owners known to the collector." R.

L. c. 13, § 38.⁴ Omission of those names from the advertisement would deprive the collector of any cause for making the sale. All the statutory forms save that in St. 1901, c. 519, require such a statement. Without such a statement the deed in an essential particular, not fairly inferable from other parts of the instrument, fails to show the existence of a cause for sale.

[7] (d) The narration of the terms of the advertisement set out in the deed was that the sale would be for "nonpayment" of taxes, while said form No. 14 was in the words that the sale would be for the "discharge and payment" of the tax. The statement in the deed was supplemental as to cause, while that in the form indicates the purpose of the sale. It is plain from the deed that the only purpose of the sale was to satisfy the tax. In this regard no substantial error appears.

[8] (e) R. L. c. 13, § 38,⁴ requires that the published notice of the sale shall "contain a substantially accurate description of the several rights, lots or divisions of the land to be sold," while by section 41⁵ the collector must sell "the smallest undivided part of the land which will satisfy the taxes and necessary intervening charges or the whole if no person offers to take an undivided part." The deed states that the advertisement was for the sale of "the smallest undivided part of said estate," sufficient to discharge the lien. The sale was of the whole and not any undivided part. The sale could not lawfully have been made of any larger estate than had been advertised. Hence in this particular the form of deed is defective in the statement of a cause for the sale of the whole. All sales in which this form was used were invalid.

It is not necessary to determine whether these deeds were also invalid in not containing enough to warrant a fair inference as to the municipality within which the land conveyed was situated.

[9] 2. Certain lands were properly assessed to the "heirs of George T. Woodward" and to the "heirs of Irene E. Richardson," under R. L. c. 12, § 21.⁶ In these instances the records of the probate court for the county, in which Lowell is located, showed, on the 1st of May of the year in which the taxes were assessed, who the heirs of Woodward and Richardson severally were and that one or more of the heirs of each resided in Lowell. The recitals in the deeds of this class were that demand was made upon "the heirs" of deceased. The collector is required to serve a demand for the payment of the tax upon every resident assessed, or in case of heirs of a deceased person, upon one of them, and to state in his deed "the name of the person on whom the demand * * * was made." R. L. c. 13, §§ 14 and 43.⁷ To

³ Now St. 1909, c. 490, pt. 2, § 41.

⁴ Now St. 1909, c. 490, pt. 2, § 39.

⁵ Now St. 1909, c. 490, pt. 2, § 42.

⁶ Now St. 1909, c. 490, pt. 1, § 21.

⁷ Now St. 1909, c. 490, pt. 2, §§ 14, 44.

say that a demand has been made upon the heirs of an intestate is not giving the name of the person upon whom the demand was made. The two sections cited impose upon the collector the duty of finding a resident heir, if there is one, making the demand upon him, and then naming him in the deed. To name a person is not the same as to describe him. The name of a person is the distinctive characterization in words by which he is known and distinguished from others. Such a designating appellation was not given by the words "heirs of" a person. Tax deeds lacking it are invalid. *Reed v. Crapo*, 127 Mass. 39. [10] Assessors are charged with notice of what may be found upon the probate records in determining whether to make an assessment to the heirs or devisees of one deceased. *Tobin v. Gillespie*, 152 Mass. 219, 25 N. E. 88. There is no hardship in holding the tax collector to the same investigation, if necessary, in ascertaining the name of an heir.

[11] 3. The advertisement of sale in several instances was printed in English in a newspaper printed in the French language. R. L. c. 13, § 1,^s provides that "Publications, as applied to any notice, advertisement or other instrument, the publication of which is required by law, shall mean the act of printing it * * * in a newspaper published in the city or town, if any, otherwise in the county, where the land * * * is situated." English is the language of this country. This conception is fundamental in the administration of all public affairs. It is an elemental truth, so axiomatic in its nature as to need no supporting authority. It is not declared in the Constitution nor enacted by statute. It is so by the universal customs of our past in colony, province and commonwealth. Apart from the more obvious considerations, there are indications that the English language is that of our institutions in the requirement that no one can be a voter or eligible to office unless able to read the Constitution in English (article 20 of Amendments to Constitution), nor solemnize marriage unless able to read and write in that language (R. L. c. 151, § 30). Instruction in the English language is required in all public and private schools. R. L. c. 42, § 1; *Id.* c. 44, § 2. It is plain that a general public notice required by law to be published in a newspaper must be printed in English in an English newspaper. The great weight of authority supports this view. *Auditor General v. Hutchinson*, 113 Mich. 245-249, 71 N. W. 514; *State v. Chamberlain*, 99 Wis. 503, 75 N. W. 62, 40 L. R. A. 843; *Chicago v. McCoy*, 136 Ill. 344, 349, 26 N. E. 363, 11 L. R. A. 413; *Graham v. King*, 50 Mo. 22, 11 Am. Rep. 401; *Road in Upper Hanover*, 44 Pa. 277; *Wilson v. Trenton*, 56 N. J. Law, 469, 29 Atl. 183; *North Baptist Church*, 54 N. J. Law, 111, 22 Atl. 1004, 14 L. R. A. 62;

State v. Jersey City, 54 N. J. Law, 437, 24 Atl. 571; *John v. Connell*, 71 Neb. 10-16, 98 N. W. 457; *Cincinnati v. Bickett*, 26 Ohio St. 49. There are decisions having a contrary appearance in *Richardson v. Tobin*, 45 Cal. 80, *Loze v. New Orleans*, 2 La. 427, and *Kernitz v. Long Island City*, 50 Hun, 428, 3 N. Y. Supp. 144. So far as they are in conflict with the principles here stated we are not inclined to follow them. The deeds which rest upon a publication of the advertisement in a newspaper printed in French are invalid.

[12] 4. Certain lots of land not of the small character indicated in St. 1909, c. 490, pt. 2, § 50 (formerly R. L. c. 13, § 49), are described in the deed by lot numbers, the street and side of street on which located, and the name of all abutting owners, with the general points of compass on which the land of abutting owners lay, but without further designation by metes and bounds, and without reference to any plan upon which the lot as numbered may be found. A sample description of this kind was "three thousand seven hundred fifty-five (3,755) sq. feet of land, more or less, being lots 549-550 on the east side of Tanner street with land now or formerly of Woonsocket Inst. for Sav. on the north and south and Merchants street on the east and Tanner street on the west." While this description reached nearly to the line of indefiniteness, it is on the whole sufficient. It gives data enough to enable one to make a reasonable identification of the property. It indicates a parcel of specified area, rectangular shape, lying between two streets and between lots of other defined owners, presumably a portion of a large tract subdivided into smaller parts. Practically the same information is conveyed in the instances when the rear of the lots bound, not upon a street, but upon another named owner. As matter of common knowledge it is a kind of description not infrequently found in deeds especially of land in the country. To require a greater particularity would impose upon the tax collector the necessity of an expensive survey in many cases. [13] While the descriptions in a tax advertisement must be such as to enable both owner and bidder from its terms to locate with substantial certainty the land to be sold, it need not be so detailed as to point out visually its precise boundaries so that an utter stranger unacquainted with the locality and ignorant of the neighbors could find it without inquiry. Applying the rule laid down in *Williams v. Bowers*, 197 Mass. 565-567, 84 N. E. 317, and the numerous cases there cited, and bearing in mind that one executing only a statutory power in the sale of land must be held to some strictness, the conclusion follows that there is no invalidity in the deeds of this class.

[14] 5. The same rule governs the deeds, where the description is similar in all respects to those last discussed, except that the

^s Now St. 1909, c. 490, pt. 2, § 1.

land is said to be a "part of lots" whose numbers are given. Lot numbers without reference to any plan upon which they may be found plotted are of no further assistance in either case than to convey the information that the parcel described is a subdivision of a larger tract. The sufficiency of the description rests on its other elements.

[15] 6. An assessment of land was made to a person not in possession but holding a tax collector's deed thereof, valid on its face and duly recorded, who had failed by inadvertence to file in the registry of deeds or with the city treasurer the statement of his residence and place of business required by R. L. c. 13, § 45.⁹ This section is chiefly for the benefit of the owner in furnishing him information as to where to find the person to whom he may make tender for purpose of redeeming. He has, however, the alternative or cumulative right to make payment to the tax collector. St. 1902, c. 443.¹⁰ It is not necessary to decide what effect, upon the rights and obligations between themselves of one entitled to redeem and one holding a tax title, the failure of the latter to comply with said section 45 may have. The tax law contains no provision that omission to record such certificate shall render the sale invalid, as it does respecting the time within which the deed shall be recorded. R. L. c. 13, § 43 (now, with subsequent amendments, St. 1909, c. 490, pt. 2, § 44). The thing required by said section 45 can be done only subsequent to the record of the tax deed. Its substance does not relate to any matter inherently affecting the title, but solely to facilitating the ease of redemption. As a general rule assessors in levying subsequent assessments and the tax collector in selling thereunder may treat the holder of a duly recorded tax deed valid on its face as the record owner. *Rogers v. Lynn*, 200 Mass. 354, 86 N. E. 889; *Soils v. Williams*, 205 Mass. 350, 353, 91 N. E. 148. The purposes of the requirements of said section 45 do not appear to include an obligation upon the assessors to make a further examination of the record, beyond finding a duly recorded valid looking tax deed, to ascertain whether the holder has recorded also the necessary certificate and to determine at their peril the sufficiency of its form and whether it has been recorded within a reasonable time. Whatever may be other effects of the failure of the purchaser to record such certificate, the tax deed is not so affected thereby as to furnish no basis for subsequent assessments. See *McNeill v. O'Brien*, 204 Mass. 594-597, 91 N. E. 138. The deeds questioned upon that ground are sufficient in that regard.

[16] 8. Certain deeds now challenged were made on sales of real estate¹¹ assessed to

persons as owners whose title was under tax deeds. In each of which the land was described only by its area in square feet, more or less, the street and side thereof on which it was located, and the number of the lot without reference to any plan. In fact, there was a private plan on record at the registry of deeds and a plan at the office of the city engineer, on which the several lots could be sufficiently identified. This description was insufficient. It differs from those discussed under paragraphs 4 and 5 of this opinion, in that the names of no abutting owners were given, nor was there anything to show the shape of the parcel. The designation of it by a lot number without naming the plan or showing where it might be found or giving any other descriptive circumstance was too indefinite. The tax deed was also in the form held insufficient in an earlier part of this opinion. These deeds were therefore invalid on their face and on inspection show that they convey no title. [17] The question is whether one holding under such a deed invalid on its face "is a person appearing of record as owner" within the meaning of these words in R. L. c. 12, § 15. See St. 1909, c. 490, pt. 1, § 15. The rule established by *Butler v. Stark*, 139 Mass. 19, 29 N. E. 213, that the holder of a tax deed was such a record owner has been applied in *Roberts v. Welsh*, 192 Mass. 278, 78 N. E. 408, and *Welsh v. Briggs*, 204 Mass. 540-552, 90 N. E. 1146, to cases where the tax deeds, good on their face, were invalid by reason of some error in the original assessment or otherwise, not apparent upon an examination of the deed itself. But the rule has never been extended to a case where the tax deed showed on its face that it conveyed no title: A tax deed stands or falls on its own unaided merits. It must be delivered and recorded within 30 days from the sale. Its worth is to be determined as of that date. It cannot be supplemented or changed by subsequent instruments. Its errors and inaccuracies cannot be corrected, nor can its defects be supplied from any source. When by its terms it is obvious that it does not convey a title, it fails utterly to affect the rights of the original owner. He remains the only person "appearing of record as owner" of the property. It follows that an assessment based upon a tax deed which is invalid on its face is not an assessment to an owner of record. Sales founded upon such an assessment are void.

These determinations dispose of all the deeds in question and it is not necessary to discuss the other points argued.

The result is that the judgments entered in the superior court in the actions in which *Dennis F. Connors* and *Joseph Walsh* are the plaintiffs are affirmed. The judgment in the action, in which *Edward F. Connors* is the plaintiff is reversed.

So ordered.

⁹ Now St. 1909, c. 490, pt. 2, § 46.

¹⁰ Now St. 1909, c. 490, pt. 2, §§ 61, 62.

¹¹ Not within the terms of R. L. c. 13, § 49 (now St. 1909, c. 490, pt. 2, § 50).

(176 Ind. 183)

STATE ex rel. DEVENING v. BARTHOLOMEW. (No. 21,866.)

(Supreme Court of Indiana. June 23, 1911.)

1. PLEADING (§ 218*)—DEMURRER—STATUTE—CONTENTS OF DEMURRER.

Under Acts 1911, c. 157, § 2, relating to demurrers in civil cases, the memorandum of demurrer should contain the reasons why the complaint is insufficient, and the reasons should be numbered, but no argument should be included.

[Ed. Note.—For other cases, see Pleading, Dec. Dig. § 218.*]

2. STATUTES (§ 124*)—TITLES OF ACTS—EXPRESSION OF SUBJECT IN TITLE—COURTS—"DEFINE."

Under Const. art. 4, § 19, providing that every act shall embrace but one subject and matters properly connected therewith, which subject shall be expressed in the title, Act March 1, 1911 (Acts 1911, c. 67), entitled "An act defining the judicial district of the Shelby and Marion superior court, fixing the time and place of holding courts therein," etc., is not unconstitutional because using the word "defining" instead of "creating" or "establishing," for the title of an act is to receive a liberal construction if necessary to sustain the legislative intent, and, if the word used by the Legislature can in any of its various usages or meanings be considered appropriate, then the act cannot be held unconstitutional, though other words may be more appropriate, and, as the word "define" is frequently used in legislation to mean "create," "establish," "enlarge," or "expand," the title of this act is broad enough to cover the creation of a new superior court.

[Ed. Note.—For other cases, see Statutes, Dec. Dig. § 124.*]

For other definitions, see Words and Phrases, vol. 2, pp. 1914, 1945.]

3. JUDGES (§ 3*)—APPOINTMENT—POWER OF LEGISLATURE.

The Legislature has no power under the Constitution to fill a vacancy in a judicial office.

[Ed. Note.—For other cases, see Judges, Cent. Dig. §§ 4-10; Dec. Dig. § 3.*]

4. STATUTES (§ 181*)—CONSTRUCTION—GENERAL RULE.

In construing legislative enactments, the court should give effect to the intention of the Legislature as collected from the entire statute, and that intention will prevail over inconsistencies, or the literal import of terms, when a strict construction would lead to contradiction.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 259, 263; Dec. Dig. § 181.*]

5. STATUTES (§ 61*)—CONSTRUCTION—GENERAL RULES—DUTY OF COURT.

Where the validity of a statute is doubtful, it is the duty of the court to so construe it as to sustain the statute if it can be done by any fair construction.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 56; Dec. Dig. § 61.*]

6. COURTS (§ 183*)—SUPERIOR COURT—STATUTES.

Under Acts 1911, c. 67, § 20, providing that "nothing in this act shall be construed as to affect existing laws pertaining to the courts of Marion county, except so far as the provisions of the act shall affect the terms and proceedings of the superior court of Marion county in room No. 5," sections 3 and 19, which fix the terms of court for both the Marion and Shelby superior courts, apply only to room or division No. 5; this being true of the sections concern-

ing the jurisdiction of the court in Marion county.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 183.*]

7. COURTS (§ 183*)—COURTS OF GENERAL JURISDICTION—INDIANA—SUPERIOR COURT—STATUTES.

Under Acts 1911, c. 67, § 4, providing for the Shelby county superior court, and making the judge of room No. 5 of the Marion county court judge of that court, the jurisdiction of that judge is the same as the other judges of the Marion county superior court, save that he has the additional jurisdiction given by Act 1911.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 183.*]

8. COURTS (§ 183*)—COURTS OF GENERAL JURISDICTION—INDIANA—SUPERIOR COURT—STATUTES.

Under Acts 1911, c. 67, creating the Shelby county superior court, that court has only the jurisdiction given it under the act.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 183.*]

9. COURTS (§ 50*)—POWERS OF JUDGES—STATUTE.

Acts 1911, c. 67, § 4, creating the Shelby county superior court, and making the judge of room No. 5 of the Marion county superior court judge of that court, does not affect the authority of the judges of the various rooms of the Marion county superior court to sit as judges in other rooms of that court.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 50.*]

10. EVIDENCE (§ 340*)—DOCUMENTARY EVIDENCE—AUTHENTICATION.

Under Acts 1911, c. 67, § 4, creating the Shelby county superior court, and making the judge of room No. 5 of the Marion county superior court judge of the Shelby county superior court, the proceedings of room No. 5 may be authenticated just as if the act of 1911 had never been passed, and the proceedings of the Shelby county superior court may be authenticated by a certificate of the clerk thereof.

[Ed. Note.—For other cases, see Evidence, Dec. Dig. § 340.*]

11. JUDGES (§ 30*)—CIRCUIT AND SUPERIOR JUDGES—NATURE OF OFFICE.

Judges of the circuit and superior courts are not county officers, but belong to the judiciary and may be required to perform their duties in a county or district outside of the one in which they were elected, and therefore Acts 1911, c. 67, § 4, requiring the judge of room No. 5 of the Marion county superior court to sit as judge of the Shelby county superior court, is constitutional.

[Ed. Note.—For other cases, see Judges, Dec. Dig. § 30.*]

12. COURTS (§ 183*)—POWERS—STATUTES.

The Legislature is not inhibited from giving a different jurisdiction to the various divisions of the superior court in Marion county.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 183.*]

13. CONSTITUTIONAL LAW (§ 70*)—DEPARTMENTS OF GOVERNMENT—JUDICIARY—ENCROACHMENT OF LEGISLATURE.

The Legislature is the sole judge of the wisdom of statutes, and courts may not interfere because they deem legislative enactments to be unwise, unjust, or inexpedient.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 129-132; Dec. Dig. § 70.*]

For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep't Indexes

14. JUDGES (§ 22*)—COMPENSATION—CHANGE IN COMPENSATION.

The Legislature is not prohibited from increasing or diminishing the salary of a judge of the superior court during his term of office.

[Ed. Note.—For other cases, see Judges, Cent. Dig. § 82; Dec. Dig. § 22.*]

15. STATUTES (§ 64*)—PARTIAL INVALIDITY—EFFECT.

Acts 1911, c. 67, § 4, creating the Shelby county superior court, and making the judge of Marion county superior court, room No. 5, judge of that court, would not be wholly invalid, because provisions as to the salary of the court were invalid.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 58-66; Dec. Dig. § 64.*]

Appeal from Circuit Court, Marion County; Charles Remster, Judge.

Mandamus by the State, on the relation of Phillip Devening, against Pliny W. Bartholomew, as Judge of Room 5 of the Superior Court of Marion County. From a judgment sustaining a demurrer to the complaint, relator appeals. Reversed and remanded.

Elmer Bassett, David L. Wilson, Wray & Campbell, Herbert C. Jones, Frank H. Wolfe, and Hord & Adams, for appellant. Gavin, Gayn & Davis, Henry Warrum, and Sullivan & Knight, for appellee.

MONKS, J. This action for mandate was brought by the relator under the provisions of an act approved March 6, 1911 (Acts 1911, pp. 541-543), to compel appellee to appear and preside over the Shelby superior court; it being alleged in the complaint that holding said court by appellee is specially enjoined by an act approved March 1, 1911 (Acts 1911, pp. 103-110), and that such duty results from the fact that appellee holds the office of judge of room No. 5 of the superior court of Marion county. Appellee's demurrer for want of facts was sustained to the complaint, and, the relator failing and refusing to plead further, judgment was rendered in favor of appellee. The errors assigned call in question the action of the court in sustaining said demurrer.

Said demurrer for want of facts is governed by an act approved March 4, 1911 (Acts 1911, p. 416), which act amended sections 85 and 89 of "An act concerning proceedings in civil cases," approved April 7, 1881, Acts 1881, p. 255, being sections 344, 348, Burns 1908.

[1] Under the proviso in section 2 of said act of 1911, the defects in a complaint not specifically stated and pointed out in the memorandum, which is a part of the demurrer, are waived by the demurring party, and he cannot thereafter question the same for any defect not so specified. Said memorandum should contain only the reasons why the complaint is insufficient, stated in plain and concise language, without repetition, and no argument to sustain the same should

be included therein. Any argument upon such demurrer, if in writing, must be upon a separate paper and is no part of the demurrer. Reasons stated in the memorandum should be numbered or otherwise designated so that in their consideration they can be referred to by number or such other designation.

It is the better practice to set out said reasons immediately following the cause of demurrer on the same paper, and that the party filing the demurrer for want of facts or his counsel sign the same at the close of the reasons set forth, so that the cause of demurrer and the reasons stated why the complaint is insufficient constitute one instrument or writing and may be signed and filed as one pleading.

[2] It is first insisted by appellant that the act approved March 1, 1911 (Acts 1911, pp. 103-110), entitled "An act defining the judicial district of the Shelby and Marion superior court, fixing the time and place of holding courts therein, providing for the jurisdiction of said courts and otherwise regulating the manner of holding and length of terms of the sessions of said courts in each of said counties," etc., is unconstitutional and void because the subject of the act is not expressed in the title as required by section 19 of article 4 of the Constitution, which reads as follows: "Every act shall embrace but one subject and matters properly connected therewith, which subject shall be expressed in the title. But if any subject shall be embraced in an act which shall not be expressed in the title, such act shall be void only as to so much thereof as shall not be expressed in the title." This contention is based upon the claim that the word "defining," as used in said title, when taken in its plain and ordinary sense, as required by section 240m, Burns 1908, does not mean "create" or "establish," and that therefore "the part of the act which purports to create the Shelby and Marion superior courts is void because not expressed in the title of the act."

This is not the first time the Legislature has used the word "define" or "defining" instead of the word "create" or "establish," in an act creating new judicial districts. Acts 1885, p. 119; Acts 1889, p. 50; Acts 1905, p. 119.

The word "constitute," instead of the word "create" or "establish," has also been used in the titles of acts creating new judicial circuits. Acts 1867, p. 84; Acts 1871, p. 63.

The act approved March 6, 1873 (Acts 1873, p. 87), which abolished the common pleas courts and established a number of new judicial circuits, did not have the word "create" or "establish" in its title.

The title of said acts reads as follows: "An act to divide the state into circuits for judicial purposes, fixing the time of holding

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

courts therein, abolishing the courts of common pleas, and transferring the business thereof to the circuit courts, and providing for the election of judges and prosecuting attorneys in certain cases."

By an act entitled "An act concerning the courts in the counties of Howard, Tip-ton, Grant and Delaware declaring an emergency," approved March 1, 1909 (Acts 1909, p. 79), the Legislature abolished the Howard superior court, established the Delaware superior court, and created a new judicial circuit consisting of the county of Howard.

The constitutionality of none of these acts has been assailed on the ground that the word "create" or "establish" was not used in the title.

In *Board, etc., v. Albright*, 168 Ind. 564, 568, 81 N. E. 578, 579, it was said by the court, in response to a contention that an act was in violation of said section 19 of article 4 of the Constitution, that: "It is quite permissible to use the details of a title where available, to grasp the general subject to which an act related. *Maulsee Coal Co. v. Partenhimer* (1900) 155 Ind. 100 [55 N. E. 751, 57 N. E. 710]; *Isehour v. State* (1901) 157 Ind. 517 [62 N. E. 40] 87 Am. St. Rep. 228. A standard text-book states: 'The subject of an act may be expressed generally in the title, or spelled out from details, and occasionally from details which are independent and unconnected except through some general subject as cousins-german are related through a common ancestor. According to the authorities, the general subject need not appear in the title, if it is clearly disclosed or readily inferred from the details expressed.' 1 *Lewis' Sutherland, Stat. Constr.* (2d Ed.) § 134." *Central Union Telephone Co. v. Fehring*, 146 Ind. 189, 45 N. E. 64.

As was said in *Western Union Telegraph Company v. Braxton*, 165 Ind. 165, 168, 74 N. E. 985, 986: "In the interpretation of the title we must look to the body of the act, and in construing the body we just look to the title; and if it appears from both that all the provisions of the act are fairly referable to one general subject, and that subject is clearly expressed in the title, the act is valid, though there may be more than the general subject expressed therein. 1 *Lewis' Sutherland, Stat. Constr.* (2d Ed.) § 131, and cases cited."

In *Hargis v. Board*, 165 Ind. 194, 195, 196, 73 N. E. 915, 916, we said: "That the title of an act is to receive a liberal construction is necessary to sustain the legislative intent. If the words used in a title, taken in any sense or meaning they will bear, are sufficient to cover the provisions of the act, the act will be sustained even though such meaning may not be the most common meaning of such words. These rules, however, are to be used to effectuate, not to defeat, the legislative intent." 26 Am. & Eng. Encyc. Law (2d Ed.) 583-590; 1 *Lewis' Suth-*

erland, Stat. Constr. (2d Ed.) §§ 121, 127, 129, 134; *Maule Coal Co. v. Partenhimer* (1900) 155 Ind. 100, 106, 107, 55 N. E. 751, 57 N. E. 710, and cases cited; *State ex rel. v. Roby* (1895) 142 Ind. 168, 184-188, 41 N. E. 145, 33 L. R. A. 213, 51 Am. St. Rep. 174; *State v. Arnold* (1895) 140 Ind. 628, 38 N. E. 820; *Walker v. Dunham* (1861) 17 Ind. 483. "The courts will not resort to a critical construction of the title in order to hold a statute unconstitutional. On the contrary, the language of the title is in all cases given a liberal interpretation, and the largest scope accorded the words employed that reason will permit in order to bring within the purview of the title all the provisions of the act." 26 Am. & Eng. Encyc. Law (2d Ed.) 583; *Clare v. State*, 68 Ind. 17, 25, and cases cited; *Mull v. Indianapolis, etc., Co.*, 169 Ind. 214, 222, 81 N. E. 657.

To "define" is "to fix, establish, or prescribe authoritatively." 2 Cent. Dic. p. 1053, "Define," 2; *Robert J. Boyd, etc., Co. v. Ward*, 85 Fed. 27, 28 C. C. A. 667, 675.

The word "define" is frequently used in legislation to mean create, establish, enlarge, or extend. In re Fourth Judicial District, 4 Wyo. 133, 137, 32 Pac. 850, and cases cited; *People v. Bradley*, 36 Mich. 447; *Commissioners v. Bailey*, 13 Kan. 607, 609; *State v. Commissioners*, 41 Kan. 630, 634, 21 Pac. 601; *State v. Burr*, 16 N. D. 581, 113 N. W. 705; *State v. Ely*, 16 N. D. 569, 113 N. W. 711, 14 L. R. A. (N. S.) 638; *Walters v. Richardson*, 93 Ky. 374, 20 S. W. 279; *Gould v. Hutchings*, 10 Me. 145, 154.

In *State v. Bradley*, supra, in construing the word "define" as used in the title of an act, it is said: "While the word 'define' may be, and frequently is, used in the sense and for the purpose claimed, and while we might concede such to be the general and more popular use of the word, yet it is not used exclusively in such a sense. It has a broader and different meaning. It is frequently used in the titles of acts, and but seldom in the narrower sense, or as merely defining powers previously given. An examination of our session laws will show that acts have frequently been passed, the constitutionality of which have never been questioned, where the powers and duties conferred could not be considered as merely explaining, or making more clear, those previously conferred or attempted to be, although the word 'define' used in the title. In legislation it is frequently used in the creation, enlarging, and extending the powers and duties of boards and officers, in defining certain offenses and providing punishment for the same, and thus enlarging and extending the scope of the criminal law. And it is properly used between different governments, as, 'to define the extent of a kingdom or country.' Indeed, it is a word of very frequent and general use, and although even the settlement of a disputed boundary must necessarily and inevitably extend the

line and take in new or additional territory, within the understanding of one of the claimants, we have never heard of any question being made as to the want of authority to enlarge the possessions of another under a power given to define them. If the word used by the Legislature can in any of its various uses or meanings be considered appropriate or applicable, then we cannot say that they did not have a right to use it in that sense, even although we might be of opinion that a better and more appropriate one might have been chosen, and one that people generally would have better understood."

It is evident, from what we have said and the authorities cited, that appellee's objection to the said act on account of the use of the word "defining" in the title of said act is not tenable, but that the title of said act is broad enough to cover said act, even if it creates a new superior court, or a new superior court district, or both.

It is next insisted by appellee that said act is valid, creates a new and independent court in Marion and Shelby counties, and that therefore it is unconstitutional so far as it attempts to name or appoint the judge of room No. 5 of the superior court of Marion county, judge of the court so created, because that power is vested in the Governor by the Constitution.

A superior court consisting of three judges was established in Marion county in 1871 (Acts 1871, pp. 48-54). Said act provided that said court should have a seal, "Which shall contain on the face the words 'Superior Court of ——— County,' filling in the blank space according to the name of the county."

It was held that said court, although consisting of more than one judge, was only one court. *Richcreek v. Russell*, 34 Ind. App. 217, 230, 72 N. E. 617.

In 1907 an act was passed providing that said court "shall consist of five judges." At the same session of the Legislature it was enacted that such court shall be divided into five rooms, and "such rooms number consecutively beginning with No. 1 and the judges of said court shall be nominated and elected by rooms, provided that any one of said judges shall have full power and authority to sit as judge in the other rooms of said court." Acts 1907, p. 42 (section 1463, Burns 1908). The effect of the act was to divide the superior court of Marion county into five rooms or divisions and require that the judges be nominated and elected by rooms or divisions; but notwithstanding this authorized any one of the judges to sit as judge in the other rooms or divisions. Whether the judges would have had this power in the absence of a provision authorizing it we need not determine.

The question is whether said act of 1911 (Acts 1911, pp. 103-110) created a new and independent superior court in Marion county

and in Shelby county without affecting the superior court of Marion county with its five judges, or whether said act abolished the superior court of Marion county and created a new court, named the "Marion superior court," in its place.

[3] If it did either, the judgment must be affirmed because the Legislature has no power under the Constitution to fill a vacancy in a judicial office.

The proper answer to these questions depends upon the construction which must be given to said act of 1911. Said act is vague and uncertain in some of its provisions, and if words are taken in their plain, exact, and literal sense, some provisions may be contradictory.

[4, 5] But as said by the court in *Clare v. State*, 68 Ind. 17, at pages 25, 26: "We do not understand that this court is bound, in the interpretation and construction of a statute, to take the words used therein in their plain, exact, and literal sense. On the contrary, the true rule is, and always has been, as recognized in many decisions of this court, to make the legislative intention, in the enactment of the particular statute, the chief guide of the court in its interpretation and construction. If the object, purpose, and intention of the Legislature, in the enactment of the particular statute, can be fairly ascertained and arrived at, then it is the duty of the court to overlook and disregard all apparent inaccuracies and mistakes in the mere verbiage or phraseology of the statute, and, if possible, to give force and effect to the evident reason, spirit, and intent of the law. This, we think, is the true and only safe rule for the guidance of the courts in all statutory exposition and construction and as such it has been recognized and acted upon by this court, in a large number of its reported decisions. We cite only a limited number of these decisions. *Mayor, etc., of Jeffersonville v. Weems*, 5 Ind. 547; *Shoemaker v. Smith*, 37 Ind. 122; *Garrigus v. Board, etc., of Park County*, 39 Ind. 66; *State ex rel. v. Tucker*, 46 Ind. 355; *State ex rel. v. Mayor, etc., of La Porte*, 28 Ind. 248; and *Zorger v. City of Greensburgh*, 60 Ind. 1. It has been well said that it is the duty of the courts to execute all laws according to their true intent and meaning; and that intent, when collected from the whole and every part of a statute, must prevail even over the literal import of terms and control the strict letter of the law, when the latter would lead to possible injustice and contradictions. Where the constitutionality of a statute is in question, and an adherence to the strict letter of the law might perhaps render the statute unconstitutional and void, while a liberal construction of the act, in accordance with the evident intention and meaning of the Legislature, would remove all doubts as to its constitutionality, in such case, it seems to us that it would be the

manifest, if not imperative, duty of the courts to give the statute such liberal construction as, by giving effect to the legislative intention, would sustain and not defeat the law in question; for it is clearly the duty of the courts, when the constitutionality of a statute is merely doubtful, to sustain the law, if it can be done by any fair construction. *Maize v. State*, 4 Ind. 342; *Stocking v. State*, 7 Ind. 326; and *Shoemaker v. Smith*, supra."

It was said by the court in *Storms v. Stevens*, 104 Ind. 46, 50, 3 N. E. 401, 403: "In the construction of statutes, the prime object is to ascertain and carry out the purpose and intent of the Legislature. To do this, the words used in the statute should be first considered in their literal and ordinary signification. But if by giving them such a signification the meaning of the whole statute is rendered doubtful, or is made to lead to contradictions or absurd results, the whole statute must be looked to, and the intent as collected therefrom must prevail over the literal import of terms and detached clauses and phrases. *Mayor, etc., v. Weems*, 5 Ind. 547; *Smith v. Moore*, 90 Ind. 294, 305, and cases there cited."

In *State Board, etc., v. Holliday*, 150 Ind. 216, 233, 49 N. E. 14, 19 (42 L. R. A. 826) this court said: "Sutherland on Stat. Const. § 218, says: 'When the intention can be collected from the statute, words may be modified, altered, or supplied so as to obviate any repugnancy of inconsistency with such intention.' To the same effect are *Endlich* on Ind. Statutes, § 365; *Potter's Dwaris* on Statutes, 175-180."

In *City of Indianapolis v. Heugle*, 115 Ind. 581, 588, 18 N. E. 172, 176, this court said: "So, it has been said that it is an established rule, applicable to the construction of all remedial statutes, that cases within the reason, though not within the letter of a statute, shall be embraced by its provisions, and that cases within the reason, though not within the letter, shall be taken to be within the statute. *State v. Canton*, 43 Mo. 48; *People v. Lacombe*, 99 N. Y. 43 [1 N. E. 599]; *Middleton v. Greeson*, 106 Ind. 18 [5 N. E. 755]."

The following authorities are to the same effect: *State v. Insurance Co., etc.*, 115 Ind. 257, 264, 17 N. E. 574, and cases cited; *Middleton v. Greeson*, 106 Ind. 18, 5 N. E. 755, and cases cited; *Miller v. State*, 106 Ind. 415, 423-424, 7 N. E. 209; *Krug v. Davis*, 87 Ind. 590, 595, 596; *Warren v. Britton*, 84 Ind. 14, 22, 23; *McComas v. Krug*, 81 Ind. 327, 332, 333, 42 Am. Rep. 135; *City of Evansville v. Summers*, 108 Ind. 189, 193, 9 N. E. 81; *Hargis v. Board, etc.*, 165 Ind. 194-196, 73 N. E. 915.

It is evident that the purpose of the Legislature in passing said act of 1911 was to relieve the Shelby circuit court without increasing the number of judges in the state and without affecting the superior court of

Marion county, except the terms and proceedings in room 5 of said court.

Keeping in view this purpose of the Legislature and said rules governing the construction of statutes, it is manifest that the Legislature by said act intended to provide a superior court in Shelby county to be called the Shelby superior court, and to continue the superior court of Marion county with its five judges divided into rooms or divisions numbered from 1 to 5, inclusive, as it existed at the time said act was passed, with the same jurisdiction it then had, except as such act affects the terms and proceedings of room 5 of said court.

There is no provision in said act of 1911 repealing the act of 1871, which created the superior court of Marion county, nor is there anything in said act of 1911 from which it can be fairly inferred that the Legislature intended to abolish said court and create another court in its place. On the contrary, although it is provided, in section 20 of said act of 1911 (Acts 1911, p. 109), that "all laws and parts of laws inconsistent with the provisions of the act are hereby repealed," it is expressly provided in said section of said act of 1911 that "nothing in this act shall be so construed as to affect existing laws pertaining to the courts of Marion county, Indiana, except in so far as the provisions of the act shall affect the terms and proceedings of the superior court of Marion county in room No. 5 of said county."

[6] It is evident, therefore, that any provision of said act of 1911, which but for said provision in section 20 would affect the superior court of Marion county, affects only room 5 of said court as to its terms and proceedings.

Under this provision of said section 20:

(1) Section 3, which fixes the term of said court in Marion county to begin on the Mondays succeeding the term of court in Shelby county and shall continue for six weeks during each term if the business thereof shall require it, and section 19 of said act, concerning the terms of said court, only apply to room or division No. 5 of said court, and this is true also of the sections concerning the jurisdiction of said court in Marion county.

[7] (2) The jurisdiction of room or division No. 5 is the same as the other rooms of said court under the law in force when the act of 1901 was passed, except that it also has such additional jurisdiction as is given by the act of 1911.

[8] (3) The Shelby superior court only has such jurisdiction as is given by the act of 1911.

[9] (4) The taking effect of said act of 1911 did not in any way affect or change the authority of any one of the judges of said superior court of Marion county to sit as judge in the other rooms or divisions of said court.

[10] (5) The proceedings of said room or

division 5 of said court may be authenticated in the same manner as if said act of 1911 had never been passed, and the proceedings of the Shelby superior court may be authenticated by the certificate of the clerk thereof and the seal of said court, as the proceedings of other courts are authenticated.

Appellee concedes that the Legislature has the power to create a superior court in Shelby county consisting of five judges and by attaching such county to Marion county form a superior court district of the two counties and require the five judges of the existing superior court in Marion county to hold such superior court in the added county of Shelby as well as the superior court in Marion county during the remainder of the terms of such judges.

[11] Judges of the circuit and superior court are not county officers; they belong to the judicial department and perform state functions, in the discharge of their official duties, and they may be required to perform these duties outside of the county or district in which they were elected, at least in counties attached to the judicial district after their election. Whether they could be compelled to hold court outside their respective districts it is not necessary to determine in this case.

Our attention has not been called to any provision of the Constitution, and we know of none, which prevents the Legislature from providing a superior court in Shelby county and adding the same to the district of room or division 5 of the superior court of Marion county, and requiring the judge of said room or division to hold court in the superior court of Shelby county as well as in said room or division 5 during the remainder of his term, and providing for the election of his successor by the judicial district composed of both of said counties. This was the evident purpose of the Legislature in passing said act of 1911.

[12] Appellee contends that this leads to an incongruous situation, "that one judge of the superior court of Marion county would be exercising a different jurisdiction from the other judges thereof," and "would receive different compensation from the other judges of said court." There is nothing in the Constitution which prevents the Legislature from giving a different jurisdiction to each room or division of the superior court of Marion county, or from giving a different jurisdiction to each of the superior courts of a district composed of more than one county. When the Nineteenth judicial circuit was composed of the counties of Marion and Hendricks, the circuit court of Hendricks county had jurisdiction of criminal cases while the circuit court of Marion county had no such jurisdiction; the same being given to the criminal court of Marion county. At the present time the jurisdiction of the circuit courts is not the same in all counties in the state. Wherever there is a probate court and criminal court as in Ma-

rión county, the circuit court has no probate or criminal jurisdiction, while in the counties where there is no probate or criminal court the circuit court has jurisdiction of such matters. Nor is the jurisdiction of the superior courts the same in all the counties where such courts exist. In some counties such courts have no probate or criminal jurisdiction (sections 1472, 1502, 1561, Burns 1908), while in other counties they have a part or all of such jurisdiction (sections 1527, 1540, 1574, Burns 1908).

It is not a question of whether such legislation is desirable or wise, but whether the Legislature has such power.

[13] If it has, the courts cannot interfere with such laws even if they are deemed unwise, unjust, or inexpedient. *Smith v. Indianapolis, etc., R. Co.*, 158 Ind. 425, 427, 63 N. E. 849; *State v. McClelland*, 138 Ind. 395, 399, 37 N. E. 799; *Hedderick v. State*, 101 Ind. 565, 1 N. E. 47, 51 Am. Rep. 763; 2 *Indiana Digest Annotated*, p. 725, §§ 39, 40.

[14] There is nothing in the Constitution which would prevent the Legislature from increasing or diminishing the salary of a judge of a superior court during his term of office. *Board v. Lindiman*, 185 Ind. 186, 191, 73 N. E. 912. It has been held that the discretion of the Legislature in passing laws fixing the salaries of public officers cannot be inquired into by the courts. *Harmon v. Board, etc.*, 153 Ind. 68, 71, 54 N. E. 105; *Board v. Lindiman*, 185 Ind. 186, 190, 73 N. E. 912.

[15] Even if the judge of room or division 5 of said court would not receive under said act of 1911 the same salary as the judges of the other rooms of said court—a question we need not and do not decide—and if the Legislature had no power to make this difference in the salaries of such judges, this would not render the entire act invalid. *Harlin v. Schaffer*, 169 Ind. 1, 81 N. E. 721; *Swartz v. Board, etc.*, 158 Ind. 141, 151, 152, 63 N. E. 31; *Martindale v. Town of Rochester*, 171 Ind. 250, 264, 86 N. E. 321; *State v. Barrett*, 172 Ind. 169, 174, 87 N. E. 7.

The names "superior court of Marion county" and "Marion superior court" seem to be used interchangeably in some sections of said act as are the names "Shelby superior court" and "superior court of Shelby county." However, what was intended by the use of each of said names in each instance where used can be readily determined from an examination of said act and the act which it affects. *Indianapolis, etc., R. Co. v. Lewis*, 30 Ind. App. 515, 518, 519, 66 N. E. 508.

Under the act of 1911 it was the duty of appellee, as the judge of room or division No. 5 of the superior court of Marion county, to appear and preside over the Shelby superior court, as said county and court were in his judicial district. It follows that the court erred in sustaining the demurrer to the complaint.

Judgment reversed, with instructions to overrule said demurrer and for further proceedings not inconsistent with this opinion.

(176 Ind. 463)

PRINCETON COAL MINING CO. v. LAWRENCE. (No. 21,829.)¹

(Supreme Court of Indiana. June 7, 1911.)

1. PLEADING (§ 63*)—COMPLAINT—STATUTES.

One seeking to avail himself of a right conferred by statute must state facts in his complaint bringing him within the statute.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 10, 133; Dec. Dig. § 63.*]

2. DEATH (§ 11*)—RIGHTS OF ACTION—STATUTES.

In the absence of statute, no action lies for death.

[Ed. Note.—For other cases, see Death, Cent. Dig. § 15; Dec. Dig. § 11.*]

3. MASTER AND SERVANT (§ 118*) — SAFE PLACE TO WORK—MINES—STATUTES.

Acts 1905 (Burns' Ann. St. 1908, § 8569), on the general subject of coal mining, by section 8579, provides that, where the roadways or entries of any mine are so dry that the air becomes charged with dust, they must be sprinkled, and that it is the duty of the inspector to see that this is done. Section 8597, which is part of the same act, provides that for any injury or death occasioned by any violation of this act, or willful failure to comply with its provision, a right of action against the operator shall accrue to the party injured, or to his widow or other relatives; and section 8598, also of the same act, makes any willful neglect, refusal, or failure to do such things required a misdemeanor. Acts 1907, c. 204, was entitled "An act concerning coal mines, and to provide for the health and safety of persons employed therein," etc., and repealed all laws in conflict; and section 21 of that act provides that "this act shall be cumulative of other acts on the subject, and that all laws in conflict shall be repealed." Acts 1907 (Burns' Ann. St. 1909, § 8613), gives mining inspectors the power to order the sprinkling of coal mines, and provides that after the operator received notice to sprinkle it should be unlawful to omit such sprinkling; and section 14 of the act of 1907 makes violation of the act a misdemeanor. On the day the act of 1907 was passed, another act was passed (Acts 1907, c. 157), with an emergency clause having reference to actions for injuries, and amending the act of 1905 but not taking away the widow's right of action. *Held*, in view of these various sections and the emergency act of 1907, and the fact that the act of 1907 was declared to be cumulative, the statute of 1907 did not repeal the act of 1905 to the extent that a failure to sprinkle would not be a violation, unless the inspector ordered it and gave notice thereof to the operator.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 118.*]

4. STATUTES (§ 225*)—CONSTRUCTIONS—SIMILAR STATUTES.

All consistent statutes relating to the same subject should be construed together with reference to the whole system of which they form a part, so as to give effect to the general intent.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 302, 303; Dec. Dig. § 225.*]

5. STATUTES (§ 225½*)—CONSTRUCTION—CONTEMPORANEOUS STATUTES.

Statutes passed by the Legislature on the same day or at the same session, when related on the same subject, are presumed to be actuated

by the same policy, and should be construed together, so that all may stand.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 304; Dec. Dig. § 225½.*]

6. STATUTES (§ 225*)—CONSTRUCTION—SIMILAR ACTS.

Where a later act is declared to be cumulative of a prior one, that fact is of value in determining the legislative intent.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 302, 303; Dec. Dig. § 225.*]

7. MASTER AND SERVANT (§ 118*)—MINES—REGULATIONS—STATUTES—CONSTRUCTION.

Acts 1905 (Burns' Ann. St. 1908, §§ 8579, 8597, 8598), making it a misdemeanor to fail to sprinkle dusty mines, and giving a right of action for injuries or death arising from such failure, is a remedial, as well as a penal, statute, and should not receive so strict a construction as to destroy the object of its enactment.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 118.*]

8. MASTER AND SERVANT (§ 118*)—REGULATION—STATUTES—"VIOLATION"—"WILLFUL NEGLIGENCE."

Acts 1905 (Burns' Ann. St. 1908, § 8579), requires the operators of a mine to sprinkle when the roadways and entries are so dry as to cause dust; and Acts 1907 (Burns' Ann. St. 1908, § 8613), provides that the inspector of mines shall have the discretion to order sprinkling in any mine. Acts 1905 (Burns' Ann. St. 1908, § 8598), and Acts 1907, c. 204, § 14, both make it a misdemeanor for any person to willfully neglect or violate any of the provisions of this act; and Acts 1905 (Burns' Ann. St. 1908, § 8597) gives a right of action for injuries occasioned by any violation or willful failure to comply with the provisions of the act. *Held*, that "violation" means either omission or commission, or nonconformity, while "willful neglect" means more than mere nonconformity, but an intentional and conscious refusal to comply with the act; and hence, under the clause giving a right of action for any violation, a mere negligent failure to sprinkle gives a right of action.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 118.*]

For other definitions, see Words and Phrases, vol. 8, pp. 7326, 7327, 7433.]

9. MINES AND MINERALS (§ 118*)—OPERATION—REGULATIONS—STATUTES.

Under Burns' Ann. St. 1908, § 8610, providing that, where the miners so elect, persons may be employed to act as shot-firers in coal-mines, and their wages shall be paid by the miners working therein, miners were hired as shot-firers and part of their wages were paid by the mining company who employed other miners to produce coal at a fixed price per ton. *Held*, that whether the strict relation of master and servant existed between these shot-firers and the operators, they were more than licensees, and were entitled to the benefit of the protection of all statutes passed for the protection of coal miners.

[Ed. Note.—For other cases, see Mines and Minerals, Dec. Dig. § 118.*]

10. MASTER AND SERVANT (§ 228*)—CONTRIBUTORY NEGLIGENCE OF SERVANT—BREACH OF STATUTORY DUTY.

Where the operator of a coal mine failed to comply with statutory regulations, and that failure occasioned an injury to miners, the miners' negligence in other particulars is no bar to recovery.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 228.*]

For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

¹ Rehearing denied, 96 N. E. 337.

11. MINES AND MINERALS (§ 118*)—OPERATION OF MINES—PERSONAL INJURIES—NEGLECT—IMPUTED NEGLIGENCE.

Where the failure of the operator of a mine to observe statutory regulations was the proximate cause of an injury to shot-firers, who were not exactly servants, but worked for the other miners, the negligence of the regular miners will not bar a recovery.

[Ed. Note.—For other cases, see *Mines and Minerals*, Dec. Dig. § 118.*]

Appeal from Circuit Court, Gibson County; O. M. Welborn, Judge.

Action by Josie Lawrence against the Princeton Coal Mining Company. From a judgment for plaintiff, defendant appeals. Affirmed.

See, also, 93 N. E. 1032.

Embree & Embree, for appellant. J. M. & S. L. Vandever and J. W. Brady, for appellee.

MYERS, J. This action is by the widow to recover for the death of her husband under the coal mining act of 1905 (Acts 1905, p. 65 et seq.; Burns 1908, § 8569 et seq.) and the amendment by the act of 1907 (Acts 1907, p. 347 et seq.; Burns 1908, § 8602 et seq.).

The complaint, the sufficiency of which is attacked, sets out with great detail the physical outline of appellant's coal mine, as to the depth of the main shaft, the main entries, the cross entries, the rooms, the break throughs, the air shafts, the employment of miners whose duty it was to produce coal at a fixed price per ton, the employment by the miners, with the knowledge and consent of appellant, of shot-firers of whom appellee's decedent was one, to whom appellant paid one-fourth of a cent per ton in addition to the compensation paid them by the miners. The complaint then alleges that on the 8th day of January, 1908, and for more than six months immediately prior thereto, as the defendant on said day, and for six months prior thereto, well knew, said entries of said mine were so dry that the air became charged with coal dust, the defendant carelessly and negligently and with full knowledge thereof permitted and allowed in all of the foresaid entries large quantities of fine, dry, dangerous, and explosive coal dust to accumulate, remain, permeate, and pervade the air, and willfully and negligently omitted and neglected to regularly and thoroughly sprinkle said entries; that on said 8th day of January, 1908, and for more than 20 days prior thereto, the said Solomon Lawrence and McCellan St. Clair were employed in said mine as shot-firers under and pursuant to the terms hereinbefore alleged, with the full knowledge and consent of the defendant; that on said 8th day of January, 1908, the said Solomon Lawrence and McCellan St. Clair entered said mine for the purpose of discharging their duties as

shot-firers as aforesaid; that they proceeded from place to place until they came to and fired a charge of blasting powder in the room nearest the air course on the southeast entry, and after lighting said charge proceeded hastily out of said room and northward on said entry to said air course, and thence westward along said air course; that said last-mentioned charge of blasting powder did not blast the coal, but was discharged through the entrance of said hole, and because thereof discharged fire into the air. Because the defendant negligently failed and omitted to regularly sprinkle said entries that were so dry as aforesaid, said charge of blasting powder, when it was so discharged as aforesaid, ignited said coal dust, and said coal dust exploded with great force and violence, and blew with great force and violence timbers, cars, slate, and other debris along said entries and said air courses, and filled all of said entries and air courses with flames and fire; that said timbers, cars, and slate struck the said Solomon Lawrence with great force and violence, and he was likewise wholly enveloped in said fire and flames, and by reason thereof was then and there crushed, mangled, burned, and instantly killed.

Three questions are presented: First, has appellee, widow of Solomon Lawrence, the capacity to sue in her individual name under the provisions of the act of 1905, or did the amendment of 1907 so far embrace the subject of the act of 1905 as to repeal it and take away the right of individual action, and relegate claimants for injuries to the general statute upon the subject?

[1, 2] It is settled that one who seeks to avail himself of a statute conferring a right must state facts in his complaint which bring him within the terms and meaning of the statute. *Ft. Wayne, etc., Co. v. Parsell*, 168 Ind. 223, 79 N. E. 439; *Chicago, etc., Co. v. Barnes*, 164 Ind. 143, 73 N. E. 91; *Indianapolis, etc., Co. v. Foreman*, 162 Ind. 85, 69 N. E. 669, 102 Am. St. Rep. 185; *American, etc., Co. v. Hullinger*, 161 Ind. 673, 67 N. E. 986, 69 N. E. 460; *Hodges v. Standard, etc., Co.*, 152 Ind. 680, 52 N. E. 391, 54 N. E. 383; *Hilliker v. Citizens' Co.*, 152 Ind. 86, 52 N. E. 607; *Harrison v. Stanton*, 146 Ind. 366, 45 N. E. 582; *Porter v. State*, 141 Ind. 488, 40 N. E. 1061; *Thornburg v. American, etc., Co.*, 141 Ind. 443, 40 N. E. 1062, 50 Am. St. Rep. 334; *Burns v. Grand Rapids, etc., Co.*, 113 Ind. 169, 15 N. E. 230; *Wabash R. Co. v. Oregon*, 23 Ind. App. 1, 54 N. E. 767. Also that no action can be maintained for the death of a human being, unless authorized by an express statute. *Wabash R. Co. v. Hassett*, 170 Ind. 370, 83 N. E. 705; *Thornburg v. American, etc., Co.*, supra; *Jackson v. Pittsburgh Co.*, 140 Ind. 241, 39 N. E. 663, 49 Am. St. Rep. 192; *Burns v. Grand Rapids Co.*, supra;

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Mayhew v. Burns, 103 Ind. 328, 2 N. E. 793; Stewart v. Terre Haute, etc., Co., 103 Ind. 44, 2 N. E. 208. Also that the general statute giving a right of action to personal representatives for wrongful death applies to every action to recover for the death of a human being, unless the facts averred bring the case within the provisions of some other statute. Maule Co. v. Partenhimer, 155 Ind. 100, 55 N. E. 751, 57 N. E. 710; Collins, etc., Co. v. Hadley, 38 Ind. App. 637, 75 N. E. 832, 78 N. E. 353; Boyd v. Brazil, etc., Co., 25 Ind. App. 157, 57 N. E. 732.

[3] By an act of the General Assembly in force from and after April 15, 1905 (Acts 1905, p. 65 et seq.; Burns 1908, § 8569 et seq.), the general subject of mining coal, the manner of doing so, the means and appliances to be used, are prescribed in detail. Under section 8579 the subject of ventilation is presented, and at the close of that section is the following provision: "In cases (where) the roadways or entries of any mine are so dry that the air becomes charged with dust, such roadways or entries shall be regularly and thoroughly sprinkled. And it shall be the duty of the inspector to see that this provision is carried out." This act of 1905 was the culmination of a series of acts, beginning in 1879 (Acts 1879, p. 19, amended in 1881; Acts 1881, p. 8, enlarged in 1885; Acts 1885, p. 65; Acts 1891, p. 57, amended in 1897; Acts 1897, p. 226, amended in 1901; Acts 1901, p. 540), upon the subject of the protection of the health and safety of coal miners, which have since been supplemented by the act of 1907 (Burns 1908, § 8602 et seq.), and by an act in 1909 (Acts 1909, p. 330). Perusal of these acts will disclose the gradual growth of the statutory precaution which we must assume the Legislature had deemed expedient, in view of the unusual hazards and dangers of the business, to protect the lives and health of miners. Prior to 1905, so far as we are able to discover, there was no requirement to sprinkle roadways or entries.

This action is predicated upon section 8597, Burns 1908, reading as follows: "For any injury to person or persons, or property, occasioned by any violation of this act, or any willful failure to comply with any of its provisions, a right of action against the operator shall accrue to the party injured for the direct injury sustained thereby, and in case of loss of life by reason of such violation, a right of action shall accrue, first to the widow, if any, second, if no widow, to the children or adopted children (if any) jointly; third, if neither the foregoing classes, then to the parents jointly, or parent; fourth, or to any person or persons jointly, who were before such loss of life dependent for support on the person or persons killed, for like recovery of damages for the injury sustained by reason of such loss of life or lives."

By the act of 1907, § 8613 (Burns 1908), it is provided: "The inspector of mines shall have power in his discretion to order the sprinkling of any coal mine, or part of mine, by notice in writing to the operator thereof, or person in charge of the same, and after receiving such notice it shall be unlawful for any person to act in violation thereof, and to omit such sprinkling. Copies of any notice given hereunder shall be posted at the mine entrance by the inspector of mines." The contention of appellant is that the provisions of the act of 1907 repealed the act of 1905 on the subject of sprinkling mines, and reposes the subject wholly in the discretion of the inspector, and that the failure to sprinkle can only be willful, and a violation of the statute, after this discretion has been exercised and notice has been given by the inspector, and that under the act of 1907 no provision is made for action by the widow, unless the omission is willful, and that it can only be a violation, and willful, after the inspector has given notice, and that no notice is alleged, and that the Legislature must have had some object and purpose in view in the use of the words in section 8597 "in violation of this act, or any willful failure to comply with any of its provisions," and that under this state of the law, and the allegations of the complaint, only a personal representative can maintain the action. The title of the act of 1907 (Acts 1907, p. 347) is "An act concerning coal mines and to provide for the health and safety of persons employed in coal mines, and matters connected therewith, and providing penalties, and repealing all laws in conflict therewith." By the twenty-first section of the act, it is provided that: "The provisions of this act shall be cumulative of other laws upon the subject of coal mining: Provided, however, that all laws and parts of laws in conflict herewith, are hereby repealed." On the same day this act was passed, another act was passed (Acts 1907, c. 157), with an emergency clause, embracing the subject of actions for injuries, but classifying in order the classes who may bring actions, under a title to amend section 27 of the act of 1905, the material modifications of which are to require actions by persons of a class and to sue jointly where there is more than one of a class. By section 28 (Burns 1908, § 8598) of the act of 1905, "Any willful neglect, refusal or failure to do the things required by any section, clause or provision of this act, on the part of the person or persons herein required to do them, or any violation of the provisions or requirements hereof, or any attempt to obstruct or interfere with, any inspector * * * or any refusal to comply with the instructions of an inspector of mines by authority of this act, shall be deemed a misdemeanor punishable by fine not exceeding five hundred dollars, or imprisonment in the county jail for a period

not exceeding six months, or both, at the discretion of the court, etc., provided that the foregoing shall not apply to sections of this act which have special penalties provided for them."

By section 14 of the act of 1907, "Any person violating the provisions of this act, or wilfully refusing, neglecting or failing to do anything required to be done by any provision hereof, by such person, or obstructing or attempting to obstruct or interfere with, the inspector of mining, or any of his assistants in the discharge of any duty imposed by law, or refusing, failing or neglecting to comply with the proper orders of the inspector of mines, or his assistants, shall be guilty of a misdemeanor, punishable on conviction by a fine not exceeding five hundred dollars to which may be added imprisonment in the county jail, for a period not exceeding six months in the discretion of the court or jury trying any such case."

[4] We are not able to agree with the learned counsel for appellant that the act of 1907 so far repealed the act of 1905, either by implication or because of its covering the subject-matter. On the contrary, it seems to us but part of a system of laws, and while it may, and probably does, change some features of the act of 1905, especially those with respect to some duties of operators, some of miners, and some of inspectors, in its main, and essential features, it is in aid of, or cumulative to, the general statute, and the rule is general that all consistent statutes which can stand together, as related to the same subject, shall be construed together, and with reference to the whole system of which they form a part, and harmonized and effect given to all, if this can be consistently done, so as to make the law consistent in all its parts and uniform in its application and results, and the intent as collected from an examination of the whole, and all its parts will prevail over the literal import of particular terms, and control the strict letter of such terms, when the latter would lead to injustice, and contradictions. *State v. Berghoff*, 158 Ind. 349, 353, 63 N. E. 717; *Lime City Co. v. Black*, 136 Ind. 544, 35 N. E. 829; *Haggerty v. Wagner*, 148 Ind. 625, 48 N. E. 366, 39 L. R. A. 384; *State v. Wilson*, 142 Ind. 102, 107, 41 N. E. 361; *U. S., etc., Co. v. Harris*, 142 Ind. 226, 231, 40 N. E. 1072, 41 N. E. 451; *Sutherland, Statutory Construction*, § 443.

[5] There is no difficulty in applying the act of 1907 with the act of 1905, and we are greatly aided in the construction intended to be given by the fact of the passage of the act regarding actions for injuries, amending section 27, on the same day the general act was passed. Even in case of acts passed at the same session, but on different days, it is to be presumed that all are in the mind of the Legislature, and, when related to the same subject, that they are imbued with the same spirit and actuated by the same policy, and

are to be so construed that all may, if possible, stand. *Conn. v. Board*, 151 Ind. 517, 51 N. E. 1062; *Shea v. Muncie*, 148 Ind. 14, 46 N. E. 138; *Houston, etc., Co. v. State*, 95 Tex. 507, 68 S. W. 777; *Harris v. State*, 96 Tenn. 496, 34 S. W. 1017; *Board v. People*, 49 Ill. App. 369; *MacVeagh v. Royston*, 71 Ill. App. 617; *Cincinnati v. Connor*, 55 Ohio St. 82, 44 N. E. 582; *Illinois, etc., Co. v. Pearson*, 140 Ill. 423, 31 N. E. 400, 16 L. R. A. 429. This is more true where acts are passed on the same day. *Commonwealth v. Huntley*, 156 Mass. 236, 30 N. E. 1127, 15 L. R. A. 839; *Solomon v. City of Denver*, 12 Colo. App. 179, 55 Pac. 199; *Territory v. Wingfield*, 2 Ariz. 305, 15 Pac. 159; *Lien v. County*, 80 Minn. 58, 82 N. W. 1094.

[6] The fact that the act is declared to be cumulative is also of great force in evincing the legislative intent. The right of action under section 27 is not taken away. *Couchman v. Prather*, 162 Ind. 251, 70 N. E. 240; *Maule Coal Co. v. Partenheimer*, 155 Ind. 100, 55 N. E. 751, 57 N. E. 710.

[7] It is next urged that no cause of action is shown, because it is not alleged that the failure to sprinkle was a willful neglect, and that the use of the word "violation" must be held to mean willful violation—an affirmative act. It will be noted that under the act of 1905 there was an express duty upon the operator to sprinkle roadways and entries. A failure to do this was both a misdemeanor, and, injury arising from it as the proximate cause, a right of action; and, while it is a penal statute, it is also remedial, and should not receive so strict construction as to destroy the very object of its enactment. *Vandalia Coal Co. v. Yemm*, 92 N. E. 49, 94 N. E. 881; *State v. Hogleiver*, 152 Ind. 652, 657, 53 N. E. 921, 45 L. R. A. 504; *United States, etc., Co. v. State*, 164 Ind. 196, 202, 73 N. E. 101; *Wooley Coal Co. v. Bracken*, 30 Ind. App. 624, 66 N. E. 775.

[8] The act of 1907 extends the requirements in regard to sprinkling, and embraces not only roadways and entries, but extends the power of the inspector to require "the sprinkling of any coal mine, or part of mine." It was no less the duty of the operator, under the act of 1905, to sprinkle the "roadways and entries," and no less the duty of the inspector to see that it was done, than it is under the act of 1907, but as to any other part of a mine the act of 1905 was silent, and the act of 1907 leaves it to the inspector to determine when and where sprinkling shall be done, and to give notice, before it becomes unlawful on the part of the operator to omit to do so, except as to roadways and entries. It is not difficult to discover the reason for the use of the words "any violation" and "any failure." "Violation," as therein used, embraces not only acts of omission, but of commission, in failing to do the things which are provided shall be done, and in doing things which it is declared shall not be done—that is, nonconformity, simple negligence—and as applied to the whole statute the in-

stances are numerous. *State v. Case*, 53 Mo. 246, 256; *People v. Fox*, 4 App. Div. 38, 38 N. Y. Supp. 635, 636; *Odin, etc., Co. v. Denman*, 185 Ill. 413, 57 N. E. 192, 76 Am. St. Rep. 45.

A willful failure implies more than mere nonconformity, inattention, thoughtlessness, or heedlessness, and goes to the intent implied in failing to do the thing after the attention is called to it, or notice given under this statute by the inspector, and implies the intentional and conscious violation and persistent refusal, or neglect, not necessarily with evil or malicious intent; it amounts to more than mere passive negligence; it is active refusal; it is willful negligence, as evidence of a reckless or indifferent regard to the safety of the miners, and an intentional failure and refusal to perform a plain statutory duty. *Brooks v. Pittsburgh, etc., Co.*, 158 Ind. 62, 62 N. E. 694; *Parker v. Pennsylvania Co.*, 134 Ind. 673, 34 N. E. 504, 23 L. R. A. 552; *Cincinnati, etc., Co. v. Cooper*, 120 Ind. 469, 22 N. E. 340, 6 L. R. A. 241, 16 Am. St. Rep. 534; *Louisville, etc., Co. v. Bryan*, 107 Ind. 51, 7 N. E. 807; *Indiana, etc., Co. v. Wheeler*, 115 Ind. 253, 17 N. E. 563; *Huff v. Chicago, etc., Co.*, 24 Ind. App. 492, 56 N. E. 932, 79 Am. St. Rep. 274; *Dull v. Cleveland, etc., Co.*, 21 Ind. App. 571, 52 N. E. 1013; *Donk Bros. Co. v. Stroff*, 100 Ill. App. 576; *Donk Bros. Co. v. Peton*, 192 Ill. 41, 61 N. E. 330; *Marquette Co. v. Dielle*, 110 Ill. App. 684; *Riverton, etc., Co. v. Shepherd*, 111 Ill. App. 294; *Athens, etc., Co. v. Carnduff*, 221 Ill. 354, 77 N. E. 571; *Wilmington, etc., Co. v. Sloan*, 225 Ill. 467, 80 N. E. 265; *Davis v. Illinois, etc., Co.*, 232 Ill. 284, 83 N. E. 886; *Moore v. Centralia, etc., Co.*, 140 Ill. App. 291; *Odin, etc., Co. v. Denman*, 185 Ill. 413, 57 N. E. 192, 76 Am. St. Rep. 45; *Carterville Co. v. Abbott*, 181 Ill. 495, 55 N. E. 131; *City of Lexington v. Lewis*, 10 Bush (Ky.) 677; *Jacobs v. Louisville, etc., Co.*, 10 Bush (Ky.) 263; *Illinois, etc., Co. v. Leiner*, 202 Ill. 624, 67 N. E. 398, 95 Am. St. Rep. 266. The distinction between willfulness and gross negligence is well drawn in *Cleveland, etc., Co. v. Miller*, 149 Ind. 490, 509, 49 N. E. 445. So here the failure to comply with the statutory requirements as to sprinkling "roadways and entries," and other express provisions, clearly constitute violations of the act; while failure to sprinkle "any coal mine or part of mine," after notice by the inspector, or to do anything which he might under the act require, would constitute "willful failure"; both "violation" and "willful failure" are made misdemeanors, and for either a civil cause of action is given. *Davis, etc., Co. v. Pollant*, 158 Ind. 607, 62 N. E. 492, 92 Am. St. Rep. 319. The statute of Illinois is more restricted than our own upon the subject of giving a right of action. The language there is "willful violation," or "willful failure" to comply with the statutory requirements. *Hurd R. S. Ill.* 1899, c. 93, § 33.

[9] It is contended that as appellee's de-

cedent is shown to have been a shot-firer, employed by the miners, he was not a servant of appellant, but at most a servant of the miners. It is alleged that the miners were mining by the ton, and that appellee's decedent was employed by the miners, with the knowledge and consent of appellant, and that the latter indirectly paid a part of his wages. A statute enacted in 1907 (Acts 1907, p. 349; Burns 1908, § 8610) provides: "That at any coal mine in the state where the miners therein so elect, persons may be employed to act as shot-firers and their wages shall be paid by the miners working therein. * * *" It will be noted that it is not provided in the act that the miners shall have the right to select the shot-firers, but, if they elect to have shot-firers, those so electing are to pay the firers wages. It is alleged in the complaint that the duties of miners, "among other duties performed by them, was to drill into the solid coal in said mine and to charge said drill holes with blasting powder and to tamp said charges of powder; that the firing of said charges of powder was performed by shot-firers employed and paid by said miners with the full knowledge and consent of the defendant, which paid to said miners a quarter of a cent per ton for coal mined from said mine in addition to the compensation paid said miners for coal mined by them, to be applied on the compensation of said shot-firers for their services." Fairly construed, this means that appellant consented to and approved the selections made by the miners; but, in any event, these shot-firers were not mere licensees, and it is not necessary that we should determine whether they were servants of appellant or not. They were in the mine pursuant to the express provisions of a statute; it was more than an invitation to be there; they were there engaged in and about the operator's business, not their own business, except as their business was that of assisting in mining coal, in carrying out a distinct part of the business of the operator, with its knowledge and consent, and we see no difference between the duty owing to them, in regard to sprinkling the mine, than as to the miners proper. The law was enacted for the benefit of all persons whose work or duty requires them to be in the mines and about the business of the operator in coal mining, whether the strict relation of master and servant existed between appellant and appellee's decedent or not. *Chicago, etc., Co. v. Vandenberg*, 164 Ind. 470, 73 N. E. 990; *Pennsylvania, etc., Co. v. O'Shaughnessy's Adm'r*, 122 Ind. 588, 23 N. E. 675; *Indiana, etc., Co. v. Barnhart*, 115 Ind. 399, 409, 16 N. E. 121; *Evansville, etc., Ry. v. Griffin*, 100 Ind. 221, 50 Am. Rep. 783.

It is finally contended that judgment should have been rendered for appellant upon the answers to the interrogatories. The latter are very numerous, being 121 in number. Appellant's urgency on this point is

that, as appellee's decedent was not a servant of appellant, and it is shown by the answers to the interrogatories that he was employed by the miners, the explosion in which he was killed was caused by an unlawful drilling by one of the miners in drilling beyond the "chance," and that cans of powder which had been improperly opened by the miners had been left in the break throughs, in violation of the statute, appellant is not liable. The findings do not negative the allegation of the complaint that the injury was caused by the explosion of coal dust by reason of a failure to sprinkle. In our view the element of negligence is eliminated from the case by the facts found, showing violation by appellant of the statutory duty of sprinkling as the proximate cause of the explosion and injury. *Cleveland, etc., Co. v. Powers*, 173 Ind. 105, 88 N. E. 1073, 89 N. E. 485; *Inland Steel Co. v. Yedinak*, 172 Ind. 423, 87 N. E. 229; *U. S., etc., Co. v. Cooper*, 172 Ind. 599, 88 N. E. 69; *Huey Co. v. Johnston*, 164 Ind. 489, 73 N. E. 996; *Pittsburgh, etc., Co. v. Lighthelser*, 163 Ind. 247, 71 N. E. 218, 660; *Himrod Coal Co. v. Adack*, 94 Ill. App. 1; *Maplewood, etc., Co. v. Graham*, 134 Ill. App. 277; *Sunnyside, etc., Co. v. Center*, 100 Ill. App. 546; *Peebles v. O'Gara Coal Co.*, 239 Ill. 370, 88 N. E. 166; *Western, etc., Co. v. Beaver*, 192 Ill. 333, 61 N. E. 335; *Pawnee Coal Co. v. Royce*, 184 Ill. 402, 52 N. E. 621; *Russell v. Dayton, etc., Co.*, 109 Tenn. 43, 70 S. W. 1; *Wolf v. Smith*, 149 Ala. 457, 42 South. 824, 9 L. R. A. 338.

[10] But it is urged that appellee's decedent was guilty of contributory negligence in firing a second time, a shot which had blown out the day before owing to the drilling being past the chance. It is found that he knew of the abortive shot of the day previous, but it is not found that he knew why the shot blew out, or that it was drilled past the chance as he had not placed the powder or tamped it in either case, or the reason for shots blowing out, or that it is unusual, but it is found that the injury was from the dust explosion. It is not made to appear that appellee's decedent knew of the open kegs of powder, or of their presence in the mine, or the manner in which the drilling or tamping had been done, so as to bring him within the rule of assumption of risk from a known or obvious danger presented in the course of his work or duty, so as to make him guilty of contributory negligence, as against appellant's statutory duty in failing to sprinkle as the proximate cause of the death. *Vandalla Coal Co. v. Yemm*, supra, and cases cited; *Cleveland, etc., Co. v. Powers*, supra, and cases cited; *U. S., etc., Co. v. Cooper*, supra; *Paul, etc., Co. v. Racine*, 43 Ind. App. 695, 88 N. E. 529; *Boyd v. Brazil, etc., Co.*, supra; *Muren Coal Co. v. Copeland*, 90 N. E. 489; *Miami, etc., Co. v. Kane*, 90 N. E. 13; *Narromore v. C., C. &*

St. L. Ry. Co., 96 Fed. 298, 37 C. C. A. 499, 48 L. R. A. 68.

[11] The fact that the negligence of another miner, or other miners, concurred with the negligence of appellant in producing the injury, will not exonerate appellant if its negligence in failing to sprinkle was the proximate cause of the injury, and the jury have so found. *Ft. Wayne, etc., Co. v. Roubush*, 173 Ind. 57, 88 N. E. 676, 89 N. E. 369; *Romona Oolitic Co. v. Shields*, 173 Ind. 68, 88 N. E. 595; *Diamond, etc., Co. v. Cuthbertson*, 166 Ind. 290, 76 N. E. 1060; *Lake Erie Co. v. Charman*, 161 Ind. 95, 67 N. E. 923; *Hymera, etc., Co. v. Mahan*, 44 Ind. App. 583, 88 N. E. 108; *Labatt, Master & Servant*, §§ 325, 813.

In consideration of the views entertained by the court, it is unnecessary that we determine any question as to the constitutionality of statutes presented by appellee.

No error in the record is made to appear, and the judgment is affirmed.

(176 Ind. 161)

STATE ex rel. BARNES et al. v. KESLING et al. (No. 21,905.)

(Supreme Court of Indiana. June 22, 1911.)

APPEAL AND ERROR (§ 635*)—PROOFS—REQUISITES.

Where an appellant, claiming as error that the court improperly sustained a demurrer to his complaint, failed to set out either a copy of or the substance of the complaint as required by rule 22 (55 N. E. v), which requires a concise statement of so much of the record as fully presents every error and exception, the error must be deemed waived and the appeal dismissed.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 2776-2782; Dec. Dig. § 635.*]

Appeal from Circuit Court, St. Joseph County; W. A. Funk, Judge.

Complaint by the State, on the relation of Nellie Barnes and others, against George A. Kesling and others. From a judgment sustaining a demurrer to the complaint, plaintiffs appeal. Transferred from Appellate Court under Burns' Ann. St. 1908, § 1405. Appeal dismissed.

Joseph G. Orr, for appellants. B. F. Shively, A. O. Graham, and H. A. Stels, for appellees.

JORDAN, C. J. Action in the lower court by appellant to recover upon a bond executed by appellees. The latter demurred to the complaint. Their demurrer was sustained. Appellant elected to abide by its complaint, and judgment was rendered that plaintiff take nothing by the action and appellees recover costs. From this judgment appellant prosecutes an appeal and assigns that the court erred in sustaining the demurrer to the complaint. This is the only error assigned.

It is urged by counsel for appellees that

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes

a consideration of this error has been waived because neither a copy of the complaint nor the substance of that pleading is set out in appellant's brief as required by rule 22 of this court. An examination of the brief in question verifies this contention, and for this failure or neglect appellant must be deemed to have waived any consideration in respect to the sufficiency of the complaint upon demurrer. This point is well settled by repeated decisions of this court. Among the number, see the following: *McElwaine-Richards Co. v. Wall*, 159 Ind. 557, 65 N. E. 753; *Perry, Matthews, etc., Stone Co. v. Wilson*, 160 Ind. 435, 67 N. E. 183; *Springer v. Bricker*, 165 Ind. 532, 76 N. E. 114.

In *Perry, etc., Stone Co. v. Wilson*, supra, this court said: "If this rule is wholly disregarded in an appeal, the result is a dismissal the same as if no brief had been filed within 60 days after submission as required by rule 21 [55 N. E. v]."

Appellant having wholly disregarded the requirement of rule 22 (55 N. E. v), the appeal, as held in the case last cited, must be and is therefore dismissed.

(48 Ind. A. 127)

HALSTEAD et al. v. WOODS. (No. 6,984.)
(Appellate Court of Indiana, Division No. 1.
June 22, 1911.)

1. STATUTES (§ 225½*)—CONSTRUCTION—RE-ENACTMENT OF REPEALED STATUTES.

It is presumed that the Legislature re-enacting a repealed statute adopts the construction placed on the repealed statute by the courts, unless the contrary is clearly shown by the language of the act.

[Ed. Note.—For other cases, see *Statutes*, Cent. Dig. § 306; Dec. Dig. § 225½*.]

2. TRIAL (§ 349*)—SPECIAL INTERROGATORIES—POWER OF COURT TO SUBMIT ISSUES.

Under *Burns' Ann. St. 1908*, § 572, requiring the court, when requested by either party, to instruct the jury to find specially on interrogatories submitted, substantially re-enacting *Rev. St. 1881*, § 546, the court may, of its own motion, submit proper interrogatories to the jury for answer to be returned with the general verdict.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 823-827; Dec. Dig. § 349*.]

3. BILLS AND NOTES (§ 538*)—CONSTRUCTION—QUESTION FOR COURT.

The court in an action on a note by a bona fide indorsee for value must apply the law to the instrument as it appears on its face, and determine whether on its face it is governed by the law merchant, and must charge the jury as to the defenses urged against it.

[Ed. Note.—For other cases, see *Bills and Notes*, Cent. Dig. §§ 1895-1910; Dec. Dig. § 538*.]

4. BILLS AND NOTES (§ 497*)—INDORSEE—PRESUMPTIONS.

Where no infirmity appeared on the face of a note in the hands of an indorsee, his possession and production raised the presumption that it came into his hands in the usual course

of business for value without notice of any defect in the consideration.

[Ed. Note.—For other cases, see *Bills and Notes*, Cent. Dig. §§ 1675-1687; Dec. Dig. § 497*.]

5. BILLS AND NOTES (§ 150*)—REQUISITES.

Any uncertainty in any of the essential elements of a note to make it negotiable destroys its negotiability as an inland bill of exchange.

[Ed. Note.—For other cases, see *Bills and Notes*, Cent. Dig. §§ 374-379; Dec. Dig. § 150*.]

6. BILLS AND NOTES (§ 150*)—REQUISITES.

A note is not negotiable as an inland bill of exchange, unless on its face its date is certain, and contains an unconditional promise to pay a certain sum of money at a fixed time in a bank of the state.

[Ed. Note.—For other cases, see *Bills and Notes*, Cent. Dig. §§ 374-379; Dec. Dig. § 150*.]

7. BILLS AND NOTES (§ 150*)—REQUISITES—"NEGOTIABLE NOTE."

A note dated "Mount Ayr, Indiana," payable on a designated future date to a person named "at the Bank of Mount Ayr," is a negotiable note within *Burns' Ann. St. 1908*, § 9076, declaring a note payable to order of bearer in a bank in the state is negotiable, since it will be presumed that the bank named in the note is a bank in the town named.

[Ed. Note.—For other cases, see *Bills and Notes*, Cent. Dig. §§ 374-379; Dec. Dig. § 150*.]

For other definitions, see *Words and Phrases*, vol. 5, pp. 4770, 4771.]

8. BILLS AND NOTES (§ 150*)—NEGOTIABILITY—PAYABLE IN BANK—"AT"—"NEGOTIABLE NOTE."

A note payable "at" a designated bank in the state is negotiable within *Burns' Ann. St. 1908*, § 9076, declaring that a note payable in a bank in the state shall be negotiable; the word "at" meaning "in."

[Ed. Note.—For other cases, see *Bills and Notes*, Cent. Dig. §§ 374-379; Dec. Dig. § 150*.]

For other definitions, see *Words and Phrases*, vol. 1, pp. 593-999; vol. 8, p. 7585.]

9. BILLS AND NOTES (§ 538*)—ACTIONS—INSTRUCTIONS—ASSUMPTION OF FACTS.

A statement in an instruction in an action on a note which is in accordance with the face of the note is not objectionable.

[Ed. Note.—For other cases, see *Bills and Notes*, Cent. Dig. §§ 1895-1910; Dec. Dig. § 538*.]

10. BILLS AND NOTES (§ 327*)—BONA FIDE HOLDER—REQUISITES.

An indorsee suing on a note must, to be entitled to the protection of the law as an innocent holder, show that he took the note before maturity in the usual course of business for a valuable consideration, without notice of facts affecting its validity or of a defense on the part of the makers.

[Ed. Note.—For other cases, see *Bills and Notes*, Cent. Dig. § 792; Dec. Dig. § 327*.]

11. TRIAL (§ 192*)—EVIDENCE—INSTRUCTIONS—ASSUMPTION OF FACT.

Where the testimony of an indorsee suing on a note that he was a bona fide holder for value before maturity without notice of facts affecting the validity of the note was not contradicted, and there were no facts discrediting his testimony on raising a doubt as to its truth, it was proper to charge the legal effect of the

facts established by the testimony, though the weight of the testimony was for the jury.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 432-434; Dec. Dig. § 192.*]

Appeal from Circuit Court, Newton County; C. W. Hanley, Judge.

Action by William S. Woods against Everett Halstead and others. From a judgment for plaintiff, defendants appeal. Affirmed.

William Darroch, Foltz & Spittler, and Geo. A. Williams, for appellants. Hume L. Sammons and E. B. Sellers, for appellees.

MYERS, J. In the court below, appellee, as indorsee, brought this action against appellants to enforce payment of a promissory note for \$1,200, dated Mt. Ayr, Ind., March 29, 1904, payable on September 1, 1907, to McLaughlin Bros., at the Bank of Mt. Ayr. This cause was submitted to a jury for trial upon the complaint alleging, among other facts: "That the plaintiff holds said note in good faith, that he obtained it before maturity, paid a valuable consideration therefor, and at the time he so paid said consideration and took said assignment he had no notice of any defense thereto on the part of the makers of said note," and an answer in five paragraphs, the first of which was a general denial; second, material alteration of the note sued on after its execution; third, breach of a written warranty of a certain horse for which the note in suit was given; fourth, non est factum; fifth, failure of consideration, and a reply in general denial. The jury returned a general verdict in favor of appellee, together with their answer to an interrogatory submitted to them by the court on its own motion. Judgment in favor of appellee on the verdict.

Appellants' motion for a new trial was overruled, and this ruling is the only error presented for our consideration. Appellants in support of this motion first insist that the court erred in submitting to the jury over their objection the following interrogatory: "Did B. B. Miller sign his name to the note in suit on March 29, 1904, at Mt. Ayr, Ind.?" It is claimed that under the act of 1897 (Acts 1897, p. 128; section 572, Burns' 1908) the court under no circumstances is authorized to submit interrogatories to the jury unless requested so to do by at least one of the parties to the action. The act of 1897, *supra*, repealed section 546, Rev. St. 1881, which provided for special and general verdicts. By the repealed section the court in all cases when requested by either party was required to instruct the jury, if they rendered a general verdict, to find specially upon particular questions of fact to be stated in writing. Under this provision, on the theory of judicial discretion subject to review, it was held not to be error for the court on its own motion to prepare and propound to the jury

proper interrogatories to be returned with their general verdict. *Senhenn v. City of Evansville*, 140 Ind. 675, 40 N. E. 69.

[1] That provision in the old statute, thus construed, was substantially re-enacted in 1897, and under a well-settled rule of construction it will be presumed that the Legislature, by re-enacting that part of the repealed statute, adopted the construction placed upon it by the courts, unless the contrary is clearly shown by the language of the act. *Board of Commissioners v. Conner*, 155 Ind. 484, 58 N. E. 828; *Brown v. Miller*, 162 Ind. 684, 71 N. E. 122.

[2] There is no language in the act of 1897, *supra*, from which it can be said that the Legislature intended that the trial court should not on its own motion submit proper interrogatories to the jury for answer, and to be returned with their general verdict. In this case the interrogatory called for a finding of fact within the issues, and the court did not commit error in submitting it.

Appellants also insist that the court erred in giving to the jury certain instructions. Our attention is first called to instructions 4 and 5, given by the court on its own motion. It is argued that instruction 4 is predicated on section 9071, Burns' 1908, which makes all written promises negotiable by indorsement, and that instruction 5 is based on section 9076, Burns' 1908, and is erroneous for the reason that no evidence was introduced showing that the note in question was payable in a bank in this state. It is true that the note in suit, although negotiable by indorsement, would not be free from defenses in the hands of appellee under section 9071, *supra*. The right of plaintiff to recover under instruction 4 was not made to depend upon the fact alone that the note was negotiable by indorsement. The jury were told that, if they found from all the evidence that the plaintiff was the owner of the note described in the complaint, that he took it before maturity, in the usual course of business, without notice of facts which impeached its validity between the original parties to the note, or such facts as should have put him on inquiry, then the plaintiff held the note by a good title free from all defenses that might have been made by the defendants if it had been sued on by McLaughlin Bros., "and, unless there are circumstances which excite suspicion, the purchaser is not bound to make inquiry at the time of the purchase." Instruction 5, is practically the same as instruction 4, except it told the jury that a promissory note payable in a bank in this state is governed by the law merchant, and again informed them if they found certain facts, practically repeating those mentioned in instruction 4, the plaintiff would be entitled to recover, "even though as between the defendants and McLaughlin Bros. there existed

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

equities in favor of the defendants, unless said note had been materially altered since it was executed."

There was evidence before the jury tending to show that one B. B. Miller signed the note as maker, and that after its execution Miller's name had been removed therefrom. No other alteration or change is claimed. There was also evidence tending to support the alleged breach of warranty of the horse, and that the consideration for the note had failed. The note itself was introduced in evidence. It had no visible erasure marks, nor was it interlineated.

[3] It was the duty of the court to apply the law to the note as it appeared upon its face, and to instruct the jury regarding the defenses urged against it. It was for the court to say whether the note upon its face was governed by the law merchant. *Nipp v. Diskey*, 81 Ind. 214, 42 Am. Rep. 124; *Louthian v. Miller*, 85 Ind. 161.

[4] It was in the hands of an indorsee, and, as no infirmity appears upon its face, its possession and production raises the presumption that it came into the hands of the holder "in the usual course of business, for value, without notice of any defect in the consideration." *Sondheim v. Gilbert*, Assignee, 117 Ind. 71, 18 N. E. 687, 5 L. R. A. 432, 10 Am. St. Rep. 23; *Citizens' Bank v. Leonhart*, 126 Ind. 206, 25 N. E. 1099; *Fisher v. Fisher*, 113 Ind. 474, 15 N. E. 832; *Tescher v. Merea*, 118 Ind. 586, 21 N. E. 316.

As the correctness of instructions 4 and 5, and most of the others to which objection is made, depends upon whether the note in suit was negotiable as an inland bill of exchange, it is necessary that we pass upon that question. It is the theory of appellants that it was not, and in support of their contention they insist that as it was payable "at the Bank of Mt. Ayr," instead of "in the Bank of Mt. Ayr," and it not appearing that the bank named was in Indiana, as required by St. § 9076, supra, therefore its place of payment was uncertain.

[5] It must be conceded that certainty is required by the law merchant, and uncertainty in any of the essential elements of a note to bring it within that law will destroy its negotiability as an inland bill. Whether the note in question should be given the dignity claimed for it must be determined from the facts appearing upon its face, unaided by extraneous evidence. *Crossan v. May*, 68 Ind. 242, 245.

[6] A promissory note is not negotiable as an inland bill of exchange, unless on its face its date is certain, and it is an unconditional promise to pay a certain sum of money at a fixed time in a bank of this state. *Gilpin v. People's Bank*, 90 N. E. 91.

[7] The note in suit upon its face is dated at Mt. Ayr, Ind., March 29, 1904, and is an unconditional promise to pay \$1,200, September 1, 1907, "at the Bank of Mt. Ayr." While the state in which the note is payable is not

named in connection with the name of the bank, yet from the fact that it was executed at Mt. Ayr, Ind., and payable "at the Bank of Mt. Ayr," the conclusion would naturally follow that the bank named was in the town named in Indiana. In the case of *Walker v. Woollen*, 54 Ind. 164, 166, 23 Am. Rep. 639, it was said: "A contract when sued upon in the courts of this state will be presumed to have been executed in this state, unless the contrary appears." In the case of *Crossan v. May*, supra, referring to the case last cited, it is said: "It was held that where a note was made payable at a named bank, in a place named, but without naming the state, it would be presumed that the bank was in the state, rather than out of it, and that the paper was governed by the law merchant." See, also, *Indianapolis Piano Mfg. Co. v. Caven*, 53 Ind. 258.

[8] Ordinarily the word "at" is less definite than the word "in," but, as used in the note before us, there can be no doubt or lack of certainty in its meaning. It is commonly employed before the name of a bank or place where the holder of a note may find its maker on the day it becomes due. Its sense is determined largely from the subject-matter with reference to which it is used. It may mean "in," and is commonly so understood when it precedes the name of a bank in fixing the place of payment of a promissory note. The note in question was payable "at the Bank of Mt. Ayr," and no person of common understanding would think of presenting it for payment at any other place than in the room where such bank was actually carrying on its business. The note in this particular meets all the requirements of the law merchant. In the case of *Crossan v. May*, supra, page 245 of 68 Ind., it was said "that, in order to place a note upon the footing of bills of exchange, it should show on its face that it is payable *at or in a bank*." (Our italics.) See, also, *Indianapolis Piano Mfg. Co. v. Caven*, supra. As to the question under consideration, this case is distinguishable from the cases of *Hardy v. Brier*, 91 Ind. 91, where the note was made payable "at the Bank at Attica, Ind.," and *Butterfield v. Davenport*, 84 Ind. 590, where the note was dated "Concord, June the 5th, 1878," and "payable at the bank at Goshen," and *Rominger v. Keyes*, 73 Ind. 375, where the note was dated "Hope, Ind.," and payable "at the Indiana Banking Company of Indianapolis, Ind." In that case it was held that the note was not governed by the law merchant because the Indiana Banking Company was not a bank in this state within the meaning of the statute.

[9] Each of the instructions 1 to 8, both inclusive, tendered by appellee and given by the court, appellants insist were erroneous and harmful. As to the first, our attention is called to that part which told the jury: "This note is payable in a bank in this state." We find no objection to this state-

ment, as no claim is made that the body of the note had been changed in any particular after its execution. The statement was in keeping with the face of the note, and it was not error for the court to thus construe it.

Instruction 2 is claimed to be erroneous, for the reason that it assumes that plaintiff had made out his case, and was entitled to recover, unless the jury should find that the note had been materially altered after its execution by the removal therefrom of the name of B. B. Miller. As we have seen, there was evidence tending to support other defenses than the one named in this instruction, all of which would have been available to appellants had the suit been prosecuted by McLaughlin Bros.

[10] But, as between appellants and appellee, the latter, by reason of the character of the paper in question, holds the same free from such defenses only in case he took the note before maturity, in the usual course of business, for a valuable consideration, without notice of facts affecting its validity, or of a defense on the part of the makers. Bradley, Holton & Co. v. Whicker, 23 Ind. App. 380, 55 N. E. 490. These were all essential elements, and all must be proven before it can be said that appellee was a bona fide holder, and entitled to the protection of the law as an innocent holder. Giberson v. Jolley, 120 Ind. 301, 22 N. E. 308. Appellee's testimony authorized a finding that he was a bona fide holder.

[11] He was the only witness who testified on that subject. His testimony was clear and without conflicting statements. He was not contradicted by any other evidence. No facts or circumstances appear in evidence from which the jury might have inferred that appellee was not an innocent purchaser and holder of the note. The testimony of appellee was before the jury in the form of a deposition; and, while the weight of the evidence thus adduced must be left to the jury (Works v. Stevens, 76 Ind. 181), there was nothing in it to which our attention has been called tending to discredit it, or from which the jury might draw reasonable inferences calculated to raise a doubt in the minds of reasonable men as to its truthfulness, other than the fact that he was an interested party. From this state of the record it was not improper for the court to tell the jury the legal effect of facts thus established. Carver v. Carver, 97 Ind. 497, 518; Hazzard v. Citizens' State Bank, 72 Ind. 130; Forsythe v. City of Hammond, 142 Ind. 505, 513, 40 N. E. 267, 41 N. E. 950, 30 L. R. A. 576; Board v. Legg, Adm'r., 110 Ind. 479, 11 N. E. 612; Roberts v. Kendall, 12 Ind. App. 269, 38 N. E. 424; Hunt, Receiver, v. Conner, Adm'r., 26 Ind. App. 51, 59 N. E. 50. "It is not error to assume in the charge facts established by uncontroverted

evidence." 19 Dec. Dig. p. 921. The doctrine thus announced is not in conflict with that class of cases disapproving a peremptory instruction to find in favor of one on whom rests the burden of the issue, when the determination of that issue involves the credibility of witnesses, and inferences and deductions drawn from established facts. Jacobs v. Jolley, 20 Ind. App. 25, 62 N. E. 1028; Wagner v. Weyhe, 164 Ind. 177, 73 N. E. 89; Haughton v. Aetna Life Ins. Co., 165 Ind. 32, 73 N. E. 592, 74 N. E. 613. The reasons assigned for declaring this instruction erroneous are not sustained.

What we have said with reference to the objections urged against this instruction applies with equal force to the specific defects claimed in each of the other instructions. Our investigation of the question under consideration has been strictly limited to the objections and reasons pointed out by appellants, but we do not mean to approve the instructions as against other objections which might be urged against them.

Judgment affirmed.

(48 Ind. A. 84)

**FIRST NAT. BANK OF DILLSBORO v.
MULFORD et al. (No. 7,286.)**

(Appellate Court of Indiana, Division No. 2,
June 20, 1911.)

1. AFFIDAVITS (§ 15*) — AUTHENTICATION — SUFFICIENCY.

An affidavit of a witness as to the facts to which he will testify, taken outside the state, and annexed as an exhibit to a complaint for a new trial, but not authenticated as required by Burns' Ann. St. 1908, § 498, will not be considered.

[Ed. Note.—For other cases, see Affidavits, Cent. Dig. §§ 61-64; Dec. Dig. § 15.*]

2. NEW TRIAL (§ 166*) — COMPLAINT — REQUIREMENTS.

A complaint to obtain a new trial for newly discovered evidence must set out the evidence alleged to have been discovered, and, if it consist of oral testimony, the name of the witness, with a statement of the facts to which he will testify must be given, which facts must appear either in the body of the sworn complaint, or from the affidavit of the person by whom it is alleged they can be proven, filed as an exhibit.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 238-249; Dec. Dig. § 166.*]

3. NEW TRIAL (§ 166*) — COMPLAINT — SUPPORTING AFFIDAVITS—NECESSITY.

On demurrer to a complaint for new trial for newly discovered evidence, filed after the term, the question is not, as in case of motion for new trial, whether the facts alleged are true, but whether, conceding their truth, the plaintiff is entitled to a new trial, and the complaint need not be supported by affidavits.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 238-249; Dec. Dig. § 166.*]

4. NEW TRIAL (§ 166*)—ACTION—COMPLAINT—REQUISITES.

Where the complaint to obtain a new trial for newly discovered evidence, filed after term, states the name of the person by whom such evidence will be given and the facts to which he will testify, such facts need not appear in

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

an affidavit made by such person and filed as an exhibit.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 238-249; Dec. Dig. § 166.*]

5. NEW TRIAL (§ 166*)—DILIGENCE.

One seeking a new trial for newly discovered evidence must allege facts showing that he has been diligent in attempting to produce the evidence, and that he nevertheless was unable to discover it until after the term at which the verdict was returned, or the decision rendered.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 238-249; Dec. Dig. § 166.*]

6. NEW TRIAL (§ 166*)—ACTION—DILIGENCE—COMPLAINT—SUFFICIENCY.

The complaint, in an action for a new trial for newly discovered evidence, *held* not to show due diligence on plaintiff's part.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 238-249; Dec. Dig. § 166.*]

Appeal from Circuit Court, Dearborn County; George E. Downey, Judge.

Action by the First National Bank of Dillsboro against Cora P. Mulford and others. From the judgment, plaintiff appeals. Affirmed.

McMullen & McMullen, for appellant. Givan & Givan, for appellees.

LAIRY, C. J. The complaint in this case was filed in the Dearborn circuit court to obtain a new trial under the provisions of section 589, Burns' Statutes 1908, providing for the granting of a new trial in cases where the cause therefor is discovered after the term at which the verdict or decision was rendered. The complaint was based upon the ground of newly discovered evidence.

The complaint alleges that the appellant brought suit against Cora P. Mulford in the Dearborn circuit court, on May 15, 1907, upon a promissory note for \$135.90, and that the same plaintiff afterwards brought another suit against Cora P. Mulford, Oliver P. Mulford, and Ulysses G. Mulford, upon two promissory notes executed by said defendants; that afterwards said suits were consolidated, and the defendant Cora P. Mulford filed an answer alleging that she was a married woman, and that she executed said note as surety for the other two defendants, and received no part of the consideration of said note. The complaint further shows that a trial was had upon the issues thus formed, and a judgment rendered in favor of the defendant Cora P. Mulford.

The complaint then alleges that one Fred Lubbe was the cashier of the bank at the time said notes were executed, and that he personally made the loan and was familiar with all the facts and circumstances surrounding the transaction, and that he would testify that he made the loan directly to Cora Mulford, and delivered the money to her, and that she represented that she was borrowing the money for her own use, and that she was not security for any person;

that he relied upon these statements in making the loan, and was induced thereby to make it, and that he had no knowledge that any person other than Cora Mulford had any interest in the money realized therefrom. It is upon his testimony as set out in the complaint that appellant relies as its ground for a new trial.

The evidence introduced at the former trial is attached to the complaint as an exhibit, as is also a paper purporting to be an affidavit of Fred Lubbe, as to the facts within his knowledge, and to which he will testify in the event a new trial is granted. The complaint contains other averments, but we shall refer to only such parts of the complaint as are necessary to the understanding of the questions presented.

A demurrer to the complaint was sustained, and, the appellant refusing to amend or plead further, judgment was rendered against it. The only question presented on appeal is the correctness of the ruling of the trial court in sustaining the demurrer to the complaint.

[1] The complaint is objected to upon the ground that the affidavit of Fred Lubbe attached to the complaint, and stating the facts to which he will testify, is not properly authenticated, and for that reason cannot be treated by the court as an affidavit. The objection to the sufficiency of the affidavit is well taken. Burns' Statutes 1908, § 498, provides: "When any affidavit is taken in another state, and certified by the officer or justice of the peace taking the same, under his hand and seal of office, if he have any such seal, and attested by the clerk of the circuit or district court, or court of common pleas of the county where said officer exercises the duties of his office, under the hand of the clerk and seal of his court, the clerk also certifying that the officer or justice of the peace is, by the laws of said state, duly empowered to administer oaths and affirmations, and take affidavits, every such affidavit shall be deemed sufficiently authenticated, and may be received and used in any courts of this state."

It was held in the case of *Jackson v. State*, 161 Ind. 36, 67 N. E. 690, that an affidavit filed in support of a motion for a new trial, taken in the state of Tennessee and not authenticated according to the requirements of the statute above quoted, could not be received or used in the courts of this state. The court says: "Authority to take and certify affidavits does not belong to the office of notary public at common law, but whether it does or not is immaterial, since a legislative enactment is paramount to the common law, and the above statute specifically prescribes how an affidavit taken in a foreign state must come authenticated to receive faith and credit in our courts. It is provided that an affidavit shall be subscribed and certified by the officer, or justice of the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes 95 N.E.—28

peace, under his hand and seal of office, if he have one, and attested by the clerk, who shall also certify that such officer, or justice of the peace, is by the laws of said state empowered to administer oaths and take affidavits. The fixing of specific mode of authentication must be held to exclude all other modes; and hence the courts have no authority to heed an affidavit that is not vouched in the manner provided by law."

The affidavit filed as an exhibit in this case shows by its caption that it was taken in the county of Leavensworth and state of Kansas. It is not authenticated in accordance with the requirements of section 498 of our statute, above quoted, and it cannot be considered in determining the sufficiency of the complaint.

As this affidavit is not properly authenticated, and cannot be considered in determining the sufficiency of the complaint, we are then led to inquire whether it is necessary, in order to make the complaint in this case sufficient to withstand demurrer, that the affidavit of the person whose evidence is alleged to have been newly discovered, stating the facts to which he will testify, shall be filed with the complaint as an exhibit.

[2] It is undoubtedly true that a complaint to obtain a new trial on the ground of newly discovered evidence must set out the evidence alleged to have been discovered, and, if it consist of oral testimony, the name of the witness must be given, with a statement of the facts to which he will testify. These facts must appear either from the averments in the body of the sworn complaint, or from the affidavit of the person by whom it is alleged they can be proven, filed as an exhibit. In this case the body of the complaint, which is sworn to, contains a statement of the name of the witness by whom the facts alleged to be newly discovered can be proved, and also a statement of the facts to which he will testify. For the purpose of the demurrer, it is admitted that the witness named in the complaint will testify to the facts stated therein. The affidavit of the party by whom such facts could be proved would tend only to show the truth of the facts which are admitted by the demurrer, and would therefore add nothing to the force or effect of such admission.

The case of *East et al. v. McKee*, 14 Ind. App. 45, 42 N. E. 368, is cited by appellant as tending to support his contention on this point. It does not appear in that case that the name of the witness, and the facts to which he would testify were set out in the body of the complaint. If these facts do not appear in the body of the sworn complaint, they must appear by the affidavit filed therewith as an exhibit, or the complaint will be insufficient to withstand demurrer. It has been held that, where a motion for a new trial on the ground of newly discovered evidence is filed, the motion should be supported by an affidavit of the person by whom it is

alleged the newly discovered facts can be proved, stating the facts to which he will testify, and that a failure to file such affidavit, or to state a valid excuse for not doing so, will render the motion insufficient. *Ogden v. Kelsey*, 4 Ind. App. 299, 30 N. E. 922; *McQueen v. Stewart*, 7 Ind. 535; *Spaulding v. State*, 162 Ind. 297, 70 N. E. 243.

[3] In passing upon a motion for a new trial on the ground of newly discovered evidence, the court must determine the facts upon which the ruling is based from the affidavits on file. The motion is either granted or refused on the facts disclosed by the affidavits. Where a complaint to obtain a new trial on the ground of newly discovered evidence is filed, after the term, and its sufficiency is tested by demurrer, quite a different question is presented. It is not then a question as to whether or not the facts pleaded in the complaint are true, but, considering them to be true, the question is whether or not the plaintiff is entitled to a new trial. If the complaint is held sufficient, the defendant may deny the facts alleged therein, in which case the plaintiff is required on the trial to sustain by a preponderance of the evidence every material fact upon which he relies for a new trial. After hearing the evidence, the court is called upon for the first time to determine the truth of the facts upon which he is to decide whether a new trial shall be granted or refused. It will readily be seen that the reasons for requiring an affidavit of the character referred to as a part of the motion for a new trial, on the grounds of newly discovered evidence, does not apply to a complaint to obtain a new trial for the same cause filed after term.

[4] We therefore hold that, where the sworn complaint in such a case states the name of the person by whom such newly discovered facts can be proved, and the facts to which he will testify, such facts need not appear in an affidavit made by such person, and filed as an exhibit.

[5] The complaint is also assailed upon the ground that the facts averred therein do not show that the appellant exercised due diligence to discover the evidence before the trial, or during the term at which the verdict was rendered or the decision made. A litigant seeking a new trial on the ground of newly discovered evidence must allege facts showing that he has been diligent in his efforts to discover and produce the evidence, and that, despite such diligence, he was unable to discover it until after the term at which the verdict was returned or the decision rendered. *Hines v. Driver*, 100 Ind. 315; *East et al. v. McKee*, 14 Ind. App. 45, 42 N. E. 368.

The rule requiring diligence to be shown has been enforced with great strictness. In the case of *Baker v. Joseph*, 16 Cal. 173, the court states the rule thus: "The law treats with disfavor all attempts to reopen causes upon the ground of newly discovered evi-

dence, and never permits it to be done, except upon a clear and unequivocal showing that the applicant was diligent in his efforts to procure the evidence for the first trial. It will be presumed that the litigant could have discovered the evidence in due time by the use of proper means, and this presumption can only be rebutted by a satisfactory showing to the contrary, particularly stating the means employed." As sustaining this principle, we cite the following cases: Chicago, etc., R. Co. v. McKeehan, 5 Ind. App. 124, 31 N. E. 831; Wynne v. Newman's Adm'r, 75 Va. 811, 817; Wallace v. Tumlin, 42 Ga. 462; Hobler v. Cole, 49 Cal. 250; Moore v. Philadelphia Bank, 5 Serg. & R. (Pa.) 41; People v. Sutton, 73 Cal. 243, 15 Pac. 86; Keisling v. Readle, 1 Ind. App. 240, 27 N. E. 583.

[6] As bearing upon the question of diligence, the complaint in this case shows that Fred Lubbe, the witness by whom appellant states he is able to prove the facts upon which he relies for a new trial, left for parts unknown, on the 8th day of August, 1907; that he was a defaulter and a fugitive from justice, and that his whereabouts were unknown until he was arrested on the 28th day of April, 1908, at Los Angeles, Cal.; and that from the time he left until the time of his arrest the officers of appellant bank diligently prosecuted a search for him in all parts of the world by means of detectives and police departments. These averments show sufficient diligence on the part of appellant prior to the date of Lubbe's arrest on the 28th day of April, 1908; but no facts are alleged showing any diligence whatever after that time.

The complaint does not show the date upon which the trial took place. The averment of the complaint is: "That said cause came on for trial in said Dearborn circuit court on the _____ day of _____, 1908, and was consolidated with cause No. 3,621 in said court by agreement of parties," etc. The complaint shows that the evidence was heard and a judgment rendered, but is silent as to the date upon which this occurred. From these averments the court cannot determine what time in the year of 1908 the case was tried. From aught that appears from the complaint, this trial may have occurred after the arrest of Lubbe on the 28th day of April, 1908. There is no averment in the complaint that the officers of appellant bank did not know of the arrest as soon as it occurred. They were in a position to know the connection which Lubbe had with the bank at the time the loan was made, and to know that his connection with the transaction was such as would, in all probability, enable him to know the facts pertaining to the execution of the notes. This being true, due diligence on the part of appellant required that its officers should have placed themselves in

communication with Lubbe as soon as they learned of his arrest. If the case had not been tried at that time, they should have taken his deposition and produced it at the trial; but if the case had been tried, and the term at which the trial occurred had not expired, they should have procured his affidavit and made use of it in an application for a new trial during the term. If the case had been tried at a term of court which had expired before the officers of appellant bank learned of the arrest of Lubbe, these facts should be averred in the complaint. The complaint avers that the officers of the bank did not learn the details concerning the Mulford loan from Lubbe until the 31st day of August, 1908, which was more than three months after his arrest. No facts are averred showing that they made any effort during that time to ascertain what facts he knew in reference to the transaction, and no excuse is shown by the complaint for the failure to make such investigation.

The complaint fails to show such diligence on the part of appellant as the law requires. The court correctly sustained the demurrer to the complaint.

(50 Ind. App. 635)

STEELE et al. v. MICHIGAN BUGGY CO.
(No. 6,991.)¹

(Appellate Court of Indiana, Division No. 1.
June 20, 1911.)

1. APPEAL AND ERROR (§ 289*)—GROUNDS OF REVIEW—RESERVATION—MOTION FOR NEW TRIAL—NECESSITY.

Assignments of error relating to rulings on a motion to strike out parts of a deposition are proper grounds for new trial, but cannot be considered as independent assignments of error.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1691-1696; Dec. Dig. § 289.*]

2. EVIDENCE (§ 460*)—PAROL EVIDENCE VARYING WRITINGS.

While parol evidence is not admissible to vary, contradict, add to, or take from a written instrument, it is admissible to give effect to a written instrument by applying it to the subject-matter, and to show, where there are equivocal expressions, in what sense they were used by the parties.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2115-2128; Dec. Dig. § 460.*]

3. NEW TRIAL (§ 124*)—WRITTEN MOTIONS—STATUTES—CONSTRUCTION.

Burns' Ann. St. 1908, § 662, requiring motions for new trial to be in writing, is mandatory.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 250-253; Dec. Dig. § 124.*]

4. EVIDENCE (§ 249*)—ADMISSIONS.

Where each of alleged partners have filed an answer in general denial, the admission of either is competent as against himself.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 965-975; Dec. Dig. § 249.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes
¹Rehearing denied. Transfer to Supreme Court denied.

5. WITNESSES (§ 390*)—IMPEACHMENT—ADMISSIONS.

In an action against alleged partners, where one testified in behalf of the other that no partnership existed between them his statements or admissions, out of court, to the contrary, were proper as affecting the weight to be given his testimony at the trial.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. § 1247; Dec. Dig. § 390.*]

6. TRIAL (§ 207*)—INSTRUCTIONS—EFFECT OF TESTIMONY.

The question of the effect of testimony and the purpose for which it should be considered by the jury is a matter to be controlled by proper instructions.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. § 498; Dec. Dig. § 207.*]

7. APPEAL AND ERROR (§§ 273, 302*)—EXCEPTIONS IN GROSS—MOTION FOR NEW TRIAL.

If instructions be excepted to in gross, or if the ground of the motion for new trial alleging error in giving or refusing instructions be in gross, and one of such instructions be sound, the error so relied on is not available on appeal.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 1621-1623, 1748; Dec. Dig. §§ 273, 302.*]

8. PARTNERSHIP (§ 34*)—EXISTENCE OF RELATION—ACTIONS—ESTOPPEL.

The liability of a person not in fact a partner, but who has held himself out as such, or permitted himself to be so held out, rests on the doctrine of estoppel, and all the elements necessary to constitute the estoppel must exist.

[Ed. Note.—For other cases, see *Partnership*, Cent. Dig. § 49; Dec. Dig. § 34.*]

9. ESTOPPEL (§ 52*)—ESTOPPEL IN PARS—ELEMENTS.

To constitute an estoppel in pars, there must be a representation or concealment of material facts, made with a knowledge of the facts. The party to whom it was made must have been ignorant of the truth of the matter. The representation must have been made with intent that the other party should act thereon, and he must have been induced thereby to act.

[Ed. Note.—For other cases, see *Estoppel*, Cent. Dig. §§ 121-127; Dec. Dig. § 52.*]

10. PARTNERSHIP (§ 37*)—EXISTENCE OF RELATION—ESTOPPEL.

The acts and conduct which constitute the holding out of one sought to be charged as a partner in favor of the one seeking to so charge him must have preceded the extension of credit on which liability is sought, and have induced the giving of such credit.

[Ed. Note.—For other cases, see *Partnership*, Cent. Dig. §§ 37, 52; Dec. Dig. § 37.*]

11. TRIAL (§ 296*)—INSTRUCTIONS—ERROR CURED.

An instruction omitting a necessary element of defendant's liability to plaintiff could not be cured by another instruction correctly stating the law.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 705-718; Dec. Dig. § 296.*]

12. TRIAL (§ 243*)—INCONSISTENT INSTRUCTIONS.

Where two or more instructions are inconsistent and calculated to mislead the jury or leave them in doubt as to the law, they are cause for reversal.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 564, 565; Dec. Dig. § 243.*]

13. PARTNERSHIP (§ 5*)—EXISTENCE OF RELATION—TEST.

The ultimate and conclusive test of a partnership is the co-ownership of the profits of the business as profits.

[Ed. Note.—For other cases, see *Partnership*, Cent. Dig. §§ 15, 16; Dec. Dig. § 5.*]

Appeal from Circuit Court, St. Joseph County; Walter H. Funk, Judge.

Action by the Michigan Buggy Company against Charles Steele and another. Judgment for plaintiff, and defendant Steele appeals. Reversed, with instructions to grant a new trial.

Dudley M. Shively, Chas. P. Drummond, and Donald P. Drummond, for appellant. M. L. Howell, D. D. Bates, Gilbert A. Elliott, and Vitus G. Jones, for appellee.

HOTTEL, J. Action by appellee against appellant and Delos Metzger on note and account.

The complaint is in two paragraphs, each of which seeks to charge appellant and said Metzger as partners doing business under the firm name of the Mishawaka Carriage & Harness Company; the first paragraph being an ordinary suit for a balance due on account for goods and merchandise sold and delivered to said firm in the sum of \$278.76, and the second paragraph being upon a note alleged to have been executed by said defendants, and which they failed to pay after protest. Total demand \$600. There was a separate answer of general denial by each defendant to each paragraph of the complaint and a sworn answer of non est factum to the second paragraph by the defendant Steele. Upon the issues thus formed, there was a trial by jury and a verdict against both defendants in the sum of \$517, upon which judgment was rendered and the defendant Steele prayed an appeal, having first unsuccessfully moved for new trial.

[1] The first and second assignments of error relate to rulings upon a motion to strike out parts of a deposition and are proper grounds for new trial, but cannot be considered as independent assignments of error. *National Bank, etc., Co., v. Dunn et al.*, 106 Ind. 110, 6 N. E. 131; *Burnett v. Milnes*, 148 Ind. 230, 235, 236, 46 N. E. 464; *Capital Nat. Bank v. Wilkerson*, 36 Ind. App. 550, 555, 76 N. E. 258. This leaves as the only error properly assigned and presented that of the ruling of the court upon the motion for new trial. The first ground of this motion urged calls in question a ruling on the admission of certain evidence. The question objected to related to a memorandum filed as an exhibit with a deposition; said memorandum being a "statement as a basis of credit made to the Mercantile Agency R. G. Dun & Co. for the use of its creditors." And the question was: "And why is the blank headed 'D. R. Metzger, Proprietor,' if you know?" The question was objected to on the ground

that the paper itself was the best evidence of its contents. The question did not ask for the contents of the memorandum or for any part of the same, and was not subject to the objections urged against it. The question and the evidence sought by the answer thereto was explanatory only; and, in view of the questions and answers that had preceded the one objected to, we think the question was a proper one.

[2] While it is settled law "that parol evidence is not admissible to vary, contradict, add to, or take from a written instrument" yet it "is equally as firmly established, and strongly sustained by authority and on principle that parol evidence is admissible to give effect to a written instrument by applying it to the subject-matter, and where there are equivocal expressions used in a written instrument, parol evidence is admissible to show in what sense they were used by the parties." *Mace, Ex'r, v. Jackson*, 38 Ind. 162, 166, 167; *Evansville, etc., R. R. Co. v. Shearer*, 10 Ind. 244, 248, 249; *Clark et al. v. Crawfordsville, etc., Co.*, 125 Ind. 277, 280, 25 N. E. 288; *Thomas v. Troxel*, 26 Ind. App. 322, 328, 59 N. E. 683.

[3] The next grounds of the motion for new trial, being Nos. 2, 3, and 4 of the errors presented by appellant, relate to rulings on motion to strike out parts of a deposition, and are not available because such motion was not in writing. The statute requiring such motion to be in writing is mandatory. Section 662, Burns 1908; *Crystal Ice Co. v. Morris*, 160 Ind. 651, 653, 67 N. E. 502.

The grounds for new trial presented by errors 6, 7, and 8, relied upon and urged by appellant, call in question the ruling of the court in the admission of certain evidence over the objections of appellant, and presents in a different form the same question attempted to be presented by the errors last above mentioned. This evidence was by way of deposition and consisted in statements made by appellant's codefendant, Metzger, to the witness tending to show the partnership between the appellant and said Metzger, the ground of the objection being that the "appellant cannot be bound by the statement of Metzger made in his absence," and "that the relation of partners cannot be established by the declaration of an alleged partner." The questions and the evidence sought to be elicited were not subject to the objections urged against them because in this case the record discloses that both defendants, Steele and Metzger, had each filed a general denial to each paragraph of the complaint, and were, in fact, each insisting, and had each so testified upon the witness stand that the partnership relation did not exist between them.

[4] Where each of the alleged partners have filed an answer in general denial, as in this case, the admission of either is competent as against himself. *Vannoy v. Klein*, 122 Ind. 416, 23 N. E. 526; *Cook v. Frederick*, 77 Ind. 406; *Bennett v. Holmes*, 32 Ind. 108.

[5] Metzger having testified in the case in behalf of Steele that no partnership existed between himself and Steele, his statements or admissions out of the court, to the contrary, were proper as affecting the weight to be given to his testimony at the trial. *McAfee v. Montgomery*, Adm'r, 21 Ind. App. 196, 201, 51 N. E. 957; *Moelering v. Smith*, 7 Ind. App. 451, 456, 34 N. E. 675.

[6] The question of the effect of the testimony and the purpose for which it should be considered by the jury was a matter to be controlled by proper instructions.

The questions next presented by appellant in his brief relate to the giving of certain instructions by the court upon its own motion, and at the request of appellee, and the refusal of certain instructions requested by appellant.

It is insisted by appellee that in the grounds for new trial the alleged error in giving these instructions is joint, and that, therefore, no available question is presented as to each individual instruction, unless they are each erroneous.

[7] It is well settled that if instructions be excepted to in gross, or if the ground of the motion for new trial alleging error in giving or refusing instructions be in gross, and one of said instructions be sound, the error so relied upon in giving or refusing the same will not be available on appeal. *Ohio & Mississippi Ry. Co. v. McCartney*, 121 Ind. 285, 287, 288, 23 N. E. 258; *Sutherland v. State*, 108 Ind. 389, 392, 9 N. E. 298. But in the case at bar we think both the exceptions saved to the instructions given and refused, and the ground for new trial upon which error is predicated in giving and refusing the same is specific and definite as to each and designates and presents for the consideration of this court the correctness of each instruction given and refused.

The first instruction objected to by appellant is number 4, given by the court of its own motion, and is as follows: "In this case there are two questions or elements for you to consider in deciding the question whether the defendant Steele is liable to the plaintiff, as claimed by the plaintiff: First. Whether or not the partnership actually existed between Mr. Metzger and Mr. Steele. And if you find that such a partnership did exist, and the goods were bought from the plaintiff for the use in the partnership business, and within the scope of the partnership business, then your verdict should be for the plaintiff against the defendants. Second. If you find that no partnership actually (actually) existed between the defendants, then the second element for you to consider is whether or not the defendant Steele so acted, or permitted others to act, as to lead the Michigan Buggy Company to reasonably believe that he was a partner with him in the business; and if you find that he did so act as to reasonably lead the Michigan Buggy Company to believe that he was a

partner in the business, even though in fact he was not such a partner, he would still be liable to the plaintiff in this case. In determining whether or not the acts of Steele were such as to reasonably lead to a belief that he was a partner in the business, you have a right to take into consideration every act and statement of Mr. Steele to the Michigan Buggy Company, and every act of Metzger and statement made by him to the Michigan Buggy Company, if said act or statement was made with the knowledge or consent of Mr. Steele, which might reasonably lead to the belief that he was an actual partner in the business." In considering this instruction, it must be kept in mind that the only question in this case was whether or not the defendant Steele should be held liable as a partner on the note and account sued on. There was no denial in fact that the Mishawaka Company got the merchandise upon which the account was predicated; nor was there any denial by said Metzger that the note sued upon in the second paragraph of complaint was executed by him in the name and style of the "Mishawaka Carriage & Harness Company." This instruction is prefaced with a statement to the jury that there were two questions for them to consider in determining whether or not the defendant Steele was liable to the plaintiff, and then correctly tells the jury, first, what will authorize a recovery in case they find that a partnership actually existed between Metzger and Steele. The instruction then attempts to tell the jury what is necessary to make the defendant Steele "liable" to the plaintiff in this case, "even though no partnership existed," and it became important and necessary that the instruction on this branch of the case should be complete and contain therein every element necessary to constitute such liability. *Indiana Nat. Gas Co. v. Vauble*, 31 Ind. App. 370, 374, 375, 68 N. E. 195; *Voris v. Shotts*, 20 Ind. App. 220, 224, 50 N. E. 454; *Wyman v. Turner*, 14 Ind. App. 118, 123, 42 N. E. 652.

[8] The doctrine of estoppel furnishes the basis upon which one person not in fact a partner of another may by his own acts or conduct, or by acquiescence in such other person's acts and conduct, bind himself as such partner, or, in other words, the liability of a person not in fact a partner, but who has held himself out as such, or has permitted himself to be so held out as such, rests on the doctrine of estoppel, "and the proof in such case must show all the elements sufficient to constitute the estoppel." *Breinig v. Sparrow*, 89 Ind. App. 455, 461, 80 N. E. 37; 3 Elliott, Evidence, § 2558.

[9] "To constitute an estoppel in pais, the following elements must be present: (1) A representation or concealment of material facts; (2) the representation must have been made with a knowledge of the facts; (3) the party to whom the representation was made must have been ignorant of the truth of the

matter; (4) the representations must have been made with the intention that the other party should act upon it; and (5) the other party must have been induced thereby to act." *Farmers' Bank v. Orr*, 25 Ind. App. 71, 84, 55 N. E. 35; *Roberts v. Abbott*, 127 Ind. 83, 89, 26 N. E. 565; *Kuriger v. Joest*, 22 Ind. App. 633, 637, 52 N. E. 764, 54 N. E. 414. The instruction above quoted, as given in this case, entirely leaves out of account the third and fifth elements above quoted as necessary to constitute an estoppel, and yet, with these elements left out, the court tells the jury that the defendant Steele "would still be liable to the plaintiff in this case." The concluding part of the instruction is also open to objection and criticism in that it tells the jury that, in determining whether or not the acts of the defendant Steele were such as to reasonably lead to the belief that he was a partner, they have a right to take into account every act and statement of Steele to the appellant, and of Metzger as well, if made with the knowledge or consent of Steele, without regard either to the time of making such statement or to its being the inducing cause of the credit given.

[10] The facts and conduct which constitute the holding of the person sought to be charged as a partner in order to create liability as against such person in favor of the person seeking to charge him with such liability must have preceded the extension of credit upon which recovery is sought, and must have induced the giving of such credit. 3 Elliott, Evidence, § 2558; 9 Enc. of Ev. §§ 549, 550; *Breinig v. Sparrow*, supra. Appellee insists that appellant was not harmed by the giving of said instruction because other instructions were given by the court containing said omitted elements of estoppel.

[11] This instruction, having undertaken to tell the jury what created a liability against appellant in favor of appellee, and omitting therefrom a necessary element constituting such liability, could not be cured by another instruction correctly stating the law. *Ind. Nat. Gas Co. v. Vauble*, supra; *Chicago, etc., R. Co. v. Glover*, 154 Ind. 584, 587, 57 N. E. 244; *Pittsburgh, etc., Ry. Co. v. Nofstger*, 148 Ind. 101, 109, 47 N. E. 832; *Wenning et al. v. Teeple et al.*, 144 Ind. 189, 194, 41 N. E. 600.

[12] If two or more instructions are inconsistent and calculated to mislead the jury or leave them in doubt as to the law, they are cause for reversal. *Pittsburgh, etc., Ry. Co. v. Nofstger*, supra; *Wenning et al. v. Teeple et al.*, supra.

Objection is also made to instruction number 14½ given at the request of appellee, which is as follows: "A partnership is a combination by two or more persons of capital, or labor, or skill, or some or all of these, for the purpose of business for their common benefit." While this instruction defines partnership in the language used by

one of the authorities on partnership and occasionally quoted in the decisions of other states, it lacks an element which we think essential under the authorities of this state, and, in fact, under the authorities generally, viz., the co-ownership of the profits of the business.

[13] In the case of *Breinlg v. Sparrow*, supra, this court said upon this subject, at page 461 of 39 Ind. App., at page 38 of 80 N. E.: "The ultimate and conclusive test of a partnership is the co-ownership of the profits of the business. If there is a community of profits, a partnership follows. Community of profits means a proprietorship in them, as distinguished from a personal claim upon the other associate. In other words, a property right in them from the start in one associate as much as in the other." To the same effect are the following cases: *Bradley v. Ely*, 24 Ind. App. 2, 5, 56 N. E. 44, 79 Am. St. Rep. 251; *Macy v. Combs*, 15 Ind. 469, 471, 77 Am. Dec. 103; *Ward v. Thompson*, 22 How. 330, 331, 16 L. Ed. 249; *Farmers' Ins. Co. v. Ross*, 29 Ohio St. 429, 431; *O'Donohue v. Bruce*, 92 Fed. 858, 860, 33 C. C. A. 52; *McMurtrie v. Guiler*, 183 Mass. 451, 67 N. E. 358 (citing *Ryder v. Wilcox*, 103 Mass. 24; *Meehan v. Valentine*, 145 U. S. 611, 12 Sup. Ct. 972, 36 L. Ed. 835).

We do not think that a business engaged in by two or more persons who combine their capital, labor, or skill for the purposes of a common benefit is necessarily a partnership within the definition above quoted and recognized by this and the Supreme Court. While this instruction may be said to be incomplete rather than erroneous, and might not in every case constitute available error, yet, in view of the evidence and the issues in this case, we think that it was important that the instruction which attempted to define a partnership should have contained the element of a co-ownership of the profits of the business, and appellant may have been prejudiced in his defense by its omission.

Objections are urged to other instructions given; but, as the case must be reversed and a new trial ordered on account of the error in giving those already discussed, we deem it unnecessary to consider the others.

Judgment reversed, with instructions to the court below to grant a new trial.

(48 Ind. A. 95)

HALSTEAD et al. v. VANDALIA R. CO.
(No. 7,235.)

(Appellate Court of Indiana, Division No. 2.
June 20, 1911.)

1. EMINENT DOMAIN (§ 222*)—INSTRUCTIONS—MISLEADING INSTRUCTIONS.

Where a proceeding to condemn land for a railroad right of way was tried on the theory that the owner could recover the value of the land and the improvements, and most of the

witnesses fixed a separate value on the land and the improvements, and the court charged that the measure of damages was the difference in the value of the real estate at the time of the taking and the value of the residue after the strip was taken, and that the word "real estate" included both the land and the improvements, a charge that evidence of the value of improvements was admitted to enable the jury to arrive at a fair market value of the improvements, and that the question was the fair market value of the improvements taken as a whole, was not objectionable as leading the jury to consider that the value of the improvements was the measure of damages, and as withdrawing from the jury the value of the land taken.

[Ed. Note.—For other cases, see *Eminent Domain*, Cent. Dig. §§ 562-567; Dec. Dig. § 222.*]

2. EVIDENCE (§ 113*)—ADMISSIBILITY.

In proceedings to condemn land, evidence of the price paid by the owner for the land shortly before condemnation is proper.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 259-296; Dec. Dig. § 113.*]

3. EMINENT DOMAIN (§ 222*)—ASSESSMENT OF DAMAGES—INSTRUCTIONS.

Where, in proceedings to condemn land, there was evidence of the price paid by the owner for the property shortly before the condemnation, a charge that the jury should consider the evidence in determining the value in connection with all the other evidence in the case was proper, as defining the duty of the jury.

[Ed. Note.—For other cases, see *Eminent Domain*, Cent. Dig. §§ 562-567; Dec. Dig. § 222.*]

4. EMINENT DOMAIN (§ 184*)—COMPENSATION—VALUE FOR SPECIAL USE.

A jury in awarding damages in eminent domain proceedings should consider the capacity of the property for other uses than those to which the land is actually applied, so far as the same may be shown in evidence, and the uses for which the property is suitable and to which it is adapted, but the jury may not consider an intended specific future use because such damages are speculative.

[Ed. Note.—For other cases, see *Eminent Domain*, Cent. Dig. § 356; Dec. Dig. § 134.*]

5. EMINENT DOMAIN (§ 239*)—PROCEEDINGS IN CIRCUIT COURT ON APPEAL FROM AWARD OF APPRAISERS.

On appeal to the circuit court from the award of appraisers in eminent domain proceedings, the case is tried de novo, and the jury must assess the damages.

[Ed. Note.—For other cases, see *Eminent Domain*, Cent. Dig. §§ 615-620; Dec. Dig. § 239.*]

6. EMINENT DOMAIN (§ 238*)—PROCEEDINGS IN CIRCUIT COURT ON APPEAL FROM AWARD OF APPRAISERS—EVIDENCE.

The amount of damages awarded by appraisers in eminent domain proceedings and the reasons influencing the fixing of that amount are inadmissible on a trial in the circuit court on appeal from the award of appraisers.

[Ed. Note.—For other cases, see *Eminent Domain*, Cent. Dig. §§ 614, 619; Dec. Dig. § 238.*]

7. EMINENT DOMAIN (§ 262*)—APPEAL—HARMLESS ERROR—ERRONEOUS ADMISSION OF EVIDENCE.

Where, on the trial in the circuit court on appeal from the award of appraisers in eminent domain proceedings, the court at the time of the admission in evidence of the amount awarded by the appraisers, and the reasons influencing the fixing of that amount, stated to counsel and jury that the evidence was admitted to fix the basis on which the witnesses fixed their judgment of the value of the property, and the court charged that the jury must award just compensation, regardless of the appraise-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

ment and that the appraisalment could not be considered, and the damages fixed by the jury was sustained by the evidence, the error in admitting the evidence was not prejudicial.

[Ed. Note.—For other cases, see *Eminent Domain*, Cent. Dig. §§ 681-686; Dec. Dig. § 282.*]

8. APPEAL AND ERROR (§ 1053*)—ERRORS IN RULINGS ON EVIDENCE CURED BY INSTRUCTIONS.

An instruction to disregard evidence will as a general rule cure the error committed by admitting the evidence.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4178-4184; Dec. Dig. § 1053; Trial, Cent. Dig. § 977.]

9. APPEAL AND ERROR (§ 1026*)—HARMLESS ERROR.

The court on appeal will not reverse a cause for error, where the error is harmless to the party complaining.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4029, 4030; Dec. Dig. § 1026.*]

Appeal from Circuit Court, Putnam County; Thomas T. Moore, Judge.

Condemnation proceedings by the Vandalla Railroad Company against James N. Halstead and another for the acquisition of land for a right of way. From a judgment of the circuit court awarding damages rendered on appeal from the award of appraisers, the owners appeal. Affirmed.

G. S. Payne, for appellants. George A. Knight, John H. James, McNutt, McNutt & Wallace, and John G. Williams, for appellee.

IBACH, J. This is an action and statutory proceeding by the Vandalla Railroad Company, plaintiff below, to condemn and appropriate for a right of way for steam railroad purposes a part of a tract of land owned by appellant James N. Halstead, defendant below, in the city of Brazil, Ind. The complaint asked for the appointment of appraisers to assess the damages, and, after answer was filed, a hearing was had, and appraisers were appointed who filed their report, assessing damages to appellant in the sum of \$3,100. Appellee filed exceptions to the assessment on the ground of excessive damages, and prayed that the amount of damages be determined and assessed as in a civil action in the manner and form provided for by law, and upon issues thus formed the cause was submitted to the jury, who found for the appellant and assessed his damages at \$2,100.

The errors relied upon for reversal are five in number, and arise out of the overruling of the motion for new trial. They are the giving of instructions numbered 15, 7, and 12, tendered by plaintiff, and the admission in evidence of certain testimony of R. S. Hill and Conrad Dierdorf, who were among the appraisers of damages. Appellee claims that the joint assignments of error by appellants James N. and Hattie B. Hal-

stead and the separate assignments of error by appellant Hattie B. Halstead raise no question. It is unnecessary for us to decide this, as the separate assignments by appellant James N. Halstead fully present the errors relied upon for reversal.

Instruction 15 is in the following words: "Evidence has been permitted to go before you as to the value of the walls and foundation of the building in controversy in this case, and the value of other separate parts of the said building and also of a well on the land appropriated by the plaintiff. This evidence has been permitted in order that you may arrive at a just and fair market value of the whole of the improvements on said real estate, and for no other purpose; the real question for your consideration being the fair market value of the improvements taken as a whole and as they then existed on the real estate appropriated on the 4th day of August, 1906."

[1] Objection is made to the last clause of this instruction on the ground that it informs the jury that the only element which they are to consider in awarding damages is the value of the improvements, that in assessing the damages the jury should not allow the value of the land taken, as well as the improvements, and that it withdraws from their consideration, as an element of damage sustained, the value of the land. We do not think this objection tenable. The case was tried on the theory that appellant was entitled to recover for the value of the land and the improvements. Almost every witness in his testimony fixed a separate value on the land and the improvements and in instruction 2 given by the court on his own motion the jury was correctly informed "that the measure of damages is the difference in the value of the real estate at the time of the appropriation, and the value of the residue after the strip is taken under the appropriation proceedings. The word 'real estate' includes both the land and improvements thereon." Though instruction 15 is not very clearly expressed, it seems to us to mean, and we believe that such would be the meaning placed upon it by ordinary men of fair intelligence, that the jury was permitted to consider the value of the improvements taken separately for the purpose of enabling them to find the fair market value of the same considered as a whole, not for the purpose of determining the entire damage, but of determining one element of that damage, namely, the value of the improvements. The instruction was clearly applicable to the evidence, and, though not complete in itself, when taken in connection with the other instructions given, it cannot be held to have misled the jury and harmed appellant. Instruction 7 is: "Evidence has been intro-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

duced in this case of the amount paid by the defendant for the real estate, a part of which has been condemned by the plaintiff. You should consider such evidence of the purchase price paid by the defendant in connection with all the other evidence in the case of determining the market value of the property condemned." This instruction is objected to as peremptory, because by the use of the word "should" instead of "may" or "might" it orders the jury to consider certain evidence which appellant claims they were at liberty to consider, but not bound so to do; and further as singling out particular evidence for comment. Evidence was introduced of the purchase price paid by appellant for the property shortly before the condemnation.

[2] This evidence was proper, and the jury was told that they should consider such evidence in connection with all the evidence in the case.

[3] In telling them that they should consider the evidence, the court announced only to them their duty, which they were bound to perform, and, as he did not comment on the weight to be given the evidence, he committed no error in giving the instruction. It is always the duty of a jury trying a cause to take into consideration all the evidence introduced, and it is not error for the court so to instruct, but what weight is to be given any particular part is entirely for the jury. *Deal v. State*, 140 Ind. 354, 368, 39 N. E. 930.

[4] Instruction 12 is: "And, if the jury find from any evidence that any witness who has given his opinion as to the market value of the property taken has based such opinion in part upon the value of such property to the defendant for an intended specific future use, such opinion should be disregarded so far as it is so based upon the value for an intended specific future use." This instruction was correct. Evidence had been given of the value of the property for an ice plant, for which purpose appellant said he intended using it. The jury were correctly advised by the court's instruction 8 that the capacity of the property for other uses than those to which the land is actually applied so far as the same may be shown in evidence, and the uses for which the property is suitable and to which it is adapted may be taken into consideration. But the inquiry as to damages cannot go into an intended specific future use; such a field of damages being held speculative. *Goodwine v. Evans*, 134 Ind. 262, 33 N. E. 1031. Mr. Lewis in his work on Eminent Domain announces the rule thus: "Proof must be limited to showing the present condition of the property and the uses to which it is naturally adapted. It is not competent for the owner to show to what use he intended to put the property, nor what plans he had for its improvement, nor the probable future use of the property. Noth-

ing can be allowed for damages to an intended use." Lewis on Eminent Domain (3d Ed.) § 709. This appears to be the rule recognized by our own Supreme Court.

Objection is made to the admission in evidence of the testimony of the witnesses Hill and Dierdorf, set forth below, on the ground that it brings before the jury the appraisers' report in evidence.

Cross-examination of R. S. Hill: "Q. 82. I will ask you if Mr. Halstead made any statement to you on that occasion about what he would do or was willing to do in regard to that property? A. 82. He did. Q. 83. Tell the jury what it was. A. 83. He said that the salvage, he thought, he would give—that he would give \$1,350. Q. 84. For what? A. 84. For the salvage in that building, when it was torn down. Q. 87. Did you take that into consideration in forming your opinion as to the value of the property and what it ought to be? A. 87. My judgment was the salvage was worth \$1,000, and I made that part of the estimate. Q. 88. You gave it credit that far? A. 88. For the amount of \$1,000. Q. 90. You say now that your value of that building is how much? What do you say the value is on the building alone? A. 90. I said the value of the building and the ground was \$4,000, and then I deducted from that \$1,000 for the salvage, or the value of the material in the building, which left \$3,000. Q. 91. As a matter of fact you made an appraisal different from that, didn't you? A. 91. Yes, sir; our appraisal was— Q. 92. Thirty-one hundred dollars? A. 92. That was done in reconciling— Q. 93. Twenty-four hundred for the building and \$700 for the ground? A. 93. If you will allow me to explain the matter—I haven't got the figures. [Here in answer to questions witness identified his signature to a paper not named in the record, apparently the appraisers' report.] Q. 99. And here it is stated that the value of the above-described piece of land on August the fourth, 1906, was \$3,100. I will ask you, Mr. Hill, to tell the jury whether you remember what valuation you put upon this building in your report. A. 99. I don't remember the detail. I remember the aggregate was \$3,100."

Redirect examination of Conrad Dierdorf: "Q. 2. Tell the jury whether Mr. Halstead made any statement to you, representing what he would pay for the salvage of the building to the railroad company, when you were making this examination? A. 2. He did. Q. 3. Tell the jury what statement he made to you. A. 3. He told me that he would give \$1,200 for that building and take it away and tear it down for the material that was in it, and take it and give the company that much for it."

The entire purpose of the appeal to the circuit court was to obtain a reconsideration of the identical question submitted to and

determined by the appraisers chosen for the purpose of fixing the damages to appellant for the land and improvements taken by appellee.

[5] The case therefore was to be tried de novo, and the award of damages made by such commissioners and included in their report could not be considered as competent evidence of the proper amount of damages sustained by appellant. This rule is well recognized by the courts of this state. *Trittip v. Beaver*, 155 Ind. 652, 655, 58 N. E. 1034, and the numerous cases there cited. The jury in such cases have but one duty to perform, and that is to assess the damages the defendant will sustain by the appropriation of his land to public use, and have no more right to know what the report or assessment of damages of the appraisers was, or the reasons which influenced that assessment, than any jury in any case has to know what the verdict of a previous jury was in the same case, or the method by which that previous jury arrived at its verdict. On appeal from the commissioners and trial de novo, the report appealed from is not evidence as to the amount of damages. *Lewis on Eminent Domain* (3d Ed.) § 669; *Missouri, etc., Co. v. Roberts*, 187 Mo. 309, 86 S. W. 91.

[6] Though in the present case the appraisers' report itself was not admitted in evidence, the amount of the appraisal and some of the reasons influencing the fixing of that amount were brought in by the testimony of the appraisers, and this was error.

[7] However, this evidence was brought out by questions which were allowed, as the court informed counsel and the jury at the time, for the purpose of fixing the basis upon which the witnesses fixed their judgment of the value of the property. And the court instructed the jury in instructions 2 and 3 given of its own motion: "Said cause is before this court for issue, trial, and judgment de novo, regardless of the said appraisal, for the purpose of litigating the question of the just compensation due said defendants for the said appropriation of said property, as asked in said complaint. You have nothing whatever to do with the action of the court in having heretofore appointed appraisers in this matter. Under the provisions of the statute of the state, in reference to condemnation proceedings, this cause is tried by you as though no such appraisers and viewers had been appointed. You have nothing to do with their appraisal, and you are not at liberty to take into consideration any appraisal that may have been made at that time. It is not even evidence of any character, and is not before you, and you should not consider it at all." The effect of these instructions was to withdraw the evidence from the consideration of

the jury, and we will presume that the jury was guided by them, in the absence of any showing to the contrary.

[8] An instruction to disregard evidence will as a general rule cure the error committed by the court in admitting it. *Elliott, Appellate Procedure*, § 701; *Citizens' St. R. Co. v. Spahr*, 7 Ind. App. 23, 33 N. E. 446; *Taylor v. Wootan*, 1 Ind. App. 188, 27 N. E. 502, 50 Am. St. Rep. 200.

[9] And this court will not reverse a cause where the error committed has been harmless to the one complaining. Such seems to be the case here, and the verdict seems right on the evidence. It was shown that shortly before the condemnation appellant had bought two-thirds of the entire property for a consideration which he testifies to as in fact \$1,000, the amount named in the deed, but the vendor testified that the true consideration was \$400. Nine years previously appellant had bought one-third of the property for \$350, and during the period while he owned one-third the building had been rented for about three years, and had returned in rentals scarcely more than the amount of taxes. About one-third of the entire tract, including the building, was taken in this proceeding. The building, a three-story brick, 40 by 60 feet, had been standing about 40 years, and was in bad repair. The values set upon the property taken varied from \$9,000 by appellant to \$700 by others, and some of the higher estimates were, as brought out by testimony, based on the value of new material required to construct a similar building. There was varying testimony as to the value of a well which was situated on the land taken. From all the evidence, the result arrived at by the jury seems to be a fair valuation.

The error in admitting the testimony in regard to the appraisers' report seeming to have been harmless to appellant, the judgment is affirmed.

(51 Ind. App. 159)

INDIANAPOLIS SOUTHERN R. CO. v.

WYCOFF. (No. 7,273.)¹

(Appellate Court of Indiana, Division No. 2.
June 23, 1911.)

1. FRAUDS, STATUTE OF (§ 60*)—CONTRACTS AFFECTING "INTEREST IN LAND"—EASEMENT.

An easement is an "interest in land," within the statute of frauds, and a contract creating an easement must be in writing.

[Ed. Note.—For other cases, see *Frauds, Statute of*, Cent. Dig. §§ 83, 94, 95; Dec. Dig. § 60.*

For other definitions, see *Words and Phrases*, vol. 4, pp. 3692-3709; vol. 8, p. 7691.]

2. FRAUDS, STATUTE OF (§ 60*)—AGREEMENT AFFECTING INTEREST IN LAND.

Burns' Ann. St. 1908, § 5445, giving an owner of land divided by a railroad right of way, acquired by condemnation or purchase, the right to maintain driveways over the right

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

¹Rehearing denied. Transfer to Supreme Court denied.

of way, reserves, to an owner of land divided by a railroad right of way, the right to a passageway over the right of way, and an agreement by a railroad company, acquiring a right of way dividing a tract to maintain approaches so as to enable pedestrians to cross the track, merely provides the owner with a convenient way, by which he may exercise the statutory right, and the contract does not create any easement or interest in the land, within the statute of frauds.

[Ed. Note.—For other cases, see *Frauds, Statute of*, Cent. Dig. §§ 83, 94, 95; Dec. Dig. § 60.*]

3. EVIDENCE (§ 443*)—PAROL EVIDENCE—VARYING CONSIDERATION IN DEED.

The rule that, in the absence of fraud or mistake, a contract reduced to writing cannot be varied by parol, does not exclude parol evidence of the actual consideration of a deed, though a consideration is expressed therein, and, where a deed conveying a right of way to a railroad company recited a consideration of a specified sum, the receipt whereof was acknowledged, and was silent as to any other consideration, parol evidence of an agreement by the company as a part of the consideration to construct and maintain approaches to the grade of the right of way to enable pedestrians to pass over the grade was admissible.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 2048-2051; Dec. Dig. § 443.*]

Appeal from Circuit Court, Monroe County; James B. Wilson, Judge.

Action by Andrew Wycoff against the Indianapolis Southern Railroad Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Duncan & Batman and James E. Kepperley, for appellant. Henry A. Lee and Miers & Corr, for appellee.

LAIRY, C. J. The appellant railroad company instituted condemnation proceedings to acquire a right of way for its railroad across the farm of appellee. Appraisers were appointed, who filed a report, awarding damages in the sum of \$850, to which award exceptions were filed by appellee. Appellant, paid the amount of the award to the clerk of the court, took possession of the right of way, and constructed its road thereon, and in so doing it built a grade of considerable height just east of the house located on appellee's land. The orchard on appellee's farm was located east of the house, as was also a valuable spring, which had been used in connection with the residence on the farm, and this grade was located between the spring and the house, and so as to leave the larger part of the orchard east of such grade. Before the case was tried on the exceptions, a compromise was reached, by the terms of which appellee conveyed the right of way across his farm to appellant, by deed, and appellant paid to appellee \$650 in addition to the amount already paid into the clerk's office, making a total of \$1,500. It is claimed by appellee that, at the time the negotiations for the settlement were had, the appellant agreed that, in consideration

of the execution of the deed for the right of way, it would pay to him the sum of \$1,500, and in addition thereto would construct and maintain stone or cement steps or approaches to its grade, immediately east of his residence, so as to enable pedestrians to pass over said grade in going between the house of appellant and the spring and orchard, which were located east of the said grade. This action was brought in the Monroe circuit court to recover damages on account of the failure of appellant to perform that part of the agreement relating to the construction of the steps. A trial was had, which resulted in a judgment in favor of appellee, from which judgment an appeal was taken to this court.

The complaint does not aver that the contract in reference to the building of the steps was in writing, and the special finding of facts affirmatively shows that it rested in parol. The deed recites that the conveyance is made in consideration of \$1,500, the receipt whereof is acknowledged; but it is silent as to any other or further consideration. In view of these facts, the appellant takes the position that the appellee is not entitled to recover for a failure of the railroad company to construct steps, as alleged in the complaint, even though it be conceded that such an agreement was made, as a part of the negotiations for settlement, which were consummated by the execution of the deed. Several errors are assigned which present this question in different ways. The determination of this question will therefore be decisive of all questions presented by the assignment of errors, and a separate discussion of each is unnecessary.

Appellant contends that the alleged agreement for the construction of the steps leading up to the grade of appellant's tracks, on each side thereof, for the use of pedestrians, would, if enforced, constitute an easement across appellant's right of way. If appellant is correct in this contention, it must prevail, in this appeal.

[1] It is well-settled law that an "easement" is an interest in land, within the meaning of the statute of frauds, and that a contract creating such an interest must be in writing. *Robinson v. Thrallkill et al.*, 110 Ind. 117, 10 N. E. 647; *Brumfield v. Carson*, 33 Ind. 94, 5 Am. Rep. 184; *Richter v. Irwin*, 28 Ind. 26; *Schmidt v. Brown*, 226 Ill. 590, 80 N. E. 1071, 11 L. R. A. (N. S.) 457, 117 Am. St. Rep. 261.

It therefore becomes necessary to determine whether the alleged agreement, in reference to the construction of the steps, has the effect, if enforced, to create an easement in favor of appellee in the land conveyed by him to appellant for right of way purposes.

It is claimed by appellant that the alleged agreement would give to appellee and his family the right to cross and recross its

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

track and right of way in passing between the residence on one side and the orchard and spring on the other, and that such a right would constitute a burden on its estate in the land, amounting to an easement. If, in the absence of any contract on the subject, appellee and his family possessed no right under the law to cross the right of way of appellant in passing from one part of his farm to the other, then the contract averred in the complaint could be properly held to confer such a right; but if the law gives to appellee and his family this right, regardless of any contract on the subject, then such a conclusion could not be reached.

[2] Burns' St. 1908, § 5445, provides: "That owners of tracts of land separated by the right of way of a railroad company, or owners of a tract or tracts of land separated by the right of way of a railway company from a public highway or road, lying and situated immediately contiguous to and adjoining said right of way, may, if such right of way has been or shall hereafter be acquired by condemnation and appropriation, or by purchase or donation, construct and maintain wagon and drive ways over and across such right of way, leading from one of such tracts to another on the opposite side of such right of way, or leading from such tract or tracts of land on one side to the highway on the other side of the right of way, at any point most convenient to such owner. For this purpose such owner may enter upon such right of way and construct such embankment or make such excavation on one or both sides of the track of such railway as may be necessary to establish easy grades from one tract of land to the opposite tract or highway, and may spike planks on the ties of such railway on the line of such way for the space of the width of such way, of such thickness as not to be elevated above the top of the rails of such railway, and may also bridge the gutters at the sides of such railway tracks in such manner as not to obstruct the flow of water therein: Provided, the railroad company shall make crossing."

The effect of this statute is to reserve to the landowner, across whose land a right of way for railroad purposes has been acquired, the right to cross that portion of land occupied for such purposes. This right is given by statute, and exists in the absence of any contract on the subject. By virtue of this statute, the appellee in this case had a right to a passageway over and across said right of way leading from the portion of his land on one side of the right of way to that on the opposite side, and the agreement of the railroad company alleged in the complaint would not have the effect to create this right, but was simply intended to provide him with a convenient way by which it could be exercised. The contract did not therefore create any easement or interest in

poses, and was not required by the statute of frauds to be in writing.

The oral testimony introduced at the trial, tending to show that the appellant agreed to erect and maintain the steps as alleged in the complaint, could not be excluded on the ground that its effect and purpose was to vary the terms of a written contract.

[3] It is true that a deed is a written contract, and it is also true as a general proposition that, where a contract has been reduced to writing and signed, it becomes the repository for the entire agreement, and that, in the absence of fraud or mistake, it cannot be varied by parol evidence; but, notwithstanding this rule, the courts hold that the actual consideration of a deed may be shown by parol evidence, even though it differs from the consideration expressed in the instrument.

It was said in the case of *Levering v. Shockey*, 100 Ind. 558: "The actual consideration of a deed may be shown by parol evidence. Either party may show for any purpose, except to defeat its operation as valid and effective grant, the true consideration of a deed, although it be entirely different from that expressed in the deed. The consideration expressed is the least important part of the instrument, and may be varied to almost any extent by parol evidence, as the estate created does not depend upon it, but upon the conditions and limitations contained in the instrument descriptive of its quantity and duration. When one consideration and no other is expressed in a deed, parol evidence is admissible to prove a different consideration, though the legal effect of the deed may be thereby changed." *Hays v. Peck*, 107 Ind. 390, 8 N. E. 274.

Many other cases might be cited as sustaining this proposition; but the rule is so well settled that we deem it unnecessary. In the case of *Hays v. Peck*, supra, the court says: "It is an elementary doctrine that the consideration of a deed may be shown by parol, and it is impossible to give effect to this doctrine without permitting the parties to prove what agreement as to the consideration preceded the execution of the deed. The agreement as to the consideration necessarily precedes the execution of the deed, and the fact that the consideration was agreed upon some time prior to the delivery of the deed does not preclude the grantor from showing what constituted the consideration of the deed. To hold otherwise would be to run counter to the rudimentary doctrine that it is always competent to prove the actual consideration yielded for the conveyance of land. With few exceptions, the rule is that the preliminary negotiations are merged in the deed. This doctrine, however, does not apply to the consideration, except, perhaps, where the deed specifically sets forth the consideration. Where, however, the consideration is merely stated in general terms, the doctrine does not apply. The case

veyed for right of way pur-

of *Ice v. Ball*, 102 Ind. 42, 1 N. E. 66, is not to be considered as deciding that where the deed states the consideration in general terms, the grantee is precluded from proving the true consideration, even though it may have been agreed upon prior to the execution of the deed. It is, of course, necessary to show that the consideration previously agreed upon was the one on which the deed was founded."

The conclusions we have reached upon this question are decisive on every question presented by this appeal. There was no error in overruling appellant's demurrer to the complaint, and the oral evidence was properly admitted, tending to prove the contract averred in the complaint. The sufficiency of the evidence to sustain the finding of facts is not questioned, and the facts found are abundantly supported by the evidence. The court committed no error in overruling appellant's motion for a new trial. There was no error in the conclusions of law as stated by the court upon the facts found, and the court properly refused to state other and further conclusions of law, as requested by appellant.

Finding no error in the record, the judgment is affirmed.

(250 Ill. 452.)

STICKEL v. RIVERVIEW SHARPSHOOTERS' PARK CO.

(Supreme Court of Illinois. June 20, 1911.)

1. MASTER AND SERVANT (§ 316*)—INJURIES TO THIRD PERSONS—AMUSEMENT PARK—NEGLIGENCE OF CONCESSIONER.

Where defendants, owners of an amusement park, leased a concession to maintain and operate a Katzenjammer Castle for 25 per cent. of the receipts from admissions, the concessioner was not an independent contractor, and the park owners were therefore liable for injuries caused by a failure to use ordinary care to see that the castle was reasonably safe, and conducted with ordinary care.

[Ed. Note.—For other cases, see *Master and Servant*, Dec. Dig. § 316.*]

2. NEGLIGENCE (§ 136*)—DANGEROUS PREMISES—KATZENJAMMER CASTLE—INJURIES TO VISITORS FOR HIRE—QUESTION FOR JURY.

In an action for injuries to a visitor at a Katzenjammer Castle in an amusement park, for hire, by breaking her limb as she was sliding down the shoot on the outside of the castle which was the only means of exit, whether defendant was negligent in so constructing the building, and whether due care was used in operating the same, *held* for the jury.

[Ed. Note.—For other cases, see *Negligence*, Dec. Dig. § 136.*]

Appeal from Branch Appellate Court, First District, on Appeal from Superior Court, Cook County; Willard M. McEwen, Judge.

Action by Nettie Stickel against the Riverview Sharpshooters' Park Company. Judgment for plaintiff affirmed by the Appellate Court, and defendant appeals. Affirmed.

Winston, Payne, Strawn & Shaw (Ralph M. Shaw, Edward W. Everett, and John C. Slade, of counsel), for appellant. James Maher and John T. Murray, for appellee.

FARMER, J. The Branch Appellate Court for the First District affirmed a judgment of the superior court of Cook county against appellant, in favor of appellee, for \$3,500 for personal injuries, and said Branch Appellate Court granted a certificate of importance, upon which a further appeal is prosecuted to this court.

Appellant is a corporation maintaining and operating a park, within which are amusements and attractions of various kinds. The park is inclosed, and an admission fee of 10 cents is charged for each person entering it. Inside the park exhibitions and attractions are maintained and operated by persons who have concessions from appellant. Additional charges are made by the concessioners for visitors to their respective attractions. One of the attractions in the park was operated by Paul W. Cooper and William Schmidt, concessioners, and was known as Katzenjammer Castle. Visitors to this attraction were charged 10 cents admission fee, and 25 per cent. of the admissions were paid to appellant for the concession. June 7, 1906, appellee and an escort visited the park, purchased tickets for entrance into the grounds, and afterwards purchased tickets for admission to and visited Katzenjammer Castle. After passing through the building and ascending a stairway, they came to a place provided for exit from the building, which was by means of a slide or chute of galvanized iron reaching from the upper story of the building to within 1½ to 2½ feet of the ground, and inclined at an angle of 35 or 40 degrees. Appellee objected to descending by means of this chute or slide, and asked to be permitted to pass from the building by some other way. She testified an attendant told her there was no other way, and took hold of her and pushed her on the chute in a sitting position, and started her down. She went down with considerable speed, breaking her leg when she struck the ground.

At the close of appellee's evidence, and again at the close of all the evidence, appellant moved the court to direct the jury to find it not guilty, but these motions were overruled, and the case was submitted to the jury, resulting in a verdict for the appellee, upon which the court rendered judgment.

The errors relied on are that the trial court erred in not directing a verdict in favor of appellant, in not allowing a motion for new trial, and in rendering judgment on the verdict, and the Appellate Court erred in not reversing the judgment for said errors.

[1] Appellant contends that its only duty with reference to the building where the injury occurred was to use ordinary care to keep the structures and devices operated by the concessioners in a reasonably safe condition for the purposes for which they were constructed, and that it cannot be held liable for the negligence of its concessioners or their employes in operating the structures and devices. Some of the authorities appear to make a distinction between cases like the one before us and cases where the owner of premises turns them over to an independent contractor, who has the sole right to hire and discharge servants. In those cases the doctrine of respondeat superior does not apply to the owner, but in amusement places where space is granted for conducting attractions for the amusement of the public, and for which an admission fee is charged by the concessioner and divided with the owner, there is unanimity of authority that the owner assumes an obligation that the devices and attractions operated by the concessioners are reasonably safe for the purposes for which the public is invited to use them. While there are some decisions to the contrary, the greater weight of authority is that the owner will not be relieved from responsibility because the exhibition is provided and conducted by the concessioner, provided it is of a character that would probably cause injury unless due precautions are taken to guard against it; and this duty applies not to construction alone, but to management and operation where the device is of a character likely to produce injury unless due care is observed in its operation. *Thornton v. Maine State Agricultural Society*, 97 Me. 108, 53 Atl. 979, 94 Am. St. Rep. 488; *Hollis v. Kansas City Retail Merchants' Ass'n*, 205 Mo. 508, 103 S. W. 32, 14 L. R. A. (N. S.) 284; *Richmond & Manchester Railway Co. v. Moore*, 94 Va. 493, 27 S. E. 70, 37 L. R. A. 258; *Thompson v. Lowell, Lawrence & Haverhill Street Railroad Co.*, 170 Mass. 577, 49 N. E. 913, 40 L. R. A. 345, 64 Am. St. Rep. 323; *Sebeck v. Plattdeutsche Volkfest Verein*, 64 N. J. Law. 624, 46 Atl. 631, 50 L. R. A. 199, 81 Am. St. Rep. 512; *Higgins v. Franklin County Agricultural Society*, 100 Me. 565, 62 Atl. 708, 3 L. R. A. (N. S.) 1132; *Texas State Fair v. Brittain*, 118 Fed. 713, 56 C. C. A. 499.

[2] But, independently of whether appellant could be held liable for the negligent conduct and management of the Katzenjammer Castle, we are satisfied that the evidence is such as to warrant submitting to the jury whether appellant performed its duty to use due and reasonable care to see that the attractions used by its concessioners were reasonably safe for the purposes for which the public were invited to use

them. To see the attractions of Katzenjammer Castle visitors were required to ascend a stairway, go through dark, narrow passages, and over moving, springing, and suspended floors. In the dark rooms and passages were images of goblins, heads of ferocious beasts with lighted eyes, and other hideous and fantastic figures. These and noises made were calculated to produce an effect upon the nerves of visitors. The exit provided for visitors who had passed through the building was by means of a chute or slide of galvanized iron, semicylindrical in shape, and wide enough for one to sit in and slide down. The upper end of the chute was about 18 feet from the ground. It descended at an angle of 35 or 40 degrees to within 1½ to 2½ feet of the ground. The lower end of it inclined upward, for the purpose of checking the speed of the person sliding down it. An attendant was employed to stand at the lower end of the chute and assist persons sliding down it and a rubber mat about three feet square was placed on the ground at the end of the chute, but appellee and her escort testified there was no person at the bottom of the chute when she was injured, and appellee testified she saw no rubber mat. Appellee and her escort testified appellee objected to going down the chute, but an attendant told her there was no other way for them to get out. Appellee asked to be permitted to go back the way she came, but an attendant told her she could not do so. Appellee testified the attendant took hold of her, put her in the chute, and pushed her down. When she struck the bottom, her leg was broken.

If, as contended by the appellant, the construction and maintenance of such a device as the only exit from the building cannot be said to be negligence per se, neither can it be said, as a matter of law, that it was not negligence. The declaration charges appellant with negligence in permitting the means of exit from the building to be and remain in a dangerous condition. While, so far as the proof shows, the chute was not out of repair and was in the same condition as when first constructed, whether the construction and maintenance of that kind of an exit was negligence was a question of fact proper, under the declaration, to be submitted to a jury for determination. Whether the appellee was guilty of contributory negligence was also a question of fact properly submitted to the jury. The judgment of the Appellate Court upon this question of fact is conclusive upon this court.

The court gave 19 instructions at the request of appellant, and we do not think it was prejudiced by the refusal by the court of any of the instructions asked by it.

The judgment of the Appellate Court is affirmed.

Judgment affirmed.

(250 Ill. 515)

PEOPLE v. TIERNEY.

(Supreme Court of Illinois. June 20, 1911.)

1. CRIMINAL LAW (§ 264*)—ARRAIGNMENT—“IMPLEADED.”

The record of an order, entitled “The People * * * vs. T. (Impleaded),” and showing that “said defendant” was arraigned, shows that T. was arraigned; the word “impleaded” not being synonymous with “et al.,” but when used in formal pleadings and in court records is properly used, following the name of a defendant when there is more than one defendant and only one defendant appears, to designate that there are defendants other than the defendant, who is then present in court.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 264.*]

For other definitions, see Words and Phrases, vol. 4, p. 3424.]

2. CRIMINAL LAW (§ 1144*)—APPEAL—RECORD—VERDICT—FINDING OF PRIOR CONVICTION OF ANOTHER OFFENSE.

The verdict on a prosecution for robbery of B. when considered with the record as a whole, as is proper, shows defendant's prior conviction for robbery of F. on a certain date, as averred in the indictment, under the habitual criminals act (Hurd's Rev. St. 1909, c. 88, §§ 473-479), it finding that he had been “convicted of robbery and had served a term in the penitentiary of this state for such offense,” and it being necessary to presume, in the absence of the evidence, that the court confined the evidence to the issues involved, and that the finding of conviction referred to the previous robbery averred.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 1144.*]

Error to Criminal Court, Cook County; George Kersten, Judge.

John Tierney was convicted of robbery, and brings error. Affirmed.

Charles E. Erbstein, for plaintiff in error. W. H. Stead, Atty. Gen., John E. W. Wayman, State's Atty., and Fred H. Hand (George Guenther, of counsel), for the People.

HAND, J. The grand jury of Cook county, at the February term, 1909, returned into the criminal court of said county an indictment containing four counts, charging John Tierney, Joseph Brocki, and John Rudinek with the crime of robbery. A plea of not guilty was entered and a conviction upon a trial before a jury was had, and the defendants were sentenced to the penitentiary for an indeterminate period. John Tierney has alone sued out a writ of error.

No bill of exceptions has been incorporated into the record, and but two reasons are urged in this court as grounds of reversal: (1) That it does not appear from the record that the plaintiff in error was arraigned; and (2) that the verdict returned by the jury is not sufficient to support the judgment.

The first count of the indictment charged that the plaintiff in error and Joseph Brocki and John Rudinek on the 19th day of January, 1909, in the county of Cook, committed

the crime of robbery by feloniously and violently taking from the person of one Elizabeth Borzek certain moneys of the value of \$48. The second count charged that the plaintiff in error was indicted on the 1st day of November, 1897, for the crime of robbery in Cook county by before that date feloniously and violently taking from the person of one August Freund a certain watch and other personal property; that at the time of the robbery plaintiff in error was armed with a revolver with intent to take the life of August Freund if resisted; and that certain confederates, who were armed, were present to aid and abet in the robbery, and that the plaintiff in error was convicted of such offense and was sentenced to the penitentiary, upon such conviction, for an indeterminate period. The count also charged the same robbery of Elizabeth Borzek charged in the first count of the indictment, and that at the time of such robbery the plaintiff in error and Joseph Brocki and John Rudinek were armed with revolvers, with the intent, if Elizabeth Borzek resisted, to maim or kill her. The third and fourth counts of the indictment charge former convictions against Joseph Brocki and John Rudinek and the robbery of Elizabeth Borzek, but as Joseph Brocki and John Rudinek are not before this court further reference need not be made to the third and fourth counts of the indictment.

On the 9th day of February, 1909, the following order was entered of record in said cause: “The People of the State of Illinois vs. John Tierney, (Impleaded)—Indictment for robbery, etc.—90,343.—This day come the said people, by John E. W. Wayman, state's attorney, and the said defendant, as well in his own proper person as by his counsel, also comes; and he having been furnished with a copy of the indictment in this cause and lists of the names of the witnesses and jurors, and he being now here duly arraigned and forthwith demanded of and concerning the crime alleged against him in said indictment how he will acquit himself thereof, for a plea in that behalf he says that he is not guilty in manner and form as charged therein; and of this he puts himself upon the country and the said people do the like.” Afterwards, on the 6th day of March, 1909, the following order was entered of record in the cause: “The People of the State of Illinois vs. John Tierney, Joseph Brocki, John Rudinek.—Indictment for robbery, etc.—90,343.—This day come the said people, by John E. W. Wayman, state's attorney, and the said defendants, as well in their own proper persons as by their counsel, also come; and also come the jurors of the jury aforesaid with a sealed verdict, and for their verdict say: ‘We, the jury, find the defendant John Tierney guilty of robbery in manner and form as charged in the indictment; and we fur-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

ther find, from the evidence, that at the time of committing said robbery he was armed with a certain dangerous weapon, to wit, a certain revolver, with the unlawful and felonious intent then and there, if resisted, then and there to kill and maim the person so robbed; and we further find, from the evidence, that the defendant John Tierney, at the time of committing the offense, had theretofore been convicted of robbery and had served a term in the penitentiary of this state for said offense." After his conviction the plaintiff in error entered his separate motions for a new trial and in arrest of judgment, both of which motions were overruled, and the plaintiff in error was sentenced to the penitentiary for an indeterminate period.

[1] It is first contended that the record does not show upon its face that the plaintiff in error was arraigned, as it is said the order entered on the 9th day of February does not show the plaintiff in error was present in court on that day; the contention being that the word "impleaded," appearing in the title of the case preceding the order of February 9th, is equivalent to the expression "et al.," and that as the record, as made up, shows that only one defendant appeared and was arraigned on that day, it cannot be certainly determined which one of defendants was arraigned on that day. The word "impleaded" is not synonymous with the expression "et al.," but when used in formal pleadings and in court records the word "impleaded" is properly used following the name of a defendant, when there is more than one defendant and only one defendant appears, to designate that there are defendants other than the defendant who is then present in court. In Abbott's Law Dictionary the use of the word "impleaded" is thus explained: "Impleaded: To sue or prosecute in course of law. In actions where there are more defendants than one and one answers, his name is sometimes stated thus in the title of his answer or plea: 'Richard Roe, impleaded with John Doe,' signifying that the two are sued together but one only interposed the plea." And in Anderson's Dictionary of Law the use of the word "implead" is thus explained: "Implead: To sue in due course of law, as, A. impleaded with B." And it is then stated by the author, where a party is designated as impleaded with another, "each defendant may then interpose his own answer."

From these expressions of the law lexicographers, it is clear the record writer in this case used the term "impleaded," following the name of the plaintiff in error in the title of the case preceding the order of February 9th advisedly, and it was there stated in correct, but abbreviated legal, phraseology that the defendant John Tierney, who was impleaded with other defendants, personally appeared and was severally arraigned. The contention, therefore, that the re-

ord does not show upon its face that the plaintiff in error was arraigned before he was put upon his trial cannot be sustained, as the record, when properly read, shows that the plaintiff in error appeared in open court and was formally arraigned and thereupon entered his plea of not guilty.

[2] It is further contended that the verdict is insufficient to support the judgment of conviction, as it is said it does not show that the plaintiff in error had been previously convicted of the robbery averred in the first paragraph of the second count of the indictment, and from aught that appears in the verdict the jury may have found that the plaintiff in error had been convicted of some robbery other than that of August Freund, alleged to have been committed on the 1st day of November, 1897. We cannot accede to that view. The record, we think, when considered as a whole, clearly shows that the jury found the plaintiff in error to be guilty of having robbed Elizabeth Borzek in manner and form as charged in the indictment—that is, that he committed robbery in the aggravated form—and that previous to the commission of that offense by him he had been convicted of robbing August Freund, as charged against him in the first paragraph of the second count of the indictment—that is, in the aggravated form. A verdict is not to be construed with the same strictness as an indictment, but it is to be liberally construed, and all reasonable inferences will be indulged in its support, and it will not be held insufficient unless, from necessity, there is doubt as to its meaning. *People v. Lee*, 237 Ill. 272, 86 N. E. 573. The rule is that in determining the sufficiency of a verdict, and a judgment of conviction based thereon, the entire record will be searched and all parts of the record interpreted together, and a deficiency at one place may be cured by what appears at another. *People v. Murphy*, 188 Ill. 144, 58 N. E. 984. Under the habitual criminals act (*Hurd's Rev. St.* 1909, c. 38, §§ 473-479), it was only necessary to set out in the indictment the former conviction of the plaintiff in error in apt words, which it is conceded was done in this case, and, as the evidence heard upon the trial is not incorporated into the record, this court clearly is bound to presume, in consideration of the verdict of the jury finding the plaintiff in error guilty, and the judgment of conviction based thereon, that the trial court confined the evidence to the issues involved upon the trial, and that the finding of the jury that the plaintiff in error had been "convicted of robbery and had served a term in the penitentiary of this state for such offense," referred to the previous robbery charged in the first paragraph of the second count of the indictment, and not to some other robbery which was entirely foreign to the issues involved in the trial of the case then on hearing before the court and jury.

Finding no reversible error in this record, the judgment of the criminal court of Cook county will be affirmed.

Judgment affirmed.

(250 Ill. 460.)

FLYNN v. CHICAGO CITY RY. CO.

(Supreme Court of Illinois. June 20, 1911.)

1. MUNICIPAL CORPORATIONS (§ 122*)—ORDINANCE—PLEADING—NECESSITY.

Where a city ordinance was relied on as a defense merely to an action for injuries, it was admissible under the general issue, and was not required to be specially pleaded.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 231-239; Dec. Dig. § 122.*]

2. NEGLIGENCE (§ 81*)—CONTRIBUTORY NEGLIGENCE—COMMON ENTERPRISE—VIOLATION OF CITY ORDINANCE.

Plaintiff, C., and another, were riding at night in a single-seated buggy without lights, drawn by a blind horse owned and driven by C. on the south side of a city street on which defendant operated an electric railway. C. was endeavoring to sell the horse to plaintiff, and they were driving at the time to try him. All were more or less intoxicated, and both plaintiff and C. had taken turns in driving, though C. was driving when the buggy was struck by a street car, and plaintiff was thrown out and injured. *Held*, that though C.'s negligence, if any, was not imputable to plaintiff, plaintiff was chargeable with his own negligence, being engaged with C. in a common enterprise, to wit, the driving of a horse and vehicle along the streets at night without lights in violation of a city ordinance, and hence such ordinance was admissible against plaintiff to show that he was negligent per se.

[Ed. Note.—For other cases, see *Negligence*, Cent. Dig. § 111; Dec. Dig. § 81.*]

3. NEGLIGENCE (§ 141*)—CONTRIBUTORY NEGLIGENCE—INSTRUCTIONS.

In an action for injuries alleged to have been caused by defendant's negligence, it was error to refuse to charge that if plaintiff by using his faculties with ordinary and reasonable care in looking out for danger could have avoided injury on the occasion in question, and he negligently failed to do so and thereby contributed to the injury, if he was injured, then he could not recover.

[Ed. Note.—For other cases, see *Negligence*, Cent. Dig. §§ 382-399; Dec. Dig. § 141.*]

Error to Appellate Court, First District, on Appeal from Superior Court, Cook County; Marcus Kavanagh, Judge.

Action by John Flynn against the Chicago City Railway Company. A judgment for plaintiff was affirmed by the Appellate Court (158 Ill. App. 405), and defendant brings error. Reversed and remanded.

George W. Miller (Leonard A. Busby, of counsel), for plaintiff in error. McGoorty & Pollock, for defendant in error.

HAND, J. This was an action on the case commenced in the superior court of Cook county by the defendant in error against the plaintiff in error to recover damages for a personal injury alleged to have been sustained by the defendant in error in consequence

of a collision between a buggy in which he was riding and an electric car operated by the plaintiff in error on one of the public streets of the city of Chicago. The case was tried upon a declaration containing two counts. The negligence charged in the first count was that the defendant, by its servants, so carelessly and negligently drove and managed said car that by and through the negligence and improper conduct of the defendant and its servants said car ran and struck with great force and violence upon and against said buggy; and the second count charged that the defendant, by its servants, carelessly and negligently drove the said car upon one of the public streets of the city without ringing a bell or giving warning of any kind. The general issue was filed, and a trial resulted in a verdict and judgment in favor of the defendant in error in the sum of \$5,000, which judgment was affirmed by the Appellate Court for the First District, and the cause has been removed into this court for further review by writ of certiorari.

Three reasons are urged as grounds for reversal in this court: (1) The contributory negligence of the defendant in error; (2) the rejection of proper evidence; and (3) the refusal to give to the jury plaintiff in error's fourth offered instruction.

The defendant in error and one White were riding in a single-seated buggy drawn by one horse owned and driven by one Cox upon Sixty-Ninth street, an east and west street in the city of Chicago, at about 7 o'clock in the evening of February 11, 1906, on which street the plaintiff in error operated a double-track electric street railway; the south track being the east-bound and the north the west-bound track. When near Prairie avenue, an electric car ran against the buggy, and the same was capsized and the occupants were thrown to the ground, and the defendant in error was severely and permanently injured. Thus far there is no conflict in the evidence. There is, however, an irreconcilable conflict in the evidence as to the manner in which the collision occurred. The evidence of the defendant in error tended to show that Cox was driving said horse and buggy, at a moderate speed, east upon the south track, and that a car overtook him from the west and ran against the rear of the buggy with such force that the buggy, with its occupants, was thrown over the horse, and when the car was stopped, the horse, by the force of the impact, was facing the car; while the evidence of the plaintiff in error tended to show that the horse and buggy were being driven west upon the south side of the track, but in such close proximity to the south rail that the car, as it passed, struck the buggy and the buggy was capsized. It was undisputed that, when the car was stopped, the horse and buggy were near the southwest corner of the car and the horse was facing west; that the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

rear of the buggy or the front of the car was not injured, but there were marks upon the buggy and upon the car which indicated that the right front wheel of the buggy had come in contact with the southeast corner of the car. The jury accepted the view of the witnesses for the defendant in error. In the condition in which the evidence appears in this record it was necessary that the rulings of the court upon the admission of evidence and upon the instructions to the jury should have been substantially correct in order to insure to the parties a fair trial. It also appears from the evidence that the occupants of the buggy had been drinking during the evening and were somewhat intoxicated at the time of the accident; that the horse which Cox was driving was blind; that the night was dark; that the street car was well lighted; that no light was displayed upon the buggy; that Cox was out with the defendant in error and White for the purpose of exhibiting his horse to the defendant in error with a view to sell him the horse; that they had driven some distance, a part of the time the driving being done by Cox and a part of the time by defendant in error.

[1] At the time of the accident there was in force in the city of Chicago an ordinance which made it unlawful for the owner or driver of a wheeled vehicle similar to that in which the defendant in error was riding at the time of the accident to use the same in the nighttime upon the streets of the city without having displayed thereon a light. At the time of the accident this ordinance was being violated, and the plaintiff in error, after proving that there was no light displayed upon the buggy in which Cox and his companions were riding, offered in evidence said ordinance, which was excluded by the court, and it is now urged that the action of the court in excluding such ordinance constitutes reversible error. The ruling of the court upon the admissibility of such ordinance is justified by the defendant in error on the grounds, first, that the ordinance was not specially pleaded; and, second, that, conceding the ordinance was being violated by Cox at the time of the collision and that its violation was negligence per se as to Cox, the negligence of Cox cannot be imputed to the defendant in error, and it is urged that the ordinance, as to the defendant in error, was properly excluded.

It is undoubtedly true that where a cause of action is predicated upon a statute or ordinance the statute or ordinance must be pleaded, but where, as here, the action is not predicated upon the ordinance but the ordinance is invoked as a defense, we think such ordinance may be properly admitted in evidence under the general issue. The admissibility of an ordinance under the general issue does not differ, in principle, from the admissibility of a foreign statute as a matter of defense, and the case of *Christiansen v. Graver Tank*

Works, 223 Ill. 142, 79 N. E. 97, we think, is in point. On page 151 of 223 Ill., on page 101 of 79 N. E., it was said: "The general rule is that a foreign law must be pleaded. That rule has its exceptions, and it does not apply in a case like this. The plea of not guilty was filed, and under that plea the appellee was properly permitted to introduce in proof, as a part of its defense, the law of the state of Indiana, so far as it was material, to show there was no liability resting upon appellee to respond in damages to appellant for the injury which he had sustained. In *City of Chicago v. Babcock*, 143 Ill. 358, on page 364, 32 N. E. 271, on page 273, it was said: 'In such an action [an action on the case] the defendant is permitted, under the general issue, to give in evidence a release, a former recovery, a satisfaction, or any other matter ex post facto which shows that the cause of action has been discharged or that in equity and conscience the plaintiff ought not to recover.' In *Thompson-Houston Electric Co. v. Palmer*, 52 Minn. 174, 53 N. W. 1137, 38 Am. St. Rep. 536, it was held that the laws of another state, as to pleading and proof, stand upon the same footing as any other facts, and are not required to be pleaded when they are mere matters of evidence." We are of the opinion the ordinance was properly admissible in evidence under the general issue.

[2] As to the second proposition, while it is true the negligence of Cox could not properly be imputed to the defendant in error, still the defendant in error was responsible for his own negligence, and, if his own negligence contributed to his injury, he could not recover. It was therefore legitimate to make proof of any fact which would tend to establish the negligence of the defendant in error. The evidence showed that the defendant in error and Cox, who owned the horse and buggy, were engaged in a common enterprise, viz., that of testing the qualities of the horse; that Cox had driven the horse for a time and then the defendant in error had taken the lines; that the night was dark; that the road south of the tracks was rough; that the horse was blind; that there were three men in a single-seated buggy; and that the occupants of the buggy were all more or less intoxicated. In view of these facts, we are of the opinion that it was proper to make proof that the vehicle in which the parties, at the time of the accident, were riding, was being driven upon the street in violation of law, which proof would have raised the presumption that all the occupants of the buggy were, as a matter of law, guilty of negligence, which negligence, if it was the proximate cause of the injury, would defeat a recovery. This view, we think, is sustained substantially by all the authorities. Mr. Beach, in his work on *Contributory Negligence* (3d Ed.) § 115, thus states the law: "It is everywhere held, on familiar grounds, that, if the negligence of the occupant con-

tributes with that of the driver and a third person, there can be no recovery against the latter. Thus, if A., being driven in the carriage of B., who is not a common carrier, willingly joins B. in driving over a place obviously dangerous and is injured in consequence, A. has no right of action against the municipality. And where a passenger has reason to apprehend danger he is not at liberty to leave the exercise of due care to the driver alone. For example, where husband and wife were sitting upon the same seat in a vehicle driven by the husband and both were killed by a collision at a crossing, in an action brought by the administratrix of the wife against the railroad company, it was held that she had no right, because her husband was driving, to omit some reasonable and provident effort to see for herself that the crossing was safe, and that she was bound to look and listen. So it has been held that a failure to look and listen, on the part of one riding with his back to the driver, while approaching a well-known railroad crossing at a fast trot, or to warn the driver, or to take any precautions whatever, was contributory negligence barring recovery. In cases of this kind it is no less the duty of the passenger, where he has the opportunity to do so, than of the driver, to learn of the danger and avoid it if possible."

The author of Elliott on Railroads (volume 3 [2d Ed.] § 1174) among other things says: "The general rule is that the negligence of the driver of a vehicle with whom the injured person is riding will not be imputed to such injured person. But, where persons riding in a vehicle all take part in managing it and the team drawing it, there is reason for holding that all are bound to exercise ordinary care to avoid collisions with railroad trains. Where the driver is the agent or servant of the injured person, it is held that the negligence of the former is attributable to the latter. It is obvious that, where the negligence of the person who receives the injury contributes to the injury, he cannot escape the consequences of his own carelessness. Thus, where one person riding with another saw the headlight of an approaching locomotive, it was held that he was guilty of contributory negligence in failing to warn the driver of the vehicle in which he was riding. If the person riding in the vehicle knows that the driver is negligent and he takes no precautions to guard against injury, he cannot recover, for in such case the negligence is his own, and not simply that of the driver. The plaintiff cannot rightfully omit to use care in blind dependence upon another, but must use care proportionate to the danger of which the facts convey knowledge."

In Hoag v. New York Central & Hudson River Railroad Co., 111 N. Y. 199, 203, 18 N. E. 648, a husband and wife were killed by collision with a passenger train while attempting to cross the company's track at a crossing. The husband was driving, and the

wife, for whose death the suit was brought, was riding with him on the way to their home. There was a directed verdict for the defendant and judgment thereon. The Court of Appeals reversed this judgment on the ground that under the facts in that case the question of contributory negligence on the part of the wife should have been submitted to the jury, and Judge Finch, writing for the court, suggested the inferences which could be drawn both for her and against her from the evidence on that question. The following quotation from the opinion is directly in point: "If they did not see it [referring to the train], or, at least, the deceased did not see it, she was negligent, for she was bound to look and listen, and the facts show that if she had looked she could have seen, and would have seen, the approaching train. She had no right, because her husband was driving, to omit some reasonable and prudent effort to see for herself that the crossing was safe."

In Brickell v. New York Central & Hudson River Railroad Co., 120 N. Y. 290, 293, 24 N. E. 449, 17 Am. St. Rep. 648, the Court of Appeals had the same question before it again. The plaintiff was injured through a collision between a wagon in which he was riding and an engine hauling a train at a highway crossing. The plaintiff was riding on the same seat with the driver of a single-horse buggy, and paid the driver for carrying him a short distance from a station on the company's road to the village of Palmyra. The accident was in the early afternoon. It had been snowing some, the wind was blowing, and the top of the buggy was raised and inclosed, except in front. Neither the driver nor the plaintiff made any effort, as they approached the crossing, to ascertain if a train was approaching. There was a judgment in favor of defendant, which the Court of Appeals affirmed. The court in its opinion said that the evidence showed contributory negligence on the part of the plaintiff, and then continued: "The excuse attempted to be set up for such conduct that the top of the buggy and the snow and wind rendered it more difficult to hear the noise of an approaching train, seems to prove and emphasize their carelessness and want of attention in making an effort, under those circumstances, to learn there was no train approaching the crossing. They well knew of the condition of things and of the location and surroundings of the crossing, and that they were called upon to use more than ordinary prudence in effecting the crossing under such circumstances. The general rule in this class of cases is that the burden of establishing, affirmatively, freedom from contributory negligence, is upon the plaintiff, or, in the language of the opinion in Tolman v. S. B. & N. Y. R. R. Co., 98 N. Y. 202 (50 Am. Rep. 649), that 'plaintiff approached the crossing where the collision and injury occurred, with prudence and care and with

senses alert to the possibility of approaching danger.' And this rule obtains even where the railroad company neglects to ring its bell or sound its whistle, as required when its trains approach a crossing. *Cullen v. D. & H. C. Co.*, 113 N. Y. 688 [21 N. E. 716]. Nor do I think that this rule is to be relaxed in favor of the plaintiff because of the fact that he was being carried in a vehicle owned and driven by another. The rule that the driver's negligence may not be imputed to the plaintiff should have no application to this case. Such rule is only applicable to cases where the relation of master and servant or principal and agent does not exist, or where the passenger is seated away from the driver or is separated from the driver by an inclosure, and is without opportunity to discover danger and to inform the driver of it. *Robinson v. New York Central & Hudson River Railroad Co.*, 66 N. Y. 11 [23 Am. Rep. 1]. It is no less the duty of the passenger, where he has the opportunity to do so, than of the driver, to learn of danger and avoid it if practicable. The plaintiff was sitting upon the seat with the driver, with the same knowledge of the road, the crossing and the environments, and with at least the same, if not better, opportunity of discovering dangers, that the driver possessed, and without any embarrassment in communicating them to him. The rule in such case is laid down in *Hoag v. New York Central & Hudson River Railroad Co.*, 111 N. Y. 199 [18 N. E. 648], where husband and wife were sitting upon the same seat in a vehicle driven by the husband and both killed by a collision at a crossing, and in an action brought by the administratrix of the wife against the railroad company it was held 'that she had no right, because her husband was driving, to omit some reasonable and prudent effort to see for herself that the crossing was safe.'

In *MacGuire v. New York City Railway Co.*, 52 Misc. Rep. 591, 593, 102 N. Y. Supp. 749, 751, the plaintiff and Dr. Mandel were sitting on the back seat of plaintiff's victrola, drawn by two horses driven by a coachman. There was a collision between the victrola and a street car, resulting in the plaintiff's injury, for which he sued and recovered a judgment, which, on appeal, was reversed. This case contains an element not in the *Hoag* and *Brickell* Cases—i. e., the driver was the servant of the plaintiff—so that it might be said that the plaintiff, having control over the driver, was chargeable with his negligence, but the opinion turns upon the negligence of the plaintiff himself rather than upon the negligence of the driver. The court said in reversing the judgment: "It is urged by defendant's counsel, in his brief, that the plaintiff must have known that by this time the north-bound car was pretty close at hand and that the south-bound car might to some extent obstruct the view of the motorman of the north-bound car, so far as plaintiff's carriage was concerned,

and that plaintiff said nothing to his driver but ran the risk of getting over before the car struck him. We are of the opinion that plaintiff did not satisfactorily establish his freedom from contributory negligence." It is a case where the coachman, driving, waited for a south-bound car to pass and then started to drive slowly across the tracks on Broadway, when the fore part of the carriage was struck by an approaching north-bound car. Plaintiff admitted that he saw the north-bound car rapidly approaching. His victrola then stopped for the south-bound car to pass, and he then allowed his driver to start over the tracks with the view somewhat obstructed by the south-bound car and without taking any precautions whatever to caution or warn the driver of the danger, and this was held to be negligence upon his own part which would defeat him, although the driver was also negligent in undertaking to cross the tracks without any effort to observe if a north-bound car was coming.

Donnelly v. Brooklyn City Railroad Co., 109 N. Y. 16, 15 N. E. 733, was a case where the plaintiff, with one McNally, had driven to the city of Brooklyn in the evening in a wagon drawn by one horse, with a load of fish for market. They started to return about midnight, taking the route of an avenue on which were two tracks of the defendant, upon which were run, either way, trains of cars drawn by dummy engines. The tracks were in the middle of the avenue, with sufficient width on either side for vehicles. McNally was driving, with plaintiff riding by his side. They had been driving on the right-hand railroad track, when, hearing a wagon approaching, they turned to the left and drove upon the other track, used by trains coming towards Brooklyn. While upon this track they saw and heard coming towards them in the distance a dummy engine. No effort seems to have been made by either of them to escape from the danger of collision. The plaintiff did nothing "except to sit on the wagon and shout twice to the engineer to hold up." He made no objection to McNally turning into the track where they were then driving, although acquainted with the avenue and the tracks, and apparently made no effort to get McNally to drive out of the track when he saw the dummy engine coming. A judgment which he obtained for his injuries was reversed. The Court of Appeals, speaking through Mr. Justice Gray, said that the case should not have been submitted to a jury. On page 22 of 109 N. Y., on page 735, of 15 N. E. the court said: "We think the plaintiff was chargeable with the neglect of his comrade. He was conscious of the danger and apparently made no objection or effort to avoid it. He was engaged in a common employment with McNally. He had full control of his own actions, and, though on the safe track, did not object when, after telling McNally to turn out, they turned upon the dangerous track. * * * After a

careful consideration of this case we think, in view of the knowledge possessed by plaintiff and of his conduct at the time, that there was contributory negligence and he was not entitled to recover."

Smith v. Maine Central Railroad Co., 87 Me. 339, 350, 32 Atl. 967, 971, is directly in point. The plaintiff accepted an invitation from one Ryder to ride with him to a neighboring town. Ryder was driving. Smith had no more control over him nor over the team that any one may be said to have riding by invitation in a buggy with another. They were injured in a collision while attempting to cross the defendant's tracks at a railroad crossing. There was a verdict in favor of the plaintiff. Under the practice in Maine the case reached the Supreme Court under a motion to set aside the verdict, where it was held that the verdict was not justified by the evidence and could not be permitted to stand. Among other things the court said, in speaking of the accident: "It was undoubtedly caused, directly or proximately, by a want of due care and prudence on the part of the plaintiff himself. True, the plaintiff was not in control of the team as driver, but was riding by a friendly invitation from Ryder and without other compensation than his companionship. But the rule that the negligence of the driver is not to be imputed to his companion under such circumstances has very little application to the facts of this case. Plaintiff was occupying the same seat with Ryder, and had the same opportunity, and after they reached the defendant's main track probably a better opportunity, for discovering dangers. Before reaching the Bangor and Aroostook track they conversed about the lights of the defendant's station, and after crossing stopped and had a further conference, at which they agreed in 'guessing that everything was all right.' It is obvious that the driver was ready and willing to act upon any information or suggestion from his companion. It is clear, also, that the plaintiff instinctively felt that there was a responsibility resting upon him as well as upon the driver. He knew that they were crossing railroad tracks, and was bound to know that a railroad track is itself a warning and a crossing a place of danger. He admits that when within fifty feet of the collision he voluntarily assumed the duties of a lookout. He saw the headlight, which Ryder does not appear to have seen, but did not mention the fact to Ryder. The horses were steady and well trained and would have promptly heeded the word to stop either from the plaintiff or the driver, but the plaintiff neither asked the driver to stop the horses nor to hurry them forward. His conduct was not that of a reasonably prudent man. It is the duty of the passenger, when he has the opportunity to do so, as well as of the driver, to learn of danger and avoid it if practicable. * * * In either view, the con-

tributory negligence of the plaintiff is clearly established."

In *Bush v. Union Pacific Railroad Co.*, 62 Kan. 709, 64 Pac. 624, the plaintiff, a young lady, was invited by one Bowhay to ride with him on the evening of the accident. In attempting to cross the company's railroad tracks at a railroad crossing they were struck by a passenger train and she sued to recover for the injuries received. It will thus appear that she was merely an invited guest and that Bowhay was driving. At the close of the plaintiff's evidence the defendant demurred thereto, and the court sustained the demurrer and rendered judgment against the plaintiff for costs. On appeal this judgment was affirmed, and the plaintiff was held to have been guilty of such contributory negligence as defeated her right to recover. In the course of the opinion it was said: "It is contended by plaintiff in error that, if Bowhay was guilty of contributory negligence in driving upon the track without looking or listening for approaching trains, such negligence is not imputable to the plaintiff in error. The want of care which resulted in injury to the plaintiff in error is chargeable to her. They were both engaged in a common purpose—mutual pleasure. Her opportunity and ability to see and appreciate the danger were equal to his. She was in no way relying upon him. It is true he furnished the vehicle and did the driving, but she seems to have acted independently of him. When they started from the point where they had stopped for the freight train, she saw the track, knew they intended to cross it, appreciated the danger, and did not advise or suggest that they be more cautious, but did look for an approaching train, and was, in fact, the first to see it."

In *Illinois Central Railroad Co. v. McLeod*, 78 Miss. 334, 341, 29 South. 76, 77, 52 L. R. A. 954, 956, 84 Am. St. Rep. 630. *McLeod* hired an open carriage, two horses, and a driver to drive him to his desired destination and back again. In attempting to cross a railroad crossing he was injured in a collision between a train and the conveyance in which he was being driven. It was an open conveyance, and *McLeod* had every opportunity the driver had to avoid the accident. He died from his injuries, and suit was brought to recover for his death. A judgment was recovered, which the court reversed, saying, among other things: "Mr. *McLeod* gave the driver no directions at all and in no way interfered with his management of the team. From the facts so put, it is too plain for controversy that, if the driver had been the party killed, no court would have permitted recovery. Recognizing this palpably clear proposition, the effort of appellees is to put Mr. *McLeod* in a different category, on the theory that the driver's negligence cannot be imputed to him, since he was merely the hirer of the

driver, the vehicle, and the team. But this doctrine cannot be stretched to save a case like this. It is a mistake to suppose that a passenger in an open buggy need not exercise the commonest prudence, the most ordinary care, when the danger of his surroundings is apparent. Ordinary and natural prudence requires him to take some action and to check or remonstrate with the driver. *Dean v. Pennsylvania Railroad Co.*, 129 Pa. 514, 18 Atl. 718, 6 L. R. A. 143, 15 Am. St. Rep. 733; *Smith v. Maine Central Railroad Co.*, 87 Me. 350, 32 Atl. 967, and the other authorities cited in the brief of counsel for appellant."

Fechley v. Springfield Traction Co., 119 Mo. App. 358, 96 S. W. 421, is an interesting case, where all of the leading authorities are referred to. *Fechley* was injured by the collision of a street car with a buggy in which he was riding. It was a one-horse buggy belonging to a man named *Pierce*, and *Pierce* was driving. It was election day, and *Pierce*, who was interested in a candidate for sheriff and who had endeavored to induce *Fechley* to vote for his candidate, was driving *Fechley* to the north side of the city, having invited *Fechley* to ride over in his buggy to make him acquainted with the candidate. *Fechley* accepted the invitation, and got into the buggy, and they were proceeding upon this errand when the collision occurred. There was a judgment for the defendant, which was affirmed. Among other things the court said on page 366 of 119 Mo. App., on page 423 of 96 S. W.: "Appellant himself must have been free from negligence proximately contributing to his injury or he is entitled to no damages, granting that *Pierce's* fault does not preclude a recovery, and that the motorman's fault was a factor in bringing about the casualty. Few, if any, courts have held that an occupant of a vehicle may intrust his safety absolutely to the driver of a vehicle, regardless of the imminence of danger or the visible lack of ordinary caution on the part of the driver to avoid harm. The law in this state and in most jurisdictions is that if a passenger is aware of the danger, and that the driver is remiss in guarding against it and takes no care himself to avoid injury, he cannot recover for one he receives. This is the law, not because the driver's negligence is imputable to the passenger, but because the latter's own negligence proximately contributed to his damage. *Marsh v. Railroad Co.*, 104 Mo. App. 577, 78 S. W. 284; *Dean v. Railroad Co.*, 129 Pa. 514, 18 Atl. 718, 6 L. R. A. 143, 15 Am. St. Rep. 733; *Township of Crescent v. Anderson*, 114 Pa. 643, 8 Atl. 379, 60 Am. Rep. 367; *Koehler v. Railroad Co.*, 66 Hun, 566, 21 N. Y. Supp. 844; *Hoag v. Railroad Co.*, 111 N. Y. 199, 18 N. E. 648; *Brickell v. Railroad Co.*, 120 N. Y. 290, 24 N. E. 449, 17 Am. St. Rep. 648; 2 *Thompson on Negligence*, § 1621; *Beach on Cont. Negligence*, § 115; 3 *Elliott on Rail-*

roads, § 1174." The court then proceeded to discuss the question of *Fechley's* contributory negligence, and further said (119 Mo. App. at page 369, 96 S. W. at page 424): "*Fechley* was imprudent in doing nothing, personally, to insure his safety. The essential fact is that *Pierce* did not look in time, as *Fechley* knew or in reason ought to have known. Therefore *Fechley* should have stopped *Pierce* or told him to look for a car, or have looked himself, before they advanced so far into danger. It is palpable, from appellant's own testimony, that he was giving no heed to his safety, but either was relying blindly on *Pierce*, or for some reason was not aware of the proximity of the tracks."

In *Lake Shore & Michigan Southern Railway Co. v. Boyts*, 16 Ind. App. 640, 647, 45 N. E. 812, 814, *Boyts* was riding in a cutter with a friend named *Hamilton*, whose cutter it was, and who sat in the same seat with *Boyts*, and was doing the driving. *Boyts* was injured through a collision with a railroad train while attempting to cross the company's tracks. A judgment in his favor was reversed, with instructions to enter a judgment in favor of the company. The following from the opinion is directly in point: "But even if the negligence of the driver (*Hamilton*) cannot be imputed to the appellee—and, as shown by the above cases, it cannot be—the appellee must still show that he was free from negligence contributing to his injury. And the same rule would not apply where the guest was riding inside a closed carriage, without opportunity to discover danger and inform the driver of it, that would apply where the guest was seated at the driver's side and had the same opportunity with the driver to discover and avoid danger. *Brickell v. New York Central & Hudson River Railroad Co.*, 120 N. Y. 290 [24 N. E. 449, 17 Am. St. Rep. 648]. Although he may be simply a guest, if he has the opportunity to do so it is no less his duty than it is the duty of the driver, when approaching a railroad crossing, to look and listen and to learn of danger and avoid it if practicable."

In *Miller v. Louisville, New Albany & Chicago Railway Co.*, 128 Ind. 97, 99, 27 N. E. 339, 25 Am. St. Rep. 416, the intestate and her husband were riding along the highway in an ordinary farm wagon, with the husband driving and managing the team. Attempting to cross a railroad track, they were struck by an approaching train, and the intestate was killed. It appeared the negligence of her husband was made clear by the evidence, so that the question whether she could be charged with that negligence was directly involved, and, if not, then whether she was herself guilty of such negligence as defeated the right to recover for her death. The court made mention of the fact that the doctrine of *Thorogood v. Bryan*, 8 C. B. 115, had never been sanctioned by that court, and among other things said: "Rejecting, as

we do, the doctrine of imputed negligence, we are nevertheless required to hold that there can be no recovery in this action. We are led to this conclusion by the fact that the intestate was not shown to be free from contributory negligence. It has long been the settled law of this state that a plaintiff cannot recover in such a case as this unless it affirmatively appears that his own negligence did not proximately contribute to his injury. * * * The intestate approached a crossing known to her to be dangerous, and approached it when a train was in full view, and took no precautions to warn her husband or to avert the threatened danger, although slight care might have avoided it. While the husband's negligence is not to be imputed to her, she was, nevertheless, under a duty to herself to exercise ordinary care. The rule we adopt is laid down in the well-reasoned case of *Brickell v. New York Central & Hudson River Railroad Co.*, 120 N. Y. 290 [24 N. E. 449, 17 Am. St. Rep. 648]."

In *Brannen v. Kokomo Gravel Road Co.*, 115 Ind. 115, 118, 17 N. E. 202, 204, 7 Am. St. Rep. 411, the plaintiff, with several others, was riding in a wagon driven by one of the other occupants of the wagon. The driver, it appears, was intoxicated. As they approached a toll gate owned by the defendant, an attempt was made by the driver to drive rapidly through the gate to avoid payment of toll. The defendant had a pole so arranged that it could be thrown across the passageway through the gate to prohibit people from driving through, and the defendant's employé in charge of the gate attempted to stop the driver from driving through by dropping this pole, and in so doing the pole struck the front end of the wagon and the plaintiff was injured. The court held that the plaintiff could not be charged with the negligence of the driver, but that he was chargeable with his own negligence, and that because of his own negligence he could not recover. The following is quoted from the opinion: "In the first place, the intoxication of the driver and his course in striking the young horses and attempting to run them through the gate without the payment of toll show, at least, that he was reckless and bold, if, indeed, he was not an unfit person to manage the team. In the second place, appellant must have known that toll was due and should be paid at the toll gate. He knew, also, that no toll was paid or tendered before the attempt to pass the gate. There is nothing to show that he in any way remonstrated or objected to the course adopted by the driver to pass the gate without the payment of toll. For aught that is shown in the special verdict, he was acquiescing in the purpose of the driver and all that he did in attempting to carry out that purpose. Having reached the conclusion that appellant is not shown to have been free from wrong or negligence which contributed

to the injury, it must follow that he cannot recover."

In *Township of Crescent v. Anderson*, 114 Pa. 643, 646, 8 Atl. 379, 381, 60 Am. Rep. 387, Mrs. Anderson was riding in a spring wagon, having with her three small children. Her father sat on the front seat, and was driving. The seat on which Mrs. Anderson rode was fastened by a spring catch, so as to be removable at pleasure. When they reached a bridge in the highway, it was found to be in the process of repair, and could not be crossed. There was a space above the bridge wide enough to admit a wagon, and through this space McKinley, the father, drove to the other side. As the front wheels ascended the bank from the ravine through which they drove, one of the catches on the seat on which Mrs. Anderson rode sprang out, the seat turned over, and she was precipitated into the ravine and injured. She and her husband sued the township, and there was a judgment obtained, but the Supreme Court of Pennsylvania reversed it. Discussing the negligence of Mrs. Anderson herself—and that was what defeated her—the court said: "She came to the bridge in daytime, about 11 o'clock in the morning, and she could see plainly that the route around the bridge was not prepared for the passage of vehicles. The ravine, its approaches, its depth, and width were all fully exposed to view. There was no water in it. There was no latent defect or danger. If it was a dangerous place she could as readily discern the fact as her father or the supervisor, and it was her duty to see what was clearly exposed to her view. Under the noting of *Carlisle v. Brisbane*, 18 Wkly. Notes Cas. 220 (3 Ammerman, 544 [113 Pa. 544, 6 Atl. 372, 57 Am. Rep. 483]), the negligence of McKinley could not, perhaps, be imputed to her, but she must be held for her own negligence. The danger which was obvious to him was as obvious to her. She made no request of her father to take any other route, so that she might get out of the wagon. She made no objection to crossing the ravine. She willingly joined McKinley in testing the danger, and she is responsible for the consequences of her own act."

In *Dean v. Pennsylvania Railroad Co.*, 129 Pa. 514, 524, 18 Atl. 718, 721, 6 L. R. A. 143, 145, 15 Am. St. Rep. 733, Dean, while crossing the tracks of the defendant company in a wagon, was struck by a locomotive and injured. Fields was the owner of the horse and wagon, and was driving. Under the evidence, the negligence of Fields was clear. The court so held, and then inquired, "But can the negligence of Fields be imputed to Dean?" There then followed a somewhat extended analysis of the authorities holding that Dean was not chargeable with the negligence of Fields, when the court, taking up directly the question whether Dean was guilty of negligence, concluded:

"Dean knew the locality well. He had crossed the tracks frequently at this point. He knew that a train was due about that time, and that he was approaching the railroad track at a fast trot, yet he took no precautions. He was certainly responsible for his own negligence. He sat with his back to the driver, and, although he might have seen his danger, he confesses that he did not look. He said nothing by way of warning to Fields, nor did he ask him to stop, to look, and listen or to permit him (Dean) to get out, and the danger was as obvious to Dean as it was to Fields. The testimony is wholly to the effect that the plaintiff committed himself voluntarily to the action of Fields, that he joined him in testing the danger, and he is responsible for his own act. The case is ruled by Township of Crescent v. Anderson, 114 Pa. 643 [8 Atl. 379, 60 Am. Rep. 367]; 6 Cent. Rep. 616." A judgment of nonsuit entered by the lower court was affirmed.

We have not been able in the course of our research to find, neither have counsel pointed out, any case decided by this court where this precise question has been considered. It is clearly, however, we think, the law of this state that under conditions such as are presented here the negligence of Cox will not be imputed to Flynn. But, as was said at the outset, Flynn is not sought to be charged with the negligence of Cox, but with his own negligence, and that he may be so charged is abundantly sustained by these authorities. Flynn knew the whole situation as it existed. He joined Cox and White in testing the danger of driving along that street, whether east or west, at that time of night without a light upon the buggy. The plaintiff in error had a right to show the jury the conditions under which the buggy was being driven, and one of the things which the jury had the right to know, and which the plaintiff in error was entitled to prove, was that the buggy was being driven upon the streets of Chicago in the nighttime in violation of an ordinance of the city, which was negligence per se.

[3] The plaintiff in error's fourth refused instruction reads as follows: "If you believe from the evidence that the plaintiff, by using his faculties with ordinary and reasonable care in looking out for danger, could have avoided injury on the occasion in question; and that he negligently failed to do so and thereby contributed to the injury, if you believe he was injured, then he cannot recover in this case." This instruction stated a correct proposition of law, and, as the principle therein contained was not covered by any given instruction, we think its refusal constituted reversible error. The principle of this instruction was approved in Chicago City Railway Co. v. O'Donnell, 208 Ill. 267, 70 N. E. 294, 477.

The judgments of the superior and Appellate Courts will be reversed, and the cause will be remanded to the superior court for a new trial.

Reversed and remanded.

(250 Ill. 496)

CITY OF CHICAGO v. CHICAGO & O. P. ELEVATED R. CO.

(Supreme Court of Illinois. June 20, 1911.)

1. STREET RAILROADS (§ 24*)—LICENSE TO USE STREET—OBLIGATION OF CONTRACTS—RIGHT OF MUNICIPALITY TO REVOKE.

The privilege of a street railroad company in the use of public streets, when granted by ordinance, is not always a mere license, revocable at the pleasure of the municipality granting it, for, if the grant is for an adequate consideration and is accepted by the railroad, then the ordinance ceases to be a mere license and becomes a valid and binding contract; and where, in case of a mere license, it is, prior to its attempted revocation, acted upon in some substantial manner, so that to revoke it would be inequitable, the same result is reached.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 69-76; Dec. Dig. § 24.*]

2. STREET RAILROADS (§ 24*)—RIGHT TO USE STREETS—REVOCAION.

Defendant company built and operated an elevated street railroad to the western limit of the city of Chicago, and an adjoining town, by ordinance, authorized the construction of a railroad from that point, and provided that it should run as a surface railroad, and permitted the building of a double track. The road was built as a double track railroad, parallel with and about nine feet from the tracks of an elevated steam railroad, which had inclosed its right of way by a concrete retaining wall and which crossed intersecting streets by bridges. In 1903, a part of the town was annexed to the city, and in 1909, while all the line was owned and operated by defendant, the city required the removal of the tracks lying parallel with the tracks of the elevated steam railway and within 15 feet of the end of any abutment wall supporting the tracks of an elevated railroad over intersecting streets, a compliance with which would limit defendant to one track and seriously impair its operation and revenues. Held, that as the town ordinance, by which the city was bound, was accepted and acted upon in a substantial manner, it constituted a contract binding upon the city and the defendant, and that as the ordinance of 1909 was, in effect, an attempt to revoke the earlier ordinance granting that privilege, and to deprive defendant of property and rights acquired under the contract, it was invalid.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 69-76; Dec. Dig. § 24.*]

3. STREET RAILROADS (§ 65*)—POLICE POWER—REGULATION.

A city has the right, under police power, to regulate the use of the tracks and cars of a street railroad company in a reasonable manner.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. § 144; Dec. Dig. § 65.*]

4. MUNICIPAL CORPORATIONS (§ 622*)—POLICE POWER—INJURY TO PROPERTY.

The right of a city, by the exercise of its police power, to regulate any business or the use of any property does not give the power to prohibit the conduct of a lawful business, or to entirely suppress the use of property.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1370; Dec. Dig. § 622.*]

5. STREET RAILROADS (§ 44*)—POLICE POWER—USE OF STREET RAILROADS.

A city cannot, by mere declaration, show the operation of a street railroad constructed under authority of law to be a nuisance, and subject its tracks to removal, merely because its operation may be dangerous, since the public welfare declares that there should not be a discontinuance of the operation of an authorized railroad.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 93-95; Dec. Dig. § 44.*]

Appeal from Municipal Court of Chicago; John C. Scovel, Judge.

Suit by the City of Chicago against the Chicago & Oak Park Elevated Railroad Company to recover penalties for violations of an ordinance. Judgment for defendant, and plaintiff appeals. Affirmed.

Edward J. Brundage, Corp. Counsel (Charles M. Haft, of counsel), for appellant. Clarence A. Knight, William G. Adams, and Edwin White Moore, for appellee.

COOKE, J. This is a suit brought by the city of Chicago, appellant, against the Chicago & Oak Park Elevated Railroad Company, appellee, in the municipal court of Chicago, to recover penalties for 304 alleged violations of an ordinance of the city of Chicago.

Appellee, in 1890, was authorized by an ordinance of the city of Chicago to construct an elevated railroad in Lake street, in that city, from Wabash avenue to Fifty-Second avenue, which was then the western limit of the city. At that time the corporate name of the appellee was "The Lake Street Elevated Railroad Company." The road so authorized was shortly thereafter constructed by appellee. December 19, 1898, the town of Cicero passed an ordinance by which it authorized the Cicero & Harlem Railroad Company to construct a railroad from Fifty-Second avenue (which should connect with the road of appellee at that point) to Harlem avenue, in Oak Park. That ordinance provided that the road should descend by gradient from Fifty-Second avenue to Willow avenue; and thence from Willow avenue to Harlem avenue as a surface railroad, with tracks supported on ties, and further provided: "Said tracks shall be laid west of Willow avenue on Lake street and South boulevard with such rails and in such manner that carriages and other vehicles can easily and freely cross the same at street intersections without obstruction, and shall at all street crossings restore the grade and pavement to as good a condition as the same were before the laying of said tracks." This road was constructed in conformity with the provisions of the ordinance, and was then purchased by the Lake Street Elevated Railroad Company. To secure the funds necessary to purchase this road, the Lake Street Elevated Railroad Company issued its bonds to the amount of \$1,275,000. Since 1901 this road has been operated as

part of the continuous line of the road, extending on Lake street from Wabash avenue to Harlem avenue, in Oak Park, a distance of nine miles. In 1903 the territory west from Fifty-Second avenue to Austin avenue on the line of this railroad—a distance of one mile—was annexed to the city of Chicago, and Austin avenue became the western city limit. Between Fifty-Second avenue and Austin avenue, the road intersects eight north and south streets. From Fifty-Second avenue west, the road of appellee is paralleled by the road of the Chicago & Northwestern Railway Company, a steam railway; the right of way of the railway company extending along the north line of Lake street and South boulevard. By the said ordinance of the town of Cicero, it was provided that the tracks of the Cicero & Harlem Railroad Company should be placed on the north 82 feet of the street for a part of the distance and on the north 28 feet of the street for the remainder of the route, and permitted the building of a double-track railway. In 1906 the city council of the city of Chicago passed an ordinance requiring the appellee and the Chicago & Northwestern Railway Company to elevate their roadbeds and tracks as far west as Austin avenue. This ordinance required the acceptance of each company within 90 days after its passage, before it should become effective as to such company, and provided by its terms that in case it was not so accepted the ordinance should be considered null and void as to the company not accepting. The Chicago & Northwestern Railway Company accepted this ordinance, but appellee declined to do so. The steam railway company thereupon proceeded to elevate its roadbed and tracks as far west as Austin avenue, which work was completed in 1909. The roadbed was inclosed on both sides by a concrete retaining wall 20 feet high, built on the boundary lines of the right of way. The roadbed is carried over the intersecting streets by bridges, supported by abutments built along the east and west boundaries of the streets. The north rail of the appellee's north track, from Willow avenue to Austin avenue, runs parallel with and is about nine feet south of the south retaining wall of the Chicago & Northwestern Railway Company. Another ordinance was passed by the city of Chicago requiring appellee to elevate the plane of its tracks between Fifty-Second avenue and Austin avenue. This ordinance also provided that it should become effective from and after its passage, and provided that it should be null and void, unless appellee accepted its terms within 60 days after its passage. The appellee declined to accept this ordinance. Thereafter on November 22, 1909, the ordinance here involved was passed. The first section of the ordinance is as follows: "Paragraph 1. That no person or corpora-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

tion shall propel, or cause to be propelled, any single car or train of cars on any track or tracks situated on the surface of any street in the city of Chicago, across an intersecting street, when the track or tracks on which such single car or train of cars is or are propelled run parallel to the tracks of any steam railroad the tracks of which are elevated on an embankment and are carried over intersecting streets by a bridge or bridges, where the condition is such that any rail of said surface track is within fifteen (15) feet of the end of any abutment wall supporting said bridge or bridges.

"Paragraph 2. It is hereby declared to be a nuisance for any person or corporation to operate a single car or train of cars in violation of the foregoing paragraph."

The second section provides for a fine of not less than \$5 nor more than \$25 for each violation of the ordinance, and provides further that every single car or train of cars operated in violation of the ordinance shall be deemed a separate offense. It was admitted that if the ordinance was held valid there had been 304 violations of the same, and that judgment should be entered accordingly. On a hearing the municipal court of Chicago entered judgment for the defendant, and the case is brought to this court upon a certificate of the trial judge that it is a case where the validity of a municipal ordinance is involved, and that in his opinion public interest requires that an appeal be allowed directly to this court.

The contention of appellee in the court below, and its contention here, is that as to it this ordinance is invalid, because it impairs the obligation of the contract between it and the town of Cicero; that it deprives it of property without compensation, and is not a valid exercise of the police power of the city. Appellant contends, on the other hand, that the ordinance on which the suit is founded in effect requires track elevation; that it is neither unreasonable nor unconstitutional, and is one which the city had authority to pass.

This ordinance is in no sense one requiring track elevation. It does not pretend to permit the separation of the grade of the railroad tracks from the grade of the street, either by elevating or depressing the roadbed and tracks of the railroad. It provides simply for the removal of the tracks of any railroad company which are lying parallel with the tracks of any elevated steam road and within 15 feet of the end of any abutment wall supporting the bridge or bridges which carry the elevated tracks over any intersecting street. So far as the terms of this ordinance alone are concerned, track elevation on the part of appellee is not contemplated or permitted.

Appellant urges that appellee can avoid the destruction of its north track under this ordinance by complying with one of the ordinan-

ces heretofore passed, requiring appellee to elevate its tracks between Fifty-Second and Austin avenues, and refers to those ordinances as though the same were still in force and effect. Each of those ordinances, by express terms, provided that it would become operative only upon the acceptance of its terms by appellee within a specified time, and, in case appellee should fail to so accept it, that it would become null and void. As appellee declined in each instance to accept the terms of these ordinances, they never became effective, and appellee is in the same position toward the city of Chicago as though no such elevation ordinances had ever been passed.

Under the ordinance passed by the town of Cicero, the Cicero & Harlem Railroad Company was granted the right to construct a railroad, consisting of two tracks, from Fifty-Second avenue to Harlem avenue over a specified portion of the streets indicated. This ordinance provided that that company should operate a surface railroad under the grant, and specified the manner in which its tracks should cross the intersecting streets and the condition in which such crossings, including the grade of the street and the pavement, should be left after the building of the road had been completed. The road was built under this ordinance, and was afterwards sold to the appellee for a large sum of money, and has been operated as a double-track surface railroad since the time of its completion. The evidence shows that appellee runs 296 trains daily to Austin avenue, and that these trains carry 50,000 passengers. There was no dispute as to any fact. The evidence further discloses that the removal of the north track to a distance of 15 feet from the abutment of the bridges over the eight intersecting streets between Fifty-Second and Austin avenues, which abutments are on the north line of appellee's right of way of 32 feet, would leave but 17 feet for appellee's use, and that two tracks could not be used in that space. To comply with this ordinance, appellee would be limited to one track for the operation of its road between Fifty-Second and Austin avenues, which it is not denied would seriously impair the operation of the road and its revenue.

The contention of appellant is that the conditions existing at the eight street crossings between Fifty-Second and Austin avenues are so dangerous that the passage and enforcement of this ordinance is a proper exercise of its police power to insure the safety of the public. It is shown by the evidence that at each of the street crossings in question appellee has voluntarily installed and maintains gates, at which signal bells are rung automatically on approach of trains and lights put on, which continue to burn while the bells are ringing. A flag is also displayed at the time, which indicates whether the gate is up or down. These gates are located between the abutments and the north track of appellee, and are about three feet from the

retaining wall and abutments. The arms of the gates, when lowered, extend across the full width of the street and the sidewalk. During four hours of each day, which are referred to as rush hours (two hours in the morning and two hours in the evening), trains are run over this territory every three minutes and at times at the rate of one every minute and a half. During the time that these conditions have existed at the eight street crossings in question, since the elevation of the tracks of the Chicago & Northwestern Railway Company, but two accidents are shown to have occurred at any of these crossings—one to a policeman on duty at one of the crossings, and one in which a milk wagon was struck. The mere fact that these crossings may be dangerous is not sufficient to authorize the city to deprive appellee of its right to use South boulevard and Lake street under its contract originally made with the town of Cicero. That ordinance granted to the assignor of appellee permission and authority to lay its tracks on the north 32 feet of South boulevard and Lake street, and to use them for the purposes for which they are being used.

[1] The privilege of the use of the public streets of the city or town, when granted by ordinance, is not always a mere license, revocable at the pleasure of the municipality granting it, for, if the grant is for an adequate consideration and is accepted by the grantee, then the ordinance ceases to be a mere license, and becomes a valid and binding contract; and the same result is reached where, in case of a mere license, it is, prior to its revocation, acted upon in some substantial manner, so that to revoke it would be inequitable and unjust. *Chicago Municipal Gas Light Co. v. Town of Lake*, 130 Ill. 42, 22 N. E. 616; *City of Belleville v. Citizens' Horse Railway Co.*, 152 Ill. 171, 38 N. E. 584, 26 L. R. A. 681; *People v. Blocki*, 203 Ill. 363, 67 N. E. 809.

[2, 3] This ordinance is, in effect, an attempt to revoke the license of appellee to use the street under the terms of the ordinance giving it that permission. The grant by the town of Cicero, and by which the city of Chicago is bound, was accepted and acted upon in a substantial manner by appellee and its assignor, and now constitutes a contract binding and obligatory upon appellant and appellee, which cannot be arbitrarily broken. The city of Chicago undoubtedly has the right, in the exercise of its police power, to regulate the use by appellee of its tracks and cars in a reasonable manner, but it cannot, under the pretense of regulation, deprive the appellee of its property or of any of its essential rights and privileges acquired under the contract with the town of Cicero. *City of Chicago v. Jackson*, 196 Ill. 496, 63 N. E. 1013, 1135; *City of Belleville v. Turnpike Co.*, 234 Ill. 428, 84 N. E. 1049, 17 L. R. A.

(N. S.) 1071; *Venner v. Chicago City Railway Co.*, 246 Ill. 170, 92 N. E. 643.

[4] It cannot be contended that by this ordinance appellant is attempting in any manner to regulate the use by appellee of its tracks and cars, and, indeed, counsel for appellant frankly admit that such is not the purpose of the ordinance, and insist that the ordinance is one requiring elevation. As has been pointed out, this ordinance cannot be regarded in any sense as an elevation ordinance, and, as its only purpose is to require the removal of the tracks of such railroad companies as are situated as is appellee, it is such an infringement upon the rights of appellee as renders the ordinance invalid as to it. The right of the city, by the exercise of its police power, to regulate any business or the use of any property does not give the power to prohibit the conducting of a lawful business, or to suppress entirely the use of property. *Town of Lake View v. Rose Hill Cemetery Co.*, 70 Ill. 191, 22 Am. Rep. 71; *City of Chicago v. Gunning System*, 214 Ill. 628, 73 N. E. 1035, 70 L. R. A. 230.

[5] It is contended by appellant that it has the power to declare such a situation as is here presented to be a nuisance and to suppress the same. Appellee is conducting its business in accordance with the grant made originally by the town of Cicero. It constructed its road by authority of law, and is operating it, under the terms of the grant, for the accommodation of the public. The city cannot, by a mere declaration, show the operation of the appellee's road through the territory in question to be a nuisance, and subject its tracks to removal. The public welfare demands that there should not be a discontinuance of the operation of an authorized railroad. *Chicago, Rock Island & Pacific Railroad Co. v. City of Joliet*, 79 Ill. 25; *Chicago & Eastern Illinois Railroad Co. v. Loeb*, 118 Ill. 203, 8 N. E. 460, 59 Am. Rep. 341.

Appellant complains of the refusal of the court to hold as law 57 propositions submitted by it, and of the action of the court in holding as law 18 propositions submitted by appellee. Many of the propositions submitted by appellant were abstract propositions of law and were correct, but were not applicable to the questions involved here. We have not made a critical examination of all these propositions of law as to the refusal or holding of which error has been assigned, as the judgment of the court below was clearly proper, even though there may have been error in the action of the court in passing upon some of the propositions submitted.

For the reasons stated, the ordinance in question, as applied to the tracks of appellee from Fifty-Second avenue to Austin avenue, in the city of Chicago, is invalid, and the judgment of the municipal court is affirmed.

Judgment affirmed.

(250 III., 376)

BOOZ v. TEXAS & P. RY. CO.

(Supreme Court of Illinois. June 20, 1911.)

1. CONSTITUTIONAL LAW (§ 315*)—DUE PROCESS OF LAW—JURISDICTION.

A question of the jurisdiction of the court to render a judgment is one of due process of law; and hence, if the defendant is not amenable to process within the state, judgment against it is not rendered in pursuance of due process of law, guaranteed by the Constitution.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 935-947; Dec. Dig. § 315.*]

2. CORPORATIONS (§ 668*)—FOREIGN CORPORATIONS—PROCESS—SERVICE.

Under Practice Act (Hurd's Rev. St. 1909, c. 110) § 8, providing that jurisdiction may be obtained over a corporation by service of a copy of the writ on any clerk or agent of the corporation, if the president cannot be found within the county, service may be had on a foreign as well as a domestic corporation, provided the foreign corporation is present within the state and has a resident agent on whom process may be served; a business corporation being regarded as constructively present within any state where it has property and carries on its operations by means of agents, though its domicile is in another state.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2608-2627; Dec. Dig. § 668.*]

3. RAILROADS (§ 33*)—FOREIGN CORPORATIONS—ACTIONS—PROCESS—SERVICE.

Where a foreign railroad corporation had no property or agent authorized to make a contract for or bind it in any way within the state, it was not subject to suit in Illinois by service on a mere soliciting agent.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 70, 71; Dec. Dig. § 33; * Corporations, §§ 2487-2677.]

Error to Municipal Court of Chicago; William N. Gemmill, Judge.

Action by John T. Booz against the Texas & Pacific Railway Company. Judgment for plaintiff, and defendant brings error. Reversed.

Jeffery, Ott & Campbell (Charles V. Clark, of counsel), for plaintiff in error.

CARTWRIGHT, J. John T. Booz, defendant in error, sued the Texas & Pacific Railway Company, plaintiff in error, for the value of an overcoat alleged to have been lost by him on February 25, 1900, through negligence of plaintiff in error while he was a passenger on one of its trains between two stations in Louisiana. Summons was returned by a bailiff served on George W. Pither, chief clerk and agent of defendant. A limited appearance was entered by attorneys for defendant for the sole purpose of questioning the jurisdiction of the court, and a motion was made to quash and set aside the return. The facts upon which the motion was decided are as follows:

The defendant is a railroad corporation existing under the laws of the United States and the state of Texas, with its principal office in Dallas, Tex. Its lines of road are in Texas and Louisiana, and it has never

owned, leased, or operated any road, nor had any principal office, in this state, and the cause of action did not arise in this state. George W. Pither is an employé of W. C. Staley, a soliciting freight agent, and Ellis Farnsworth, a soliciting passenger agent, of several foreign railroad companies, including the defendant. The defendant and four other railroad companies operating railroads outside of this state in the same region jointly maintain three offices in the city of Chicago and jointly pay the office expenses and salaries of the employés; the defendant paying its share of the rental and salaries. All the employés and the business are under the control of Edward B. Boyd, who is not an officer of any of the corporations, but is hired by the railroads jointly, and is called an assistant to the vice president. The only business transacted through this office or by the employés is soliciting shipments by way of the lines of these corporations from large manufacturing and industrial concerns, and endeavoring to persuade prospective shippers or consignees of freight to route shipments over the lines of said corporations, and soliciting passenger business by persuading passengers to purchase their tickets so they will pass over some one or more of the lines of said corporations, all of which are outside of this state. That is and has been the only business transacted in this state for the defendant, and neither Boyd nor any of the employés under him have any power to make a contract for the defendant, to issue any bill of lading, sell any ticket, receive any money, or make any freight or passenger contract. Boyd and his subordinates devote only a portion of their time to the services of the defendant, and the sole duties performed by them are the solicitation of freight and passenger business.

The court overruled the motion to quash the return, and the defendant elected to stand by its motion, and declined to enter another or further appearance. The court thereupon heard the evidence for the plaintiff, found the issues in his favor, assessed his damages at \$50, and entered judgment for that amount. The defendant excepted to the judgment, and sued out a writ of error from this court to obtain a review of the record. By the assignment of errors it is alleged that the judgment violated the Constitutions of this state and the United States by depriving the defendant of its property without due process of law.

[1, 2] A question of the jurisdiction of a court to render a judgment is one of due process of law, and if the defendant was not amenable to service of process within this state, the judgment was not rendered in pursuance of the due process of law guaranteed by our Constitution. Section 8 of the practice act (Hurd's Rev. St. 1909, c.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

110) provides the method for acquiring jurisdiction of a corporation, which may be done by leaving a copy with any clerk or agent of the corporation, if the president cannot be found within the county. The section is not confined, in its terms, to domestic corporations, and if a foreign corporation is present within this state, and has an agent here, process may be served upon it. A business corporation is constructively present in any state where it has property and carries on its operations by means of agents, although the domicile of the corporation is in another state. *Edwards v. Schilling*, 245 Ill. 231, 91 N. E. 1048, 137 Am. St. Rep. 308. If a foreign corporation does business in the state through agents, it may be sued there by obtaining service on the agent. *Barrow Steamship Co. v. Kane*, 170 U. S. 100, 18 Sup. Ct. 528, 42 L. Ed. 964; *Western Union Telegraph Co. v. Pleasants*, 48 Ala. 641. If it avails itself of the privilege of doing business in a state whose laws authorize it to be sued there by service of process upon an agent, its assent to such service will be implied (13 Am. & Eng. Ency. of Law [2d Ed.] 895); but the foreign corporation must have entered the domestic state for the purpose of carrying on its business there (19 Cyc. 1328).

In *Mineral Point Railroad Co. v. Keep*, 22 Ill. 9, 74 Am. Dec. 124, a Wisconsin corporation had built and operated a railroad from the line between Wisconsin and this state to Warren, in Jo Daviess county, and it was held the foreign corporation, having property in this state and doing business here, could be served with process by delivering a copy to its conductor; the president not being within the state. In *Italian-Swiss Agricultural Colony v. Pease*, 194 Ill. 98, 62 N. E. 317, a foreign corporation had extended its business into this state and transacted such business here through an agent, who occupied an office maintained by the corporation, and who was advertised on the office door as its Western agent, and the corporation had written letters to its customers referring them to the agent for the adjustment of its business affairs. It was held not improper to instruct the jury that a corporation so acting was bound, as principal, to those dealing with such person, whether the agency in fact existed or not. It was not implied, however, that any representative capacity would be sufficient to constitute a representative an agent, and attention was called to the fact that in other instructions the court advised the jury that a salesman who sells goods for a corporation on commission and stands in no other relation to the corporation is not an agent as contemplated by the statute, and that service of process on such a salesman could not confer jurisdiction on the cor-

poration. Doing business within this state means the transaction of the ordinary business in which the corporation is engaged, by the exercise of some of its charter powers. *Alpena Cement Co. v. Jenkins & Reynolds Co.*, 244 Ill. 354, 91 N. E. 480. In *Midland Pacific Railway Co. v. McDermid*, 91 Ill. 170, the defendant was a corporation of the state of Nebraska, and the summons was served on its general superintendent temporarily in this state and passing through it, and the defendant did not do any business nor have any property in this state. The service was within the literal language of the practice act; but it was held that, there being no local agent in this state, there was no one upon whom service of process could be lawfully had.

[3] The return of the bailiff was not conclusive of the fact that George W. Pither was the agent of the defendant, and defendant was at liberty to dispute the truth of the return. The conclusion as to that fact depended upon whether the defendant had extended its business into this state, so as to be constructively present here, and was transacting that business through George W. Pither, as its agent. The defendant, being a foreign corporation, could only be served in this state if it was doing business here, and no one could be an agent of the defendant unless he had power to represent it in the transaction of some part of the business contemplated by its charter. There was no one in this state who had power to make any contract or bind the defendant in any way, and the mere solicitation of business by persons who have no other authority is not doing business within this state. Neither Boyd nor any one under him had authority to sell a ticket, issue a bill of lading, or make a contract for the defendant, and they were no more agents of the defendant than other railroad companies selling tickets or issuing bills of lading under which the passengers or freight would pass over the road of the defendant in Texas or Louisiana. The decisions of the courts are that mere solicitors of business are not agents, within the meaning of the statute. *Wall v. Chesapeake & Ohio Railway Co.*, 95 Fed. 398, 37 O. C. A. 129; *Fairbank Co. v. C.*, N. O. & T. P. Ry. Co., 54 Fed. 420, 4 C. C. A. 403, 38 L. R. A. 271; *Green v. Chicago, Burlington & Quincy Railroad Co.*, 205 U. S. 530, 27 Sup. Ct. 595, 51 L. Ed. 916; *North Wisconsin Cattle Co. v. Oregon Short Line Railroad Co.*, 105 Minn. 198, 117 N. W. 391.

The court erred in refusing to quash the return, and the subsequent proceedings were void for want of jurisdiction over the defendant. The judgment is reversed.

Judgment reversed.

(250 Ill. 416.)

WALTER CABINET CO. v. RUSSELL et al.
(Supreme Court of Illinois. June 20, 1911.)

1. COURTS (§ 189*)—CHICAGO MUNICIPAL COURT—RULES—AFFIDAVIT OF MERITS.

Under rule 18 of the Chicago Municipal Court, providing that in cases of the fourth class statements of set-off must be filed with the defendant's appearance, and that the plaintiff shall file an affidavit of merits of defense to the set-off within such time as the court may order, a plaintiff cannot be in default for want of such an affidavit of merits until the order is made, fixing the time within which it must be filed.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 189.*]

2. COURTS (§ 189*)—CHICAGO MUNICIPAL COURT—RULES—TIME TO PLEAD.

Where a defendant has filed, in the Chicago Municipal Court, a statement of set-off after the time allowed to plead, without securing special leave, neither the court nor the plaintiff is required to recognize it; the statement being placed among the papers in the cause without authority of law.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 189.*]

3. DISCOVERY (§ 89*)—STATUTORY PROVISIONS—PRODUCTION—INSPECTION OF WRITTEN INSTRUMENTS.

Under Hurd's Rev. St. 1909, c. 51, § 9, providing that the courts may require parties to produce books of account or writings in their possession which contain evidence pertinent to the issue, the object of which is to give litigants a speedy and summary way of obtaining written evidence in the possession of the other party, one cannot secure a general investigation of the business of a party, or of any transaction not material to the issue; and hence, where a defendant claimed as a set-off commissions for sales of plaintiff's goods, an order compelling the plaintiff to produce all books of account with reference to sales in a certain territory was erroneous, not being limited to the issue of the sales made by defendant.

[Ed. Note.—For other cases, see Discovery, Cent. Dig. § 115; Dec. Dig. § 89.*]

4. COURTS (§ 189*)—CHICAGO MUNICIPAL COURT—PLEADING AND PROOF.

While the formalities of pleading have been abolished in the Chicago Municipal Court, the purpose of statements of claim and of set-off which are still required is to inform the opposite party, and a party is limited in his evidence to the claim he has made, and cannot plead one claim and recover upon another.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 189.*]

5. COURTS (§ 189*)—CHICAGO MUNICIPAL COURT—SCOPE OF PLEADING—EXTENSION OF PLEA.

The issue raised by a statement of set-off cannot be extended by oral claims or affidavits.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 189.*]

6. COURTS (§ 189*)—CHICAGO MUNICIPAL COURT—STATEMENT OF SET-OFF—TIME OF FILING—EXTENSION.

The time for filing statements of set-off in the Chicago Municipal Court may, in the discretion of the court, be extended.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 189.*]

7. CONSTITUTIONAL LAW (§ 314*)—DUE PROCESS OF LAW—CONDUCT OF TRIAL.

In an action where the court ordered plaintiff to produce certain writings and books of account in his possession, and the plaintiff failed

and refused to do so, the court cannot, consistently with due process of law, strike his pleadings from the file and award judgment for defendant upon a set-off, for the contempt of a party does not justify the court in depriving him of his civil rights, and the plaintiff, so far as the set-off is concerned, occupied the position of defendant, of whom the court had jurisdiction, and it cannot deprive him of his defense because in contempt.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 934; Dec. Dig. § 314.*]

8. CONSTITUTIONAL LAW (§ 70*)—DISCOVERY UNDER STATUTORY PROCEEDINGS—REFUSAL OF DISCOVERY—EFFECT.

Under Hurd's Rev. St. 1909, c. 51, § 9, allowing the court to order a party to produce books or writings in his possession which are pertinent to the issue, which does not provide that a failure to comply with such order will raise a presumption which entitles the court to strike out his pleadings from the files and render judgment against him, the court may not raise such a presumption in the absence of express statutory authority, for the Legislature makes the law, and it is the province of the court merely to determine it.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 129-132; Dec. Dig. § 70.*]

Error to Municipal Court of Chicago; William N. Gemmill, Judge.

Action by the Walter Cabinet Company against Samuel A. Russell and others. There was a judgment for defendants upon their set-off, and plaintiff brings error. Reversed and remanded.

Moses, Rosenthal & Kennedy (Walter Bachrach and R. D. Wallace, of counsel), for plaintiff in error. Earl J. Walker, for defendants in error.

DUNN, J. The plaintiff in error sued the defendants in error in a case of the fourth class in the municipal court of Chicago upon an attachment bond. The appearances of the defendants were entered on December 2, 1910, and an extension of time for filing an affidavit of merits was granted to them. On December 9th, without any leave of court, the defendant in error Russell filed a statement of set-off and affidavit, but no order was then or afterward made in regard to the plaintiff's affidavit of merits of defense, and no such affidavit of merits was filed by the plaintiff. The statement of set-off claimed \$375 from the plaintiff "for commission on goods sold for the plaintiff by the said defendant." On December 12th, upon the motion of defendant in error Russell, an order was made, over the objection of the plaintiff in error, requiring it to produce, on December 19, 1910, for the defendant's inspection and examination, all books, papers, and memoranda showing orders and sales of furniture cabinets of the plaintiff in that part of the United States between St. Paul, Minn., and Galveston, Tex., west of Lake Michigan and east of Colorado. On December 16th the plaintiff in error moved to strike from the files the statement and affidavit of

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

set-off, because they were not filed with the defendant's appearance and no leave was given to file them. This motion was denied. On December 23d defendant in error Russell moved to strike from the files the plaintiff's statement of claim and to render judgment in favor of the defendant for the amount of his set-off. In support of his motion, he read to the court affidavits showing that the plaintiff in error had failed and refused to comply with the order of December 12th in regard to the production of books and papers, and did not intend to comply with that order, and the plaintiff in error, by its counsel, stated that the order would not be complied with. The court sustained the motion, the plaintiff's statement of claim was stricken from the files, and judgment was entered against the plaintiff, in favor of the defendant Russell, for the amount of his set-off, \$375, and costs, and in favor of the defendant the American Surety Company for costs. A writ of error to review this record was sued out of this court, and it is urged that the order of December 12th and the judgment of December 23d were beyond the constitutional power of the court.

[1] The filing of a statement of set-off by a defendant sued in the municipal court is governed by rule 18 of that court, which provides that in cases of the fourth class such statement shall be filed with the defendant's appearance, provided that the court may extend the time for filing it. The same rule provides that the plaintiff shall be required to file an affidavit of merits of defense to a set-off within such time as the court may order. A plaintiff cannot, therefore, be in default for want of an affidavit of merits of defense until the court has made an order fixing the time within which the affidavit must be filed.

[2] Still less ground is there for holding the plaintiff in default where the defendant's statement of set-off has been filed after the time limited by the rule, and without leave of the court. After the expiration of the rule, the defendant had no right to plead without special leave of the court, and neither the court nor the plaintiff was required to recognize in any way the statement of claim thus placed among the papers in the cause without authority of law. *Robb v. Bostwick*, 4 Scam. 115; *Flanders v. Whitaker*, 13 Ill. 707; *Davis v. Lang*, 153 Ill. 175, 38 N. E. 635.

[3] Section 9 of chapter 51 of the Revised Statutes of 1909 provides that the courts may require parties to produce books or writings in their possession which contain evidence pertinent to the issue. The object of this section is to furnish litigants a summary means of obtaining written evidence pertinent to the issues in a cause which may be in the possession of the opposite party. It serves the purpose, in a more speedy and summary way, intended to be accomplished by a bill of discovery in some cases, or a

subpoena duces tecum in others. It cannot be used to procure a general investigation of the accounts or business of a party, or of any transaction not material to the issue. At the time the order for the production of books and papers was made in this case, the only issue was upon the plaintiff's claim upon the attachment bond, as to which there is no claim that there was any evidence in the books. The statement of set-off had been filed without authority of law, no leave was then asked to file it, the plaintiff was under no obligation to answer it, and in that condition of the record it should have been disregarded by the court upon the hearing of the motion to require the production of books. Had the court, however, then given leave to file the statement, the order to produce the plaintiff's books would still have been improper. The claim presented by the statement was for commissions on sales made by the defendant Russell for the plaintiff. The order was for the production of all books, invoices memoranda, and writings showing orders and sales of furniture cabinets of the plaintiff within the territory described. It called for a general exposition of all the plaintiff's business throughout that territory, of all sales of the plaintiff's articles, and was not limited to the issue of sales made by Russell. Such an order cannot be justified as pertinent to the defendant's claim, even if such claim were to be considered as properly in the case.

[4, 5] It is urged that the affidavit of Russell read in support of the motion set forth a contract giving him the exclusive right to sell furniture in the territory named, by which he was entitled to a commission on all accepted orders, whether from himself direct or by mail from the described territory. This affidavit, however, did not make the issue, and was no evidence of the issue. In fact, it was no part of the record, except as it was made so by including it in a bill of exceptions, or stenographic report. The object of the rules requiring statements of claim and of set-off is to inform the parties of the nature of the respective claims, and, while the formalities of pleading have been abolished by statute, it is still the law in the municipal court, as in other courts, that a party is limited, in his evidence, to the claim he has made; that he cannot make one claim in his statement and recover upon proof of another without amendment. The issue is made by the statement of claim, and the evidence must be limited by that statement. The issue cannot be enlarged by oral claims or affidavits filed in the case.

[6] It is not intended to hold that the action of the court in denying the motion of the plaintiff in error, on December 16th, to strike the statement of set-off from the files was erroneous. The denial of this motion was equivalent to an order then made extending the time for filing the statement, and was within the discretion of the court. But

on December 12th no such order had been made, and nothing appears in the record to show that the statement of set-off had then ever been recognized or brought to the attention of the plaintiff or the court.

[7] The order striking from the files the plaintiff's statement of claim and entering judgment against it, without any proof whatever, for the full amount of the defendant's claim was without authority of law. The constitutional guaranty of due process of law, without which no person may be deprived of his property, requires inquiry before judgment; hearing before condemnation. The contumacy of a party in disobeying the order of a court may justify his punishment for contempt, but not the deprivation of his civil rights, or the taking of his property and giving it to another. The judgment here, though purporting to be a judicial determination of the rights of the parties, is, in fact, only an arbitrary declaration of the judge, having no reference to such rights. The plaintiff in error, so far as the set-off of the defendant in error Russell was concerned, occupied the position of a defendant, and it is a principle of fundamental justice that, however plenary may be the power to punish for contempt, no court, having obtained jurisdiction of a defendant, may refuse to allow him to answer, refuse to consider his evidence, and condemn him without a hearing, because he is in contempt of court. *Hovey v. Elliott*, 167 U. S. 409, 17 Sup. Ct. 841, 42 L. Ed. 215; *Windsor v. McVeigh*, 93 U. S. 277, 23 L. Ed. 914; *McVeigh v. United States*, 11 Wall. 259, 20 L. Ed. 80; *Gordon v. Gordon*, 141 Ill. 160, 30 N. E. 446, 21 L. R. A. 387, 33 Am. St. Rep. 294; *Meacham v. Bear Valley Irrigation Co.*, 145 Cal. 606, 79 Pac. 281, 68 L. R. A. 600; *Foley v. Foley*, 120 Cal. 33, 52 Pac. 122, 65 Am. St. Rep. 147; *Greig v. Ware*, 25 Colo. 184, 55 Pac. 163; *Trough v. Trough*, 59 W. Va. 464, 53 S. E. 630, 4 L. R. A. (N. S.) 1185, 115 Am. St. Rep. 940; *Peel v. Peel*, 50 Iowa, 521; *Haldine v. Eckford*, L. R. 7 Eq. 425.

[8] It is argued on behalf of the defendants in error that the action of the court may be justified by "the undoubted right of the court to create a presumption of fact that the books, if produced, would present evidence against the plaintiff." The trouble with this argument is that there is no such right. The court administers the laws; it is the province of the Legislature to make them. The Legislature may prescribe rules of evidence and change them. *People v. McBride*, 234 Ill. 146, 84 N. E. 865, 123 Am. St. Rep. 82; *Waugh v. Glos*, 246 Ill. 604, 92 N. E. 974; *Pittsfield & Florence Plankroad Co. v. Harrison*, 16 Ill. 81. In those states where the striking of a party's pleadings from the files and the entry of a judgment by default upon the failure of such party to comply with an order for the production of

evidence have been sustained, such action has been authorized by an express statute. Such statutes, if within the power of the Legislature, find their sanction, as stated by the Supreme Court of the United States, in *Hammond Packing Co. v. Arkansas*, 212 U. S. 322, 29 Sup. Ct. 370, 53 L. Ed. 530, in "the undoubted right of the lawmaking power to create a presumption of fact as to the bad faith and untruth of an answer to be gotten from the suppression or failure to produce the proof ordered, when such proof concerned the rightful decision of the cause." Our statute contains no provision for the striking of pleadings, the creation of a presumption, or the entry of judgment upon a failure to produce the evidence required by an order of court. The parties are left to the remedies existing in the absence of a statute.

The judgment is reversed, and the cause remanded.

Reversed and remanded.

(250 Ill. 442)

HOYT v. McLAUGHLIN et al.

(Supreme Court of Illinois. June 20, 1911.)

1. INTOXICATING LIQUORS (§ 264*)—INJUNCTION—NUISANCE—REMEDY OF INDIVIDUAL.

A nuisance created by an unlicensed dramshop, as declared by Hurd's Rev. St. 1909, c. 43, § 7, may be abated at the suit of an individual who has suffered special damages different from that suffered by him in common with the public, such as injury to his property.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. § 403; Dec. Dig. § 264.*]

2. NUISANCE (§ 72*) — PUBLIC NUISANCE — ABATEMENT AT SUIT OF PRIVATE INDIVIDUAL.

A public nuisance will only be abated at the suit of an individual who has suffered special damages, and, where an individual has suffered special damages to his property, he may sue, though the property of others has been injured by the same cause, but, where the injury merely excludes all alike in the enjoyment of a common right, the suit must be instituted by or in the name of the public.

[Ed. Note.—For other cases, see *Nuisance*, Cent. Dig. §§ 164-169; Dec. Dig. § 72.*]

3. INTOXICATING LIQUORS (§ 80*)—LICENSES—APPLICATION—REQUISITES—"OPERATED WITHOUT A LICENSE."

A dramshop license issued without compliance with an ordinance, requiring the application to be signed by a majority of the property owners according to frontage on both sides of the street in the block where the dramshop is to be kept, or by a majority of the bona fide householders and persons or firms living in or doing business on each side of the street in the block on which the dramshop has its entrance, is invalid, and a dramshop operated under such a license is "operated without a license" within Hurd's Rev. St. 1909, c. 43, § 7, providing that an unlicensed dramshop shall be a nuisance.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. § 83; Dec. Dig. § 80.*]

4. EQUITY (§ 239*)—PLEADING—DEMURRER.

A demurrer to a bill in equity admits the truth of its allegations.

[Ed. Note.—For other cases, see *Equity*, Cent. Dig. § 494; Dec. Dig. § 239.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

5. INTOXICATING LIQUORS (§ 66*)—LICENSE—APPLICATION—REQUISITES.

Under a city ordinance, providing that no liquor license shall be issued unless the application therefor is signed by a majority of the bona fide householders and persons or firms living in or doing business on each side of the street in the block on which the dramshop shall have its main entrance, an application for a dramshop having the main entrance on two streets must have the required signatures of the persons on the two streets, and the ordinance is not complied with by procuring signatures only of persons on one street.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. § 66; Dec. Dig. § 66.*]

6. INTOXICATING LIQUORS (§ 103*)—LICENSES—TRANSFERS—VALIDITY.

Under Dramshop Act (Hurd's Rev. St. 1909, c. 43) § 4, providing that a dramshop license shall not be transferable, and a municipal ordinance, providing that a license shall not authorize any person to do business except the person named therein, one may not own and conduct a dramshop under a license issued to and in the name of another.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. §§ 108, 110-112; Dec. Dig. § 108.*]

7. INTOXICATING LIQUORS (§ 46*)—LICENSES—ORDINANCES—VALIDITY.

A municipal ordinance dividing the liquor license year into two equal periods, and providing for the issuance of licenses for the unexpired portion of a year, or unexpired portion of any period, etc., is not in conflict with Hurd's Rev. St. 1909, c. 43, § 3, prohibiting the granting of a license except on payment in advance of a license fee not less than at the rate of a specified sum per year.

[Ed. Note.—For other cases see *Intoxicating Liquors*, Cent. Dig. § 48; Dec. Dig. § 46.*]

Appeal from Superior Court, Cook County; William Fennimore Cooper, Judge.

Suit by William M. Hoyt against Robert G. McLaughlin and another. From a decree of dismissal for want of equity, plaintiff appeals on the certificate of the trial court. Reversed and remanded.

Edwin Bebb, for appellant. Winston, Payne, Strawn & Shaw (Arthur C. Marriott, of counsel), for appellees.

FARMER, J. The appellant, William M. Hoyt, filed a bill in the superior court of Cook county, on the chancery side, for an injunction against Herman P. Grube and Robert G. McLaughlin, the appellees, the latter of whom was running a dramshop located on the corner of Fifty-Fifth street and Lake avenue, in the city of Chicago. The bill alleged that the dramshop was owned and conducted by McLaughlin under a license issued to Grube; that the ordinance under which said license was issued was void; that the petition filed with the application for license did not contain a sufficient number of signers, as required by the ordinance; and that said dramshop was operated and maintained by said McLaughlin illegally and without any warrant of law. The bill further alleged that appellant is the owner and in possession of a four-

story brick building located at 5528 and 5530 Lake avenue, which building contains on the first floor two storerooms leased and occupied for merchandise purposes, and on the second, third, and fourth floors are eighteen flats or apartments occupied as dwellings by tenants, for which a certain rent is paid to appellant. The bill further alleged that appellant's property is located in the same block as the dramshop and about 200 feet distant therefrom; that the operation of said dramshop denies "to the complainant and his said tenants the peace and quiet to which they are entitled, and said saloon, and its patrons attracted thereto, are a constant source of injury and damage to the said property of complainant used for dwellings and for other purposes, as aforesaid, and depreciate the value of complainant's said property; that by reason of the nuisance of the said saloon and by reason of the inherent nature of the business said complainant cannot rent his said apartments or flats as dwellings and stores advantageously, and is forced to rent the said dwellings at a greatly reduced rent from that which he otherwise could have obtained, to the great loss of the complainant; that the class of tenants who will rent such dwellings and stores while said unlawful saloon or dramshop is operated embrace a larger number than there otherwise would be of persons who are unable to pay their rent when due and often fail wholly to pay their rent, to the great loss of complainant." The bill alleged that the damage and injury to appellant occasioned by maintaining and operating said dramshop were great and irreparable, and that appellant would continue to suffer such damage and injury unless appellees be enjoined from further operating, conducting, and maintaining said dramshop. A general demurrer was filed to the bill, which was sustained by the court, and the bill dismissed for want of equity. The court having certified that the validity of a municipal ordinance of the city of Chicago was involved and that the public interest required that the question should be passed upon by this court, an appeal was prayed and allowed, and the case has been brought here for review.

The bill alleges that the property described is in what was the village of Hyde Park before its annexation to the city of Chicago; that prior to said annexation the village adopted an ordinance which, in part, is as follows: "Any person who shall desire to obtain a license to keep a saloon or dramshop shall, in addition to the requirements now provided by ordinance, present his application, in writing, to the village comptroller for such license, in which shall be stated the name of the person or firm to whom the license is to be issued and the place where such saloon or dramshop is to

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes 95 N.E.—30

be kept, which application shall be signed by a majority of the property owners, according to frontage, on both sides of the street in the block in which such dramshop is to be kept, and shall also be signed by a majority of the bona fide householders and persons or firms living in or doing business on each side of the street in the block upon which such dramshop shall have its main entrance," and which said ordinance is now in full force and effect in that part of the city of Chicago which was formerly Hyde Park. The bill alleges that said ordinance was not complied with by securing the signatures to the application for license of a majority of the property owners, according to frontage, on both sides of the street in the block in which the dramshop is located, nor by securing to the application the signatures of a majority of the bona fide householders and persons or firms living in or doing business on each side of the street in the block upon which the dramshop has its main entrance. It is alleged that at the time the license was issued the total number of bona fide householders, persons, or firms living or doing business on the east side of Lake avenue in the block in which the dramshop is located was nine, but that only two of this number had signed the application. The entrance to the dramshop is in the corner of the building on Lake avenue and Fifty-Fifth street, and is alleged to be as much on one street as the other. The bill charges it was the duty of the applicant for license to secure the signatures of a majority of the bona fide householders and persons or firms living in or doing business on each side of both Lake avenue and Fifty-Fifth street because the main entrance was on both of said streets, and it is alleged the application was not signed by any householder, person, or firm living or doing business on either side of Fifty-Fifth street. The bill sets out a number of ordinances of the city of Chicago relating to the subject of dramshops, among them section 1840, which divides the license year into two periods of six months each, and authorizes a license for either period upon the payment of the fee in advance for the period. This ordinance, it is alleged, is in conflict with the dramshop act and is invalid.

While the trial court certified that the validity of an ordinance of the city of Chicago is involved and the public interest required the appeal to be prosecuted to this court, we have not been favored by counsel for appellees with any reference to or discussion of the validity of any ordinance. The grounds relied upon by appellees to sustain the decree of the superior court are that the bill does not make a case showing special damage to appellant different from that suffered by the public at large, and, in the absence of such showing, it is claimed the nuisance could only be abated in an action by or in the name of the people. It is also insisted that the

validity of a city ordinance cannot be raised in a court of equity by bill for an injunction.

[1] An unlicensed dramshop or saloon is declared by law to be a nuisance. Hurd's Rev. St. 1909, c. 43, par. 7. Can such a nuisance be abated at the suit of a private person? The answer to this question depends upon whether an individual has suffered special damage different from that suffered by him in common with the public.

[2] The rule is well settled by the decisions of this and other states that a public nuisance will not be enjoined at the suit of a private person unless the nuisance causes such person a special and particular injury distinct from that suffered by him in common with the public at large. In cases where no private or special injury is caused to an individual, an action to abate the nuisance must be instituted by or in the name of the public. But a public nuisance may also be a private nuisance (Wood on Nuisances, § 674), as where the property of an individual is injured in a manner special to him and different from the injury to the public. An injury to the public, in the sense here used, is such an injury as excludes or hinders all alike in the enjoyment of a common right. The question whether a private person has suffered such special injury or damage is not to be determined by whether he alone has suffered damage or whether others in the same vicinity have been injured also. If an individual has suffered special damage to his property from the nuisance, his right to maintain a bill to enjoin it is not affected by the fact that the property of others has been injured by the same cause. *Wylie v. Elwood*, 134 Ill. 281, 25 N. E. 570, 9 L. R. A. 726, 23 Am. St. Rep. 673. This question has been the subject of frequent adjudication, and, according to the great weight of authority, if the allegations of the bill here make a case against appellees of conducting a dramshop without a license, the special damage alleged is sufficient to authorize maintaining the bill. In *Wesson v. Washburn Iron Co.*, 13 Allen (Mass.) 95, 90 Am. Dec. 181, the court said: "The real distinction would seem to be this: That, when the wrongful act is of itself a disturbance or obstruction only to the exercise of a common and public right, the sole remedy is by public prosecution, unless special damage is caused to individuals distinct from that done to the whole community. But, when the alleged nuisance would constitute a private wrong by injuring property or health or creating personal inconvenience and annoyance for which an action might be maintained in favor of a person injured, it is none the less actionable because the wrong is committed in a manner and under circumstances which would render the guilty party liable to indictment for a common nuisance." Other cases in point and sustaining the appellant's right to maintain his action are: *Cranford v. Tyrrell*, 128 N. Y. 341, 28 N. E. 514; *Weakley v. Page*, 102 Tenn. 178, 53 S. W. 551,

46 L. R. A. 552; *Kissel v. Lewis*, 156 Ind. 233, 59 N. E. 478; *Hamilton v. Whitledge*, 11 Md. 128, 60 Am. Dec. 184; *Haggart v. Stehlin*, 137 Ind. 43, 35 N. E. 997, 22 L. R. A. 577; *Detroit Realty Co. v. Oppenheim*, 156 Mich. 385, 120 N. W. 804, 21 L. R. A. (N. S.) 585; *Yolo County v. Sacramento*, 36 Cal. 193; *Walker v. Sheppardson*, 2 Wis. 384, 60 Am. Dec. 423.

The ordinance prescribing the requirements of the application for a dramshop license, with reference to the signatures of property owners, was adopted by the former village of Hyde Park, but it has continued in force in that territory since the annexation of the village of Hyde Park to the city of Chicago and has been frequently before this court. *People v. Harrison*, 185 Ill. 307, 56 N. E. 1120; *Harrison v. People*, 195 Ill. 468, 63 N. E. 191; *People v. Griesbach*, 211 Ill. 35, 71 N. E. 874; *Theurer v. People*, 211 Ill. 296, 71 N. E. 997; *People v. Heidelberg Garden Co.*, 233 Ill. 290, 84 N. E. 230.

[3] The bill alleges that the application by appellee Grube for the license was not signed, as the ordinance required, by a majority of the property owners, according to frontage, on both sides of the street in the block where the dramshop was to be kept, and was not signed by a majority of the bona fide householders and persons or firms living in or doing business on each side of the street in the block upon which the dramshop has its main entrance; that there were nine bona fide householders and persons or firms living in or doing business on the east side of Lake avenue—a street in the block upon which said dramshop had its main entrance when the pretended license was issued—but only two of said number signed the application. By reason of these matters the bill alleges the license issued was void. That a license issued without compliance with the ordinance requiring the application to be signed by the proportion of the property owners specified is invalid and void was held in *People v. Griesbach*, *supra*, *Martens v. People*, 186 Ill. 314, 57 N. E. 871, and *Theurer v. People*, *supra*.

[4] On this ground we think the allegations of the bill made a case against appellee of running a dramshop without a license, and the demurrer admitted the truth of these allegations.

[5] It is also alleged in the bill that the dramshop is located on the corner of Lake avenue and Fifty-Fifth street; that the main entrance is diagonally across the corner of the building and is as convenient from Fifty-Fifth street as from Lake avenue—in fact, is as much on one street as the other—but no signatures of householders, persons, or firms doing business on Fifty-Fifth street were obtained, and it is claimed in such case it was required that the application be signed by the requisite number on Fifty-Fifth street. We are of opinion this is a proper construction of the ordinance. It is to be assumed that there were special reasons for requiring the

applicant for a license to secure the signatures to his application of a majority of the bona fide householders and persons or firms living in or doing business on each side of the street in the block upon which the dramshop was to have its main entrance. According to the allegations of the bill, the main entrance was on two streets, or, at least, it was no more on Lake avenue than it was on Fifty-Fifth street. Where such an entrance is adopted, it is our opinion the ordinance would not be complied with by procuring signatures only of persons on Lake avenue.

[6] The bill further alleges the license was secured by and issued to appellee Grube, but that the dramshop is now owned, maintained, and operated by appellee McLaughlin; that McLaughlin is lessee of the building, and has had issued to him a United States government tax receipt authorizing him to sell intoxicating liquors; that the said McLaughlin purchases in his own name the liquors sold in said dramshop and advertises himself to be the owner of said dramshop; and that this is all done upon the pretended authority of the license issued to the appellee Grube. Paragraph 4 of the dramshop act provides a dramshop license shall not be transferable. Section 1332 of the ordinances of the city of Chicago, which is made part of the bill, is as follows: "No license granted under this ordinance shall be assigned or transferred except as hereinafter provided, nor shall any such license authorize any person to do business or act under it but the person named thereon. Any person to whom any license shall have been issued may, with the permission of the mayor, assign and transfer the same to any other person, and the person to whom such license is issued, or the assignee of such license, shall surrender such assigned license and have a new license issued for the unexpired term of the old license, authorizing the assignee or transferee of such license to carry on the same business or occupation at such place as may be named in such new license: Provided, that in all cases the person obtaining such new license shall give a bond, with sureties, which shall conform, as near as may be, to the bond upon which such surrendered license was issued: Provided further, that nothing herein contained shall be held to authorize the assignment or transfer of saloon or dramshop licenses. Such licenses shall be nonassignable and not transferable." It would seem too plain for debate that McLaughlin could not own, maintain and conduct a dramshop under a license issued to and in the name of another man.

The validity of the ordinance relating to the signatures of property owners in the block, and householders, persons, or firms living in or doing business on each side of the street where the dramshop has its main entrance is not questioned in this suit by either party, and we are of opinion that, whether the ordinance which is attacked by appellant is valid or invalid, the allegations of the

bill were sufficient to require an answer. The decree merely sustains the general demurrer of appellees to the bill and dismisses it for want of equity. The chancellor certified that the validity of an ordinance is involved and that the public interest required the appeal to be direct to this court.

[7] The bill makes Ordinance 1340 of the city of Chicago a part thereof, and alleges that it is in conflict with paragraph 3 of chapter 43, Hurd's Rev. St. 1909, p. 931. Section 1340 of the ordinance divides the license year into two periods. The first period is from May 1st to October 31st and the second period from November 1st to April 30th. It authorizes dramshop licenses to be issued for the full license year or the unexpired portion thereof, or for any period of the unexpired portion thereof. The license fee of \$1,000 is made payable in advance for the full year, or \$500 in advance for each period. If a license is issued for the unexpired portion of a year or for the unexpired portion of any period, the fee to be paid shall bear the same ratio to the sum required for the whole year that the number of days in such unexpired portion bears to the whole number of days in the year. One of the errors assigned is that the court erred in holding this ordinance valid. The bill alleges the license was issued to the appellee Grube by periods, in accordance with the provisions of said ordinance, and the fee for each period was paid in advance. Paragraph 3, which appellant claims the ordinance is in conflict with, reads: "That hereafter it shall not be lawful for the corporate authorities of any city, town or village in this state, to grant a license for the keeping of a dramshop, except upon the payment, in advance, into the treasury of the city, town or village granting the license, such sum as may be determined by the respective authorities of such city, town or village, not less than at the rate of five hundred dollars (\$500) per annum." We do not think the ordinance is in conflict with the statute, but for the reasons given the bill stated a cause of action, and the court erred in sustaining the demurrer to and dismissing it.

The decree is reversed and the cause remanded to the superior court, with directions to overrule the demurrer.

Reversed and remanded, with directions.

(250 Ill. 408)

HILL v. KREIGER et al.

(Supreme Court of Illinois. June 20, 1911.)

1. DEEDS (§§ 54, 56, 64*)—DELIVERY—WHAT CONSTITUTES—NECESSITY.

Delivery of a deed by the grantor and acceptance by the grantee is essential to its validity as a conveyance. A delivery may be made by acts without words, or by words without acts, or both, and anything which clearly manifests the grantor's intention that the deed shall presently become operative and effectual, and

that he releases control over it, and the grantee is to become possessed of the estate, is a sufficient delivery; the test being the intention with which the act or acts relied on, as the equivalent of or substitute for a formal delivery, were done.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 116-125, 142, 143; Dec. Dig. §§ 54, 56, 64.*]

2. DEEDS (§ 194*)—DELIVERY—PRESUMPTIONS—RECORD.

Where a deed creates no liability against the grantee, and imposes no obligation on him, the recording of the deed by the grantor may afford prima facie evidence of delivery and acceptance; but if the deed does create such a liability, or impose an obligation, acceptance cannot rest on a presumption, but must consist of an act of affirmative character.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 574-583, 623; Dec. Dig. § 194.*]

3. DEEDS (§ 194*)—DELIVERY—PRESUMPTIONS—VOLUNTARY SETTLEMENT.

Where deeds executed by a father to his minor children were in the nature of voluntary settlements on the grantees, the law presumes much more in favor of a delivery than in the case of ordinary business transactions, and such settlement, when made, is binding on the grantor, unless there is decisive proof that he never parted or intended to part with possession of the deed, which will be regarded as delivered though retained by the grantor, unless there are other absolute circumstances to show that it was not intended to be absolute.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 574-583, 623; Dec. Dig. § 194.*]

4. DEEDS (§ 64*)—ACCEPTANCE—NECESSITY—INFANTS.

Actual delivery and acceptance of a deed to an infant is not necessary to vest title in the infant, nor is it essential that the infant should have knowledge of the conveyance; it being the duty of the court to declare an acceptance for him if the conveyance is for his benefit.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 142, 143; Dec. Dig. § 64.*]

5. DEEDS (§ 54*)—DELIVERY—NECESSITY—RESERVATION OF LIFE ESTATE.

Where a grantor reserves a life estate in the property, and its possession and control, the retention of the deed is not inconsistent with delivery, such reservation raising the presumption that the deed is intended to operate immediately as a conveyance of the future estate which is to vest in possession at the termination of the life estate.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. § 116; Dec. Dig. § 54.*]

6. DEEDS (§ 59*)—DELIVERY—RECORD.

Decedent executed a deed as part of a voluntary settlement with complainant, his daughter, and her four minor children, by name, as tenants in common, subject to the dower of decedent's wife, and providing that possession should be given at the grantor's death. The grantor directed the deeds to be sent to the recorder and recorded, and on a suggestion that they should be delivered to the grantee refused and ordered them returned to him, but gave no reason for retaining possession. Complainant knew of the making of the deed to her a few days after it was made, and there were various other conversations between them concerning the matter, indicating that he believed he had parted with title to the property, and that he had no power to change the deed. *Held*, that the recording of the deed was equivalent to a delivery, and that complainant was not entitled to have the deed set aside as a cloud on the title which she claimed by inheritance from her

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

father and a conveyance from his other heirs at law for want of a sufficient delivery.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 136-139; Dec. Dig. § 59.*]

Appeal from Circuit Court, Christian County; A. M. Rose, Judge.

Bill by Amanda J. Hill against Julia I. Kreiger and others. Decree for defendants, and plaintiff appeals. Affirmed.

Hogan & Wallace, for appellant. J. A. Merry and Frank P. Drennan, for appellees.

CARTWRIGHT, J. [1] Delivery of a deed by the grantor, and acceptance by the grantee, is essential to constitute a conveyance. *Wiggins v. Lusk*, 12 Ill. 132; *Kingsbury v. Burnside*, 58 Ill. 310, 11 Am. Rep. 67; *Moore v. Flynn*, 135 Ill. 74, 25 N. E. 844; *Sullivan v. Eddy*, 154 Ill. 199, 40 N. E. 482. The appellant, Amanda J. Hill, relying upon that rule of law and claiming that a deed made by her father to her and her four minor children was inoperative to convey title for want of delivery, filed her bill in the circuit court of Christian county against the appellees, her said children, Julia Irene Kreiger, Dora Belle Scott, Charles Wilbur Parish, and Herschel Orren Parish, asking the court to set aside the deed as a cloud upon the title which she claimed by inheritance from her father and a conveyance from his other heirs at law. Julia Irene Kreiger answered the bill, and the other defendants, who were still minors, answered by a guardian ad litem. The court heard the evidence, which established the following facts:

On November 10, 1906, when the deed was made, Andrew L. Augur was the owner of much land and other property in Christian county, and had four children, John W. Augur, Calvin L. Augur, Mary L. Butcher, and complainant, who was then the wife of Charles Parish. Andrew L. Augur had given to each of his children a gift of \$8,000 in money and determined to also make a gift of land to each of them. Accordingly he made four deeds, each for 120 acres of land, one to John W. Augur, one to Calvin L. Augur, one to Mary L. Butcher, and the fourth to the complainant and her four children, Julia Irene Parish, Dora Belle Parish, Charles Wilbur Parish, and Herschel Orren Parish, as tenants in common. The deeds were made subject to the dower of the grantor's wife, Emily Augur, and provided that possession was to be given at his death. The two sons were present, and the deeds were written by one of them. The grantor directed the deeds to be sent to the recorder and recorded, and upon a suggestion that they should be delivered to the grantees he refused and ordered them returned to him, but he gave no reason for retaining possession of them. He said that he had the deed to the complainant and her children made in

that way so that the complainant's husband, Charles Parish, could not induce her to mortgage the land, and that it would have been all right for her to have had the land except for that reason. The complainant knew of the making of the deed to her and her children a few days after it was made, and her father then told her that he had done something that he did not want to do, and that the reason why he did it was that he did not want her husband to mortgage the land. Charles Parish afterward died, and the complainant then tried to induce her father to make a deed direct to her. In the summer of 1909 she had a deed prepared and tried to persuade him to sign it, but he refused, saying that he did not want to change it; that he did not have his business fixed the way he wanted it, but he would not refix it. He was told the deeds were not good unless delivered to the grantees, but he said he thought they were good enough; that he thought he could not sign the new deed; that he would do it in a minute if he thought he could, but he thought it would not stand; and that he had already conveyed the land. Andrew L. Augur retained possession of the premises, had control of them, and paid the taxes until his death, which occurred on August 15, 1909. A few days before his death his sons took his papers with his consent, and the deeds were found among the papers. He left Emily Augur, his widow, and his four children his only heirs at law. Emily Augur, the widow, afterward died, and the complainant was married a second time, and her name is now Amanda J. Hill. After the death of complainant's father, the deed to her and her children was offered to her, and she at first refused to take it, but was persuaded to do so. The heirs then exchanged deeds between themselves to render effective the deeds to Calvin L. Augur, John W. Augur, and Mary A. Butcher, and those persons conveyed to the complainant all their interest, as heirs at law of their father, in the 120 acres described in the deed in question. When the deed was made, Julia Irene was 16 years old, Dora Belle was 14, Charles Wilbur was 5, and Herschel Orren was 2. Julia Irene attained her majority and was married, and her name is Julia Irene Kreiger. Dora Belle was married to one Scott, and reached the age of 18 years during the pendency of the suit. The court dismissed the bill for want of equity, and the complainant appealed.

While delivery and acceptance are essential to render a deed operative as a conveyance, no particular form or ceremony is required. A delivery may be by acts without words or words without acts, or both, and anything which clearly manifests the intention of the grantor that a deed shall presently become operative and effectual, that he loses control over it and the grantee is to become possessed of the estate, constitutes a

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

sufficient delivery. The test in each case is the intention with which the act or acts relied on as the equivalent or substitute for a formal delivery were done, and each case must therefore be judged by its facts and circumstances. The necessity of so doing and the varying conclusions drawn from different states of facts led Mr. Justice Mulkey, in the case of *Weber v. Christen*, 121 Ill. 91, 11 N. E. 893, 2 Am. St. Rep. 68, to regard it as difficult to fully harmonize the decisions on any well-recognized principle. That is true in the sense that no two states of circumstances are exactly alike, but certain principles upon which the conclusion must rest in each case are well established. In the same case, it was said that in the case of an adult grantee the acknowledging and recording of a deed without his knowledge or consent would not of itself amount to a delivery, but, if from all the circumstances it appears that the grantor by his acts intended to give effect and operation to the deed and relinquish all power and control over it, such acts would amount to a delivery. It may appear from the facts and circumstances that the grantor, in delivering a deed to a recorder to be placed on record, intended to part with his title and that he delivered it for the benefit of the grantee, while under other circumstances no such presumption would arise. In the case of an ordinary deed of bargain and sale it is indispensable, whatever means may be adopted to accomplish its delivery, that the deed passes beyond the dominion and control of the grantor, since both the grantor and the grantee cannot have control of the deed at the same time. *Provar v. Harris*, 150 Ill. 40, 36 N. E. 958. There must also be an acceptance of the conveyance by the grantee, and, where the facts do not show an actual acceptance nor justify a presumption of law that the deed has been accepted, the title does not pass. Accordingly, it is held that the recording of such a deed by the grantor without the knowledge and consent of the grantee does not constitute either a delivery or acceptance. *Brown v. Brown*, 167 Ill. 631, 47 N. E. 1046; *Dagley v. Black*, 197 Ill. 53, 64 N. E. 275. [2] Under some circumstances, the recording of a deed may afford prima facie evidence of delivery and acceptance, but, if the deed creates any liability against the grantee or imposes any obligation upon him, an acceptance cannot rest upon any presumption, but the acceptance must be of an affirmative character. *Thompson v. Dearborn*, 107 Ill. 87.

[3] The deeds made by Andrew L. Augur were voluntary settlements upon the grantees, and in such cases the law presumes much more in favor of a delivery than it does in ordinary business transactions. Such a settlement, when fairly made, is binding on the grantor, unless there be clear and decisive proof that he never parted or intended to part with the possession of the deed, and

it will be regarded as delivered, although he retains it, unless there are other circumstances to show that it was not intended to be absolute. *Otis v. Beckwith*, 49 Ill. 121; *Cline v. Jones*, 111 Ill. 563; *Shults v. Shults*, 159 Ill. 654, 43 N. E. 800, 50 Am. St. Rep. 188; *Brady v. Huber*, 197 Ill. 291, 64 N. E. 284, 90 Am. St. Rep. 161; *Creighton v. Roe*, 218 Ill. 619, 75 N. E. 1073, 109 Am. St. Rep. 310. The rule in such cases results from the presumed intention of the grantor to make his act effectual, the relation of the parties to each other, and the trust and confidence reposed. If the grantee knows of the conveyance, an acceptance will also be presumed, in the absence of other proof, on account of the beneficial nature of the gift. It would naturally be inferred that one would consent to and accept a conveyance for his benefit. The law adds other presumptions where a voluntary conveyance is made to an infant or one under some disability.

[4] The actual delivery to and acceptance by such a grantee is never necessary. An infant is incapable of doing any act in regard to a deed which he may not avoid on reaching his majority, and it was not unnatural for one sustaining the relation which existed between Andrew L. Augur and the infant children of his daughter to preserve the deed for them. *Masterson v. Cheek*, 23 Ill. 72; *Hayes v. Boylan*, 141 Ill. 400, 30 N. E. 1041, 33 Am. St. Rep. 326; *Willenou v. Handlon*, 207 Ill. 104, 69 N. E. 892; *Abrams v. Beale*, 224 Ill. 496, 79 N. E. 671. As an infant or one under disability is incapable of making any formal and valid acceptance, his knowledge of the conveyance is not necessary, and it is the duty of the court to declare an acceptance for him where the conveyance is beneficial. The grantor's intention to presently vest title in the grantee in the case of a voluntary settlement is regarded as of more importance than the mere manual possession of the deed, and in the case of a conveyance to an infant the recording of a deed by the grantor or by his direction is prima facie evidence of a delivery. *Blankenship v. Hall*, 233 Ill. 116, 84 N. E. 192, 122 Am. St. Rep. 149.

[5] Where the grantor reserves a life estate in the property and its possession and control, the retention of the deed is not inconsistent with the idea that delivery was intended and that the deed is operative. *Valter v. Blavka*, 195 Ill. 610, 63 N. E. 499. Such a reservation raises a presumption that the deed is intended to operate immediately as a conveyance of the future estate which is to vest in possession at the termination of the life estate, since there would be no object in reserving a life estate if the deed was not to be effectual as a conveyance or was retained to prevent its taking effect until the death of the grantor. *Baker v. Hall*, 214 Ill. 364, 73 N. E. 351; *Riegel v. Riegel*, 243 Ill. 626, 90 N. E. 1108.

[6] The deed in question was made by An-

drew L. Augur to his daughter and her four infant children as a voluntary conveyance, and is governed by the rules applicable to deeds of that kind. The infant grantees were grandchildren of the grantor, and the presumption would be that his possession of the deed was for their benefit even if he had not retained a life estate. The grantor reserved a life estate and unquestionably intended the deed to become operative at once as a conveyance of the future estate, subject to the dower of his widow, if she should survive him. The possession of the deed by the grantor, who had a life estate in the property, was not inconsistent with the title of the grantees in the deed, and his possession and payments of taxes are referable to such life estate. The grantor believed and understood that the title had passed beyond his control and that he had conveyed the property to the complainant and her minor children. His intention was clearly proved, and the necessary conclusion is that the recording of the deed was intended as a delivery for the benefit of the grantees. The complainant was not entitled to have the deed set aside, and the decree of the court is right and is affirmed.

Decree affirmed.

(250 Ill. 481)

STRAW et al. v. BARNES et al.

(Supreme Court of Illinois. June 20, 1911.)

I. WILLS (§ 452*)—CONSTRUCTION—DISINHERITING NATURAL HEIRS.

Natural heirs are not disinherited by dubious and ambiguous words in a will.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 968-970; Dec. Dig. § 452.*]

II. WILLS (§ 512*)—CONSTRUCTION—HEIRS.

Testator made ample provision for his widow and devised real estate to his "brothers and sisters or their heirs." He knew that a brother and sister of the whole blood were dead, both having children. Four of his brothers and sisters living at the date of will were of the half blood. *Held*, that the will designated as beneficiaries the brothers and sisters and the heirs of the brother and sister who predeceased testator.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1074, 1075; Dec. Dig. § 512.*]

Appeal from Circuit Court, Carroll County; Oscar E. Heard, Judge.

Suit by Reuben B. Straw against Frank J. Barnes and others for the partition of real estate. From a decree of partition excluding certain of defendants, they appeal. Reversed and remanded.

William N. Cronkrite and Joseph H. Vincent, for appellants. Cook & Cook and John Connell, for appellees.

HAND, J. This was a bill in chancery filed by Reuben B. Straw in the circuit court Carroll county against the widow, brothers, sisters, nephews, and nieces and grandchildren of Nathaniel H. Straw, deceased, his father, for the partition of certain real estate situated in Carroll county of which Nathaniel H. Straw died seised. Answers and replications were filed and the cause was referred to a master to take the proofs, and the court entered a decree finding that the brothers and sisters of said Nathaniel H. Straw, deceased, who survived him, took by devise from the testator all of the real estate of which he died seised, with the exception of the real estate which was devised to the widow and one small tract of land which he had purchased subsequent to the date of the will, which was held to be intestate property, and entered a decree for the partition thereof among said surviving brothers and sisters, and the appellants have prosecuted this appeal.

The facts involved in this controversy, in brief, are as follows: Nathaniel H. Straw was a justice of the peace and retired farmer who had lived in Carroll county for many years and had accumulated a considerable estate, consisting, at his death, of real and personal estate of about the value of \$30,000. On the 11th day of December, 1893, he executed a holographic will, which, omitting the formal parts, reads as follows:

"First—I order and direct that my executors hereinafter named pay all my just debts and funeral expenses as soon after my decease as conveniently may be.

"Second—After the payment of such funeral expenses and debts, I give, devise and bequeath to my wife, Susan E. Straw, the house where we live, with all in the house, of every kind and nature, except the money and notes, and the east half of the north-east quarter section 14, town 25, range 6.

"Third—The west half of the north-east quarter section 14, town 25, range 6, to my brothers and sisters or their heirs; also the house and lots in Shannon & Bradshaw's addition to the village of Shannon, being lots (1) one and (4) four in block 4, and also lot (3) three, in block (9) nine, same addition; then \$2,000 to my brothers and sisters or their heirs; then out of the balance, when collected, my wife is to have one-half, the other half to my brothers and sisters or their heirs.

"Lastly, I make, constitute and appoint Reuben B. Straw and Susan E. Straw, my wife, to be executors of this my last will and testament, hereby revoking all former wills by me made."

The testator died on the 11th day of January, 1910, whereupon said will was admitted to probate in the county court of Carroll county, and Reuben B. Straw qualified as executor. At the time of his death Nathaniel H. Straw left him surviving Susan E. Straw, his widow, Reuben B. Straw, Joseph F. Straw, and Emma Sherretts, his brothers and sister of the full blood, Sarah Tures, Lillian Butterfield, Delmar Straw, John Straw, and Mabel Buckingham, his brothers and sis-

ters of the half blood, Ella Shoals, Harry Straw, and Ethel Williams, the son and daughters of William H. Straw, a brother of the full blood, who had predeceased the testator by 25 years, Minerva E. Beaver, Frank Barnes, Robert S. Barnes, and Senada G. Linder, the sons and daughters of Lydia Barnes, a sister of the full blood, who had predeceased the testator about 22 years, and Luella McBride and Rosella McBride, the daughters of Etta McBride, a deceased daughter of William H. Straw, deceased, who died three years prior to the death of Nathaniel H. Straw, as his sole and only heirs at law.

The sole question in this case is as to the proper interpretation and construction to be placed upon the words "my brothers and sisters or their heirs," found in the third paragraph of the will. The eight brothers and sisters—three of the full blood and five of the half blood—were all living at the date of the will and at the date of the death of the testator, and the trial court held that the words "my brothers and sisters or their heirs," found in the third paragraph of the will, only included the brothers and sisters of the testator who survived him, and gave to those brothers and sisters the entire estate, to the entire exclusion of the children of the brother William H. Straw and the children of the sister Lydia Barnes; it being the theory of the decree entered by the court that the children of the deceased brother and sister who had died before the date of the execution of the will and the date of the death of the testator were excluded from a participation in the distribution of the estate of Nathaniel H. Straw, deceased. We do not agree with the construction placed by the court upon those words. To so construe those words is to entirely eliminate from the will the words "or their heirs," unless those words be limited to the children of the brothers and sisters who were living at the date of the execution of the will and who should die between the date of the will and the date of the death of the testator. We see no valid reason for so limiting those words. The testator knew his brother William and his sister Lydia were both dead at the time he made his will, leaving them surviving children. The deceased brother and sister were of the full blood, and we are unable to discover why the testator should make provision, in the event of his death, that his nephews and nieces and grand nephews and nieces of the half blood should enjoy his bounty to the exclusion of his nephews and nieces of the full blood. The children of William and Lydia, upon the death of Nathaniel H. Straw, would be the natural heirs, in part, of the testator and entitled to share in the distribution of his estate, unless by his will he clearly made it manifest that he intended to disinherit them.

[1] Natural heirs will not be disinherited by dubious and ambiguous words. *Olcott v. Tope*, 213 Ill. 124, 72 N. E. 751.

Numerous cases have been cited by the appellees where deceased brothers and sisters and children and their heirs have been held to have been excluded by expressions found in wills which are somewhat analogous to the language found in this will, but none of those cases are directly in point, and we do not think any of them are controlling in this case. No two wills are precisely alike, and the conditions which surround one testator may differ so widely from those which surround another that the conclusion reached in one instance is of little value as a guide in another. *Dee v. Dee*, 212 Ill. 338, 72 N. E. 429.

[2] It is to us obvious that the testator, being childless, after he had made ample provision for his widow, desired that the remainder of his estate should be equally divided among the members of his family—that is, between his brothers and sisters, if living—and, if one or more were dead at the time he made the will or should die subsequent to the date of his will and prior to his death, that the children of such deceased brother or sister should take the parent's share. Had the word "and" been used instead of the word "or," the meaning of the will would, perhaps, be more doubtful and probably susceptible to the construction placed thereon by the chancellor. While the word "or" will sometimes be read as "and," ordinarily it is used as a disjunctive rather than as a conjunction, and in this case the word should, we think, be given its ordinary meaning, the result of which is there are two classes of beneficiaries designated in the will, viz., first, the brothers and sisters of the testator; and, secondly, the heirs of the brother and sister of the testator who predeceased the testator. The construction placed upon the words "my brothers and sisters or their heirs" by the appellants, we are satisfied, when the whole will is considered in connection with the circumstances which surrounded the testator at the time he made the will, does justice to all parties in interest and fully effectuates the intention of the testator as expressed in his will, while the construction contended for by the appellees we think strained and unnatural, and one which works a great injustice to the children of William H. Straw and Lydia Barnes.

From a careful study of this record we have reached the conclusion that the circuit court erred in so construing the will as to exclude the children of William H. Straw, deceased, and the children of Lydia Barnes, deceased, from participating in the division of the estate of Nathaniel H. Straw, deceased.

The decree of the circuit court will therefore be reversed, and the case will be remanded to the circuit court for further proceedings in accordance with the views herein expressed.

Reversed and remanded.

(250 Ill. 512)

CITY OF CHICAGO v. MARSH et al.

(Supreme Court of Illinois. June 20, 1911.)

1. MUNICIPAL CORPORATIONS (§ 439*)—STREET IMPROVEMENTS—SIDEWALKS—SPECIAL ASSESSMENTS.

The basis of assessment of abutting property for sidewalk improvements is the enhanced market value of the property, and not the benefit or detriment to the occupant of the premises in his business, though that may be a proper subject to consider in forming a judgment.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1053; Dec. Dig. § 439.*]

2. MUNICIPAL CORPORATIONS (§ 484*)—SIDEWALK ASSESSMENT—BENEFIT.

In proceedings for confirmation of an assessment on abutting property for a sidewalk improvement, the assessment roll is prima facie evidence that the property has been benefited to the extent of the assessment, and is not overcome by proof that defendant's adjoining property is mainly used for heavy teaming, is located in the jobbing district, is separated from the street by a high board fence, and that a construction of a sidewalk along same would amount to a nuisance rather than a benefit to the property, so far as defendant's use thereof was concerned.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1137-1139; Dec. Dig. § 484.*]

Appeal from Cook County Court; Frank G. Plain, Judge.

Proceeding by the City of Chicago for confirmation of a special assessment for a cement sidewalk on Elston avenue. From a judgment overruling objections filed by Marshall S. Marsh and others, they appeal. Affirmed.

Montgomery, Hart & Smith, for appellants. George A. Mason and William T. Hapeman (Edward J. Brundage, Corp. Counsel of counsel), for appellee.

DUNN, J. This is an appeal from the confirmation of a special assessment for a cement sidewalk six feet wide on Elston avenue, in the city of Chicago. A reversal is asked upon the ground that the property of appellants is assessed more than it will be benefited by the proposed improvement.

The appellants' property is situated on the east side of Elston avenue, bounded on the south by the elevated right of way of the Chicago & Northwestern Railway, and on the easterly side by the North branch of the Chicago river. It has docks on the river and switch tracks connecting with the railroad. Elston avenue in front of the property is a granite-paved thoroughfare. The neighborhood is devoted almost wholly to manufacturing and jobbing in heavy materials. The appellants' property, being the only property in the vicinity having combined water and rail shipping facilities and abutting upon a street mainly used for heavy teaming, is especially adapted for heavy manufacturing or jobbing in such materials as iron, coal, and lumber, and is now devoted to

those uses. The surface of the property is from two to five feet below the level of Elston avenue. A high board fence extends along the entire front of the property next to the sidewalk. There are three team openings in the fence, through which heavy traffic is constantly moving. The appellants introduced testimony that the improvement would not benefit the property, but would injure it, by attracting many more pedestrians to that side of the street, who would be in the way of the teaming, and would be a nuisance and bother, and would be getting hurt; that the walk, if built as proposed, would naturally crack and break and leave bad places; that the ordinance provided for no retaining wall, and the weather would cause the walk to settle and break; that it would be injured by reason of the heavy traffic across it, and that no cement sidewalk could stand the strain of this heavy hauling. The appellee's superintendent of sidewalks testified that in his opinion the property would be benefited not less than \$2 a front foot.

[1] The basis of the appellants' objections is that the increased use by the public of the sidewalk will interfere with the use of it by appellants' tenants, and thus be a detriment instead of an advantage to the business conducted on their property. This view cannot be accepted as conclusive evidence that the property itself would receive no benefit from the proposed improvement. The basis of the assessment is the enhanced market value of the property. The benefit or detriment to the occupant of the premises in his business cannot determine that question, though it may be proper for consideration in forming a judgment. *Clark v. City of Chicago*, 229 Ill. 363, 82 N. E. 370; *Jones v. City of Chicago*, 206 Ill. 374, 69 N. E. 64.

[2] The assessment roll was prima facie evidence that the property was benefited to the extent of the assessment on the true legal theory. *Chicago Union Traction Co. v. City of Chicago*, 207 Ill. 544, 69 N. E. 849. We cannot say that this evidence was overcome by the testimony on behalf of appellants, or that the judgment is palpably against the weight of the evidence. The judgment must therefore be affirmed. *Clark v. City of Chicago*, 214 Ill. 318, 73 N. E. 358; *Morton v. City of Chicago*, 228 Ill. 201, 81 N. E. 847.

Judgment affirmed.

(250 Ill. 404)

KLINE et al. v. BARNES et al.

(Supreme Court of Illinois. June 20, 1911.)

1. STATUTES (§ 124*)—TITLE—MATTER GERMANE TO TITLE.

Act June 5, 1909 (Laws 1909, p. 171), is entitled "An act to give circuit courts of this state, and the superior courts of Cook county, in term time, and the judges thereof in vacation, concurrent jurisdiction with the county courts, in all matters pertaining to the juris-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes

diction of farm drainage districts, and farm drainage and levee districts, and to [repeal] all acts," etc. *Held*, that a provision authorizing appeals from final orders, judgments, and decrees of other county or circuit courts in such proceedings direct to the Supreme Court was germane to the matter specified in the title of the act, which was, therefore, not objectionable as containing matter not expressed in its title.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 184-186; Dec. Dig. § 124.*]

2. DRAINS (§ 16*)—DRAINAGE DISTRICT—DISSOLUTION PROCEEDINGS—JURISDICTION—APPEAL.

Act June 5, 1909 (Laws 1909, p. 171), regulating farm drainage, provides that circuit courts and the superior courts of Cook county shall have concurrent jurisdiction with county courts in all matters pertaining to the organization of farm drainage districts and farm drainage and levee districts, and the operation thereof, and provides for appeals from either the county or circuit courts direct to the Supreme Court. *Held*, that such act included proceedings for the dissolution of drainage districts, so that, when an order was granted by a county court denying a petition for such dissolution, an appeal lay direct to the Supreme Court, and not to the circuit court.

[Ed. Note.—For other cases, see Drains, Cent. Dig. §§ 4, 5; Dec. Dig. § 16.*]

Appeal from Circuit Court, Logan County; T. M. Harris, Judge.

Petition by John W. Kline and others for the dissolution of a drainage district, to which Charlotte L. Barnes and others file objections. From an order denying and dismissing the petition, objectors Kline and Bates appealed to the circuit court, and from a judgment dismissing that appeal said appellants again appeal. Affirmed.

S. L. Wallace, Donald McCormick, Peter Murphy, and Humphrey & Anderson, for appellants. King & Miller and Beach & Trapp, for appellees.

FARMER, J. Appellants, John W. Kline and E. W. Bates, were two of a large number of persons who signed and presented to the county court of Logan county a petition for the dissolution of the Salt Creek special drainage district, in said Logan county. The petition for dissolution of the district was filed under the provisions of the act of June 4, 1889 (Laws 1889, p. 117), which gives the county court jurisdiction to dissolve a drainage district upon a petition signed by not less than four-fifths of the adult landowners, who own not less than three-fourths in area of the land assessed, upon due notice being given as required by the act. A hearing was had upon the petition, and at the December term of the county court a judgment was entered denying the petition and dismissing the same. Kline and Bates, two of the petitioners, appealed from the judgment of the county court to the circuit court of Logan county. In the circuit court appellees moved to dismiss the appeal, on the ground that the circuit court had no jurisdiction to entertain the appeal, and that it should have

been prosecuted directly to the Supreme Court. The circuit court sustained the motion and dismissed the appeal. From that judgment, Kline and Bates have prosecuted an appeal to this court.

[1] If the circuit court had no jurisdiction to entertain the appeal, the judgment of that court was right, and must be affirmed. By an act of the Legislature approved and in force June 5, 1909, entitled "An act to give circuit courts of this state, and the superior courts of Cook county, in term time, and judges thereof in vacation, concurrent jurisdiction with the county courts, in all matters pertaining to the organization of farm drainage districts, and farm drainage and levee districts, and the operation thereof, and to [repeal] all acts in conflict herewith" (Laws of 1909, p. 171), circuit courts and the superior courts of Cook county were given concurrent jurisdiction with county courts "in all matters pertaining to the organization of farm drainage districts, and farm drainage and levee districts, and the operation thereof; and when proceedings under this act are pending in the circuit court, such court shall have power to make all necessary orders affecting the district or its officers as fully as is now vested in the county courts," and it is made the duty of the clerk of the circuit court to perform the same acts required of the clerk of the county court when the proceedings are pending in the county court. Section 3 of the act is as follows: "Appeals may be taken from the final orders, judgments and decrees from either of the county or circuit courts to the Supreme Court." If that act is a valid act, then it is clear the circuit court had no jurisdiction to entertain the appeal, and it should have been prosecuted from the county court directly to this court.

Appellants say it is doubtful whether the third section of the act is constitutional, in that it provides for appeals to the Supreme Court, which subject is not mentioned or referred to in the title of the act. The rule is that all doubts or uncertainties as to the constitutionality of an act must be resolved in favor of its validity. *Claffy v. Chicago Dock Co.*, 249 Ill. 210, 94 N. E. 551. But we do not consider the validity of section 3 even doubtful. It is germane to the subject expressed in the title. *Fleischman v. Walker*, 91 Ill. 313. The Appellate Court act (Hurd's Rev. St. 1906, c. 37, §§ 18-35a) is entitled "An act to establish Appellate Courts," but it contains provisions for appeals to the Supreme Court. The municipal court act of the city of Chicago is entitled "An act in relation to a municipal court in the city of Chicago" (Hurd's Rev. St. 1906, c. 37, §§ 264-330), and contains provisions for appeals to and writs of error from the Appellate and Supreme Courts. Such provisions are neces-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

sary for the accomplishment of the legislative purpose, and do not violate the constitutional provision that no act shall embrace more than one subject, and that shall be expressed in the title. "An act may contain many provisions and details for the accomplishment of the legislative purpose, and if they legitimately tend to effectuate that object the act is not contrary to the constitutional provision." *People v. McBride*, 234 Ill. 146, 84 N. E. 865, 123 Am. St. Rep. 82.

[2] It is further contended by appellants that the act of 1909 does not confer upon circuit courts concurrent jurisdiction with county courts in proceedings for the dissolution of drainage districts, and that appeals from orders in that class of proceedings are not governed by the act of 1909. We are of opinion said act was intended to be, and is, broad enough to include proceedings for the dissolution of drainage districts. In *Beatty v. Zimmerman*, 249 Ill. 180, 94 N. E. 110, this court entertained an appeal direct from the county court from a judgment of said court dismissing a petition to dissolve a drainage district; and in *Boston v. Kickapoo Drainage District*, 244 Ill. 577, 91 N. E. 707, we entertained a writ of error to review a judgment of the county court rendered October 1, 1909, denying a petition, filed under the provisions of section 44 of the levee act (*Hurd's Rev. St. 1909*, c. 42), to abandon and abolish a district. While it is not so stated in *Myers v. Commissioners of Newcomb Special Drainage District*, 245 Ill. 140, 91 N. E. 1070, the fact is in that case the judgment the writ of error was sued out to review was rendered before the passage of the act of 1909.

In our opinion the circuit court properly dismissed the appeal, and its judgment is affirmed.

Judgment affirmed.

(250 Ill. 427)

PEOPLE v. WALKER.

(Supreme Court of Illinois. June 20, 1911.)

1. CRIMINAL LAW (§ 1142*)—APPEAL—RECORD—PRESUMPTION.

It must be presumed, in support of the recital of the record that defendant was "fully advised by the court of the effect of rendering said plea," that the court discharged its duty as to explaining to him, before receiving such plea, the consequence of entering a plea of guilty.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 3014-3037; Dec. Dig. § 1142.*]

2. CRIMINAL LAW (§ 274*)—PLEA OF GUILTY—WITHDRAWAL—DISCRETION.

It was an abuse of discretion not to vacate the judgment on a plea of guilty in a bigamy case, and permit defendant to withdraw his plea of guilty and allow him to submit his case to the jury; he making affidavit that he did so on the advice of counsel, on the assurance of such counsel that he had arranged with the state's counsel that the bigamy charge was to

be dropped, he having pleaded to the charge of adultery.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 633; Dec. Dig. § 274.*]

Error to Criminal Court, Cook County; Marcus Kavanagh, Judge.

Fred T. Walker was convicted of bigamy, and brings error. Reversed, and remanded for further proceedings.

A. L. Gettys, for plaintiff in error. W. H. Stead, Atty. Gen., John E. W. Wayman, State's Atty., and W. Edgar Sampson (Frederick Burnham, of counsel), for the People.

VICKERS, J. Fred T. Walker has sued out a writ of error to the criminal court of Cook county to bring into review the record of his conviction in said court upon the charge of bigamy. The record shows that when the plaintiff in error was arraigned upon said charge he entered a plea of not guilty. Afterwards, on January 31, 1911, he withdrew his plea of not guilty and entered a plea of guilty. The judgment of the court contains the following recital and order in regard to the plea of guilty: "And said defendant, by leave of court, now here withdraws his plea of not guilty, heretofore rendered to the indictment in this case, and for a plea thereto says that he is guilty in manner and form as charged therein; and, he being fully advised by the court of the effect in rendering said plea, he still persists therein, and the court orders said plea to be accepted and entered of record against the said defendant." On the 4th day of February, following the day that the judgment was entered, plaintiff in error entered a motion to vacate the sentence and judgment, and for leave to withdraw his plea of guilty, which motion was overruled, to which plaintiff in error preserved an exception. A motion for a new trial was then made and overruled. The question presented for the consideration of this court is whether the trial court erred in denying the motion to vacate the judgment and to permit the plaintiff in error to withdraw his plea of guilty.

Upon the hearing of the motion to vacate in the criminal court plaintiff in error submitted three affidavits—one made by himself, one by his mother, and one by his grandmother. The affidavit of the plaintiff in error is as follows: "That he was arrested some time in November last on two charges—one for adultery and one for bigamy; that he engaged a lawyer by the name of William Schreider; that the said lawyer took charge of the case, and was paid a retainer in said case; that he relied entirely upon the advice of counsel, and did everything that he told him to do; that the said lawyer said to this affiant that he had seen the state's attorney and talked with him; and that he told this affiant that, if he would plead guilty to adul-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

tery, the bigamy charge would be dropped. Thereupon, acting upon the advice of counsel, he did plead guilty to adultery before his honor, Judge Goling, when, as a matter of fact, he is now advised by counsel that he was not guilty of the charge; that the plea was entered solely for the purpose of carrying out the promise of his attorney, and, as the attorney told him, the promise of the state's attorney that the bigamy charge would be dropped. The said attorney even went so far as to say that the said attorney had talked with him about the case, and had agreed that he should get a divorce from the said Annie Meyers, if there was any marriage at all contracted. This affiant further states that there was some kind of a ceremony performed, but he does not believe that it was a valid ceremony. At any rate, this affiant never cohabited with the said Annie Meyers, and never lived with her as her husband; that at the time the ceremony took place the said Annie Meyers insisted upon it being performed, and threatened him that if he did not perform the ceremony, by implication and other conduct, that she would have him arrested, because she said that she was pregnant with child; that the said ceremony took place without lawful authority. This affiant further says that this is the first time he was ever arrested; that he is unaccustomed to court and court practices; that he did not want to do anything, except as he was advised by counsel; that while he remained in jail, from November until the day of his trial, on the said bigamy charge, which occurred on January 31, 1911, he was very seldom visited in jail by his attorney, and only saw him about three or four times; that the said attorney said that he had everything arranged, and that everything would be all right, and the bigamy case would be dropped and stricken from the docket. Thereafter, on the day of the trial, the said attorney came rushing into the prisoner's room and said: 'You had better plead guilty. If you will plead guilty, you will soon get out of it, and after you serve your sentence on the adultery conviction then this case will be dropped. Then you will be entirely out of your trouble.' This affiant further says that, when the case was called before your honor, he did act upon the advice of his counsel, but he was so terrified and was so weak that he was almost unconscious of what was going on before him; that, while the court said to him that he had the authority to send him to the penitentiary, still he did not understand the court would do it, or the length of time he would or could send him there, and he did not realize the import of the court's declaration, as he was under the impression that the secret arrangement with the state's attorney, as he was informed by his attorney, would supplement or overrule the sentence of the court; that he believes that he has a good defense on the merits of the case, and if it

had not been for his attorney acting as he did, and in collusion with other people, he would have a trial by the jury, and that when he pleaded guilty to bigamy he did it, not with the understanding he would be sent to the penitentiary, but that he would be free ultimately and allowed his liberty; that his counsel did not advise him that there was nothing else the court could do on a plea of guilty but to sentence him to the penitentiary, but, on the other hand, gave him to understand that the court had authority to save him from the penitentiary on a plea of guilty; that he did not fully and fairly understand the consequences of such plea and the waiver of rights thereunder. This affiant further says that he is the defendant in this entitled cause, and that he makes the foregoing affidavit for himself, and also says that the court did not disclose to him that the jury could do no more to him if it found adversely to him than the court would have to do if he plead guilty to the said charge of bigamy."

The affidavit of plaintiff in error's mother, Mrs. Helfrich, states that she employed Schreider to defend her son and paid him a large retainer fee, and that said Schreider told affiant several times that he had everything arranged so that by pleading guilty to the charge of adultery the charge of bigamy was to be dropped. She states that the plaintiff in error is 22 years of age, that he was married when only about 19 years of age, and that he had never had anything to do with court proceedings before the present charges were brought against him. Mrs. Hayes, the grandmother, testifies that she was in court at the time the plaintiff in error entered his plea of guilty; that she had been holding the plaintiff in error in her arms just before he was called to the bar of the court, and that he was so terrified and bewildered that he did not know what he was doing, and that she could feel that when he was in her arms he was shaking like a man with palsy; that he could not say anything and was not able to articulate. She testifies that she asked his attorney why he did not have a jury trial, and he said that it was for Walker's interest.

There was no counter affidavit submitted, and the foregoing statement is, in substance, the evidence introduced on the hearing of the motion.

[1] Plaintiff in error insists that the record does not show that the court fully explained to the accused the consequence of entering a plea of guilty before receiving such plea and rendering judgment thereon. The bill of exceptions does not purport to show what was said to the plaintiff in error by the court at the time the plea of guilty was entered. The record simply shows that plaintiff in error was "fully advised by the court of the effect of rendering said plea." It must be presumed, in support of this recital, that the court discharged its duty.

Marx v. People, 204 Ill. 248, 68 N. E. 436.

[2] But independent, entirely, of this question, it was a matter within the sound legal discretion of the judge to vacate the judgment, and permit the plaintiff in error to withdraw his plea of guilty, and allow him to submit his case to a jury, if it appeared that such plea had been entered unadvisedly or through a misapprehension, in consequence of the misrepresentation of his counsel. If, as he testifies in his affidavit, his attorney had assured him that he had arranged with the state's attorney that the bigamy charge was to be dropped, it is not unreasonable that the plaintiff in error would follow the advice of his counsel and enter a plea of guilty, expecting and believing that in some way he would not be imprisoned on said charge. In the case of Krolage v. People, 224 Ill. 456, on page 460, 79 N. E. 570, on page 571, this court said: "The withdrawal of the plea of guilty should not be denied in any case, where it is evident that the ends of justice will be subserved by permitting the plea of not guilty in its stead. The least surprise or influence causing him to plead guilty when he had any defense at all should be sufficient cause to permit a change of the plea from guilty to not guilty." The case from which the quotation above is made is in some respects very similar to the one at bar, and the conviction was reversed because the court refused to permit the withdrawal of a plea of guilty. In our opinion there was an abuse of the discretion vested in the trial court in refusing to permit plaintiff in error to withdraw his plea of guilty.

The judgment of the criminal court of Cook county is reversed, and the cause remanded for further proceedings in accordance with the views herein expressed.

Reversed and remanded.

(250 Ill. 457)

GODDARD et al. v. LANDES.

(Supreme Court of Illinois. June 20, 1911.)

1. HOMESTEAD (§ 143*)—WIDOW'S INTEREST—ASSIGNMENT.

A widow is entitled to an allowance of \$1,000 for her homestead interest, where the homestead is worth more than that amount, and is not susceptible of division, and where heirs or devisees seek to compel her to vacate.

[Ed. Note.—For other cases, see Homestead, Cent. Dig. § 270; Dec. Dig. § 143.*]

2. JUDGMENT (§ 736*)—CONCLUSIVENESS—MATTERS NOT CONCLUDED.

A decree on a bill to have a widow's homestead interest assigned to her does not affect her rights under an alleged antenuptial contract, settling all her rights in decedent's estate, excepting her homestead interest, where no relief was asked concerning such contract, and the record does not refer to it.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1264, 1265; Dec. Dig. § 736.*]

Farmer, J., dissenting.

Appeal from Circuit Court, Wabash County; E. E. Newlin, Judge.

Bill by Henry T. Goddard and others against Bertie A. Landes. From the decree, defendant appeals. Affirmed.

H. M. Phipps, George B. Gillespie, and A. M. Fitzgerald, for appellant. E. B. Green, P. J. Kolb, and George P. Ramsay, for appellees.

VICKERS, J. The trustees under the last will and testament of Silas Z. Landes and the heirs of testator filed a bill in the circuit court of Wabash county against Bertie Landes, the surviving widow of testator, for the purpose of having the homestead of the widow set off and assigned to her, with an alternative prayer that, in case the homestead premises were of greater value than \$1,000 and so situated that the homestead could not be assigned to her, the cash value of the homestead interest be ascertained, and that the trustees under the will be authorized to pay the widow the value of her homestead estate, and that thereupon she be required to vacate and surrender possession to the persons entitled to the property under the will. The bill contains an averment that, prior to the marriage of the testator and the defendant, an antenuptial contract was entered into between the parties, by which all property rights of the widow in the testator's estate were settled, except her statutory right to a homestead. The bill alleges that prior to the commencement of the suit the trustees tendered the widow \$450 for her homestead, which she refused to accept. The widow filed an answer to the bill, in which she denied all of the allegations, except the death of the testator. The case was heard upon the bill, answer, and proofs, in open court, and a decree was rendered finding that the bill was true and appointing commissioners to assign the widow's homestead. The commissioners reported that they had examined the premises and found the same not susceptible of division, and valued the premises located on Inlet No. 491, in the city of Mt. Carmel, at \$15,000. This report was approved by the court. The age of the widow was found to be 54 years, and the value of her homestead was fixed at \$598.79, which was directed to be paid to her by the trustees, and the decree directed the widow to surrender possession of the homestead within 50 days from the date of the decree. The widow excepted to the decree of the court and has perfected an appeal therefrom to this court.

[1] The sole question involved in the case below, and the only one open for consideration in this court, is the amount that should be paid to the widow for her homestead estate. The precise question here involved was recently before this court in the case of

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Powell v. Powell, 247 Ill. 432, 93 N. E. 432, and it was there decided that, when the heirs or devisees sought to compel the surviving husband or wife to vacate an indivisible homestead which exceeded \$1,000 in value, a court of equity should require the heirs or devisees to pay the person entitled to such homestead \$1,000. The case at bar falls within the rule announced in the **Powell Case** and must be controlled by what was there decided. We do not deem it necessary to repeat the reasons or review the authorities upon which the **Powell Case** rests. The court below erred in requiring the widow to vacate the premises and surrender her homestead upon the payment of \$598.79.

[2] There is an allegation in the bill respecting the execution of the antenuptial contract, and a denial thereof in the appellant's answer. No evidence was introduced by either party on this issue, except the antenuptial contract. No relief was prayed in regard to such contract, and there is no reference to it in the record. The appellant suggests, both in her brief and in the oral argument of her counsel in this case, that she desires to save whatever right she may have to attack the validity of the antenuptial contract for fraud and misrepresentation. No question relating to the antenuptial contract was involved in this proceeding. The bill conceded that the appellant is entitled to a homestead in the premises in question, and the reference to the antenuptial contract in the bill seems to have been merely for the purpose of showing that the homestead right was excepted from the terms of the agreement. No adjudication of the validity of the antenuptial contract was necessary or proper under the issues in this case.

For the error indicated, the decree of the circuit court of Wabash county is reversed, and the cause remanded.

Reversed and remanded.

FARMER, J., dissents.

(250 Ill. 423.)

CITY OF CHICAGO v. CUMMINGS.

(Supreme Court of Illinois. June 20, 1911.)

MUNICIPAL CORPORATIONS (§ 444*)—PUBLIC IMPROVEMENTS—DESCRIPTION OF PROPERTY—SPECIFICATION AS TO MATERIALS AND WORK.

An ordinance for the improvement of a certain street provided for concrete walks, and that the sidewalk space should be graded by cutting down or filling up the surface of the ground to 14 inches below grade, and that the necessary filling should be done with earth or other material. The ordinance also provided that abutting owners might construct the sidewalk in front of their property, if the work complied with the requirements of the ordinance. The objector's property was 9 feet below grade, and in order to construct the sidewalk a retaining wall or an embankment would be nec-

essary. *Held*, that as the ordinance did not specify how such retaining walls should be made, or of what materials, or whether an embankment should be used instead, the assessment for the improvement provided for in the ordinance was void.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1064; Dec. Dig. § 444.*]

Appeal from Superior Court, Cook County; Theodore Brentavo, Judge.

Proceeding by the City of Chicago to improve certain property and confirm a special assessment. David M. Cummings objected. From a judgment confirming the assessment, objector appeals. Reversed.

William J. Donlin, for appellant. George A. Mason and William T. Hapeman (Edward J. Brundage, Corp. Counsel, of counsel), for appellee.

HAND, J. This was an application for the confirmation of a special assessment, sought to be levied under the provisions of the local improvement act for the purpose of constructing a 16-foot concrete sidewalk on each side of Ninety-Second street, between South Chicago avenue and Harbor avenue, in the city of Chicago. The appellant, who was the owner of 100 feet of unimproved property on the line of the improvement, appeared and filed objections to confirmation, which objections were overruled, and the assessment confirmed, and an appeal has been prosecuted to this court.

The sidewalk was to occupy the space between the curb lines and the street lines, and the ordinance provided the sidewalk space should be graded by cutting down or filling up the surface of the ground to 14 inches below grade, and that wherever filling was necessary it should be done with earth or other material equally as good for filling purposes, and upon the filling there was to be placed a layer of cinders, or other material equally as good, 9 inches thick, and upon this should be laid a 5-inch layer of concrete, the work to be done under the supervision of the board of local improvements. The evidence showed that the appellant's property was about 9 feet below grade, and that in order to hold the filling in place it would be necessary to construct a retaining wall upon his lot line 9 feet high, or to construct a berme or embankment 9 feet high and 12 feet wide at the base, which berme or embankment would rest wholly upon appellant's property.

It is first contended that, as the ordinance does not provide for the construction of the retaining wall or berme, the ordinance is not sufficiently specific upon which to base a special assessment to pay for the construction of the improvement. We are of the opinion this objection is a valid one. At the foundation of every special assessment there must rest

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.

a valid ordinance, and one that specifically describes the nature, character, and locality of the proposed improvement, and no valid special assessment can be predicated upon an ordinance which omits from its terms essential features of the improvement. *Washington Ice Co. v. City of Chicago*, 147 Ill. 327, 35 N. E. 378, 37 Am. St. Rep. 222; *Title Guarantee & Trust Co. v. City of Chicago*, 162 Ill. 505, 44 N. E. 832. It is obvious that the construction of a retaining wall or berme 9 feet high upon the lot line of appellant's property would be attended with much expense, and if a berme were constructed it would necessarily deprive the appellant of the use of a considerable portion of his property. If, however, it were held that the ordinance was sufficiently specific in the foregoing particular, then it would be necessary for the board of local improvements to determine what sort of a retaining wall or berme should be constructed in front of appellant's property. If a retaining wall were decided upon, it might be constructed of stone, concrete, brick, or wood; and if a berme were constructed, earth, gravel, crushed stone, or other similar material might be used, the cost of construction depending entirely upon the material used in building the berme. This would all rest in the discretion of the board of local improvements. In one part of the improvement a stone wall might be determined by the board to be necessary, while upon other parts the board might determine that brick, wood, or earth would answer the purpose. The general rule is that an ordinance must describe the improvement, so that the property owner may know from its terms what he is to get when the improvement is completed, and what sort of an improvement his property is being assessed to construct. We think the ordinance should have specified the character of the wall or berme to be constructed and the material to be used in its construction, and that the ordinance was defective in failing so to do.

The ordinance also provided the property owners whose property the sidewalk adjoins should have the right to construct the sidewalk in front of their property within 40 days, "provided the work so to be done shall in all respects conform to the requirements of the ordinance." It is clear that the appellant could not avail himself of that right in this instance, as he could not know from the ordinance what would be a compliance with the terms of the ordinance, as the character of the improvement rests, to a large extent, in the discretion of the board of local improvements.

We are of the opinion the trial court erred in confirming the special assessment against the property of the appellant.

The judgment of the superior court will be reversed.

Judgment reversed.

(260 Ill. 540)

THURSTON et al. v. TUBBS.

(Supreme Court of Illinois. June 20, 1911.)
INFANTS (§§ 78, 90*)—GUARDIAN AD LITEM—
NECESSITY—APPEARANCE BY ATTORNEY.

In a suit to quiet title against an infant defendant, his appearance by a solicitor, without appointment of a guardian ad litem to represent him, was insufficient.

[Ed. Note.—For other cases, see *Infants*, Cent. Dig. §§ 195-207, 273-276; Dec. Dig. §§ 78, 90.*]

Error to Circuit Court, Marion County; A. M. Rose, Judge.

Action by Wilson W. Thurston and others against Elmer Tubbs. Judgment for plaintiffs, and defendant brings error. Reversed and remanded.

William G. Wilson and Samuel N. Finn, for plaintiff in error. E. D. Telford, for defendants in error.

VICKERS, J. Wilson W. Thurston and Daisy V. Thurston filed a bill in equity in the circuit court of Marion county to quiet their title to certain lands therein described, and praying that an alleged misdescription contained in the second paragraph of the last will and testament of Vickerman Robinson be declared a cloud upon complainants' title and as such removed therefrom. Elmer Tubbs was made the sole defendant to the bill and filed an answer thereto, signed by himself, "by W. G. Wilson, Solicitor for Defendant." The cause was heard upon evidence reported by the master in chancery and other evidence heard in open court, and a decree was rendered in accordance with the prayer of the bill. To reverse this decree Elmer Tubbs has sued out this writ of error, and the record has been brought to this court for review.

We are of the opinion that there is an error in this record which requires a reversal of the decree below, without regard to the real merits of the controversy. It appears, both from the bill and answer, that plaintiff in error is a minor under the age of 21 years. He was regularly served with summons and appeared by attorney and answered the bill. There was no prayer in the bill for the appointment of a guardian ad litem, and none was appointed. The minor was directly interested in the subject-matter of the action, as will appear from the following statement of the facts: Vickerman Robinson, a widower of advanced years, residing in Marion county, was in his lifetime the owner of a farm of 280 acres. He had seven children. In 1896 he made deeds purporting to convey 40 acres of land to each of his said children. These deeds were properly executed and left in the hands of William Jones, a notary public, who had prepared said deeds, with instructions from the grantor "to keep them until after the death of the grantor and then deliver them to the parties named as gran-

tees." A few years afterwards Vickerman Robinson married. In 1900 he executed a will, by which he gave his wife a life estate in the S. E. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$ of section 35, township 3, range 3 E., with remainder in fee to Elmer Tubbs, a son of Florence May Tubbs and grandson of the testator. The south half of the above-described 40 acres was included in a deed made by the testator to his son, Clarence Robinson, and the north half thereof was in the deed made to his daughter, Daisy, now Daisy Thurston. Clarence Robinson conveyed the south half of said 40 acres to Wilson W. Thurston, husband of Daisy Thurston, who were complainants below and are defendants in error here. It will thus be seen that plaintiff in error claimed to be the owner in fee, subject to the life estate of the widow of the testator, of the S. E. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$ of section 35, while defendants in error claim the same lands under the deeds executed by Vickerman Robinson. Questions arising out of these conflicting claims of title were decided by the court below and have been argued in this court.

Since the failure of the court to appoint a guardian ad litem for plaintiff in error to represent him and protect his rights in the premises requires a reversal of the decree, we do not deem it proper to express any opinion upon any question relating to the merits of this case until plaintiff in error has had an opportunity to be heard by a guardian ad litem appointed by the court to properly protect his interests. The record should affirmatively show that a guardian ad litem was appointed to appear and answer for infant parties; otherwise, the judgment or decree will be reversed on error or appeal. 22 Cyc. 636; *Essington v. Neill*, 21 Ill. 139; *Rhoads v. Rhoads*, 43 Ill. 239; *Hall v. Davis*, 44 Ill. 494; *Roodhouse v. Roodhouse*, 132 Ill. 360, 24 N. E. 55, 22 Am. St. Rep. 539; *Ames v. Ames*, 151 Ill. 280, 37 N. E. 890; *Phillips v. Phillips*, 185 Ill. 629, 57 N. E. 796; *Binns v. La Forge*, 191 Ill. 598, 61 N. E. 382; *White v. Kilmartin*, 205 Ill. 525, 68 N. E. 1086.

For the error of the court in proceeding to hear said cause and rendering a final decree therein against the minor defendant without the appointment of a guardian ad litem, the decree of the circuit court is reversed, and the cause remanded.

Reversed and remanded.

(250 Ill. 433)

CLAYTON v. CLAYTON et al.

(Supreme Court of Illinois, June 20, 1911.)

1. EXECUTORS AND ADMINISTRATORS (§ 344*)—SALE OF LAND—ADVERSE CLAIMS—JURISDICTION.

Under Administration Law, § 101, as amended in 1887 (Hurd's Rev. St. 1909, c. 3, § 100), authorizing the probate court, in directing sale of decedent's real estate, to remove

clouds from the title to such real estate, etc., the court can, under a petition for an order of sale determine the validity of a quitclaim deed from one heir to another, and the validity of an attachment lien.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 1442, 1443; Dec. Dig. § 344.*]

2. COURTS (§ 219*)—APPELLATE JURISDICTION—FREEHOLDS.

A decision, under a petition for an order to sell decedent's real estate to pay debts, that a quitclaim deed from decedent's son to the widow of his interest in the estate was valid as against an attaching creditor of the son, involves a freehold as affecting the Supreme Court's jurisdiction of a writ of error.

[Ed. Note.—For other cases, see *Courts*, Cent. Dig. §§ 557-573; Dec. Dig. § 219.*]

3. FRAUDULENT CONVEYANCES (§ 271*)—VACATION—PROOF REQUIRED.

One is not entitled to vacation of a conveyance as having been made to delay creditors without proving that he was a creditor.

[Ed. Note.—For other cases, see *Fraudulent Conveyances*, Cent. Dig. § 796; Dec. Dig. § 271.*]

4. JUDGMENT (§ 682*)—CONCLUSIVENESS—PARTIES BOUND.

The record in an attachment suit does not bind a stranger to the suit in a subsequent proceeding wherein plaintiff in attachment claims that a quitclaim deed from the debtor to such person was in fraud of the debtor's creditors.

[Ed. Note.—For other cases, see *Judgment*, Cent. Dig. §§ 1203-1205; Dec. Dig. § 682.*]

5. FRAUDULENT CONVEYANCES (§ 272*)—SUIT TO VACATE—PROOF REQUIRED.

One seeking to vacate a conveyance as in fraud of creditors must prove that the grantor was insolvent when the deed was made.

[Ed. Note.—For other cases, see *Fraudulent Conveyances*, Cent. Dig. § 804; Dec. Dig. § 272.*]

6. FRAUDULENT CONVEYANCES (§ 298*)—EXISTENCE OF FRAUD—EVIDENCE—SUFFICIENCY.

Evidence held insufficient to show that a quitclaim deed to the grantor's mother was made with fraudulent intent.

[Ed. Note.—For other cases, see *Fraudulent Conveyances*, Cent. Dig. §§ 892-895; Dec. Dig. § 298.*]

Dunn, Cartwright, and Hand, JJ., dissenting in part.

Error to Probate Court, La Salle County; A. T. Lardin, Judge.

Petition by Julia A. Clayton, administratrix, against William R. Clayton and others, for an order to sell real estate. Decree for petitioner, and the named defendant brings error. Affirmed.

I. I. Hanna, for plaintiff in error. S. P. Hall and Butters & Armstrong, for defendant in error.

VICKERS, J. Julia A. Clayton, as administratrix of the estate of her deceased husband, John S. Clayton, filed a petition in the probate court of La Salle county for the purpose of obtaining an order to sell certain real estate of which her husband died seised, to pay the debts of the estate. The petition recites that John S. Clayton, who in his lifetime resided at Utica, died May 14, 1909,

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes

leaving the petitioner, his widow, and Grant F. Clayton, Charles S. Clayton, and Glennie C. Percy, his children and only heirs at law; that decedent owned, at the time of his death, a house and lot in Utica and 198 acres of land in La Salle county; that the debts of the estate amount to \$7,833.15, exclusive of the expense of administration, and the personal assets amount to \$3,046.50. The petition alleges that since the death of John S. Clayton, on May 19, 1909, Grant F. Clayton and Sarah Clayton, his wife, by a quitclaim deed, for a valuable consideration, conveyed all of their interest in said real estate to the petitioner, Julia A. Clayton. William R. Clayton, a brother of the decedent and a party defendant to the petition, filed an answer, in which he states that he is a creditor of Grant F. Clayton, and that he had sued out a writ of attachment from the circuit court of La Salle county against said Grant F. Clayton for \$4,619.30, and caused the same to be levied upon all interest of said Grant F. Clayton in the real estate described in the said petition, June 15, 1910. In his answer William R. Clayton charges that the quitclaim deed from Grant F. Clayton and wife to Julia A. Clayton, the mother of Grant F. Clayton, was made without any valuable consideration, for the purpose of hindering and delaying the creditors of said Grant F. Clayton in the collection of their debts, and that said deed was therefore fraudulent and void as to the creditors of the grantor, and prayed that the title to a one-third interest in the said real estate, subject to the debts of the decedent and the widow's homestead and dower, might be found to be in said Grant F. Clayton, and that the attachment writ be held to be a valid lien on the interest of said Grant F. Clayton. The only controversy before the probate court was the question raised by the answer of William R. Clayton in regard to the validity of the quitclaim deed of Grant F. Clayton to his mother. This question was tried by the probate court, and resulted in a decree sustaining the validity of the quitclaim deed and adjudging the title to the interest of Grant F. Clayton to be in Julia A. Clayton, subject to the debts of her husband's estate. William R. Clayton has sued out a writ of error to bring up the record of the probate court for review, and his assignment of error questions the correctness of the decree in so far as it finds that the quitclaim deed was a valid conveyance of the interest of Grant F. Clayton, and that said interest was not subject to the lien of the attachment writ.

Before coming to a consideration of the merits of this case, two preliminary questions require a brief notice.

[1] Defendant in error suggests that the issue raised by the answer of William R. Clayton was not within the jurisdiction of the probate court in a proceeding to sell real estate to pay the debts of a deceased owner. Section 101 of our chapter on administration,

as amended in 1887 (Hurd's Rev. St. 1909, c. 3, § 100), has extended the jurisdiction in proceedings of this character, so that the court in which such proceeding is instituted has jurisdiction to direct the sale of real estate disincumbered of all mortgage, judgment, or other money liens that are due and direct their payment out of the proceeds of the sale, and may also settle and adjust all equities and all questions of priority between all parties interested therein, and may investigate and determine all questions of conflicting titles arising between any of the parties to such proceedings, and may remove clouds from the title of any real estate sought to be sold and invest the purchaser with an indefeasible title to the premises. Said section provides that the practice in such cases shall be the same as in courts of chancery, and evidently the Legislature has attempted to confer general chancery powers upon the county and probate courts in all proceedings of this character. The controversy here as to the validity of the quitclaim deed and the lien of attachment was within the jurisdiction of the probate court in this proceeding.

[2] It is further suggested by defendant in error that this court is without jurisdiction of this case for the reason that a freehold is not involved in that part of the decree upon which error is assigned. Ordinarily a suit by attachment, where real estate of the debtor is sought to be subjected to a lien, does not involve a freehold; but where real estate has been levied upon by an attachment, and the real estate attached is claimed by an intervening third party adversely to the defendant in the attachment suit, the title is directly put in issue, and the case then necessarily involves a freehold. *Ducker v. Wear & Boogher Dry Goods Co.*, 145 Ill. 653, 34 N. E. 562; *Alsdurf v. Williams*, 196 Ill. 244, 63 N. E. 688. The issue involved in this proceeding and decided by the court below is one of title between an attaching creditor and a person, other than the defendant in the attachment, who claims the title to the attached premises. A freehold being thus involved, the writ of error is properly sued out of this court.

Upon the merits of this case the plaintiff in error contends that the decree below is not supported by the evidence. The evidence, which is not conflicting, shows the following facts: Grant F. Clayton left the state of Illinois about 14 years before his father's death and located in the state of California. He never returned to this state, either before or after his father's death. On May 10, 1908, he wrote his mother a letter, inclosing two notes signed by himself and payable to Julia A. Clayton, one for \$1,274.96 and the other for \$1,698.51, and both payable on demand. The letter explains that the notes cover several loans of money and the interest thereon up to the date of the notes, which made a total of \$2,973.47. These notes were deliv-

ered to defendant in error about one year before the death of her husband. On October 15, 1908, Grant F. Clayton again wrote his mother a letter, in which he said: "I wonder if it would be possible for me to secure you in some way by a quitclaim deed to you for anything I might have fall to me from father's estate in Illinois. He is not well and might pass away any time, or the same might happen to me. Let me hear from you. I think it better not to say much to father about this, as such things always irritate him." Julia A. Clayton testified that she purchased the interest of Grant F. Clayton in the estate of his father in La Salle county on May 19, 1909, for the sum of \$6,000, subject to the debts of the estate and the cost of administration and also subject to the widow's homestead and dower. She testified that at the date of the quitclaim deed her son owed her \$3,204.83, and that by his direction she paid debts for him, as follows: John Carlin, \$1,050; La Salle State Bank, \$450; Duncan Bros. & Carlin, \$225; Wheeler & Leland, \$500; Fitzgerald, \$40; Haynes, \$55; cash to Grant, \$500—making a total of \$6,024.83. In addition to the real estate in La Salle county owned by John S. Clayton at the time of his death, the inventory filed by his administratrix shows that he also owned real estate in California valued at \$29,700, and a lot in the city of Lake Charles, La., valued at \$700, none of which was included in the quitclaim deed to defendant in error or had otherwise been disposed of by Grant F. Clayton at that time. The only evidence offered by the plaintiff in error was an affidavit for an attachment, subscribed and sworn to by him on June 13, 1910, in which it is stated that Grant F. Clayton was indebted to plaintiff in error in the sum of \$4,619, due May 19, 1909, and that said Grant F. Clayton was a nonresident of the state of Illinois; a writ of attachment issued on said affidavit out of the circuit court of La Salle county, showing a levy, by virtue of said writ, on the interest of Grant F. Clayton in the premises in question; a certificate of levy filed by the sheriff June 15, 1910; and an order of the circuit court showing that Grant F. Clayton had been defaulted. There was no proof of personal service on the defendant in the attachment proceedings; but the default order contains a recital that the defendant had been duly notified by publication. Upon the foregoing evidence the probate court rendered the decree of which the plaintiff in error complains.

[3] Disregarding the form, and looking at the substance, of the controversy between the parties to this record, plaintiff in error occupies the situation of an attaching creditor who is seeking to have the conveyance made by the defendant in the attachment set aside because said conveyance was made for the purpose of hindering and delaying the creditors of the grantor in the collection of their debts. In order to give plaintiff in error any

standing in any court to have the conveyance set aside, it was necessary that he should prove that he was, in fact, a creditor of the grantor in the deed. There is no evidence whatever in this record which even tends to prove, as against the defendant in error, that plaintiff in error was a creditor of Grant F. Clayton at the time the quitclaim deed was made or at any time.

[4] Plaintiff in error relies upon his affidavit, and other papers and proceedings in the attachment case, as establishing all of the elements of his case against defendant in error. Mrs. Clayton was not a party to that proceeding. Being a stranger to the case, no admission or statement therein, either of record or otherwise, by the parties, would be binding upon her. *Julliard & Co. v. May*, 130 Ill. 87, 22 N. E. 477; *Springer v. Bigford*, 160 Ill. 495, 43 N. E. 751; *Yost Mfg. Co. v. Alton*, 168 Ill. 564, 566, 48 N. E. 175.

In the case last above cited the situation was similar to the one here presented. The attaching creditor there, as here, relied on the affidavit and other papers to establish his indebtedness on an issue being tried between the attaching creditor and a third party who claimed the property by interplea. There being no other evidence that the plaintiff in the attachment was a creditor of the defendant in that proceeding, the trial court directed a verdict for the interpleader. This court, in passing on that question, said: "There was evidence produced upon the trial which, uncontradicted, showed the appellee to be the owner of the property in question. The appellant introduced no evidence that it was a creditor of the Olimax Cycle Company, except the affidavit, bond, and other papers in the attachment suit, as before stated. These were no evidence of any indebtedness due the appellant. Without evidence of such an indebtedness, the appellant could not raise any question of fraud; it not being shown to be a creditor. *Springer v. Bigford*, 160 Ill. 495, 43 N. E. 751. Without evidence, therefore, that appellant was a creditor, and it not being in a position to raise any question of fraud, it was not error in the trial court to instruct the jury, at the close of all the evidence, to find for appellee."

[5] The decree of the court below might well be sustained because plaintiff in error wholly failed to prove that he was a creditor of Grant F. Clayton at the time the deed in question was made; but there are other matters in respect to which the plaintiff in error failed to establish his contention. There is no proof that Grant F. Clayton was insolvent at the time the deed was made. The inventory, as well as the evidence of the defendant in error, shows that John S. Clayton owned, at the time of his death, unincumbered real estate outside of Illinois worth about \$30,000. Grant F. Clayton inherited one-third of this property, subject to the rights of his mother, as widow.

The deed in question was made five days after his father's death. This evidence tends to show that Grant F. Clayton was not insolvent at the time the deed in question was made to his mother.

[6] Again, there is no evidence in this record that proves, or tends to prove, that the quitclaim deed was made by Grant F. Clayton with the fraudulent intent charged, and certainly none that the defendant in error participated in or had any knowledge of such fraudulent intent on the part of the grantor, if such intent, in fact, existed. There is no dispute about the amount or adequacy of the consideration. The evidence is undisputed that the defendant in error paid \$6,024.83 for the interest of Grant F. Clayton in the La Salle county land, and that she was to take it subject to her homestead and dower rights and the debts of her husband's estate. The evidence shows that this was the full value of his interest. The defendant in error testifies that she knew nothing about Grant's indebtedness to the plaintiff in error at the time she bought his interest. She says that she had understood that Grant was owing the plaintiff in error some amount 14 years before, when he went to California, but she had heard nothing about such debt since that time.

Under the evidence in this record, the decree of the probate court sustaining the deed and ordering the sale of real estate free and clear of the attachment lien was correct, and the same will be affirmed.

Decree affirmed.

DUNN, CARTWRIGHT, and HAND, JJ. (dissenting). Both the petitioner and the plaintiff in error, William R. Clayton, claimed through Grant F. Clayton, one of the heirs of the decedent; the former as the grantee in a conveyance by the said Grant F. Clayton, the latter as a creditor of said Grant F. Clayton by reason of the subsequent levy of a writ of attachment. The only question in the case was as to the existence of a lien in favor of the plaintiff in error on the interest John F. Clayton inherited. The decree found against the plaintiff in error and that there was no such lien. If the decree had been in his favor, it could have found no more than that a lien existed in favor of the plaintiff in error for a certain sum of money, and upon payment of that amount the interest inherited by John F. Clayton would have been relieved of the lien. No freehold was involved. The only question tried, or that could have been tried, was the good faith of the conveyance to the petitioner, and the only question adjudicated, or that could have been adjudicated, was the existence of a lien in favor of the plaintiff in error. We have many times held that a suit to estab-

lish a lien does not involve a freehold, whether it seeks to foreclose a mortgage or mechanic's lien, to redeem from a mortgage, to have an absolute conveyance declared a mortgage, or to set aside an absolute deed made in fraud of creditors. *Beach v. Peabody*, 188 Ill. 75, 58 N. E. 679; *Pearson Lumber Co. v. Brady*, 159 Ill. 378, 42 N. E. 875; *Ryan v. Sanford*, 133 Ill. 291, 24 N. E. 428; *Adamski v. Wlcsorek*, 181 Ill. 361, 54 N. E. 1034; *First Nat. Bank v. Vest*, 187 Ill. 389, 58 N. E. 229. The relief sought here is to declare the conveyance to the petitioner fraudulent and subject her property to the attachment lien. The cases of *Ducker v. Wear & Boogher Dry Goods Co.*, 145 Ill. 653, 34 N. E. 562, and *Alsduff v. Williams*, 196 Ill. 244, 63 N. E. 686, cited in the majority opinion, do not sustain the jurisdiction of this court. Those were attachment cases in which a third person intervened denying the title of the defendant and claiming the land adversely. The title was thus put directly in issue by the pleadings. Under the statute the question tried was not the existence of a lien by virtue of the attachment, but the ownership of the property. In such case the statute directs a jury to be impaneled to inquire into the right of property. That is the sole issue—the title. Neither the plaintiff's debt nor his lien is in issue, and the judgment of the court does not establish or deny any lien. The judgment is either for or against the claimant absolutely, and establishes the title. In our judgment this appeal should be transferred to the Appellate Court.

(250 Ill. 382.)

LESHER v. LESHER.

(Supreme Court of Illinois. June 20, 1911.)

APPEAL AND ERROR (§ 1161*)—QUESTIONS REVIEWABLE—MOOT QUESTIONS.

Where, in a suit by a wife for divorce, she appealed from a decree dismissing the bill, and the husband filed a confession of error and joined in asking for a reversal, the wife was entitled to judgment on the pleadings, and the court could only reverse the decree and remand the case, under the rule that a court will not determine moot questions.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4520; Dec. Dig. § 1161.*]

Error to Appellate Court, First District, on Appeal from Superior Court, Cook County; Samuel C. Stough, Judge.

Suit by Belle Leshar against Jacob H. Leshar. There was a decree of the Appellate Court, affirming a decree dismissing the bill, and complainant brings error. Reversed and remanded.

Albert H. Fry and Russell M. Wing, for plaintiff in error.

DUNN, J. The plaintiff in error filed her bill in the circuit court of Cook county, alleging her marriage to defendant in error

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

and his desertion of her without any reasonable cause, and praying for a decree awarding her separate support and maintenance. The defendant in error answered, denying the marriage, and after a hearing upon the evidence a decree was rendered, finding against the plaintiff in error and dismissing her bill. She prosecuted an appeal to the Appellate Court, where the defendant in error filed a confession of errors, and the parties joined in asking for a reversal of the decree. That court, however, denied this motion, and upon a consideration of the merits of the case affirmed the decree. The record has been brought before us by certiorari, and the plaintiff in error seeks a reversal of the judgment of the Appellate Court.

No brief has been filed on the part of the defendant in error. In the brief of the plaintiff in error the record of the circuit court is considered at length, and it is argued that the decree is contrary to the evidence. We have not gone into that record. Courts of review, like courts of original jurisdiction, exist for the determination of actual controversies and the establishment of rights requiring adjudication. Courts will not occupy themselves with moot cases, and cases which do not involve the establishment of a right which may be the subject of controversy between the parties. Here the plaintiff in error alleged the decree to be erroneous, and the defendant in error confessed it. The plaintiff in error was entitled to judgment on the pleadings, and the Appellate Court had no other duty to perform than to enter the judgment required by law, reversing the decree and remanding the cause.

The judgment of the Appellate Court and the decree of the circuit court will be reversed, and the cause remanded to the circuit court.

Reversed and remanded.

(250 Ill. 321)

BRENTS v. SMITH.

(Supreme Court of Illinois. June 20, 1911.)

1. ELECTIONS (§ 269*)—CONTESTS—NATURE OF PROCEEDINGS.

An election contest under the statute is a chancery proceeding, subject to the rules governing the same, and contestant may by amendment add points of contest not contained in the original petition.

[Ed. Note.—For other cases, see Elections, Cent. Dig. §§ 245, 246; Dec. Dig. § 269.*]

2. ELECTIONS (§ 305*)—CONTESTS—REVIEW—QUESTIONS REVIEWABLE—QUESTIONS NOT RAISED IN TRIAL COURT.

The objection that a petition in an election contest should be dismissed because all the candidates for the office were not made parties cannot be raised for the first time on appeal.

[Ed. Note.—For other cases, see Elections, Cent. Dig. §§ 317-332; Dec. Dig. § 305.*]

3. ELECTIONS (§ 279*)—CONTESTS—PARTIES.

Where the pleadings in an election contest between the republican and democratic candi-

dates for an office showed that it would be unreasonable to believe that either the socialist or prohibition candidate could gain enough votes on a recount to win the election, and the result of the recount proved that fact, the failure of contestant to make such candidates parties was not ground for dismissal.

[Ed. Note.—For other cases, see Elections, Cent. Dig. § 263; Dec. Dig. § 279.*]

4. ELECTIONS (§ 194*)—OFFICERS—MISCONDUCT.

The act of the judges and clerks of election in improperly marking ballots by numbers, followed by words, does not render the ballots, properly marked by the voters, illegal.

[Ed. Note.—For other cases, see Elections, Cent. Dig. §§ 166, 167; Dec. Dig. § 194.*]

5. ELECTIONS (§ 180*)—BALLOTS—VALIDITY.

Where an honest attempt was made by a voter to make a cross in the appropriate square in the ballot, that the cross was imperfect does not invalidate the ballot.

[Ed. Note.—For other cases, see Elections, Cent. Dig. §§ 151-157; Dec. Dig. § 180.*]

6. ELECTIONS (§ 180*)—BALLOTS—MARKINGS—SUFFICIENCY—"CROSS."

Lines which meet, but which do not intersect, do not form a cross essential to mark a ballot, but lines which intersect slightly make a cross sufficient to require the counting of the ballot.

[Ed. Note.—For other cases, see Elections, Cent. Dig. §§ 151-157; Dec. Dig. § 180.*]

For other definitions, see Words and Phrases, vol. 2, pp. 1757, 1758.]

7. ELECTIONS (§ 180*)—BALLOTS—MARKINGS—SUFFICIENCY.

A ballot having a V-shaped mark in the square before a candidate's name, without any intersection of lines to form a cross, must be rejected.

[Ed. Note.—For other cases, see Elections, Cent. Dig. §§ 151-157; Dec. Dig. § 180.*]

8. ELECTIONS (§ 180*)—BALLOTS—MARKINGS—SUFFICIENCY.

A ballot having in a party circle an irregular-shaped mark in the form of "T" must be counted.

[Ed. Note.—For other cases, see Elections, Cent. Dig. §§ 151-157; Dec. Dig. § 180.*]

9. ELECTIONS (§ 180*)—BALLOTS—MARKINGS—SUFFICIENCY.

A ballot with dim crosses in the proper circle or square, made by pressing the pencil lightly, or by using a pencil with the lead broken, must be counted.

[Ed. Note.—For other cases, see Elections, Cent. Dig. §§ 151-157; Dec. Dig. § 180.*]

10. ELECTIONS (§ 180*)—BALLOTS—MARKINGS—SUFFICIENCY.

A ballot having a mark in a party circle resembling the letter "O," without any attempt at a cross, cannot be counted.

[Ed. Note.—For other cases, see Elections, Cent. Dig. §§ 151-157; Dec. Dig. § 180.*]

11. ELECTIONS (§ 180*)—BALLOTS—MARKINGS—SUFFICIENCY.

A ballot having a cross in the democratic circle and the names of the democratic and republican candidates for an office marked out with a lead pencil drawn horizontally through each name cannot be counted for the democratic candidate.

[Ed. Note.—For other cases, see Elections, Cent. Dig. §§ 151-157; Dec. Dig. § 180.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

12. ELECTIONS (§ 194*) — BALLOTS — DISTINGUISHING MARKS.

A ballot with a distinguishing mark to indicate who cast it cannot be counted.

[Ed. Note.—For other cases, see Elections, Cent. Dig. §§ 166, 167; Dec. Dig. § 194.*]

13. ELECTIONS (§ 194*) — BALLOTS — DISTINGUISHING MARKS.

Whether a mark on a ballot is a distinguishing mark, so as to invalidate it, is largely, if not wholly, a question of fact.

[Ed. Note.—For other cases, see Elections, Cent. Dig. §§ 166, 167; Dec. Dig. § 194.*]

14. ELECTIONS (§ 194*) — BALLOTS — DISTINGUISHING MARKS.

A ballot having on the back thereof, a little under the official printing, two dim crosses made by a blunt instrument pressing into the paper, without any marks of lead or other marking substance, has not a distinguishing mark, and the ballot marked with a cross in a party circle must be counted.

[Ed. Note.—For other cases, see Elections, Cent. Dig. §§ 166, 167; Dec. Dig. § 194.*]

15. ELECTIONS (§ 194*) — BALLOTS — DISTINGUISHING MARKS.

A ballot having a lead pencil cross in the republican circle and lead pencil crosses after the names of two democratic candidates cannot be counted, when the crosses after the democratic candidates appear as distinguishing marks, in the absence of any explanation of the marks.

[Ed. Note.—For other cases, see Elections, Cent. Dig. §§ 166, 167; Dec. Dig. § 194.*]

16. ELECTIONS (§ 194*) — BALLOTS — DISTINGUISHING MARKS.

A ballot having on its back the word "Jofe," instead of the initials of an election judge, has a distinguishing mark, and cannot be counted, though it is claimed that the word was the nickname of a judge who placed it there, instead of his initials, where the judge, whose nickname was "Joed," stated the writing was not his.

[Ed. Note.—For other cases, see Elections, Cent. Dig. §§ 166, 167; Dec. Dig. § 194.*]

17. ELECTIONS (§ 190*) — BALLOTS — MUTILATION.

A ballot was fed into the printing press, so that a part of the squares and of the circle on a party ticket were not on the ballot. A voter attempted to place a cross in a number of these parts of squares, and because the part of the square in front of a candidate's name did not give him sufficient room for a cross, the lines of the cross intersected outside of the square. *Held*, that the ballot was mutilated and improperly given to a voter, who should have asked for another ballot, and it could not be counted.

[Ed. Note.—For other cases, see Elections, Cent. Dig. § 164; Dec. Dig. § 190.*]

18. ELECTIONS (§ 180*) — BALLOTS — MANNER OF MARKING.

A ballot having a lead pencil cross in the democratic circle and a large pencil cross covering the whole length of the democratic ticket, with no other marks, cannot be counted for a democratic candidate.

[Ed. Note.—For other cases, see Elections, Cent. Dig. §§ 151-157; Dec. Dig. § 180.*]

19. ELECTIONS (§ 180*) — BALLOTS — MANNER OF MARKING.

A ballot was marked with pencil crosses in the squares before the first eight names on the socialist ticket, and down the entire length of the ticket was a large cross. The crosses in the squares and the large cross were partly erased. There were crosses in squares on the

republican ticket and an erasure thereof. There were crosses in the respective squares on the democratic ticket. *Held*, that the ballot must be counted for the democratic candidates; the crosses on the socialist and republican tickets having been made by mistake, or the voter changing his mind.

[Ed. Note.—For other cases, see Elections, Cent. Dig. §§ 151-157; Dec. Dig. § 180.*]

20. ELECTIONS (§ 194*) — BALLOTS — DISTINGUISHING MARKS.

A ballot had a pencil cross in the circle at the head of the republican ticket and pencil crosses in the squares before several republican candidates and one democratic. A single line was made through the democratic circle, and an attempt made to erase it. *Held*, that the ballot did not have a distinguishing mark, and must be counted.

[Ed. Note.—For other cases, see Elections, Cent. Dig. §§ 166, 167; Dec. Dig. § 194.*]

21. ELECTIONS (§ 194*) — BALLOTS — DISTINGUISHING MARKS.

A ballot having a pencil cross in the democratic circle and on its back the names of democratic candidates written a little below the printed signature of the county clerk seeking a re-election, and before his name a cross, has a distinguishing mark, and cannot be counted.

[Ed. Note.—For other cases, see Elections, Cent. Dig. §§ 166, 167; Dec. Dig. § 194.*]

22. ELECTIONS (§ 194*) — BALLOTS — DISTINGUISHING MARKS.

The capital letter "D" on the back of a ballot having a pencil cross in the democratic circle and a cross in the square before a republican candidate must be deemed a distinguishing mark; the judges of election stating that they did not know how the "D" was marked on the ballot.

[Ed. Note.—For other cases, see Elections, Cent. Dig. §§ 166, 167; Dec. Dig. § 194.*]

23. ELECTIONS (§ 194*) — BALLOTS — DISTINGUISHING MARKS.

Where crosses in the circle or square of a ballot were made by mistake, and the voter then attempted to mark them out by filling the circle or square with pencil marks, the erasures were not distinguishing marks, and the ballot must be counted.

[Ed. Note.—For other cases, see Elections, Cent. Dig. §§ 166, 167; Dec. Dig. § 194.*]

24. ELECTIONS (§ 190*) — BALLOTS — MUTILATION—EFFECT.

Where the lower left-hand corner of a ballot was torn off, but enough remained to show that there was a cross in the square before the name of a candidate, and a judge of election testified that he remembered seeing the ballot when the ballots were counted, and that the cross was complete when the two pieces were placed together, the ballot must be counted.

[Ed. Note.—For other cases, see Elections, Cent. Dig. § 164; Dec. Dig. § 190.*]

25. ELECTIONS (§ 190*) — BALLOTS — MUTILATION—EFFECT.

A ballot having a cross in the republican circle, and torn by a voter into three pieces, the democratic ticket at the left of the ballot being on a separate piece, and the socialist ticket at the right being practically on a separate piece, cannot be counted.

[Ed. Note.—For other cases, see Elections, Cent. Dig. § 164; Dec. Dig. § 190.*]

26. ELECTIONS (§ 190*) — BALLOTS — MUTILATION—EFFECT.

The circle on the democratic ticket on a ballot was torn away. The ballot had a cross

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

in the republican circle. The election judges did not know how the ballot was torn, and were not sure it was torn when counted. *Held*, that the ballot could not be counted.

[Ed. Note.—For other cases, see Elections, Cent. Dig. § 164; Dec. Dig. § 190.*]

27. ELECTIONS (§ 177*)—BALLOTS—INITIALS OF ELECTION OFFICERS.

A ballot which does not have on its back the initials of any of the judges of election cannot be counted.

[Ed. Note.—For other cases, see Elections, Cent. Dig. § 149; Dec. Dig. § 177.*]

28. ELECTIONS (§ 255*)—CONTESTS—BALLOTS AS BEST EVIDENCE.

The ballots of an election when preserved are the best evidence of the result, but it must affirmatively appear that they have been preserved by the proper officers, and in the manner prescribed by law.

[Ed. Note.—For other cases, see Elections, Cent. Dig. § 231; Dec. Dig. § 255.*]

29. ELECTIONS (§ 295*)—CONTESTS—BALLOTS AS BEST EVIDENCE.

Where the evidence in an election contest discredits both the ballots and the election returns, the true result must be determined by a consideration of the ballots and returns, and the facts.

[Ed. Note.—For other cases, see Elections, Cent. Dig. §§ 297-299; Dec. Dig. § 295.*]

30. ELECTIONS (§ 295*)—CONTESTS—FRAUD—EVIDENCE.

Fraud in the conduct of an election may be proved by circumstantial evidence.

[Ed. Note.—For other cases, see Elections, Cent. Dig. §§ 297-299; Dec. Dig. § 295.*]

31. ELECTIONS (§ 298*)—CONTESTS—FRAUD—EVIDENCE.

Where it can be ascertained from the proof how voters marked their ballots, and they can be counted, or where the honest votes can be separated from the dishonest votes, and the returns purged of fraud, the votes of the entire precinct need not be thrown out for fraud.

[Ed. Note.—For other cases, see Elections, Cent. Dig. §§ 303-305; Dec. Dig. § 298.*]

32. ELECTIONS (§ 295*)—CONTESTS—FRAUD—EVIDENCE.

In an election contest, evidence *held* to show that ballots properly marked by the voters were tampered with by others marking crosses before the names of other candidates, and such crosses must be ignored in counting the ballots.

[Ed. Note.—For other cases, see Elections, Cent. Dig. §§ 297-299; Dec. Dig. § 295.*]

33. ELECTIONS (§ 190*)—BALLOTS—MUTILATION.

A ballot, properly marked for a candidate by a voter, must be counted for the candidate, though others wrongfully placed crosses in the squares before the name of the opposing candidate.

[Ed. Note.—For other cases, see Elections, Cent. Dig. § 164; Dec. Dig. § 190.*]

34. ELECTIONS (§ 190*)—BALLOTS—MARKING.

A voter marked his ballot by blue pencil crosses in the republican circle, in the square before the republican candidate for representative, and in the squares before the democratic candidates for county clerk and county superintendent. Others wrongfully placed black crosses in the squares before the republican candidates for county judge, sheriff, and county superintendent. *Held*, that the ballot must be counted for the republican candidate for sheriff.

[Ed. Note.—For other cases, see Elections, Cent. Dig. § 164; Dec. Dig. § 190.*]

35. ELECTIONS (§ 180*)—BALLOTS—MARKING.

A ballot marked by a voter placing crosses in the squares before the names of opposing candidates for the same office cannot be counted.

[Ed. Note.—For other cases, see Elections, Cent. Dig. §§ 151-157; Dec. Dig. § 180.*]

Appeal from Christian County Court; G. A. Prater, Judge.

Election contest by Thomas W. Brents against J. R. Smith. From judgment for contestee, contestant appeals. Reversed and remanded.

Hogan & Wallace, for appellant. Provine & Provine, L. G. Grundy, J. H. Fornoff, and Taylor & Taylor, for appellee.

CARTER, C. J. This is an appeal from a judgment of the county court of Christian county, declaring appellee elected to the office of sheriff of said county. At the regular election held on November 8, 1910, for that and other county offices, appellant, Thomas W. Brents, was the regular democratic candidate, and appellee, J. R. Smith, the regular republican candidate, for sheriff. William Hart and James A. Bickerdike were candidates, respectively, on the socialist and prohibition tickets. On the canvass of the returns, Brents was given 3,293, Smith 3,299, Hart 172, and Bickerdike 100, and Smith was declared elected by a plurality of six votes. A contest was instituted in the county court of Christian county, and the ballots were opened and recounted, with the result that Brents was given 3,277 votes, Smith 3,283, Hart 176, and Bickerdike 119, and a finding made that appellee, Smith, was elected by a plurality of six votes. From that order and decree, this appeal was taken to this court.

The contest was started on November 15, 1910. The petition charged incorrect counting of ballots in the various precincts, but did not charge fraud. After an answer was filed, setting out that some ballots had been incorrectly counted for the appellant in various precincts, the appellant, on January 3, 1911, filed, by leave of court, an amendment to his petition, charging that certain markings had been fraudulently placed upon ballots in district No. 4 of Pana, in said county, which inured to the benefit of appellee, and that said votes either ought to be counted as the ballots showed them to have been cast, or that the entire precinct be thrown out and not counted for either candidate. It is here insisted that this amendment was improperly allowed.

[1] Contests of elections under the present act are to all intents and purposes chancery proceedings, subject to all the rules governing the same. *Dale v. Irwin*, 78 Ill. 170; *Rodman v. Wurzburg*, 183 Ill. 395, 55 N. E. 638; *Weinberg v. Noonan*, 193 Ill. 165, 61 N. E. 1022. This court held, in *Dale v. Irwin*, supra, that the contestant could by an

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

amendment add points of contest not contained in his original petition. This is in accord with the general chancery practice, and we see no reason to depart from that ruling.

[2, 3] It is next insisted that under the ruling of this court in *Conway v. Sexton*, 243 Ill. 59, 90 N. E. 203, the petition should be dismissed, because the socialist and prohibition candidates were not made parties to the contest. There are two sufficient answers to this objection: First, we do not find that this point was raised in the trial court; and, second, the petition and answer show that it was unnecessary to make any of the other candidates parties, as it would be most unreasonable to believe that one of them could gain enough on a recount to entitle him to be declared elected. The result of the contest proved that fact. In the *Conway-Sexton Case* the pleadings did not show, and in the light of the facts in that case could not honestly show, that the candidates who were not made parties might not on the recount have been necessary parties. On the recount the uncontested ballots agreed upon by attorneys for both sides gave Brents 3,255 votes and Smith 3,217 votes, leaving 110 contested ballots. The original contested ballots have been certified to this court with the record. They were each numbered in the court below for identification, and we shall find it convenient to identify the ballots by referring to those numbers. Many of the ballots can be divided into groups, according to the nature of the objections, and disposed of together.

[4] Fifty-two ballots are objected to because they have on the front or back a number or numbers, followed by words. From the appearance of the ballots, as well as from the testimony of the judges and clerks, these numbers and words were made by the judges as an aid in counting the ballots, and indicate the number of votes credited to various candidates. Judges and clerks should not mark ballots in this manner while counting the votes, but when it appears that the voter has complied with the law in marking his ballot he should not be disfranchised by such marks made by the judges. *Kerr v. Flewelling*, 235 Ill. 326, 85 N. E. 624; *Rexroth v. Schein*, 206 Ill. 80, 69 N. E. 240. Eleven of these votes were properly counted by the court for Brents and 41 for Smith.

[5-8] Seven ballots are objected to because, it is argued, the lines forming the attempted cross do not intersect inside the square or circle, or do not form a cross. The rule often stated by this court is that, if an honest attempt was made to follow the law in making the cross in an appropriate circle or square, the fact that the cross was imperfect will not prevent the ballot being counted. *Parker v. Orr*, 158 Ill. 309, 41 N. E. 1002, 30 L. R. A. 227; *Kerr v. Flewelling*, *supra*; *Winn v. Blackman*, 229 Ill. 198, 82

N. E. 215, 120 Am. St. Rep. 237; *Apple v. Barcroft*, 158 Ill. 649, 41 N. E. 1116. If the lines meet, but do not cross or intersect, they cannot be held a cross under the authorities; but if they intersect and cross, even slightly, within the proper circle or square they should be considered as a cross. Following this rule, ballots 216, 2,133, and 2,703 should be counted for Brents, and ballots 2,449, 2,779, 3,383, and 6,875 for Smith. Ballot 4,176 has a V-shaped mark in the square before the name of appellee, Smith. At no point in the square is there an intersection of the lines to form a cross. Under the ruling of this court in *Winn v. Blackman*, 229 Ill. 198, 82 N. E. 215, 120 Am. St. Rep. 237, this ballot cannot be counted for Smith. Ballot 5,282 has in the republican circle an irregular-shaped mark similar in form to the letter "T." This ballot should be counted for Smith. *Parker v. Orr*, *supra*.

[9] Ballots 3,014, 3,589, 3,783, and 6,103 are objected to because the respective crosses in the republican circle or square before Smith are dim or not made, as claimed in some cases, by lead pencil or pen. We believe in all these cases the voter honestly attempted to make a cross, in some instances by pressing the pencil very lightly on the paper, and in other instances by using a pencil when the lead was broken. All these ballots should be counted for Smith. *Rexroth v. Schein*, *supra*. Ballot 6,053, objected to because of dimness of the cross, will be counted for Brents.

[10] Ballot 2,604 has a mark in the democratic circle resembling a letter "O." There being no attempt at a cross, this ballot cannot be counted for Brents. *Parker v. Orr*, *supra*.

[11] Ballot 3,450 has a cross in the democratic circle, and the names of both Brents and Smith are marked out with a lead pencil line drawn horizontally through each name. This court has held that the voter can erase the name of the candidate and write in another, and thus vote for the candidate whose name is written in. *Winn v. Blackman*, *supra*. While the precise question here raised does not seem to have been decided in any of the cases, we think, under the reasoning of the authorities, this vote cannot be counted for Brents.

[12, 13] Various ballots are objected to by each party on the ground that they bear distinguishing marks. The law forbids such a mark as will distinguish and separate the particular ballot from the other ballots cast at the election—a mark put upon the ballot to indicate who cast it and to evade its secrecy. Whether a given mark is or is not distinguishing is largely, if not wholly, a question of fact. *Winn v. Blackman*, *supra*.

It is contended by appellant that ballot 4,993, should be counted for him, while he contends that ballot 2,154 should not be counted for appellee. If one of these ballots

should be counted, the other should be, and therefore the result would not be changed. Neither will be counted.

[14] Ballot 3,641 has a lead pencil cross in the democratic circle and no other mark on the face of the ballot. On the back of the ballot, a little under the official printing, are two dim crosses made by some blunt instrument pressing into the paper, but no mark of lead or other marking substance. If held up to the light, they show slightly through the ballot, but not in such a way as to indicate any mark as to any candidate. We hold this was not a distinguishing mark, and the ballot will be counted for appellant.

[15] Ballot 1,442 has a lead pencil cross in the republican circle and a lead pencil cross after the name Harp, democratic candidate for representative, and another after the name of Brockamp, the democratic candidate for county treasurer. No explanation is given as to how these marks were made on the ballots. It is argued that they are distinguishing marks. From the appearance of this ballot, we are disposed to hold that these crosses are distinguishing marks, and the ballot cannot be counted for Smith.

[16] Ballot 1,073 is properly marked with a cross in the square before the name of appellee, Smith. On the back of the ballot is found the word "Jofe," instead of the initials of a judge. It is argued by appellee that this is a nickname of one of the judges, and that he placed it there, instead of his initials. The judges in this precinct all testified as to this ballot, and the man whose nickname was claimed to be "Joed" stated that the writing was not his. We must hold this writing a distinguishing mark, and the ballot should not be counted for Smith.

[17] Ballot 2,478 was apparently fed into the printing press in such manner that a part of the squares and of the circle on the democratic ticket are not on the ballot; that ticket being at the left-hand edge. The voter attempted to place a cross in a number of these parts of squares. As he approached the lower edge of the ballot, the portion of the square in front of Brents' name did not give him room in which to place the cross, and the lines of the cross intersect outside of the square. This ballot was mutilated, and should not have been given by the judges to the voter, and when they did give it to him he should have asked for one that was printed according to law. It cannot be counted for Brents. *Kerr v. Flewelling*, supra.

[18] Ballot 2,953 is marked with a lead pencil cross in the democratic circle and a large pencil cross covering the whole length of the democratic ticket, with no other mark on the ballot. This ballot, under the reasoning of this court in *Kerr v. Flewelling*, supra, as to this class of marks, cannot be counted for Brents.

[19] Ballot 6,708 has pencil crosses in the squares before the first eight names on the

socialist ticket and down the entire length of that ticket is made a large cross. All of the crosses in the squares on that ticket, as well as the large cross, have been partly erased. There are also crosses in nine of the squares on the republican ticket. Evidently there was an attempt to make crosses in the respective squares before the last three names on the republican ticket, and an erasure of these crosses; the voter rubbing out in the attempt a large part of the three printed squares. There are also lead pencil crosses in the respective squares before the last three names on the democratic ticket, including Brents'. If there had been no attempt to erase the large cross on the socialist ticket, on the reasoning of the case last cited, this ballot could not have been counted; but we do not feel like extending the ruling as to such marks further than laid down in that case. We are of the opinion that these crosses on the socialist ticket, as well as at the end of the republican ticket, were made by mistake, or the voter afterward changed his mind. This vote should be counted for Brents.

[20] Ballot 3,835 has a pencil cross in the circle at the head of the republican ticket and pencil crosses in the squares before 11 republican candidates (including Smith) and one democratic. There is also a single line made through the democratic circle and an attempt to erase this, as if the voter had drawn a moistened finger over the circle. We do not think this can be considered a distinguishing mark. The ballot should be counted for Smith.

[21] Ballot 5,747 has a colored pencil cross in the democratic circle and no other mark on the face of the ballot. On the back of the ballot, at the left of the official printed signature of Henry J. Burke, the county clerk, is a colored pencil cross. A little below Burke's name are the names "F. Brents" and "Folkes," written with colored pencil. It is argued that the voter attempted to emphasize the fact that he was voting for Burke (who was running for re-election) and for Brents and Fowkes by making the cross before the printed signature, and writing in the names of the other two candidates on the back of the ballot. However that may be, we consider this was so marked a departure from the law and so plainly distinguishing that the ballot cannot be counted. *Smith v. Reid*, 223 Ill. 493, 79 N. E. 148; *Winn v. Blackman*, supra. Had these names been on the face of the ballot where the candidates' names were printed, a different situation might have been presented.

[22] Ballot 6,636 has a pencil cross in the democratic circle and a cross in the square before the name of Evans, republican candidate for county superintendent, and no other mark on the face of the ballot. On the back of the ballot were the initials of one of the judges, followed, in a different kind of pencil, by a capital letter "D." The judges

were called and stated that they did not know how this "D" was marked on the ballot. We hold it a distinguishing mark, and the ballot cannot be counted for Brents.

[23] Ballot 3,565 has a cross in the republican circle. The square before the name of Walter M. Provine, republican candidate for representative, has been almost completely filled in by lead pencil marks. Ballot 4,103 has a cross in the republican circle. There is also a cross in the democratic circle, and the circle was almost completely filled in with pencil marks covering the cross. Ballots 4,779, 5,125, and 6,228 have each a cross in the square before the name of some candidate (not Smith) on the republican ticket, and then, in each instance, the square is filled in with lead pencil marks covering the cross. It is clear from the face of all these five ballots that the crosses over which pencil marks are drawn were made by mistake, and then an attempt made to mark them out by using a lead pencil, as indicated. We do not think these pencil erasures can be held to be distinguishing marks. All five ballots should be counted for Smith.

[24] Three ballots, each from a different precinct, are torn. Ballot 1,076 has the lower left-hand corner torn off, but enough remains to show that there was a cross in the square before Brents. One of the judges in that precinct testified that he remembered, when they were counting, seeing this ballot with the torn corner still hanging by a shred, and that the cross, when the two pieces were placed together, was complete. On this situation of the record this ballot should be counted for Brents.

[25] Ballot 2,281 was torn in three pieces; the democratic ticket at the left being on a separate piece, and the socialist labor ticket at the right of the ballot being practically all on a separate piece. There is a cross in the republican circle and no other mark on the face of the ballot. All three of the pieces were found in the ballot box. The judges did not know how it became torn. They testified it was not torn when they delivered it, but did not know whether it was given back by the voter torn, or not; that the ballot box became so full that it was difficult to put the ballots through the slot, and they used a stick to push them down. If the voter tore it in this manner, he should have returned it and obtained another ballot. The initials of the judge, part of which appears on one piece and part on another, show that the ballot was handed to the voter intact, and it does not appear reasonable, from an inspection of the ballot, that it was so torn while in the box. We are of opinion that this ballot was torn by the voter, and should not be counted.

[26] Ballot 3,579 had both upper corners torn off—evidently torn at the same time when the ballot was folded once. The circle on the democratic ticket is torn completely away. There is a cross in the republican

circle. The judges of this precinct testified that they did not know how this ballot was torn, and were not sure it was torn when they counted it. The democratic circle being completely torn away, we cannot tell whether it had any marks in it, or not. On this state of the record, the ballot cannot be counted for Smith.

[27] Ballots 830, 860, and 1,033 are marked for Smith. All of these ballots were cast in the first district of the Buckhart precinct. None of them has the initials of any judge of that precinct on the back. Under the holding of this court in *Sienker v. Engel*, 95 N. E. 618, and cases there cited, these ballots cannot be counted.

We have now discussed all the contested ballots, except 20 from the fourth district, Pana precinct. Appellant contends that such fraud was committed in this district as to change the result. It is claimed that a number of unauthorized persons handled ballots during the count; that during the canvass of the vote some of the judges absented themselves from the room for a time, and that the closing of the count was purposely delayed until between 2 and 3 o'clock in the morning, and in the meantime the judges and clerks had learned the result of the vote on sheriff in the other districts in the county. If the returns in this district were in proper condition, it might be argued that the figures of the tally sheets and statements of votes should be taken as conclusive of the result, but in this district the tally sheets show erasures; a number of tallies apparently having been scratched off from Brents. Moreover, the uncontested vote for Brents, omitting the disputed ballots, was three greater than the vote given him by the returns of the judges and clerks.

[28] Where the ballots have been properly preserved, they are the best evidence of the result of the election. *Bonney v. Finch*, 180 Ill. 133, 54 N. E. 318; *Caldwell v. McElvain*, 184 Ill. 552, 56 N. E. 1012. In order that the ballots should be controlling as evidence, it must affirmatively appear that they have been preserved in the manner required by law, and by the proper officers. *Beall v. Albert*, 159 Ill. 127, 42 N. E. 166; *Jeter v. Headley*, 186 Ill. 34, 57 N. E. 784. After the ballots were given to the county clerk by the judges of this precinct, as well as the judges of other precincts, the evidence shows that they were properly preserved by the county clerk, and were opened at the time of the contest in the same condition as when returned to him.


[29] Where the evidence discredits both the ballots and the returns of the election officials, the true result of the election must be determined by a consideration of both and of all other circumstances which will aid in determining the truth of the matter at issue. *Roland v. Walker*, 244 Ill. 129, 91 N. E. 80; *West v. Sloan*, 238 Ill. 330, 87 N. E. 323.

All but one of these 20 ballots from this

district are marked partly in blue indelible pencil and partly in ordinary black pencil. The judges testified that blue indelible pencils were placed in the voting booths to start with, but that voters called for pencils at various times during the day and black pencils were furnished. A number of these ballots, from their appearance, might have been marked entirely by the respective voters; but it is impossible to so conclude as to the majority of the 20. If there had been only two or three ballots thus marked with different pencils in the same district, there would be less ground for suspicion.

[30] Fraud in the conduct of an election may be shown by circumstantial evidence (McCrary on Elections [4th Ed.] § 575), and frequently can be shown in no other way. The peculiar marking of these ballots would, in itself, arouse suspicion, but when taken in connection with the uncontradicted proof in this record that this was the last district to be counted; that the result as to sheriff was known before the count in the district was closed; that three or four persons who had nothing to do with the canvass, were not judges and clerks, handled these ballots before they were counted, two of them having lead pencils in their hands; that the door of the polling place was open during the time the counting was going on; that no attempt was made to keep unauthorized persons from counting the ballots—the proof must be held practically conclusive, from this record, that some of these ballots were tampered with.

[31] If from the proof it can be ascertained how the voters marked their ballots and they can be thus counted, or if the honest votes can be separated from the dishonest votes and the returns purged, then the entire district need not be thrown out. McCrary on Elections (4th Ed.) § 583.

[32] We will first consider nine of these ballots, namely, 3,742, 3,744, 3,748, 3,756, 3,763, 3,764, 3,772, 3,774, and 3,811. Each one of these ballots is marked with an indelible blue pencil for various candidates on the democratic and republican tickets. In every one of the nine ballots there is a cross made by an indelible pencil in the square before the name of appellant, Brents, for sheriff. Taking the indelible pencil crosses alone, it is clear that the person who made these crosses on each of these ballots was voting intelligently for a complete set of candidates on the ballot, although in every instance he voted a split ticket. Ballots 3,742, 3,763, 3,772, and 3,811 each have a black pencil cross in the square before the name of appellee, Smith. Ballot 3,756 has a black lead pencil  in the square before Smith's name. Ballots 3,748 and 3,764 have black pencil crosses in the respective squares before Smith and the republican candidate for county superintendent. Ballots 3,744 and 3,774 have black lead pencil crosses in the respective squares before the

names of appellee Smith and the republican candidate for county judge. Some, if not all, of the crosses made by black pencil appear to have been made hastily, and do not resemble in form the blue pencil crosses. We think it is clear that all of these nine ballots were marked originally by the voter with a blue indelible pencil for various candidates, including appellant, Brents, for sheriff, and that the black pencil marks were made by another person than the voter. The evidence tends strongly to show that the black crosses were made during the canvass of the votes in the precinct. If there had been only one of these ballots marked with a different colored pencil, even though it contained different colored crosses in the two squares before the candidates for the same office, it might be possible to believe that the voter had changed pencils, and had erroneously voted for two candidates for the same office; but it is hardly within the range of probability that nine voters in the same voting district would mark their ballots with two different lead pencils, and that every one of them would vote for two candidates for sheriff, and use a blue pencil in making a cross in the square before the name of Brents and a black pencil in making a cross before the name of Smith. The black pencil crosses, so far as they affect appellant and appellee on this record, must be disregarded and these nine ballots counted for Brents.

Ballot 3,743 has a blue pencil cross in the democratic circle and a blue pencil cross in the square before the name of Provine, republican candidate for representative, and a black pencil cross in the square before the name of appellee, Smith. If this ballot were the only one in this precinct marked in this manner, we should not be disposed to disregard this black pencil cross; but, in view of the similarity of this ballot to the last ballots considered, we think the black pencil cross should be ignored, and the ballot counted for appellant, Brents.

Ballot 3,757 has blue pencil crosses in the squares before five republican candidates for various offices and in the squares before three republican candidates for various other offices, and a black pencil cross in the square before the name of appellee, Smith. There is no other mark on the face of the ballot. In view of the facts on this record, we hold that the black pencil cross should be ignored, and this ballot not be counted for either appellant or appellee.

[33] Ballot 3,823 has a blue pencil cross in the circle at the head of the democratic ticket. The three black crosses marked on this ballot do not in any way affect any of the candidates for sheriff, and the ballot should be counted for Brents.

Ballot 3,765 has a blue pencil cross in the democratic circle and also in the square before the name of Harp, democratic candidate for representative, and a black pencil

cross partly in and partly out of the square before the name of Smith; the intersection being plainly outside of the square. For this reason, as well as for the reasons already given, this black pencil cross should be ignored, and the ballot counted for Brents.

Ballots 3,773, 3,777, and 3,780 each have a blue pencil cross in the square before the name of appellee, Smith. The black lead pencil crosses in the various squares on each of these ballots are not before the names of any of the candidates for sheriff or do not affect in any way the counting of the ballots as to that office. These three ballots should therefore be counted for appellee, Smith.

[34] Ballot 3,758 is marked with a blue pencil cross in the republican circle, in the square before the name of Provine, candidate for representative on the same ticket, and in the respective squares before the democratic candidates for county clerk and county superintendent. On the republican ticket there are black pencil crosses in the respective squares before the candidates for county judge, sheriff, and county superintendent. Following a consistent line of reasoning as to this district and these different colored pencil crosses, the blue pencil cross in the circle at the head of the republican ticket would still require this ballot to be counted for appellee, Smith.

Ballots 3,721 and 3,768 have blue pencil crosses before various candidates and black lead pencil crosses before various other candidates, including a black lead pencil cross on each ballot in the square before Smith. There is no mark, except these two crosses on either of the ballots that in any way affects the counting as to sheriff. The black pencil crosses on ballot 3,768 are so scattered over the ballot that we think it would have been very difficult for a person secretly to have made them all during the time the ballots were being counted. On most, if not all, of the previous 17 ballots that we have considered from this precinct, the black lead pencil crosses appear to have been made hastily and in a different form from the blue pencil marks. This is not true as to ballot 3,768 and possibly is not true as to ballot 3,721. Practically the only thing that throws doubt on these two ballots is the extrinsic evidence. Notwithstanding that evidence, we are disposed to count these two ballots for appellee, Smith.

[35] Ballot 3,781 has a blue lead pencil cross in the square before the democratic candidate for county treasurer, in the square before the name of appellant and the square before appellee, and the square before the republican candidate for county superintendent. These are all the marks on the face of the ballot. This ballot alone would not arouse suspicion of anything more than a mistake on the part of the voter, and even with the rest of the proof in the record we

are not prepared to say that the voter did not make the two blue pencil marks in the respective squares before the names of appellant and appellee, both running for sheriff. This ballot cannot be counted for either appellant or appellee.

It is insisted by appellant that, if the court should count these ballots in said fourth Pana district as indicated above, then, following the same reasoning, the court should count eight ballots in district No. 1 of Buckhart township, which were not counted by the trial court. It is contended by the appellee that these ballots cannot be considered by this court, as they were not properly presented here by the record. We are inclined to agree with that contention. We deem it proper, however, to say that there is no proof of any kind in the record to show that any fraud was committed in the first Buckhart district. Although on some of these ballots different colored pencils were used in marking crosses, still, without some extrinsic proof of fraud, we would not feel justified in ignoring the black pencil crosses, as we did in the fourth Pana district. Moreover, if this were done, it would not change the final result. While the result on the face of the returns, on the contest in the trial court, and in the counting of the ballots in this court has been close, if a consistent line of reasoning be followed as to the various questions raised, we are convinced that the result cannot be more favorable to appellee than reached in the foregoing opinion.

Apparently no effort was made by the judges of election in the fourth district of Pana, during the canvass of the votes, to enforce the law and prevent unauthorized persons from handling the ballots. An election conducted with as little regard to the law as was the canvass of the ballots in that district would be but a mockery. The safety and perpetuity of popular government depends on the purity of its elections. The sanctity of the ballot should be safeguarded in every possible manner. The courts can perform no higher duty, in a contest of this character, than to enforce strictly and impartially the election laws of the state.

Adding to the 3,255 uncontested votes for appellant, Brents, the 30 contested ballots we have counted for him, gives him 3,285. Adding to Smith's 3,217 uncontested votes the 62 contested ballots we have counted for him, gives him 3,279. This leaves a plurality of six votes for Brents. It follows that Thomas W. Brents was duly elected sheriff of Christian county, and that the county court erred in finding appellee, J. R. Smith, elected and rendering judgment accordingly.

The judgment of the county court will be reversed, and the cause remanded to that court, with directions to enter a judgment in favor of appellant.

Reversed and remanded, with directions.

(250 Ill. 396)

ILLINOIS MATCH CO. v. CHICAGO, R. I. & P. RY. CO.

(Supreme Court of Illinois. June 20, 1911.)

1. EVIDENCE (§ 471*)—CONCLUSION OF WITNESS.

A question, asked an officer of a corporation constantly shipping freight in car load lots for transportation beyond the line of the initial carrier, as to whether the corporation had ever agreed with the carrier that the corporation should be bound by the conditions contained in the bill of lading limiting the liability of the carrier to damages on its own line, was objectionable as calling for a mere conclusion of the witness.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2174; Dec. Dig. § 471.*]

2. APPEAL AND ERROR (§ 1050*)—HARMLESS ERROR—ERRONEOUS ADMISSION OF EVIDENCE.

Where an officer of a corporation, constantly delivering goods in car load lots to a carrier for transportation beyond its line, testified that when he made up the shipping order for a particular shipment he did not know the conditions of the carrier's bill of lading, and that his attention had never been called to the conditions therein, and other officers testified to the same effect, the statement of the officer, in response to a question calling for his conclusion, that, speaking as a representative of the corporation, he had not, and as far as he knew no other officer of the corporation had, consented to conditions in the bill of lading, the error in overruling an objection to the question was not ground for reversal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4166; Dec. Dig. § 1050.*]

3. CONTRACTS (§ 164*)—CONSTRUCTION—SEPARATE STATEMENTS.

Where two written instruments are executed to evidence one transaction, they will be read and considered as one instrument in arriving at the intention of the parties.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 746-748; Dec. Dig. § 164.*]

4. CARRIERS (§§ 53, 155*)—SHIPPING CONTRACTS—INSTRUMENTS CONSTITUTING.

Where a shipper delivered to a carrier his shipping order as per conditions of the carrier's bill of lading, and the carrier delivered to the shipper a bill of lading, the shipping order and the bill of lading constituted the contract of transportation; but the carrier, limiting its liability in the bill of lading, must show by evidence outside of the instruments that the limitations were assented to by the shipper.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 167, 691; Dec. Dig. §§ 53, 155.*]

5. CARRIERS (§§ 172, 180*)—CONTRACTS—PRESUMPTIONS.

The acceptance by a carrier of a car load of freight for delivery beyond its own line constitutes a prima facie contract to carry and deliver to the point of destination with the liabilities of a carrier; but the carrier may limit its obligation to its own line, provided the restriction is assented to by the shipper.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 743, 815-823; Dec. Dig. §§ 172, 180.*]

6. CARRIERS (§ 180*)—CONTRACTS—LIMITATION OF LIABILITY—VALIDITY.

Under the statute prohibiting a carrier from limiting its common-law liability to safely deliver property, by any stipulation in the receipt given therefor, a limitation in a bill of lading acknowledging the receipt of property, which limits the liability of the carrier to loss

on its own line, is invalid; but the common-law liability may be limited by the part of the bill constituting the contract on the shipper assenting to the restrictions; but common-law liability may not be restricted merely by notice of limitations.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 815-823; Dec. Dig. § 180.*]

7. CARRIERS (§ 51*)—"BILL OF LADING."

A "bill of lading" is a written acknowledgment of the receipt of goods and an agreement, on consideration, to transport and deliver them at a specified place to a person named on his order.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 143, 149; Dec. Dig. § 51.*]

For other definitions, see Words and Phrases, vol. 1, pp. 790-795.]

8. CARRIERS (§§ 163, 155*)—CONTRACTS OF SHIPMENT—PRESUMPTIONS.

It is not presumed that a shipper intends to abandon any of his legal rights; but, where a limitation of a carrier's liability is knowingly assented to by him, it will bind him, whether he signs any agreement or not, and whether any restriction has been assented to is a matter of proof.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 722-725, 691-696; Dec. Dig. §§ 163, 155.*]

9. CARRIERS (§ 187*)—CARRIAGE OF FREIGHT—LIMITATION OF LIABILITY—EVIDENCE—INSTRUCTIONS.

Where, in an action against the initial carrier for loss of freight on a connecting carrier's line, the evidence showed that plaintiff was constantly shipping freight in car load lots beyond the line of the initial carrier, and received bills of lading from the initial carrier limiting its liability for loss to that occurring on its own line, that plaintiff used shipping orders directing shipments as per conditions of the carrier's bill of lading, and the officers of plaintiff testified that they had never read a bill of lading and did not know its contents, the facts raised a natural inference that plaintiff, through its officers, knew the conditions of bills of lading and assented to the limitations therein, and the carrier was entitled to a charge that, if plaintiff assented to the conditions of the bill of lading, it could not recover.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 187.*]

10. APPEAL AND ERROR (§ 1066*)—HARMLESS ERROR—ERRONEOUS INSTRUCTIONS.

Where instructions, which are mere abstract statements of law, and which do not apply the law to the case, are not misleading, the error in the instructions is not reversible.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4220; Dec. Dig. § 1066.*]

11. TRIAL (§ 243*)—INSTRUCTIONS—INCONSISTENT INSTRUCTIONS.

Where the instructions lay down contradictory rules, and following one rule will lead to a different result than will be arrived at by following the other rule, the instructions are defective and misleading.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 864, 865; Dec. Dig. § 243.*]

Error to Appellate Court, Second District, on Appeal from Circuit Court, Will County; A. O. Marshall, Judge.

Action by the Illinois Match Company against the Chicago, Rock Island & Pacific Railway Company. There was a judgment of the Appellate Court (153 Ill. App. 568) af-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

firming a judgment for plaintiff, and defendant brings error. Reversed and remanded.

J. L. O'Donnell, T. F. Donovan, and J. A. Bray (Winston, Payne, Strawn & Shaw, of counsel), for plaintiff in error. Knox & Akin, for defendant in error.

CARTWRIGHT, J. On June 16, 1904, the defendant in error, the Illinois Match Company, delivered to the plaintiff in error, the Chicago, Rock Island & Pacific Railway Company, a car load of matches consigned to John T. Huner, Our Darling Siding, Queen's county, N. Y. The plaintiff in error delivered the car at Chicago to the Lake Shore & Michigan Southern Railway Company, which forwarded the car to New York, and in the evening of June 21, 1904, the matches were destroyed by fire while the car was standing on a storage track of the New York Central & Hudson River Railroad Company in New York City. Defendant in error sued the plaintiff in error in the circuit court of Will county for the damages occasioned by the loss of the matches and recovered a judgment of \$1,404.71, which was affirmed by the Appellate Court for the Second District. 153 Ill. App. 588. The record has been brought to this court by virtue of a writ of certiorari granted for that purpose.

The only substantial defense interposed and the only one mentioned or insisted upon in the brief and argument in this court is that there was a special contract entered into by the parties which limited all liability of the defendant to loss occurring upon its own lines. If there was such contract, the defendant was not liable for the loss, and, if there was not, there was no defense to the suit.

The plaintiff was a manufacturer of matches at Joliet and shipped them to all parts of the United States. Its shipments by the defendant's railroad and another railroad at Joliet amounted to from 100 to 150 car loads a year, besides other shipments of less than car load lots. The plaintiff had sold and shipped matches to John T. Huner, and in June, 1904, he bought 25 car loads from it, which were shipped as fast as they were manufactured. The plaintiff caused to be printed and kept for its own use a blank shipping order, with places for the name of the railroad company to which the car was delivered at Joliet and the name and address of the consignee, and containing directions to deliver the car in good order without unnecessary delay, "as per conditions of company's bill of lading." After the car in question was loaded, one of these shipping orders, directed to the defendant and containing the name and address of the consignee, was delivered to the defendant. The defendant then made and delivered to the plaintiff a bill of lading, signed by its agent, acknowledging the receipt of the car load of matches, to be delivered to the next carrier to be carried to its destination, and both in

that part of the bill of lading which constituted the receipt and the subsequent portion containing the agreement of the defendant there was a limitation of liability to the defendant's own lines. It contained an agreement that the defendant assumed no responsibility for the safe carriage of the matches, or for their safety, except on its own road. The secretary of the plaintiff testified that when he made out the shipping order he did not know what the conditions of the defendant's bill of lading were, that his attention had never been called to the conditions in its bills of lading, and that he never read the bill of lading for this car. The treasurer and manager of the plaintiff, who received the bill of lading, testified that he read only the written portions, and had never read the other provisions and conditions, and did not know until the trial what they were, and that he never talked with the defendant or any of its agents as to whether the plaintiff would be bound by the conditions in the bill of lading. The president testified that prior to the trial he never read or examined the form of the bill of lading and never knew of the terms and conditions. There was another general officer of the plaintiff, but he had nothing to do with shipping goods.

[1, 2] The secretary was asked whether the plaintiff ever assented or agreed with the defendant that the plaintiff should be bound by the conditions contained in the bill of lading, and the court overruled an objection to the question. The ruling was wrong, as it called for a mere conclusion; but the answer of the witness was that, speaking as a representative of the company, he had never, and so far as he knew no other representative of the company had ever, so consented. While the answer was somewhat in the nature of a conclusion, it was a necessary one from the testimony of that witness and others and would not be bound for a reversal of the judgment.

[3] Where two written instruments are executed as the evidence of one transaction, they will be read and considered together as one instrument in arriving at the intention of the parties. *Gardt v. Brown*, 113 Ill. 475, 55 Am. Rep. 434; *Crandall v. Sorg*, 198 Ill. 48, 64 N. E. 769; *Gould v. Magnolia Metal Co.*, 207 Ill. 172, 69 N. E. 896; 1 *Greenleaf on Evidence*, § 283.

[4] Under that rule the shipping order delivered by the plaintiff to defendant and the bill of lading delivered by defendant to plaintiff constituted the contract between the parties for the carriage of the matches. 4 *Elliott on Railroads*, § 1424. That being so, it is contended that the plaintiff was estopped by the shipping order from asserting that it did not agree to the conditions of the bill of lading. That is true as to ordinary contracts (*Wynkoop v. Cowing*, 21 Ill. 570), and the general rule was applied to such contracts as this in *Black v. Wabash, St. Louis & Pacific Railway Co.*, 111 Ill. 351, 53

Am. Rep. 628. But that decision was overruled in *Wabash Railroad Co. v. Thomas*, 222 Ill. 337, 78 N. E. 777, 7 L. R. A. (N. S.) 1041, where it was held that, even if the shipper signs the bill of lading containing limitations on the liability of the carrier, the burden is still on the carrier to show by evidence allunde that the restrictions or limitations of the common-law liability contained therein were assented to by the shipper. Of course, this does not mean that there must be a verbal contract in addition to the written one, but means that the evidence must show that the contract was understandingly entered into by the shipper and its limitations assented to. If this is the rule, it must apply where the contract consists of two instruments instead of only one, and the conclusion whether this contract was assented to by the plaintiff must depend upon other evidence than the writing.

[5] The acceptance by the defendant of the car load of matches marked to a place beyond the terminus of its line constituted a prima facie contract to carry and deliver at the place so marked, with all the liabilities and duties of a common carrier. *Erie Railway Co. v. Wilcox*, 84 Ill. 239, 25 Am. Rep. 451; *Chicago & Northwestern Railway Co. v. Simon*, 160 Ill. 648, 43 N. E. 596. The carrier may limit its obligation to carry goods safely to its own lines, although they are marked to a point beyond, and, if such restriction is assented to by the shipper, it will bind him. *Erie Railway Co. v. Wilcox*, supra.

[8] The statute provides that it shall not be lawful for a carrier to limit its common-law liability to safely deliver property received by it at the place to which the same is to be transported, by any stipulation or limitation expressed in the receipt given for such property. The limitation contained in that part of the bill of lading acknowledging the receipt of the property was therefore in violation of law and of no effect; but the common-law liability may be limited by that part of the bill of lading which constitutes a contract if the shipper assents to the restrictions. *Chicago & Northwestern Railway Co. v. Simon*, supra.

[7] A bill of lading is both a written acknowledgment of the receipt of goods and also an agreement for a consideration to transport and deliver the same at the specified place to a person therein named, or his order. It has the twofold character of a receipt and an agreement. 4 Elliott on Railroads, § 1415; 4 Am. & Eng. Ency. of Law (2d Ed.) 510. The common-law liability cannot be restricted merely by notice of any limitation, and the carrier is bound to receive and carry goods offered for transportation, subject to all the incidents of the employment, unless some exemption from liability is given by express contract.

[8] There is no presumption that the shipper intends to abandon any of his legal rights; but, if a limitation of liability is

understandingly assented to by him, it will bind him whether he signs any agreement or not, and whether such restrictions have been assented to in a particular case is always a matter of evidence. *Western Transportation Co. v. Newhall*, 24 Ill. 468, 76 Am. Dec. 760; *Merchants' Despatch Transportation Co. v. Theilbar*, 86 Ill. 71; *Boscowitz v. Adams Express Co.*, 93 Ill. 523, 34 Am. Rep. 191.

[9] In this case the plaintiff was constantly shipping matches in car load lots, and otherwise, by rail from Joliet to points beyond the lines of the railroads, and received bills of lading from the defendant containing the conditions and restrictions of the one in question. It was using shipping orders directing shipments "as per conditions of company's bill of lading." Its officers testified that they never read a bill of lading and did not know its contents. The facts proved by the defendant would raise a natural inference that the plaintiff, through its officers or agents, knew the conditions of bills of lading and by the shipping order intended that the matches should be shipped on the conditions therein specified and thereby assented to the limitations therein contained. The defendant had a right to have the evidence in its favor submitted to the jury upon correct instructions as to the law. The court gave at the request of the plaintiff 13 instructions, and with one exception they were mere abstract statements of rules relating to the duties and liability of common carriers of goods received for transportation.

[10] Instructions should be so drawn as to apply to the case to be decided by the jury; but, if the instructions are not misleading, it is not ground for reversal that they are mere statements of rules of law. *Chicago City Railway Co. v. Anderson*, 193 Ill. 9, 61 N. E. 999. These instructions, however, were misleading, both because they ignored the real matter in controversy and were incorrect as applied to the case. Instruction 5 will show the general character of the instructions, and it is as follows:

"The court instructs the jury that a common carrier is an insurer for the safe transportation and delivery of goods intrusted to it for carriage, and in case of loss or injury to such goods it can only relieve itself from liability as an insurer by showing that the loss or injury was occasioned either by an act of God or the public enemy, or by reason of some neglect or failure of the shipper, or that the loss or injury resulted from the inherent nature of the goods, which the exercise of ordinary care on its part would not have prevented."

If the jury accepted that instruction as the law, a verdict for the plaintiff was inevitable, and the defense was wholly eliminated. The jury, applying the instruction to this case, would necessarily say that the defendant could only relieve itself from liability as an insurer by showing that the loss of the

matches was occasioned either by an act of God or the public enemy, or by reason of the neglect of the shipper, or that the loss resulted from the inherent nature of the goods, which the exercise of ordinary care on its part would not have prevented. Such instructions could only be justified if the defendant was not entitled to have its defense submitted to the jury at all, and could only be sustained in a case where the court ought to have directed a verdict.

[11] The court did tell the jury, as requested by the defendant, that, if the plaintiff assented to the conditions of the bill of lading, it could not recover unless the loss occurred while the goods were in the defendant's possession or was caused by the negligence of the defendant or its servants, but that was merely contradicting the instruction above quoted; and if instructions lay down contradictory rules, and following one rule would lead to a different result than would be arrived at by following another, the instructions are defective and misleading. *Gilmore v. Fuller*, 198 Ill. 130, 65 N. E. 84, 60 L. R. A. 236; *Cleveland, Cincinnati, Chicago & St. Louis Railway Co. v. Best*, 169 Ill. 301, 48 N. E. 684.

The judgments of the Appellate Court and circuit court are reversed, and the cause is remanded to the circuit court.

Reversed and remanded.

(250 Ill. 399)

FERRIMAN v. GILLESPIE et al.

(Supreme Court of Illinois. June 20, 1911.)

1. JUDGMENT (§ 948*)—RES JUDICATA—MANNER OF RAISING QUESTION.

Where the bill, in a suit to set aside an oil and gas lease, so far as it related to the homestead interests of the owners of the land, set forth the substance of the pleadings in prior suits involving the validity of the lease, and the findings thereon and the decree adjudging the validity of the lease, and prayed for a decree adjudging the invalidity of the lease, the defense of former adjudication could be raised by demurrer.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1788; Dec. Dig. § 948.*]

2. JUDGMENT (§ 713*)—RES JUDICATA—QUESTIONS CONCLUDED.

A decree, adjudging the validity of an oil and gas lease, rendered in a suit in which the question of the homestead rights of the owners of the land could have been, but was not, raised, is *res judicata*.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1241; Dec. Dig. § 713.*]

3. JUDGMENT (§ 684*)—RES JUDICATA—PARTIES CONCLUDED.

A decree adjudging the validity of an oil and gas lease, so far as it relates to the homestead rights of the owners, is binding on a subsequent lessee of the owners, having notice of the litigation, under the rule that all parties and their privies are bound by an adjudication.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1207; Dec. Dig. § 684.*]

Appeal from Circuit Court, Crawford County; E. E. Newlin, Judge.

Suit by H. C. Ferriman against E. N. Gillespie, trustee, and others. From a decree dismissing the bill on sustaining a demurrer thereto, complainant appeals. Affirmed.

John Lynch, for appellant. Callahan, Jones & Lowe, for appellees.

CARTER, C. J. Appellant filed his bill to the September term, 1910, of the circuit court of Crawford county, alleging the former ownership by Sanford C. Bowman of 50 acres of land in said county; that on May 17, 1905, said Bowman and his wife occupied the same as a homestead, the land then being worth less than \$1,000; that on said date Bowman leased said land to one Pierce for five years, or longer if gas or oil was found in paying quantities; that said lease was assigned by Pierce to E. N. Gillespie; that said lease did not contain any waiver of homestead rights by Bowman and was not signed nor acknowledged by his wife; that on March 26, 1910, Bowman and wife executed and delivered to appellant a lease of the said premises for the production of oil and gas, in which lease their homestead rights were waived; that on or about September 1, 1910, the Fulton Oil & Gas Company and Walter Hennig claimed some title in said premises for the purpose of mining for oil and gas, by virtue of two leases executed to one T. N. Rogers and assigned by him, and entered upon said premises and drilled wells for oil and gas and removed and sold the product. A demurrer was filed, and on hearing was sustained, and the bill dismissed at appellant's costs. From this order and decree an appeal was allowed to this court.

The chief object of the present proceeding, as shown by the prayer of the bill, is to have the Pierce-Gillespie lease set aside so far as it related to the homestead interest of Mr. and Mrs. Bowman; that, if the court should find that the premises were worth \$1,000 or less at the time the lease was made, the lease be held void as to the whole of the premises, otherwise that it be declared void as to the portion representing the \$1,000, and the court appoint commissioners to set aside the homestead; and that appellant, as grantee of the Bowmans' rights, be placed in possession of such portion.

The bill sets out the facts as to the litigation between Gillespie and the Fulton Oil & Gas Company, the details of which, and the conclusions of this court thereon, are found in *Gillespie v. Fulton Oil & Gas Co.*, 236 Ill. 188, 86 N. E. 219; *Id.*, 239 Ill. 328, 88 N. E. 192; *Id.*, 244 Ill. 9, 91 N. E. 75.

[1] It sets forth the substance of the pleadings in these former suits and the findings therein, and prays for a decree inconsistent with the decree in that litigation. It also states the result of that litigation and the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

holding that the Gillespie lease was valid, and prays that it may be declared null and void. The defense of former adjudication may therefore be raised by demurrer. *Hofmann v. Burris*, 210 Ill. 587, 71 N. E. 584; *Davis v. Hall*, 57 N. C. 403; 9 Ency. of Pl. & Pr. 616.

[2] Neither Bowman nor his wife, under the findings in *Gillespie v. Fulton Oil & Gas Co.*, supra, could raise in other litigation any question as to their homestead rights under the Gillespie lease. While it is true the homestead question here raised was not properly raised in the former litigation, it could have been so raised, as Bowman was a party. The doctrine of *res judicata* extends not only to every matter that was determined in the former suit, but to every other matter that might have been raised and determined. *South Park Com'rs v. Ward & Co.*, 248 Ill. 299, 93 N. E. 910; *Singer v. Hutchinson*, 183 Ill. 606, 56 N. E. 388, 75 Am. St. Rep. 133; *Daniel v. Gum* (Tenn. Ch.) 45 S. W. 468.

[3] The lease was executed by appellant after the former litigation with Bowman as to the Gillespie lease had been heard in this court. Appellant had notice of that fact. This litigation, being binding on Bowman, is binding on his grantees. He succeeded to the same estate or interest which Bowman had. *Towle v. Quante*, 246 Ill. 568; 92 N. E. 967, and cases cited; *City of Chicago v. Drexel*, 141 Ill. 89, 30 N. E. 774. All parties and their privies are bound by a former adjudication. Privies are estopped from litigating that which is conclusive upon him with whom they are in privity.

The decree of the circuit court must be affirmed.

Decree affirmed.

(250 Ill. 372.)

HOPKINS v. LEVANDOWSKI.

(Supreme Court of Illinois. June 20, 1911.)

1. CONSTITUTIONAL LAW (§ 61*)—MUNICIPAL COURT—DELEGATION OF LEGISLATIVE POWER.

Const. art. 4, § 84, states that the practice in the Chicago municipal court shall be as the General Assembly shall prescribe. Section 48 of the municipal court act (Hurd's Rev. St. 1909, c. 37, § 311) provides that the practice in forcible entry and detainer, other than the mode of trial and the proceedings subsequent thereto, shall be the same as prescribed by law for similar cases in other courts of record, but that the mode of trial and proceedings subsequent thereto shall be as near as may be to that pursued in other cases of the fourth class. The municipal court act made no provision for the issuance of a writ of restitution in forcible entry and detainer; but, under the power given the court by that act to make rules, it made rules providing for a writ of restitution. *Held*, that section 48 is not unconstitutional in allowing the court to regulate the issuance of writs of restitution; that not being a delegation of legislative power.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 103-107; Dec. Dig. § 61.*]

2. LANDLORD AND TENANT (§ 291*)—PAYMENT OF RENT—EVIDENCE—JURY QUESTION.

In an action of forcible entry and detainer to evict a tenant for nonpayment of rent, the question whether the defendant offered to pay his rent *held* to be one for the jury.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 1217-1269; Dec. Dig. § 291.*]

3. LANDLORD AND TENANT (§ 112*)—FORFEITURE OF LEASE—WAIVER.

Where a landlord sent his tenant a notice that the rent was due and unpaid, and if not paid within five days the lease would be forfeited, such a notice was a waiver of the right to declare a forfeiture for the nonpayment until the expiration of the time stated in the notice.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 343-349; Dec. Dig. § 112.*]

Error to Municipal Court of Chicago; Charles A. Williams, Judge.

Action by W. H. Hopkins against W. G. Levandowski. There was a judgment for plaintiff, and defendant brings error. Reversed and remanded.

Louis Greenberg, Clarence E. Mercer, and Thomas H. Mercer, for plaintiff in error. McKenzie Cleland, for defendant in error.

CARTER, C. J. An action of forcible detainer was brought by defendant in error in the municipal court of Chicago against the plaintiff in error December 3, 1910, and on the trial the court instructed the jury to find for defendant in error, and judgment was entered on the verdict. This writ of error was sued out to reverse that judgment, and the case is brought to this court on the ground that a constitutional question is involved as to the power of the municipal court to make rules.

[1] Plaintiff in error contends that the provisions of the municipal court act as to proceedings in forcible entry and detainer suits subsequent to the trial delegate legislative powers to the municipal court of Chicago and are therefore unconstitutional. Section 48 of the municipal court act (Hurd's Rev. St. 1909, c. 37, § 311) provides that the practice in forcible entry and detainer suits, other than the mode of trial and the proceedings subsequent to trial, shall be the same, as near as may be, to that prescribed by law for similar cases in other courts of record, but that "the mode of trial and all proceedings subsequent to the trial shall be the same, as near as may be, as in other cases of the fourth class, mentioned in section 2 of this act." Cases of the fourth class in the municipal court are tried without written pleadings. Nothing is said in the municipal court act as to the issuing of a writ of restitution in forcible entry and detainer suits. Under the provisions of said municipal court act the municipal court may make rules for conducting and disposing of cases within the jurisdiction of that court for which methods of procedure have not been sufficiently pre-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

scribed by the said act. The municipal court, under these provisions, has made rules with reference to issuing writs of restitution in forcible entry and detainer suits. Section 34 of article 4 of the Constitution, under which the municipal court was created states that the practice in that court "shall be such as the General Assembly shall prescribe."

Counsel for plaintiff in error argue that the Legislature cannot delegate to the municipal court the power to regulate the issuing of writs of restitution in forcible entry and detainer suits. In the recent case of *People v. Roth*, 249 Ill. 532, 94 N. E. 953, this court held that it was not a violation of the provision of the Constitution vesting legislative power in the General Assembly to authorize boards created by the Legislature to formulate rules for the performance of their duties. In *Coleman v. Newby*, 7 Kan. 82, it is stated that the Legislature may enact general provisions, authorizing the courts who are to act thereunder to fill up the details. "They may mark out the outlines and leave those who are to act within these outlines to use their discretion in carrying out the minor regulations." In *Wayman v. Southard*, 10 Wheat. 1, 6 L. Ed. 253, the Supreme Court of the United States, speaking through Chief Justice Marshall, said: "The jurisdiction of a court is not exhausted by the rendition of its judgment, but continues until the judgment shall be satisfied. * * * Were it even true that jurisdiction could be technically said to terminate with the judgment, an execution would be a writ necessary for the perfection of that which was previously done, and would consequently be necessary to the beneficial exercise of jurisdiction." Nothing is said in any of the authorities cited by counsel for plaintiff in error that in any way conflicts with the conclusions reached in the foregoing decisions. The sections of the municipal court act are not unconstitutional because they fail to state in specific terms the requirements as to the issuing of writs of restitution in forcible entry and detainer suits.

[2] Plaintiff in error occupied a storeroom in a building known as 4548 Cottage Grove avenue, Chicago, and the second-floor flat of a building in the rear of said store, under two leases executed in 1910 and both expiring April 30, 1913. The original lessor for the flat was the defendant in error, and for the store one Bovee, who afterwards, on April 12, 1910, assigned the lease to the defendant in error. The rental was payable in monthly installments of \$35 on the store and \$15 for the flat. The record shows that the default is as to the rent for December, 1910; that on December 1st plaintiff in error went to Hopkins' residence and told his wife that he came to pay the rent; that she said she had no receipt, and the rent would be collected by the man who had collected it the previous month; and that she refused to ac-

cept it. The testimony of plaintiff in error as to his offer to pay the rent to Mrs. Hopkins is not contradicted, and no question is made whether Mrs. Hopkins was the proper person to receive it; hence whether plaintiff in error offered to pay the rent on December 1st was a question for the jury to determine. *Van Vlissingen v. Lenz*, 171 Ill. 162, 49 N. E. 422.

[3] The plaintiff in error also offered in evidence a five days' notice concerning the rent due December, 1910, which stated that unless payment was made on or before December 7th the lease would be terminated. He testified that this notice was served on him December 2, 1910, the day before this suit was started. The court refused to admit this notice in evidence. Plaintiff in error contends that, having served such five days' notice, the defendant in error thereby waived the right to declare a forfeiture under the lease, at least until the time stated in the notice had expired. Defendant in error, on the contrary, insists that, as the leases provided that they could be forfeited at the election of the lessors for nonpayment of rent without notice, the notice in question could not be considered as waiving the forfeiture under the leases. If the landlord has by some act recognized the existence of the tenancy subsequent to the time he might have declared the forfeiture, such right of forfeiture is thereby waived. *Webster v. Nichols*, 104 Ill. 160; *McKildoe's Ex'r v. Darracott*, 13 Grat. (Va.) 278; *Jones on Landlord and Tenant*, § 496; 1 *Underhill on Landlord and Tenant* (1809 Ed.) § 407; *Ward v. Day*, 117 Eng. C. L. 359. It is not essential that the landlord should actually have in mind the waiving of the forfeiture. *Kales on Future Interests*, § 64. A notice to quit has been held such a waiver. *Taylor on Landlord and Tenant* (6th Ed.) § 498; 2 *Platt on Law of Leases*, § 469; *Doe v. Miller*, 2 C. & P. 348. The reasoning in *Gradle v. Warner*, 140 Ill. 123, 29 N. E. 1118, and *McConnell v. Pierce*, 210 Ill. 627, 71 N. E. 622, tends to support the same conclusion. The provision declaring a forfeiture for nonpayment of rent only made the lease voidable at the election of the lessor. On reason and authority, therefore, if the defendant in error gave a five days' notice, he thereby recognized the tenancy of plaintiff in error, and waived his right to forfeiture until the expiration of the time stated in the notice. The trial court should have admitted the notice in evidence.

The conclusions we have reached render it unnecessary to consider or decide the other errors assigned. The judgment of the municipal court must be reversed, and the cause remanded to that court for further proceedings in harmony with the views herein expressed.

Reversed and remanded.

(250 Ill. 426)

PEOPLE v. CASADY.

(Supreme Court of Illinois. June 20, 1911.)

INFANTS (§ 20*)—CRUELTY TO CHILD—PUNISHMENT—STATUTES.

One guilty of cruelty to a child, punishable under Cr. Code (Hurd's Rev. St. 1909, c. 38) § 53, by fine or imprisonment in the penitentiary for not more than five years, may not be sentenced under the parole law (Hurd's Rev. St. 1909, c. 38, §§ 498-509), but must be sentenced under section 53.

[Ed. Note.—For other cases, see *Infants*, Cent. Dig. § 20; Dec. Dig. § 20.*]

Error to Circuit Court, Henry County; Emery C. Graves, Judge.

Austin Casady was convicted on several indictments charging cruelty to a child, and brings error. Reversed.

Louis Greenberg, for plaintiff in error. W. H. Stead, Atty. Gen., Charles E. Sturtz, State's Atty., and Fred H. Hand, for the People.

PER CURIAM. At the February term, 1909, of the Henry county circuit court, six indictments were returned against the plaintiff in error, charging him with cruelty to a child, under section 53 of division 1 of the Criminal Code. Hurd's Rev. St. 1909, p. 759. He entered a plea of guilty to each indictment, and thereupon the court sentenced him to imprisonment in the penitentiary "until discharged under due process of law, not to exceed the period of five years." A writ of error has been sued out in each of the six cases, and as they all involve the same questions they have been consolidated here.

Said section 53 provides that any person who is guilty of acts therein designated "shall be be fined not exceeding \$500 or imprisoned in the penitentiary not exceeding five years." Under the reasoning of this court in *People v. Hartsig*, 249 Ill. 348, 94 N. E. 525, plaintiff in error should have been sentenced under said section 53, and not under the parole law (Hurd's Rev. St. 1909, c. 38, §§ 498-509). This is conceded by the state. The judgment in each of the cases is therefore erroneous, and each must be reversed. The plaintiff in error has been confined two years in the penitentiary. In view of the circumstances of this case, the punishment already inflicted, and the nature of the charge in the indictments, the causes will not be remanded.

Judgments reversed.

(250 Ill. 384)

FOX et al. v. FOX et al.

(Supreme Court of Illinois. June 20, 1911.)

1. TRUSTS (§ 62*)—RESULTING TRUSTS—NATURE.

A resulting trust is implied by law from the facts, and does not arise out of a contract.

[Ed. Note.—For other cases, see *Trusts*, Cent. Dig. § 88; Dec. Dig. § 62.*]

2. TRUSTS (§§ 35, 70*)—NATURE—EXPRESS TRUST—RESULTING TRUST.

Where inherited property sold under partition was bid in by an heir, under agreement that it should be held in trust for her brothers and sister, and for the children of a deceased brother, there was an express trust as to the adult heirs and a resulting trust as to the minors.

[Ed. Note.—For other cases, see *Trusts*, Cent. Dig. §§ 45-50, 95-97; Dec. Dig. §§ 35, 70.*]

3. TRUSTS (§ 20*)—EXPRESS TRUST—DECLARATIONS.

It is not necessary that an express trust be declared by the trustee in any particular form, or that a writing be framed in declaring the trust; but the declaration may be found in letters, memoranda, or writings of the most informal nature.

[Ed. Note.—For other cases, see *Trusts*, Cent. Dig. §§ 25-28; Dec. Dig. § 20.*]

4. TRUSTS (§ 20*)—EXPRESS TRUSTS—DECLARATION.

An express trust may be declared by an answer in chancery, signed by one entitled to declare it; the terms being gathered from the whole answer.

[Ed. Note.—For other cases, see *Trusts*, Cent. Dig. §§ 25-28; Dec. Dig. § 20.*]

5. TRUSTS (§ 21*)—DECLARATION—SUFFICIENCY.

No particular form of words is necessary to create a trust, when the writing makes clear its existence; and, if it states a definite subject and object, it is unnecessary that every element, required to constitute it, be so clearly expressed in detail that nothing can be left to inference or implication.

[Ed. Note.—For other cases, see *Trusts*, Cent. Dig. §§ 29, 30; Dec. Dig. § 21.*]

6. TRUSTS (§ 43*)—EXPRESS TRUSTS—PAROL EVIDENCE AFFECTING TRUSTS—ADMISSIBILITY.

Parol evidence is admissible to make clear the details of a trust, the existence and general object of which is shown by writing.

[Ed. Note.—For other cases, see *Trusts*, Cent. Dig. §§ 62-65; Dec. Dig. § 43.*]

7. TRUSTS (§ 61*)—TERMINATION—TIME.

Where inherited property sold under partition was bid in by an heir, under an agreement that it should be held in trust for her brothers and sister, and for the children of a deceased brother, and no definite time was set for termination of the trust, there may be distribution of the assets or partition of the estate before all the land is sold; the persons appointed to sell not being able to agree upon the price.

[Ed. Note.—For other cases, see *Trusts*, Cent. Dig. §§ 83-87; Dec. Dig. § 61.*]

8. PARTITION (§ 12*)—ESTATES SUBJECT TO.

Persons holding the equitable title to land held under a trust are entitled to maintain a bill in partition and for an accounting.

[Ed. Note.—For other cases, see *Partition*, Cent. Dig. §§ 38-51; Dec. Dig. § 12.*]

9. CONVERSION (§ 3*)—GROUNDS.

Whether there was an equitable conversion under a trust in land held for the benefit of several heirs is to be determined from the terms and conditions of the trust; it being usually necessary for that purpose that there be an absolute direction that the land be sold, so that, where the sale was made dependent on the agreement of certain parties as to time and price, there was no conversion.

[Ed. Note.—For other cases, see *Conversion*, Dec. Dig. § 3.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.

10. TRUSTS (§ 60*)—CONSTRUCTION—DURATION.

Courts may construe a trust on the question of its duration, where the question is doubtful.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 60.*]

11. TRUSTS (§ 61*)—TERMINATION—RIGHTS OF BENEFICIARIES.

When the purposes of a trust have been fulfilled and the trustee holds the property on a simple trust, or it becomes impossible to carry out the trust, the beneficiaries having absolute equitable ownership of the fund are entitled to have it terminated.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 83-87; Dec. Dig. § 61.*]

12. ATTORNEY AND CLIENT (§ 123*)—FIDUCIARY RELATION.

Where one of the several heirs was the only attorney in a family, and acted for all of them, he was bound to give one of them full information as to all facts concerning her interest on the receiving of an assignment thereof.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 239-245; Dec. Dig. § 123.*]

13. ATTORNEY AND CLIENT (§ 123*)—SETTLEMENT OF ESTATES—RIGHTS OF ATTORNEY.

An heir who acted as an attorney in the settlement of an estate was not incapacitated from purchasing the interest of another heir, but the burden was on him to show perfect good faith on his part, and that a fair price was paid for the interest.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 239-245; Dec. Dig. § 123.*]

14. PARTITION (§ 82*)—RIGHT OF TRUSTEE TO SUE.

After assigning her interest in an estate to W., a coheir and attorney in settling the estate, A. caused the same interest to be deeded to F., in trust for her children. *Held*, in a suit to partition the estate, that W., the assignment to him having been set aside, cannot question F.'s right to sue concerning the property conveyed to him, on the ground that he became vested only with a mere dry trust, which was executed by the statute of uses; the children being parties to the proceeding and asking, by their guardian ad litem, that the trust be declared to be in F.

[Ed. Note.—For other cases, see Partition, Dec. Dig. § 82.*]

15. TRUSTS (§ 227*)—SETTLEMENT—ATTORNEY'S FEES.

On an accounting by a trustee, she was not entitled to an allowance for money paid an attorney merely because, in distributing funds to the beneficiaries, the statements accompanying the remittances stated that a sum had been paid the attorney, and no objections were made; the doctrine of settled accounts being inapplicable.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 324; Dec. Dig. § 227.*]

16. TRUSTS (§ 315*)—TRUSTEES—RIGHT TO COMPENSATION.

A trustee is not entitled to compensation for personal trouble and loss of time, in the absence of some provision of the statutes, or of the instrument creating a trust, allowing him compensation.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 433-443, 474-479; Dec. Dig. § 315.*]

17. TRUSTS (§ 227*)—ACCOUNTING—ATTORNEY'S FEES.

A trustee is entitled to an allowance for attorney's fees under proper circumstances, when it is necessary to protect the trust fund.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 324; Dec. Dig. § 227.*]

Appeal from Circuit Court, Clay County; A. M. Rose, Judge.

Bill by Frank Fox and others against W. F. Fox and others. From the decree, defendants appeal. *Affirmed*.

John Lynch, Eugene L. Martin, and W. F. Fox, for appellants. James H. Smith and R. W. Nelson (T. S. Williams, guardian ad litem), for appellees.

CARTER, C. J. This is a bill filed by appellees in the circuit court of Clay county, to the September term, 1909, asking for an accounting from the appellant Mary A. Fox, trustee, for the setting aside of a certain deed, and that the lands in the name of the trustee be vested in the owners and partitioned or sold. After the taking of testimony and a report by the master in chancery, a decree was entered in substantial conformity with the prayer of the bill. From that decree, this appeal has been prayed.

Patrick Fox died intestate on June 19, 1887. He was unmarried and left no children or descendants. His only heirs, at law were Michael W. Fox and Frank Fox, his brothers; Bridget Kelly and Mary Fox, his sisters; and eight children of a deceased brother, Bernard Fox. He left land in Clay and Gallatin counties, Ill., aggregating in all about 1,000 acres. In 1894 these heirs commenced a partition suit in the circuit court of Clay county, which was prosecuted to a decree of sale, and pursuant to the decree the master advertised the lands for sale. Frank Fox, representing himself and his brother and sisters, and W. F. Fox (who was the son of the deceased brother, Bernard Fox) representing his brothers and sisters, some of whom were then minors, concluded that if the land was sold to strangers at this sale it was liable to be sacrificed. They agreed that W. F. Fox should attend the sale and bid in the property, if necessary. Accordingly he attended the sale, and as the land did not go to a satisfactory price he bid it in in the name of his sister, Mary A. Fox, as trustee. The master's deed was issued to Mary A. Fox, trustee, but did not name the beneficiaries, nor designate the power of the trustee, nor the duration of the trust. Pending the hearing of the partition suit, in 1894, Anna J. Fox, a sister of appellant W. F. Fox, by her attorney in fact, W. F. Fox, conveyed her undivided one-fortieth interest in the lands in question to her uncle, Frank Fox; it being understood that he should hold this interest in trust for her benefit. The decree in the original partition suit, in 1894, vested this undivided interest in Frank Fox absolutely.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

It decreed that he owned the undivided nine-fortieths interest in the said land, Mary Fox owned one-fifth, Bridget Kelly one-fifth, Michael W. Fox one-fifth, and the children of Bernard Fox (except Anna J.) each an undivided one-fortieth interest in said premises. It is claimed by appellees (and there is evidence in the record tending to uphold this claim) that appellant W. F. Fox, being the only lawyer in the family, engineered and advised the sale by the master to his sister as trustee, explaining to his uncle, Frank Fox, that it would be much better to take the title in one person for the purpose of making conveyances of the land, both because some of the beneficiaries were minors, and therefore unable at that time to execute deeds, and further because of the fact that Mary Fox, the sister of Frank Fox, was in a convent and did not wish to be annoyed with worldly matters; that they could probably sell the land to better advantage in small tracts; that the agreement was that the trustee should keep the title of the unsold land in her until the youngest child of Bernard Fox became of age, unless all the land was sold prior thereto; that it was further agreed between Frank Fox, representing himself and his brother and sisters, and W. F. Fox, representing himself and his brothers and sisters, that Frank Fox should act as the financial agent of all the parties, negotiate the sale of these lands, and should personally supervise and attend to the same; that Mary A. Fox should sign and acknowledge deeds as directed by Frank Fox and W. F. Fox; that W. F. Fox was to act as legal adviser for all parties in interest, and that each should render all necessary services without compensation.

Appellants agree substantially as to all of the matters above set forth with reference to the original partition suit and the sale of the property to Mary A. Fox, as trustee, but they disagree as to the terms of the trust. In the answer of Mary A. Fox, it is claimed that subsequent to the sale it was agreed between Frank Fox, representing four-fifths of the interests, and W. F. Fox, representing the remaining one-fifth, that the said Mary A. Fox, trustee, should hold the title in trust for the heirs (as their interests appeared at the time of Patrick Fox's death) until such time as a sale of the whole could be made, in tracts or in entirety; that as such sales were made she was to make deeds to the purchasers, and that the price should be that agreed upon and consented to by both Frank Fox and W. F. Fox; that, after paying the expenses incident thereto, Mary A. Fox, trustee, was to divide the net proceeds in accordance with the interests of each heir at law, and that the title was to remain in said trustee until all the lands formerly owned by Patrick Fox in Clay county were sold and disposed of.

[1, 2] It is insisted by appellants that this trust must be held to be an express trust, and not a resulting trust; that, so far as

the parties who were of age at the time it was entered into are concerned, it is based on a contract, and the heirs who were then minors have since ratified it. A resulting trust does not arise out of a contract, but is an implication of law from the existence of facts necessary to justify such implication. *Monson v. Hutchin*, 194 Ill. 431, 62 N. E. 788. This was an express trust as to the adults, but was a resulting trust as to those who were minors at the time the deed was taken in the partition suit in the name of Mary A. Fox, trustee. These minors now being of age insist that it shall be held an express trust, and it will therefore be so treated as to all the parties.

[3, 4] It is further argued by appellants that an express trust cannot be sustained, except by writing, and there is no writing by which Mary A. Fox can be bound as trustee, except her answer in this proceeding. It is not necessary that the trust should be declared by the trustee in any particular form, or that a writing should have been framed for the purpose of declaring the trust, but such declaration may be found in letters, memoranda, or writings of the most informal nature. *Whetsler v. Sprague*, 224 Ill. 461, 79 N. E. 667, and cases cited. It is well settled that an express trust may be declared by an answer in chancery, signed by the party who in law is entitled to declare it. *White v. Ross*, 160 Ill. 56, 43 N. E. 336; *Myers v. Myers*, 167 Ill. 52, 47 N. E. 309. The terms of the trust must be gathered from the whole answer as it stands. 1 *Perry on Trusts* (6th Ed.) § 85; *Lewin on Trusts* (9th Ed.) § 55.

[5, 6] No particular form of words is necessary to create a trust, when the writing makes clear the existence of a trust. *Orr v. Yates*, 209 Ill. 222, 70 N. E. 731. If it states a definite subject and object, it is not necessary that every element required to constitute it must be so clearly expressed in detail that nothing can be left to inference or implication. Parol evidence is admitted to make clear such details. "If the writing makes clear the existence of a trust, the terms may be supplied aliunde." *Kingsbury v. Burnside*, 58 Ill. 310, 11 Am. Rep. 67; 1 *Perry on Trusts* (6th Ed.) § 82; *Cagney v. O'Brien*, 83 Ill. 72; 28 Am. & Eng. Ency. of Law (2d Ed.) 879, and cases cited.

[7] Conceding that on this record the terms of the trust, so far as they are supplied by the answer of the trustee, must control, it does not necessarily follow, as contended by appellants, that there could be no distribution of the assets or partition of the estate until all the land is sold. We shall refer to this again at greater length. It can be better understood if we first set out the further history of the transactions.

The evidence discloses that Frank Fox paid the entire cost of the partition proceedings in 1894; that the first lands that were sold under the trust agreement were all those in Gallatin county, the total selling price of

that property being paid over to the trustee direct; that since then there have been two pieces sold of the Clay county lands, the two sums of money being paid to Frank Fox, and that later another tract of Clay county land was sold, the money being paid directly to the trustee; that from the time of Patrick Fox's death, down to and including the year 1903, Frank Fox from his own funds paid the traveling expenses of himself and W. F. Fox incurred in looking after these lands. Bridget Kelly died in 1901, leaving as her only heir at law her daughter, Anna Staggenborg, now Anna Frommel. She left a will, which was set aside by the courts of Kentucky. The one-fifth interest of Bridget Kelly thereupon vested in Anna Frommel. Mary Fox, the other sister of Patrick Fox, died intestate in February, 1904, and her interest in this property vested in Frank Fox, Michael W. Fox, Anna Frommel, and the eight children of Bernard Fox. Frank Fox was appointed administrator of her estate. The youngest of the minor children of Bernard Fox became of age in 1904. Some of the land has been sold and deeds executed by the trustee since that date, apparently with the sanction of all parties. Michael W. Fox was one of the original complainants in this suit, but has since died. He left a last will and testament, by the terms of which appellee Frank Fox was made sole legatee. A supplemental bill setting up these facts has been filed.

After the will of Bridget Kelly was set aside, Anna Frommel (then Anna Staggenborg) on September 30, 1904, assigned all of her right, title, and interest in the estate of Patrick Fox to appellant W. F. Fox for \$950. It is contended by appellees, and so found by the decree, that the assignment was made upon the representation that it was for the use and benefit of Frank Fox, who was to hold the title thereof for the benefit of the three children of Anna Frommel. The decree set aside this assignment to W. F. Fox, and found said interest in Frank Fox, as trustee of said three children of Anna Frommel. The decree found the amounts due and unpaid for the land already sold from the trustee to the various beneficiaries. It further ordered that the trust in said Mary A. Fox be terminated, and that the title held by said trustee be vested in the former cestuis que trust as tenants in common; that said Mary A. Fox be divested of all right, title, or other claim as such trustee, and that each of the parties be entitled, in fee simple, to the respective shares and interests as follows: Frank Fox, $\frac{20}{100}$; Frank Fox, trustee of Alice, Helen, and Dorothy Staggenborg, $\frac{20}{100}$; Frank Fox, trustee of Anna J. Fox, $\frac{4}{100}$; Anna J. Fox, $\frac{1}{100}$; and William F. Fox, Mary A. Fox, Bertha G. Fox, John P. Fox, Bernard C. Fox, May Fox, and Joseph E. Fox, each $\frac{5}{100}$; that a division and partition of the premises be made and commissioners appointed therefor, and that if the

premises were not susceptible of division without prejudice the commissioners should report their appraisal.

It is clear from the terms of the trust as set out in the answer of the trustee that no definite time was set when the property should be sold and the trust terminated. It is also apparent from the evidence in this record that appellee Frank Fox and appellant W. F. Fox, who according to said answer were to decide on the price for the property sold, do not agree as to the steps to be taken to terminate the trust. It is contended by the appellants that the trust cannot be terminated until the land is sold, but the chief reason urged by them why it should not now be terminated and closed is that it is inequitable to charge the costs of this proceeding to them, in view of the terms of the trust. There is no claim made that the decree of the court sacrifices the interests of any of the beneficiaries. It is conceded by appellants that it is the duty of every trustee to keep an accurate, full, and fair account of all transactions, and to have the said accounts ready for inspection, and to render them promptly upon reasonable notice; but it is contended that the appellee Frank Fox cannot compel such an accounting, as he has never made any accounting to the trustee of the moneys he has received from the sale of lands. The evidence discloses that Frank Fox has paid out more money in caring for the trust estate than he received from the sale of the trust lands. The master found that there was a certain sum of money due him yet from the receipts of the lands already sold, over and above what had been paid him by purchasers and by the trustee.

[8] In this connection it is contended by counsel for appellees that partition proceedings do not lie, because under the terms of this trust there is an equitable conversion of the real estate. The persons found by the decree to be vested with interests in the unsold land had the equitable title thereto, and under the reasoning of this court in *Bissell v. Peirce*, 184 Ill. 60, 56 N. E. 374, *Johnson v. Filson*, 118 Ill. 219, 8 N. E. 318, and *Fitch v. Miller*, 200 Ill. 170, 65 N. E. 650, a bill would lie for partition and accounting.

[9] The question as to whether there was conversion under this trust is to be determined from the terms and conditions of the trust. We do not think those terms, as established in this record, made it imperative to sell the land. Ordinarily an essential requisite for equitable conversion is an absolute expression that the land should be sold. 3 Pomeroy's Eq. Jur. (3d Ed.) § 1159. This sale was dependent upon the agreement of certain parties as to price and time.

As we have seen, the time when this trust should terminate, as set forth in the answer of the trustee, rests upon the uncertain condition of the agreement of the two

parties as to the price. It would necessarily end at the death of one of those two parties. If they cannot agree, it is not reasonable to construe the trust to mean that it should continue indefinitely. Furthermore, there has been the death of three of the beneficiaries since the trust was created, and all who were minors at that time have become of age. It has been held that, where the beneficiaries have become of age or died, the trust will, under certain circumstances, expire. 28 Am. & Eng. Ency. of Law (2d Ed.) 949, and cases cited.

[10] If the question of the duration of the trust is doubtful, it is proper for a court to be asked to construe the trust on that point. 2 Perry on Trusts (6th Ed.) § 920. A trust will not be continued merely for the benefit of the trustee, or in order that he may continue to receive compensation.

[11] When the purposes of the trust have been fulfilled and the trustee holds the property on a simple trust, the beneficiaries having the absolute equitable ownership of the fund are entitled to have the trust terminated. The same rule applies if it becomes impossible to carry out the trust. 2 Perry on Trusts (2d Ed.) § 920. From everything shown in this record, we think it is clear that for the benefit of all parties this trust should be terminated and the subject-matter divided among the beneficiaries. Nothing has been done by any of the beneficiaries that would estop them from asking for the termination of the trust, and there is no claim made that it would be advantageous to any of them to have it continued.

[12] Counsel for appellees further contend that the finding of the decree setting aside the assignment from Anna Staggenborg (Frommel) to W. F. Fox was not justified by the evidence in the record. It appears from the evidence that when this assignment was made W. F. Fox was the only one connected with it that was fully acquainted with the value of that interest, and, while Anna Frommel had attorneys representing her who had investigated as to the value of the property, it also appears by the great weight of the evidence that she did not know at this time that her aunt, Mary Fox, had died and that she (Anna Frommel) was entitled to receive a part of her aunt's interest. The evidence also shows that she supposed the property was being sold to her uncle, Frank Fox, that W. F. Fox was acting for him, and that Frank Fox was buying this interest for the benefit of her three children. In view of the fact that W. F. Fox was the only attorney in the family and had been acting for practically all of the heirs up to this time, we think his relations with Anna Frommel were of such a character that it was his duty to give her full and complete information as to all of the facts in connection with her interest. In

our judgment the weight of the evidence is to the effect that at the time she sold her interest for \$950 it was worth, as the court found, at least four times that amount.

[13] W. F. Fox, as former attorney of the heirs of Patrick Fox, was not entirely incapacitated from purchasing this interest, but the burden of proof on this record was upon him to show the most perfect good faith on his part, and that a fair price was paid for the interest purchased. Roby v. Colehour, 135 Ill. 300, 25 N. E. 777; Beach v. Wilton, 244 Ill. 413, 91 N. E. 492. This he did not show, and the court rightly set aside the assignment.

[14] Subsequent to the conveyance by Anna Staggenborg to W. F. Fox of all her interest in the estate, she executed another deed of all her interest to one McDermott, and the latter then executed a deed of the same property to Frank Fox, as trustee for the three children of Anna Staggenborg. The decree in the trial court set aside the assignment to W. F. Fox, and held that the interest of Anna vested in Frank Fox, as trustee for said three children, under the deed from McDermott, and that Frank Fox, as trustee, should repay to W. F. Fox the \$950 which the latter had paid to Anna Staggenborg for her interest. In this connection it is urged by counsel for appellants that Frank Fox's interest as trustee for the children of Anna Frommel was obtained by a deed which vested him only with a passive or dry trust, with no active duties to perform, and that it would be at once executed by the statute of uses, so that he could not maintain an action in relation to any of the property conveyed. On this record we do not think that W. F. Fox, or any one of the appellants, is in a position to raise this question. Anna Frommel's children are made parties to this proceeding, and ask by their guardian ad litem that the trust be declared to be in Frank Fox.

[15] The trustee asked the court below for the allowance of \$1,000 which she had paid to her brother, the appellant W. F. Fox, who had acted as her attorney since the trust was placed in her hands. In distributing the funds which had been paid out by the trustee, in several of the statements accompanying the check, the trustee, through her attorney, W. F. Fox, stated that \$1,000 had been paid him as attorney's fees, and no objections appear to have been made by any of the beneficiaries. We do not think the doctrine of settled accounts applies in this case to attorney's fees. The evidence does not show that any of the beneficiaries settled with the trustee in full and assented to the attorney's fees. There is nothing in the written memoranda that we have in this record concerning the conditions of the trust that refers in any way to compensation to be paid to the trustee or to her attorney. Frank Fox testified that he and the trustee

and W. F. Fox were to give all their services gratis, and we do not find any contradiction of this statement in the record. The decree of the court found that W. F. Fox was not entitled to \$1,000 attorney's fees that had been paid to him, and that the trustee should account for this amount to the beneficiaries.

[16, 17] The decisions in this state hold that a trustee is not entitled to compensation for personal trouble and loss of time, in the absence of some provision of the statutes, or of the instrument creating the trust, allowing him compensation. *Cook v. Gilmore*, 133 Ill. 139, 24 N. E. 524; *Buckingham v. Morrison*, 136 Ill. 437, 27 N. E. 65; *Gray v. Robertson*, 174 Ill. 242, 51 N. E. 248. This record shows that Frank Fox, who has given a great deal of time to the care of this trust estate, has never charged anything for his time, and was not allowed any compensation by the decree. A trustee is entitled to be allowed attorney's fees, under proper circumstances, when it is necessary to protect the trust fund. *Nevitt v. Woodburn*, 190 Ill. 283, 60 N. E. 500. In view of the testimony that W. F. Fox was to serve as attorney without compensation, we are not disposed to disturb the decree of the chancellor on this point.

The decree of the circuit court will be affirmed.

Decree affirmed.

(209 Mass. 196)

GREBENSTEIN v. STONE & WEBSTER ENGINEERING CO.

(Supreme Judicial Court of Massachusetts. Middlesex. May 19, 1911.)

1. MASTER AND SERVANT (§ 252*)—INJURIES TO SERVANT—ACTIONS—NOTICE—NECESSITY. The notice, which by Rev. Laws, c. 106, § 71, an injured servant is required to give the master, is a condition precedent to the servant's right of action under the statute.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 806; Dec. Dig. 252.*]

2. MASTER AND SERVANT (§ 252*)—INJURY TO SERVANT—ACTIONS—NOTICE—SUFFICIENCY.

The notice which Rev. Laws, c. 106, § 71, requires that an injured servant must give to render the master liable, should be in writing, and should contain a statement of the time, place, and cause of the injury, and should show that it is intended to serve as a basis of an action; and hence a letter, written by an attorney acting for an injured servant, which informed the master that the servant while in his employ was greatly injured and would probably lose his eyesight, the injury occurring while the servant was at work on certain electrical appliances at a place specified, and that the servant had placed his case in the attorney's hands for adjustment, and that, if the master wished to confer with the writer as to a settlement, he would be glad to see or hear from him at once, is insufficient, being nothing more than a lawyer's letter telling the defendant that the servant had placed a claim in his hands for adjustment.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 806; Dec. Dig. § 252.*]

Report from Superior Court, Middlesex County; William Cushing Wait, Judge.

Action by William F. Grebenstein against the Stone & Webster Engineering Company. On report from the superior court. Judgment directed for defendant.

D. H. Coakley and H. D. Moore, for plaintiff. Peabody, Arnold, Batchelder & Luther, for defendant.

MORTON, J. This case was before this court in 205 Mass. 431, 91 N. E. 411, where the defendant's exceptions were sustained, and it was left to the superior court to decide whether the plaintiff should be allowed to amend his declaration by substituting, for the count at common law on which the case was tried, counts under R. L. c. 106, § 71, the act which was in force at the time of the injury complained of. The superior court allowed the plaintiff to amend by substituting for the count at common law a count under R. L. c. 106, for negligent superintendence, and the case came on for trial on the declaration as thus amended. The presiding justice ruled, subject to the defendant's objection and exception, that there was evidence of negligent superintendence, and by agreement of the parties submitted certain questions to the jury which they answered in favor of the plaintiff and assessed damages in the sum of \$4,000. The presiding justice was, however, of opinion that the notice was insufficient and directed a verdict for the defendant and reported the case to this court. If the ruling in regard to the notice was wrong and the facts reported would justify a submission of the case to the jury, then judgment is to be entered for the plaintiff for \$4,000. Otherwise judgment is to be entered on the verdict for the defendant.

[1] We think that the ruling was right. The notice required by the statute is a condition precedent to a right of action. Any right of action which the plaintiff otherwise would have had is lost if he fails to give a sufficient notice. The notice required must be in writing, signed by the person injured or some one in his behalf, and must be given to the employer within 60 days, and must contain a statement of the time, place and cause of the injury. [2] The notice relied on in this case, omitting the letter head, is as follows:

"November 5, 1907.

"Stone & Webster Engineering Corporation, No. 147 Milk Street, Boston, Mass.—Gentlemen: William F. Grebenstein, who was in your employ and was very greatly injured and will probably permanently lose his eyesight, while at work on electrical appliances of the Boston Elevated Railway at Sullivan Square, and is now in the Boston City Hospital, has placed his case in my hands for adjustment.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

"There seems to be no doubt about the liability and certainly the injury is very great. If you wish to confer with me regarding a settlement I would be glad to see or hear from you at once.

"Yours very truly,

"[Signed] Howard D. Moore."

The notices required by the statute are not, as was said in *Driscoll v. Fall River*, 163 Mass. 105, 39 N. E. 1003, of notices under the highway statutes, "to be construed with technical strictness, but enough should appear in them to show that they are intended as the basis of a claim against the city or town." In *Kenady v. Lawrence*, 128 Mass. 318, it was said that "the notice should show * * * either by a form of words, or by the circumstances under which it is given, that it is intended by the party giving it as a notice for the purpose of fixing his right of action." This was cited with approval in *Lyman v. Hampshire*, 138 Mass. 74, 77, and in *Carroll v. New York, New Haven & Hartford Railroad*, 182 Mass. 237, 241, 65 N. E. 69. In the present case the alleged notice begins with a statement that the plaintiff was in the employ of the defendant, and while at work on electrical appliances of the Elevated Railway at Sullivan Square was greatly injured and "will probably lose his eyesight," and that he "has placed his case in my [i. e., the writer's] hands for adjustment." So far there is nothing to show that the writer is giving a notice on behalf of the plaintiff which is intended to serve as a basis of a claim under the statute. All that it amounts to is a notice that the plaintiff has been injured while at work in the defendant's employ on electrical appliances at Sullivan Square belonging to the Elevated Railway, and that his claim is in the writer's hands for adjustment. The notice then goes on to say that "there seems to be no doubt about the liability and certainly the injury is very great," and concludes by saying that "if you wish to confer with me regarding a settlement I would be glad to see or hear from you at once." We do not see how it possibly can be said that this calls or was intended to call the attention of the defendant to the time, place and cause of the accident with a view to laying the foundation for a claim against the defendant under the statute. The alleged notice is nothing more nor less than a lawyer's letter calling the attention of the defendant to the fact that a claim has been placed in his hands for adjustment, and cannot be regarded as in any sense a notice under the statute. The case presented is not that of an inaccuracy in giving a notice intended as the basis of a claim under the statute, but a case where no notice whatever has been given. The plaintiff has been severely injured and his case is a hard one. But we are compelled to

hold that the action cannot be maintained for want of a notice.

It is not necessary to consider whether the case was properly submitted to the jury on the question of liability.

Judgment on the verdict for the defendant.

(209 Mass. 259)

BROWN et al. v. CITY OF NEWBURYPORT.

(Supreme Judicial Court of Massachusetts.

Suffolk. May 29, 1911.)

1. BILLS AND NOTES (§ 116*)—CONTENTS—CONSTRUCTION.

All that appears in writing or printing on the face of a note may be taken as a part of it.

[Ed. Note.—For other cases, see *Bills and Notes*, Cent. Dig. §§ 248-254; Dec. Dig. § 116.*]

2. MUNICIPAL CORPORATIONS (§ 908*)—FISCAL MANAGEMENT—NOTES—EXECUTION.

A note purporting to be executed by defendant city was signed by the city treasurer and mayor, and opposite the mayor's signature was an approval by the mayor for the committee on finance. Below this was a separate certificate of the city clerk, reciting a council's order authorizing the city treasurer to borrow from time to time, with the approval of the committee on finance, sums not exceeding in the aggregate \$160,000, with renewals thereof, and to execute and deliver notes of the city therefor, and below this a certificate of the treasurer that the amount borrowed under such authorization, including the note in question, was \$85,000, and after this an order that the mayor be authorized to approve for the committee on finance all notes of the city duly negotiated on its behalf and attested by the clerk of the committee. *Held*, that the signing of the note by the mayor and city treasurer was not an assertion of their truth by the mayor; such certificates being such independent assertions by different city officers, intended to stand separately on their own merits.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1896; Dec. Dig. § 908.*]

3. MUNICIPAL CORPORATIONS (§ 908*)—FISCAL MANAGEMENT—NOTES—EXECUTION.

A city council's order, authorizing the city treasurer to procure temporary loans in anticipation of taxes from time to time, with the approval of the committee on finance, and an order of the committee that the mayor approve for it all notes of the city duly negotiated on any loan made for or on behalf of the city, did not require the execution of such notes in the manner specified by Rev. Laws, c. 27, § 9, declaring that notes of municipal corporations shall be signed by its treasurer and countersigned by the mayor.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1896; Dec. Dig. § 908.*]

4. MUNICIPAL CORPORATIONS (§ 908*)—NOTES—ISSUANCE—EFFECT.

The issuance of a note for the benefit of a city, signed by its treasurer and by its mayor, was not of itself equivalent to a recital of the existence of the necessary precedent facts showing authority of such officers to negotiate the loan.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1896; Dec. Dig. § 908.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

5. MUNICIPAL CORPORATIONS (§ 908*)—FISCAL MANAGEMENT—NOTES—CERTIFICATION—DEFECT.

A note, purporting to evidence a loan obtained for the benefit of defendant city, was signed by the city treasurer and mayor, and approved by the mayor for the city's finance committee. It also contained a copy of the vote of the city council authorizing the borrowing of money, which was attested by the city clerk, and statements of the city clerk and clerk of the finance committee in assurance of certain facts, and an order by the finance committee to authorize the mayor to approve for the committee all notes of the city for loans made on its behalf. *Held* that, since, there was no statute authorizing the city clerk or the clerk of the finance committee to make certificates, nor conferring power on the city treasurer to determine and certify the outstanding indebtedness, such certificates were ineffective to give validity to the note.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1896; Dec. Dig. § 908.*]

6. MUNICIPAL CORPORATIONS (§§ 869, 908*)—FISCAL MANAGEMENT—BORROWING MONEY.

A municipal corporation has no inherent power to borrow money or to issue notes, as it can incur debts only in the manner and within the limitations prescribed by statute.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1843, 1844, 1896; Dec. Dig. §§ 869, 908.*]

7. MUNICIPAL CORPORATIONS (§ 869*)—FISCAL MANAGEMENT—BORROWING MONEY—FINANCE COMMITTEE—DELEGATION OF DUTIES—“APPROVAL.”

Where a city council authorized the city treasurer to borrow money “from time to time with the approval of the committee on finance,” the word “approval,” as so used, contemplated the exercise of discretion by the committee as a whole, investigating and sanctioning according to their own independent judgment each separate loan made under its order; and hence it could not legally delegate such duty to the mayor or as chairman of the committee.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1843, 1844; Dec. Dig. § 869.*]

For other definitions, see Words and Phrases, vol. 1, p. 474.]

8. MUNICIPAL CORPORATIONS (§ 908*)—FISCAL MANAGEMENT—NOTES—VALIDITY.

Where a note purporting to evidence a loan to a city contained a copy of the order of the city council which authorized the city treasurer to borrow money up to a certain amount from time to time, with the approval of the finance committee, and further contained a certificate of an order by the finance committee delegating the authority to approve such notes to the mayor, and was “approved for the committee on finance” by the mayor, it showed on its face that there had been no actual approval of the loan by the finance committee and was invalid, even in the hands of a bona fide purchaser before maturity.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1896; Dec. Dig. § 908.*]

9. MUNICIPAL CORPORATIONS (§ 908*)—FISCAL MANAGEMENT—NOTES—“NEGOTIATE.”

Where an order authorized a city finance committee to “negotiate” notes for the city's benefit, the term “negotiate” was sufficient to include the entire transaction of asking for bids, or ascertaining the discount by private inquiry,

and deciding upon the amounts, the rate, and the time on which the notes should be given.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1896; Dec. Dig. § 908.*]

For other definitions, see Words and Phrases, vol. 5, pp. 4771, 4772.]

10. MUNICIPAL CORPORATIONS (§ 949*)—LOAN TO CITY—VOID NOTE—RIGHTS OF HOLDERS.

Certain notes, purporting to have been executed to evidence a loan to defendant city, were void on their face. One of the notes was negotiated to plaintiffs, and the proceeds deposited in the city's bank account, and immediately used by the city treasurer to cover his defalcations. *Held*, that the fact that the proceeds were so deposited was not sufficient to charge the city with liability for money had and received; no benefit having been conferred on it.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1991-1994; Dec. Dig. § 949.*]

Appeal from Superior Court, Suffolk County.

Action by Joseph E. Brown and others, doing business as Blake Bros. & Co., bankers and brokers, against the City of Newburyport, to recover on a note purported to have been made by defendant city, payable to its treasurer, indorsed by him, and delivered to plaintiffs. In the superior court, judgment was ordered for defendant on an agreed statement of facts, and plaintiffs appeal. Affirmed.

J. L. Thorndike and H. Ware, for appellants. Arthur Withington, for appellee.

RUGG, J. This is an action upon a promissory note of the following tenor:

“\$25,000.

“Newburyport, Mass., April 13th, 1906.

“[Stamp \$25,000\$]

“For value received, the City of Newburyport, by its treasurer, promises to pay J. V. Felker, City Treas., or order, twenty-five thousand dollars, in six months without grace, at the First National Bank of Boston.

“Approved for Committee on Finance:

“J. V. Felker, City Treasurer.

“W. F. Houston, Mayor.

“No. 795. W. F. Houston, Mayor.

“In City Council, City of Newburyport, Mass.

“January 1, 1906.

“Ordered, that for the purpose of procuring a temporary loan to and for the use of the city of Newburyport, in anticipation of the taxes of the present municipal year, the City Treasurer is hereby authorized and directed to borrow from time to time, with the approval of the Committee on Finance, a sum or sums, in the aggregate not exceeding one hundred and sixty thousand dollars, with renewals thereof, and to execute and deliver the note or notes of the city therefor, payable within one year from the time the loan is made, with interest thereon or discounted at a rate not exceeding six per cent. per annum. The said debt or debts incurred by a loan or

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

loans to the city under this order, are to be paid from the said taxes of the present municipal year.

"In Common Council, January 1, 1906.

"Order adopted by ye and nay vote and sent up for concurrence. Yeas 18, nays 0, absent 0. J. Herman Carver, Clerk.

"In Board of Alderman, January 1, 1906.

"Order adopted in concurrence by a ye and nay vote. Yeas 7, nays 0, absent 0.

"[Seal of City.]

"George H. Stevens, City Clerk.

"Approved January 1, 1906.

"W. F. Houston, Mayor.

"A true copy. Attest:

"George H. Stevens, City Clerk.

"City of Newburyport, April 13, 1906.

"I hereby certify that the total amount borrowed under the above authorization, including note No. 795 of this date, is eighty-five thousand dollars.

"J. V. Felker, Treasurer.

"In Committee on Finance,

"January 9th, 1906.

"Ordered, that his honor, the Mayor, be authorized to approve for the Committee on Finance all notes of the city of Newburyport duly negotiated on any loan made for and in behalf of the city.

"Attest:

"George H. Stevens,

"Clerk of the Committee."

Indorsement on back:

"J. V. Felker, City Treas."

This note was the first of five numbered consecutively bearing the same date, aggregating \$80,000, sold to the plaintiffs by the city treasurer of the defendant on the day of their date. The certificate of the city treasurer on each of the other four notes as to the amounts of indebtedness incurred under the order of the city council was increased by the face of each note and the aggregate of those preceding it. The city council and the committee on finance, which was composed of seven members of the city council and the mayor, passed respectively the two orders set forth on the note, and the committee on January 9, 1906, further voted "that the mayor and city treasurer be authorized to negotiate notes under the provisions of the order of the city council passed January 1, 1906, from time to time as may be required." Between January 17, 1906, and April 13, 1906, Felker had negotiated under the authority of said order and votes notes aggregating \$98,475 upon forms substantially the same as that here in question, and had properly entered the proceeds from the sales of said notes upon the books of the city. The proceeds of the five notes dated April 13th were used by Felker to pay a single note for \$80,000 dated November 13, 1905, and made in the name of the city, which note was the latest of many fraudulently issued and used to cover a series of defalcations made by him as city treasurer

er during a period of about ten years. No action was taken by the city council except to pass the order, copy of which appears on the note and no action was taken by the committee on finance respecting the note in suit, and no action whatever was taken by it under the authority of the order of January 1st except to pass the two votes on January 9th before recited. The sums embezzled by Felker were not entered upon the books of the city, and the blanks used for the fraudulent notes were torn from the end of the note book, while those used for legitimate purposes were taken in order from the front of the note book. No other city official knew of the fraud of Felker. The defendant resists liability on this note on two grounds: First, because it appeared from the face of the note that it was not approved by the committee on finance as required by the vote of the city council; and, secondly, because of overissue on the ground that the limit of borrowing authorized was \$160,000 and the notes of April 13, 1906, of which this was one, brought the total up to \$178,475.

[1] All that appears in writing or print upon the note may be taken as a part of it.

[2] The several certificates of the city treasurer and city clerk, are not in such form, and the phrase of the note itself is not such, as to indicate an assertion of their truth by the mayor and city treasurer in signing the note. Their terms import plainly that they are independent declarations by different city officials intended to stand on their own merits.

[3] R. L. c. 27, § 9, required the notes of the defendant to be signed by its treasurer and countersigned by its mayor. In this regard the order did not follow the statute, but was of course by implication subject to its terms. So far as any recitals are concerned, which might bind the city touching notes, these are the officers inferentially designated by the statute as alone empowered to make them. We do not undertake to decide what might be the effect of a complete narration of facts as a part of the note, attested by these two officers, of the existence of facts which would show on its face a valid obligation binding upon the city. That is not the case before us. That point was left open by *Agawam National Bank v. South Hadley*, 128 Mass. 503, and has not since been decided by this court. We have merely a promissory note in common form without any recitals in its body, to which are appended several certificates. The signing by the mayor and treasurer of the note itself goes no further than the execution of the promise, and does not purport to be an authentication of the other statements upon the note. These derive all their strength from the signatures of the several officials affixed to them. [4] The issuance of the note was not itself equivalent to any recital of the existence of necessary precedent facts. *Buchanan v. Litchfield Co.*,

102 U. S. 278, 26 L. Ed. 138; Hopper v. Covington, 118 U. S. 148, 6 Sup. Ct. 1025, 30 L. Ed. 190. [5] The copy of the vote of the city council, which alone was empowered to authorize the issuance of the notes, is attested by the city clerk. This vote does not purport to empower any officer to make recitals. All that appears upon the note therefore are statements of the city clerk and clerk of committee and city treasurer in way of assurance to purchasers of the existence of certain facts. None of them are made in execution of any legal duty. It was said by Mr. Justice Gray in *Davless County v. Dickinson*, 117 U. S. 657, at page 664, 6 Sup. Ct. 897, 29 L. Ed. 1026. "An officer's certificate of a fact he has no authority to determine is of no legal effect." It is only as to facts within the power of the officers to ascertain and determine that this statement can affect the city. *Bloomfield v. Charter Oak Bank*, 121 U. S. 121, 7 Sup. Ct. 865, 30 L. Ed. 923; *Northern Bank v. Porter Township*, 110 U. S. 608-617, 4 Sup. Ct. 254, 28 L. Ed. 258. A city clerk has a duty and authority as to authentication of records. But there is no statute which clothes a city treasurer with the power or duty to determine and certify the outstanding indebtedness of the municipality. If such power can be inferred from the right to execute notes, then it inheres in the mayor and city treasurer, the signatures of both of whom are required to validate a city note, and not in either acting separately. Hence it is unnecessary to consider whether *Presidio County v. Noel-Young Bond Co.*, 212 U. S. 58, 65, 66, 29 Sup. Ct. 237, 53 L. Ed. 402, and the cases there cited announced principles of law controlling in this commonwealth, for there the recitals were in the body of the instrument and were signed by all the officers whose signatures were required to make valid the obligation. Its validity must therefore depend upon the matters stated on the note, giving to each the force to which each is entitled, and not covering them all with the blanket of authority of the city itself acting through the city treasurer and mayor as agents duly empowered to execute notes. [7] The point to be decided is whether under this principle the city is concluded by what appeared upon the note, or whether enough appears there to show the validity of the note. This requires an analysis of the several statements on the note. The order of the city council bounded the liability to which the city could be subjected under the statute. [6] In this commonwealth a municipality has now no inherent power to borrow money or to issue notes. It can incur debts only in the manner and within the limitations prescribed by the statutes, which have somewhat narrowed powers previously possessed. *Agawam Nat. Bank v. South Hadley*, 128 Mass. 503, 506. A prerequisite to the borrowing of any

money in anticipation of taxes by the defendant was an authorizing vote of the city council. R. L. c. 27, § 6. This note did not undertake to describe the effect of the authorizing vote, but set it out at length, so that every holder was charged with notice of its terms. The order itself was not strictly in compliance with the statute, in that it did not require the countersigning of the note by the mayor. This however was necessarily implied. Moreover, the mayor was a member of the finance committee, and thus indirectly his approval was required. It is to be observed that the city treasurer was not given an absolute and unqualified authority to negotiate the loan, but he was authorized only to borrow "from time to time with the approval of the committee on finance." This language shows a plain purpose to enable the borrowing to be made at different intervals of time. The collocation of the description of this duty, imposed on the finance committee, indicates that it was to be exercised whenever the borrowing took place, either from time to time or by a single loan. The crucial word to be construed is "approval." This word, like many others, has different meanings, depending upon the connection in which it is found and the subject-matter to which it is applied. It is used here by a municipal legislative body in a formal order to express a supervisory power reposed in one of its sub-committees as a restraint upon the action of an executive officer of the city, which might serve the purpose of enlightening his judgment, controlling his discretion and limiting his opportunity for folly or dishonesty. It occurs in a vote relating to the borrowing of money for municipal purposes. This is no simple matter, but involves a high degree of skill in order to determine the time and conditions, under which most favorable rates of interest and discount may be secured in the light of the actual financial necessities of the city. It does not show an intention to confer a perfunctory commission to be exercised once for all at the beginning of the year. That would be an idle ceremony, and would accomplish none of the results which the use of the language imports. The finance committee, as its name indicates and the ordinances of the defendant city provided, was the general legislative guardian of the financial affairs of the city. Approval, in this connection, means that the members of the finance committee, acting upon their official responsibilities and having in view the public welfare, shall investigate and sanction according to their own independent judgment, each separate borrowing made under the order. It implies reflection and sound business discretion as to each loan proposed. It did not confer a mere ministerial function, but imposed active and important prudential obligations. *Galligan v. Leonard*, 204 Mass. 202, 205, 90

N. E. 583. See cases collected in 4 Enc. L. & P. 1228 et seq. [8] The note shows by an attested copy of its vote how that committee undertook to perform the duty thus reposed in it, and hence every holder is charged with notice of the effect of its action. The vote plainly discloses that the members of the committee did not intend to exercise any individual judgment touching loans, but tried to delegate their authority of approval to the mayor. Official duties involving the exercise of discretion and judgment for the public weal cannot be delegated. They can be performed only in person. *Com. v. Maletsky*, 203 Mass. 241, 246, 89 N. E. 245, 24 L. R. A. (N. S.) 1168, and cases cited; *Hill v. Boston*, 193 Mass. 569, 573, 79 N. E. 825; *Com. v. Smith*, 141 Mass. 135, 140, 6 N. E. 89; *Com. v. Staples*, 191 Mass. 384, 386, 77 N. E. 712; *Stoughton v. Baker*, 4 Mass. 522, 530, 3 Am. Dec. 236; *Attorney General v. McCabe*, 172 Mass. 417, 420, 52 N. E. 717; *Ruggles v. Nantucket*, 11 Cush. 433; *Day v. Green*, 4 Cush. 433; *Coffin v. Nantucket*, 5 Cush. 269, 272; *Blair v. Waco*, 75 Fed. 800, 21 C. C. A. 517; *Curtis v. Portland*, 59 Me. 483; *Andover v. Grafton*, 7 N. H. 298; *State v. Hauser*, 63 Ind. 155; *Birdsall v. Clark*, 73 N. Y. 73, 29 Am. Rep. 105.

The certificate of the mayor upon the face of the note in these words, "Approved for Committee on Finance," read in connection with the vote of the committee on finance, denotes clearly that the mayor was undertaking merely to exercise the power delegated to him by the finance committee, and was not expressing (what did not exist in fact) an approval resting upon the actual exercise of the power conferred upon the committee by the order. It follows that this note showed upon its face its infirmity, in that it did not comply with the terms of the order by which it alone could acquire vitality. A note thus manifesting its invalidity on its face is not binding, even in the hands of a bona fide purchaser for value before maturity, either under our own decisions or under the general current of authority elsewhere. Nothing is better settled than that the holder of a note is held to a knowledge of the recitals it contains and is bound by their legal effect. *Agawam National Bank v. South Hadley*, 128 Mass. 503; *Lowell Five Cents Savings Bank v. Winchester*, 8 Allen, 109; *Benoit v. Conway*, 10 Allen, 528; *Abbott v. North Andover*, 145 Mass. 484, 14 N. E. 754; *Dickinson v. Conway*, 12 Allen, 487; *Lake County v. Graham*, 130 U. S. 674, 9 Sup. Ct. 654, 32 L. Ed. 1065; *Gunnison v. Rollins*, 173 U. S. 255, 257, 19 Sup. Ct. 390, 43 L. Ed. 689; *Nesbit v. Riverside Independent District*, 144 U. S. 610, 12 Sup. Ct. 746, 36 L. Ed. 562; *Sutliff v. Lake County Commissioners*, 147 U. S. 230, 13 Sup. Ct. 318, 37 L. Ed. 145; *Davless Co. v. Dickinson*, 117 U. S. 657, 6 Sup. Ct. 897, 29 L. Ed. 1026.

[9] It is urged, however, that as the only

infirmity suggested in this regard touches the authority of the treasurer to issue the note under the order of the city council, the holder is not confined to the evidence on the face of the note, but may find that authority anywhere, if it exists, and that ample authority is found in the second vote of the finance committee of January 9, 1906, quoted above, which purported to empower the mayor and city treasurer to "negotiate" all the notes under the city council order. It is said that thus "so far as the committee had jurisdiction, it by one stroke gave the city treasurer coupled with the mayor authority to issue the notes to the limit named." *Citizens' Savings Bank v. Newburyport*, 169 Fed. 766-772, 95 C. C. A. 232. But according to the construction which we have given to the order of the city council in respect to the duty thereby imposed on the finance committee, its vote passed long before the present note was considered, and, so far as appears, before any specific borrowing was contemplated and eight days at least before any note was in fact negotiated, was no valid performance of the function required of them. It appears not to be on its face, because it does not profess by its terms to be the exercise of any judgment or discretion on the part of the committee. It is not an "approval" by the committee of any particular borrowing, and it was not made "from time to time" as the notes were issued. It does not purport by its terms to be an approval of an act of borrowing performed or proposed by the treasurer, but to be an antecedent authorization of an act not yet initiated. It attempts to authorize these officers to "negotiate" notes, which means to perform the entire transaction of asking for bids or ascertaining the discount by private inquiry, and deciding upon the amounts, the rate and time on which they should be given. *Everson v. Gen. Accident, Fire & Life Ass. Corp.*, 202 Mass. 169-172, 88 N. E. 658. The committee was not clothed by the order with power to authorize the city treasurer to act. His authority to borrow could flow only from the city council and its order conferred that authority, and did not undertake to delegate it to its committee. But it conferred the authority upon the treasurer, subject, as before pointed out, to the limitation that the finance committee must approve his exercise of authority before it could be quickened with the legal breath of life. The effect of the vote now relied on was merely to surrender the trust reposed in the committee to the mayor and city treasurer. But this being an official responsibility involving discretion could not be delegated. This is not a narrow or technical definition of words, but a natural interpretation according to their common meaning. So far as we are able to perceive, it is the only construction which gives force to all language of the order of the city council

or renders it capable of accomplishing practical results in the administration of the affairs of the city. It follows that this vote was ineffectual to constitute a compliance with the order of the city council as to the finance committee. The note was therefore not legally issued.

The considerations here stated are so conclusive to our mind as to compel us to a different conclusion from that reached by the United States Circuit Court of Appeals for this district in *Citizens' Savings Bank v. Newburyport*, 169 Fed. 766, 95 C. C. A. 232, in which a certiorari has been refused by the Supreme Court of the United States, 215 U. S. 598, 30 Sup. Ct. 399, 54 L. Ed. 342, which involved the other notes issued on April 13, 1906.

It becomes unnecessary to consider whether this note constituted an overissue.

[10] The liability of the defendant on the count for money had and received is also urged. The check, with which this note and the others of even date was bought, was made to the order of the defendant, deposited in its bank account, and immediately used by the treasurer to cover his defalcations. If the note had been valid in the hands of the holder, the purchaser would not be answerable for the application of the purchase money. But this note was not a binding obligation of the defendant. So far as the city was concerned, the check was a voluntary payment without its knowledge. The fact that it was deposited in its bank account is not enough to charge the defendant with liability. This point is concluded against the plaintiff by *Railroad National Bank v. Lowell*, 109 Mass. 214, and *Agawam National Bank v. South Hadley*, 128 Mass. 503. It is the application of a widely prevailing principle. *Craft v. South Boston R. R.*, 150 Mass. 207, 22 N. E. 920, 5 L. R. A. 641; *Foote v. Cotting*, 195 Mass. 55, 80 N. E. 600, 15 L. R. A. (N. S.) 693; *Boston Electric Co. v. Cambridge*, 163 Mass. 64, 39 N. E. 787. Even direct benefits conferred do not necessarily impose liability upon an incorporated subdivision of government. *Adams v. County of Essex*, 205 Mass. 189, 91 N. E. 557. But here no benefit was conferred on the defendant.

This is not a case of issue of bonds valid on their face but void by reason of lack of statutory or other authority, where all the acts done have been approved in fact by proper officers of the city, and where the city has received and used the money with the authority of its responsible officers (see *Louisiana v. Wood*, 102 U. S. 294, 26 L. Ed. 153), but a case where both the plaintiffs and the city have suffered by the criminal acts of one person, who put forth a note invalid on its face and misappropriated the proceeds.

Judgment for defendant affirmed.

(84 Ohio St. 74)

**YOUNGSTOWN PARK & FALLS ST. RY.
CO. v. KESSLER.**

(Supreme Court of Ohio. April 18, 1911.)

(Syllabus by the Court.)

1. PHYSICIANS AND SURGEONS (§ 13*)—CONTRACTS—PERFORMANCE OF MEDICAL SERVICES.

A contract to perform medical or surgical services by a corporation organized for the purpose of constructing, owning, and operating a street railway is not only ultra vires, but is in direct conflict with the laws of this state regulating the practice of medicine and surgery, and is therefore void.

[Ed. Note.—For other cases, see *Physicians and Surgeons*, Dec. Dig. § 13.*]

2. PHYSICIANS AND SURGEONS (§ 16*)—LIABILITY FOR MALPRACTICE.

Such a corporation cannot be directly liable for damages for malpractice of medicine or surgery.

[Ed. Note.—For other cases, see *Physicians and Surgeons*, Dec. Dig. § 16.*]

3. PHYSICIANS AND SURGEONS (§ 13*)—CONTRACT TO FURNISH MEDICAL AID—BREACH—LIABILITY.

Such corporation may make a valid contract to furnish or pay for medical aid and attention to one injured upon its cars or tracks; and an action against it for damages for a breach of such contract may be maintained.

[Ed. Note.—For other cases, see *Physicians and Surgeons*, Dec. Dig. § 13.*]

4. PHYSICIANS AND SURGEONS (§ 18*)—CONTRACT FOR MEDICAL SERVICES—MALPRACTICE—BREACH.

A petition that avers the making of such contract, the employment by the company of a surgeon in pursuance of such contract, and malpractice on the part of such surgeon resulting in damages to the plaintiff, but which does not aver that the person so employed was not regularly admitted to practice medicine and surgery in Ohio, or that he was incompetent and the company knew, or had means of knowing of his incompetency, or that it was otherwise guilty of negligence or carelessness in selecting him to perform such service, does not state a cause of action.

[Ed. Note.—For other cases, see *Physicians and Surgeons*, Dec. Dig. § 18.*]

Error to Circuit Court, Mahoning County.

Action by one Kessler against the Youngstown Park & Falls Street Railway Company. Judgment for defendant in the common pleas was reversed in the circuit court, and it brings error. Reversed.

On the 1st day of July, 1905, the defendant in error filed her petition in the common pleas court of Mahoning county, seeking to recover a judgment for damages against the plaintiff in error, the Youngstown Park & Falls Street Railway Company, to which petition this plaintiff in error filed a demurrer, which demurrer was sustained. The defendant in error then filed an amended petition, to which a demurrer also was filed, and later the defendant took leave to file a second amended petition, and on the 24th day of July, 1907, did file such second amended petition, averring, in substance, that on the 22d day of July, 1899, she was

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

a passenger on one of the cars of the defendant company; that in alighting therefrom she received certain injuries; that "the defendant sent its surgeon to treat her for the injuries so received, and insisted upon furnishing the treatment necessary in and about the injuries so received, and that in assuming such treatment said defendant contracted and agreed with plaintiff to furnish such surgical and medical attention and advice as her injuries demanded, and to correctly diagnose and treat her injuries with diligence, care, and ordinary skill and for such length of time as would be necessary to make a complete recovery, to all of which plaintiff assented and defendant entered on the performance of its contract with plaintiff." She then avers that the diagnosis then made by the surgeon was incorrect; that the treatment given her was not the proper treatment for the nature of the injuries she had received; that the advice given her was not proper; that she has followed this advice faithfully, but, instead of recovering from her injuries, she has become a confirmed cripple; that neither medicine nor surgical treatment has been given her within the year next preceding the bringing of this action, but that plaintiff has been at all times following the advice of the surgeon and attempting to use her limb as directed by him to do, and relying upon his advice that by using the same it would eventually become well and sound, all of which has now proven to be without avail, and she avers that this was only for the purpose of getting rid of, and avoiding the carrying out of, the contract made with the company. She also avers with some particularity the nature of the injury actually received by her, and the character of the treatment given her, and the extent of the injuries and damage she has suffered by reason of such improper diagnosis and incorrect advice and treatment and asks damages in the sum of \$10,000.

To this second amended petition the defendant filed a general demurrer, which demurrer was sustained, and, plaintiff not desiring further to amend, her petition was dismissed, with costs, and error prosecuted by her in the circuit court of Mahoning county. That court reversed the judgment of the common pleas court and remanded the cause with directions to the common pleas court to overrule the demurrer. This proceeding in error is now brought in this court to reverse the judgment of the circuit court.

Norris, Jackson & Rose and Arrel, Wilson & Harrington, for plaintiff in error. S. L. Clark, for defendant in error.

DONAHUE, J. (after stating the facts as above). It is contended on the part of counsel for plaintiff in error that by the provisions of section 4983, Revised Statutes, the limitation of the time in which an action for malpractice may be brought is one year

from the time of the commission of the wrong complained of, that this second amended petition shows upon its face that the diagnosis was made, and the treatment and advice given plaintiff, almost six years prior to the time of bringing this action, and that the action being barred by the statute, and the averments of the pleading clearly showing that fact, that the demurrer to the second amended petition was properly sustained by the common pleas court.

[1] It is sufficient to say with reference to this contention that a railroad company cannot be guilty of malpractice. It is not authorized to practice medicine or surgery, and therefore any contract it might make to do so would be not only ultra vires, but in direct conflict with the laws of this state regulating the practice of medicine and surgery. Therefore the statute limiting the time in which actions for damages for malpractice may be brought has no application to this suit.

[2] No such action will lie against a railroad company, and, if that is the cause of action stated in this second amended petition, then it would be vulnerable to a demurrer, not only because of the statute of limitation, but also because it does not aver facts sufficient to constitute a cause of action.

It probably does appear from a reading of this second amended petition that the pleader intended to state a cause of action for damages for malpractice, but the intention of the pleader does not necessarily control. If there are sufficient facts pleaded to constitute any cause of action, it is not important whether the pleader intended to state that particular cause of action or not.

[3] If this petition states a cause of action, it must be one for a breach of contract to furnish such medical and surgical aid and attention to the plaintiff as she might require. This second amended petition does aver such a contract, but it does not clearly appear whether the pleader intended to aver an express contract, or a contract implied from the circumstances of the case and conduct of the parties. It does not aver any consideration for such a contract. So far as this pleading is concerned, the railroad company was a mere intermeddler. It sent its surgeon there without any request on her part for his services, or without any reason for its doing so, unless the fact that the plaintiff had been injured while alighting from the defendant's car be taken as a sufficient reason for its having so done. There is no averment that the defendant was negligent in the management and operation of its cars or had negligently or carelessly or wrongfully caused the injury to the plaintiff. However, if it be conceded that sufficient facts are pleaded to show a valid contract between the plaintiff and the defendant by the terms of which the defendant undertook to furnish to the plaintiff the services

of a physician and surgeon to treat her for the injuries she received while alighting from its car, it also fully appears in this petition that it did furnish her a physician and surgeon for that purpose, and that he did examine her injuries, diagnose her case, and give her treatment and advice. Her claim is not that the railroad company failed to furnish a physician and surgeon, as by the terms of its contract it had agreed and undertaken to do, but that it failed to furnish a surgeon sufficiently skilled and competent to treat her injuries.

It is not the law that one who contracts to furnish or pay for medical or surgical aid and attention to another is liable at all events for the mistakes or incompetency of the physician or surgeon he may employ for that purpose. There must be some neglect or carelessness or misconduct on his part in the performance of his obligations arising under such contract. If he act in good faith and with reasonable care in the selection of the physician or surgeon, and has no knowledge of the incompetency or lack of skill or want of ability on the part of the person employed but selects one of good standing in his profession, one authorized under the laws of this state to practice medicine and surgery, he has filled the full measure of his contract, and cannot be held liable in damages for any want of skill or malpractice on the part of the physician or surgeon employed.

[4] There is no averment in this petition that the surgeon employed by this defendant railroad company was not in good standing in his profession; that he was not authorized to practice surgery, or that he was grossly incompetent and that the defendant had knowledge of his incompetency, or in the exercise of due care could have obtained such knowledge; that the plaintiff did not know and had not equal means of knowing the competency and ability of the person employed or that the company was guilty of any neglect or any carelessness in selecting this particular surgeon to perform this service. Therefore, if this second amended petition does aver sufficient facts to show a valid contract by the terms of which this company agreed and undertook to furnish medical and surgical aid to this plaintiff it wholly fails to show any breach of this contract on the part of the company or any such careless or negligent performance of its obligations arising under such contract as would make it liable to plaintiff for the damages which she may have sustained by reason of the incompetency, want of skill or malpractice on the part of the surgeon so employed.

Judgment of the circuit court reversed, and that of the common pleas affirmed.

Judgment reversed.

SPEAR, C. J., and PRICE and JOHNSON, JJ., concur. DAVIS, J., not present at the

argument and not voting. SHAUCK, J., concurs in the judgment and in the first and fourth propositions of the syllabus.

(84 Oh. St. 111)

OBERLIN v. UPSON.

(Supreme Court of Ohio. April 18, 1911.)

(Syllabus by the Court.)

SEDUCTION (§ 11*)—RIGHT OF ACTION.

In this state a woman cannot maintain an action against her seducer for damages arising from her own seduction.

[Ed. Note.—For other cases, see Seduction, Cent. Dig. §§ 23, 24; Dec. Dig. § 11.*]

Error to Circuit Court, Richland County.

Action by Nora Oberlin against James Upson. Verdict for plaintiff in the court of common pleas was reversed in the circuit court, and plaintiff brings error. Affirmed.

The plaintiff commenced her action against the defendant in the court of common pleas, and subsequently filed an amended petition, of which the material averments are as follows: "That at the time of the commission of the grievances hereinafter mentioned she, the said Nora Oberlin, was and now is an unmarried female. She further says: That along about the spring of 1905, as nearly as she can remember the last of April or the 1st of May, of the said year, that the said defendant, James Upson, began paying attention to her, the said plaintiff, and continued so to do for more than a year. That he frequently during said time took her out automobiling, and otherwise entertained her by buggy riding, calling upon her at her home and at the residences of her friends and relatives. And, as aforesaid, this conduct continued until about July 20, 1906, during which said time he had, by his continued attentions to her, and by his blandishments and protestations of affection and the like, gained her respect, her confidence, and affection. And she further says that on account of the things above set forth, and on account of his persuasion and various inducements, and because he did in connection therewith importune her, the said plaintiff, to have illicit relations with him, and because of her respect and confidence in him, she did submit to his desires, and did have such relations with him. But she further alleges that at all times she relied upon his promise, which he frequently made, of marrying her; and she further asserts that, had it not been for such promise, she would not have submitted to his desires, but, as herein alleged, because of the fact that he had gained her confidence, esteem, and affection, coupled with his promise of marriage, she did submit, as herein alleged, to his desires, and as a consequence of such relations she asserts that she became pregnant, and that the said defendant is responsible for

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes

her said condition. She further says that on account of her illicit relations with him, the said defendant, she was delivered of a bastard child November 2, 1906, and that defendant is the father of said child; that she suffered great pain, both of body and mind, on account thereof, and was compelled to pay the sum of \$—— for medical attendance during her sickness and \$—— for nursing and other incidental expenses, whereby plaintiff has been damaged on account of the things alleged in this amended petition in the sum of \$8,000, for which she demands judgment."

To this amended petition a demurrer was filed, on the ground that it did not state a cause of action. The demurrer was overruled, and an answer filed, and on the trial of the issues in the court of common pleas a verdict was rendered in favor of the plaintiff. The circuit court reversed the judgment of the court of common pleas, on the ground that the amended petition did not state a cause of action, and this proceeding is prosecuted to reverse the judgment of the circuit court, and to affirm the judgment of the court of common pleas.

Kramer & Jarvis, for plaintiff in error.
W. S. Kerr, for defendant in error.

DAVIS, J. (after stating the facts as above). Under the common law of England, as it has been recognized and administered in this country, a woman cannot maintain against her seducer an action for damages arising from her own seduction. This is frankly admitted by the counsel for the plaintiff in error; but they ask a reversal of the judgment below upon the ground that the plaintiff was induced to consent to the

solicitations of the defendant by a betrayal of the love and confidence which had been engendered in her by a period of courtship and by a promise of marriage made by him. Confessedly this is not an action *ex contractu* upon a promise of marriage, in which the seduction might be pleaded and proved as an aggravation of damages; but it is clearly an attempt to recover *ex delicto*. There is no averment of mutual promises or of an agreement to marry; and an analysis of the amended petition discloses no more than that the defendant's promise was one of the blandishments by which he accomplished his purpose. The case, therefore, presents no exception to the common-law rule; for there is no claim of fraud, violence, or artifice other than mere solicitation.

The theory of the common law is that, since adultery and fornication are crimes, the woman is *particeps criminis*, and hence that she cannot be heard to complain of a wrong which she helped to produce. It may be conceded that some of the arguments adduced here might be fairly persuasive if addressed to the Legislature. Indeed, in several of the states statutes have been enacted authorizing such an action; but a careful study of the decisions in those states, limiting and construing those statutes, raises a doubt whether the legislation is a real advance upon the common law. 8 Am. & Eng. Ann. Cas. 1115, note. There is, however, no such statute in this state, and the common-law rule applies.

The judgment of the circuit court is affirmed.

SPEAR, O. J., and SHAUCK, PRICE, and JOHNSON, JJ., concur. DONAHUE, J., not participating.

(177 Ind. 33)

ADAMS EXPRESS CO. v. BYERS et al.
(No. 21,881.)¹

(Supreme Court of Indiana. June 21, 1911.)

1. CARRIERS (§ 158*)—EXPRESS SHIPMENT—LIMITED LIABILITY.

Parties may agree on the value of property to be shipped by express, and limit the carrier's liability to the agreed valuation, where the agreement as to limitation is fairly made, on a good consideration.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 667; Dec. Dig. § 158.*]

2. PRINCIPAL AND AGENT (§ 101*)—AUTHORITY—CONTRACT WITH CARRIER.

In general, authority by a shipper to an agent to deliver an article at a carrier's shipping station for shipment carries with it authority to fix a valuation, and to contract with the carrier to limit the latter's liability to a value fixed in the contract.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. § 256; Dec. Dig. § 101.*]

3. CARRIERS (§ 180*)—CONNECTING CARRIERS—LIMITED LIABILITY.

A connecting carrier may avail itself of a limited liability contract entered into by the initial carrier.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 815-828; Dec. Dig. § 180.*]

4. CARRIERS (§ 180*)—LOSS OF FREIGHT—LIMITED LIABILITY.

Plaintiff took valuable poultry to the agent of an express company for shipment over its line and that of defendant company to an exposition for exhibition. Plaintiff notified the agent that the fowls were very valuable, and had cards to that effect attached to the crates. The agent, without further conversation, valued the fowls at \$5 a head and shipped them under a merchandise rate amounting to \$12.60, which plaintiff paid. The established rate for poultry valued at the value of the fowls in question was \$103.50. The agent gave no receipt or bill of lading to plaintiff, nor was any special contract made fixing the value of the property, nor did plaintiff know that the agent had valued the fowls at \$5 a head. The fowls were delivered safely by the initial carrier to defendant, a connecting carrier, and by it were so negligently transported that seven died from suffocation. *Held*, that the agent of the initial carrier had no authority to bind the shipper by limitation of the value of the fowls, and, plaintiff never having ratified such act, defendant was liable for their actual value.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 180.*]

Appeal from Circuit Court, Boone County; B. R. Artman, Judge.

Action by Carl S. Byers and others against the Adams Express Company and another. Judgment for plaintiffs against the Adams Express Company alone, and it appeals. Transferred from Appellate Court under section 1405, Burns' Ann. St. 1908 (Acts 1901, p. 590). Affirmed.

Pickens, Moores, Davidson & Pickens, for appellant. Ira M. Sharp, for appellees.

MORRIS, J. Byers, appellee, sued appellant and appellee American Express Company, to recover the value of seven chickens which died while being carried by the express companies from Hazelrigg, Ind., to Tri-

Centennial Exposition at Jamestown, Va., in 1907.

There was a trial by the court, special findings of fact, and conclusions of law thereon, and judgment for Byers for \$1,000 against the Adams Express Company, and for the American Express Company against Byers for costs. From this judgment, the Adams Express Company appeals.

The uncontroverted facts are that Byers was a breeder and shipper of fancy poultry, with his poultry yards located near Hazelrigg, a station on the Cleveland, Cincinnati, Chicago & St. Louis Railway, in Boone County, and for years had made numerous shipments by express from the station. Appellee American Express Company is a common carrier of freight by express, and conducts its business, both state and interstate, principally upon the system of railway lines commonly known as the New York Central and Big Four. On and prior to October 19, 1907, it had an office and agent at Hazelrigg. The Adams Express Company is and has been for years a common carrier of freight by express, and conducts its business, state and interstate, principally upon the lines of railroad owned by the Pennsylvania Company. On and prior to October 19, 1907, the Adams Express Company had the exclusive express privileges at the exposition grounds of the Jamestown Exposition, at Norfolk, Va.

As a part of the attractions at the exposition, there was a poultry exhibit planned to open on October 22d. On October 19, 1907, Byers delivered to the American Express Company, at Hazelrigg, a crate of poultry, consisting of nine black Orpington chickens and three ducks. He instructed the express company's agent at Hazelrigg to ship the poultry to Indianapolis, Ind., and there transfer it to the Adams Express Company, to be by it carried and delivered to the superintendent of the poultry department of the exposition at Norfolk, where Byers intended to exhibit the poultry. The poultry department of the exposition had prepared special cards to be attached to crates of poultry destined for exhibition at the exposition. Byers filled out one of these cards, by which it was directed that the poultry be shipped by the American Express Company to Indianapolis and there transferred to the Adams Company for shipment to the exposition. On the crate, in bold letters, Byers, before shipment, had written: "Very valuable. Handle with care." The two express companies had joint rates for shipments from Hazelrigg to Norfolk. The American agent at Hazelrigg, when the crate was tendered for shipment, figured the rate from Hazelrigg to Norfolk, Va., and announced to Byers that it was \$12.60. Byers thereupon paid the agent the above amount. This rate was in fact a merchandise rate, and was

¹For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes
95 N.E.—33

1 Rehearing denied.

only intended by the companies to apply to poultry when the value thereof was \$5 per head or less. The established rate of the Adams Company, from Indianapolis to Norfolk, for poultry valued at \$1,000 was \$103.50 and for poultry valued at \$60 was \$9.50.

The experience of the agent of the American Company at Hazelrigg had been somewhat limited. When Byers delivered the crate of poultry to him, he made no inquiry as to the value of the poultry, although in the conversation Byers did say to him that this was the most valuable shipment he had ever made. No express agreement, written or oral, was made in regard to the value of the shipment or the liabilities of the companies. Byers was not furnished any bill of lading, nor given any receipt for the poultry. The agent at Hazelrigg prepared and forwarded with the poultry a waybill, upon which he designated the value of the poultry at \$60, but he did not inform Byers of this fact, nor did Byers ever see the waybill, or have any knowledge that the valuation of \$60 had been placed thereon.

The agent of the American Company at Hazelrigg made the following entry in the out-book of the company regarding this shipment:

1 Coop	From	To	Weight	Ch'g's.
12 Fowls	C. S. Byers.	John A. Mur- kin, Jr. Norfolk, Va.	#180	\$12.60 Prepaid.

At the time the agent believed that he was not required, either by law or the rules of the company, to deliver any receipt or bill of lading to the shipper, nor did he know it was the rule of the company to present to the shipper a special contract, or bill of lading, fixing the value of the property and limiting the liability of the company when the shipment was to go on ordinary merchandise rates.

At the city of Indianapolis, the transfer agent of the American Company made out a transfer receipt and delivered the crate to the Adams Company, and at the time presented his transfer receipt, indicating the weight of the crate, the proportion of the express charges to be paid the Adams Company, which was \$9.50, and also reciting the fact that the poultry was valued at \$60, and at the time he stated to the agent of the Adams Company, who received the shipment, that the value of the poultry was \$5 per head, and it was in good order; whereupon the agent of the Adams Company at Indianapolis took charge of the poultry and signed the transfer receipt. The Adams Company shipped the fowls from Indianapolis to Norfolk, and in the shipment caused seven of the chickens to be suffocated, and they were delivered dead at the exposition grounds. These seven chickens were of the value of \$1,000 when received by the Adams Company at Indianapolis.

It is contended by the appellant, under the above facts, that the American Express Company was the agent of Byers in the delivery of the shipment to appellant, and was bound by the declarations and acts of the American Company, in connection with the delivery; that, having received the chickens at a valuation of \$5 per head, fixed by the American Company, appellant is only liable for \$35 for the seven dead chickens, and consequently the court erred in overruling the motion which was made by appellant to so modify the judgment against it as to limit the recovery to the sum of \$35. The several errors relied on by appellant present the same proposition.

[1] Parties may agree on the value of property to be shipped, and limit the liability of the carrier to the agreed valuation, where the contract is fairly made upon a good consideration. *Adams Express Company v. Carnahan* (1902) 29 Ind. App. 606, 63 N. E. 245, 64 N. E. 647, 94 Am. St. Rep. 279, and cases cited.

[2, 3] It may be stated, also, as a general proposition, that authority by the shipper to an agent to deliver an article at the shipping station of the carrier for shipment carries with it the authority to fix a valuation, and to enter into a contract with the carrier which limits the liability of the latter to the value fixed in the contract; and a connecting carrier may avail itself of the limitation. *Adams Express Company v. Carnahan*, supra; *Hill v. Boston, etc., R. Co.*, 144 Mass. 284, 10 N. E. 836.

This rule is recognized, because one of the necessary incidents to a shipment is to arrange with the carrier to receive the goods. 31 Cyc. 1402. While an agent may not act beyond the scope of his authority, yet, when the appointment has been expressly made in writing, it frequently happens that much of the agent's resulting authority is implied, because, even where acting under a minutely detailed power of attorney, some item is almost inevitably omitted in drawing the instrument. 31 Cyc. 1335.

[4] The facts in this case, however, do not warrant the conclusion that authority to bind the shipper should be implied, because there was no relationship of principal and agent between Byers and the American Company, but instead it was that of shipper and carrier. In the absence of facts showing a habit or course of dealing between the shipper and the initial carrier, whereby the shipper acquiesced in or consented to the initial carrier fixing the value of shipments, and limiting the common-law liability of the succeeding carriers, authority will not be implied to warrant the carrier in making an agreement of that character binding on the shipper. *Benson v. Oregon, etc., R. Co.*, 35 Utah 241, 99 Pac. 1072, 136 Am. St. Rep. 1052; *Nelson v. Hudson River R. Co.*, 48 N. Y. 498; *Seller v. Steamship Pacific*, 1 Or. 409, Fed. Cas. No. 12,644; *Russell v. Erie*

R. Co., 70 N. J. Law, 808, 59 Atl. 150, 67 L. R. A. 433, 1 Am. & Eng. Ann. Cas. 672.

In this case the shipper gave no authority to the American Company to place a valuation on the chickens. He never ratified the act of the American Company in placing a value thereon. The evidence discloses no course of dealing from which such authority might be presumed. The common-law liability of the carrier cannot be limited, except by contract with the shipper, express or implied. No such contract is disclosed by the evidence, and appellant's remedy, if any, is against the American Company. There is no error in the record.

Judgment affirmed.

(176 Ind. 73)

Ex parte FRANCE, Clerk of Supreme Court.
(No. 21,832.)

(Supreme Court of Indiana. June 21, 1911.)

1. CONSTITUTIONAL LAW (§ 42*)—STATUTES—VALIDITY—PARTY ENTITLED TO RAISE QUESTION.

The constitutionality of Acts 1911, c. 117, defining the jurisdiction of the Supreme and Appellate Courts, and providing for the transfer and distribution of cases pending in the courts, may be raised and decided on a petition by the clerk of the Supreme Court and ex officio clerk of the Appellate Court for directions as to his duty under the act.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 39, 40; Dec. Dig. § 42.*]

2. CONSTITUTIONAL LAW (§ 56*)—JUDICIAL POWER—LEGISLATIVE INTERFERENCE.

Const. art. 7, § 1, as amended in 1881 (Laws 1881, c. 17), providing that the judicial power of the state shall be vested in a Supreme Court, in circuit courts, and in such other courts as the Legislature may establish, does not expressly or impliedly empower the Legislature to establish a court equal in rank to the Supreme Court or in any degree co-ordinate with it.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 63-65; Dec. Dig. § 56.*]

3. CONSTITUTIONAL LAW (§ 56*)—JURISDICTION OF "SUPREME COURT."

The Supreme Court, created by Const. art. 7, § 1, which vests judicial power in a Supreme Court and other courts, is supreme over the other two departments of the state government, including the administrative, and it cannot be deprived by the Legislature of its powers; the words "Supreme Court" designating the highest court of the state or nation, possessing the highest and controlling jurisdiction, and the word "supreme," as used in connection with the word "court," signifying "over, above, beyond."

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 63-65; Dec. Dig. § 56.*]

For other definitions, see Words and Phrases, vol. 8, p. 6808.]

4. COURTS (§ 220*)—JURISDICTION—STATUTES—CONSTRUCTION.

The purpose of Acts 1901, c. 247, § 10, authorizing the transfer of cases from the Appellate Court to the Supreme Court on the ground that the opinion of the Appellate Court contravenes a ruling precedent of the Supreme Court, or that a new question of law directly involved was decided erroneously by the Appellate Court, is to give the Supreme Court a revising power over the decisions of the Appellate Court when necessary in order to control

the declaration of legal principles, in conformity with Const. art. 7, § 1, vesting the judicial power in a Supreme Court and other courts.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 220.*]

5. CONSTITUTIONAL LAW (§ 56*)—JUDICIAL POWER—LEGISLATIVE INTERFERENCE.

The provision of Acts 1911, c. 117, defining the jurisdiction of the Supreme and Appellate Courts, that the decision of the Appellate Court shall be final, makes the Appellate Court, within the jurisdiction conferred on it, co-ordinate with the Supreme Court, and withdraws from the Supreme Court revising power, and is in conflict with Const. art. 7, § 1, vesting the judicial power in a Supreme Court and other courts.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 63-65; Dec. Dig. § 56.*]

6. CONSTITUTIONAL LAW (§ 56*)—JUDICIAL POWER—LEGISLATIVE INTERFERENCE.

Where a court is, by the Constitution, placed at the head of the judicial system of a state, the Legislature may not interfere with its existence or supremacy nor create a court of co-ordinate final jurisdiction.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 63-65; Dec. Dig. § 56.*]

7. CONSTITUTIONAL LAW (§ 56*)—COURTS.

Const. art. 7, § 4, declaring that the Supreme Court shall have jurisdiction co-extensive with the limitation of the state in appeals and writs of error under such regulations and restrictions as may be prescribed by law, when considered in connection with section 1, vesting the judicial power in a Supreme Court in circuit courts and such other courts as the Legislature may establish, does not empower the Legislature to deprive the Supreme Court of appellate jurisdiction in all cases for the recovery of money, and the Legislature may not strip the Supreme Court of all appellate jurisdiction in such cases and confer a final jurisdiction thereunder on another court of its own creation.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 63-65; Dec. Dig. § 56.*]

8. STATUTES (§ 64*)—INVALIDITY IN PART—EFFECT.

The invalidity of the provisions of Acts 1911, c. 117, defining the jurisdiction of the Supreme and Appellate Courts, providing that the decision of the Appellate Court in cases within its jurisdiction shall be final, and repealing conflicting laws, does not affect the validity of the provision that all cases pending in the Appellate Court and not distributed, and all cases subsequently appealed or transferred to the Appellate Court, shall be distributed in the order of their submission and placed on the docket of the division to which they are distributed, because the latter provision is independent of the former provisions.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 58-66; Dec. Dig. § 64.*]

Morris and Cox, JJ., dissenting.

Petition by J. Fred France, Clerk of the Supreme Court and Ex Officio Clerk of the Appellate Court, for directions as to his official duty under Acts 1911, c. 117. Act adjudged invalid in part.

Henley, Matson & Gates, for petitioner. Miller, Shirley, Miller & Thompson, amici curiæ. Ewbank, Hanan & Hanan, in reply.

JORDAN, C. J. The petitioner herein, J. Fred France, clerk of the Supreme Court and

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Sylls & Rep'r Indexes

ex officio clerk of the Appellate Court, has filed and presented a petition to the Supreme Court, whereby he invokes its judgment and direction in respect to his official duty of transferring undistributed cases pending in the Appellate Court to the Supreme Court, and in transferring cases pending in the Supreme Court to the Appellate Court, as provided and required by section 2 of an act of the Legislature entitled "An act concerning appeals to the Supreme and Appellate Courts, defining the jurisdiction of each of said courts, providing for the distribution of cases appealed and not distributed, repealing all laws in conflict, * * * and expressly repealing section 10 of an act," etc. Approved and in force on March 3, 1911. See Acts 1911, c. 117, p. 201.

The first section of this act provides that: "All appeals in appealable cases in the following classes shall be taken directly to the Supreme Court: First. All cases in which there is in question, and such question is duly presented, either the validity of a franchise or the validity of an ordinance of a municipal corporation, or the constitutionality of a statute, state or federal, or the rights guaranteed by the state or federal Constitution. Second. All criminal prosecutions. Third. Actions to contest the election of public officers. Fourth. Cases of mandate and prohibition and actions or proceedings in quo warranto. Fifth. Cases of habeas corpus. Sixth. Actions to contest wills. Seventh. All actions in which the construction of a will is involved. Eighth. Proceedings to establish drains and proceedings to change or improve water courses. Ninth. Condemnation proceedings for the appropriation of lands for public use. Tenth. Proceedings to establish gravel roads and proceedings to establish public highways and proceedings to vacate public highways. Eleventh. Judgments granting or denying licenses to sell intoxicating liquors. Twelfth. Prosecutions for contempt of the lower courts. Thirteenth. Applications for admission to the bar to practice law and proceedings to disbar an attorney at law. Fourteenth. All actions involving the title to real estate or the possession thereof. Fifteenth. All cases involving the granting or refusal to grant injunctions. Sixteenth. All cases for the specific performance of contracts. Seventeenth. All probate matters including all suits growing out of the settlement of decedents' estates; the settlement of the estates of infants and the settlement of the estates of persons of unsound mind, and all matters incident thereto. Eighteenth. Interlocutory orders for the payment of money or to compel the execution of any instrument of writing, or the delivery or assignment of any securities, evidences of debt, documents or things in action. Nineteenth. Interlocutory orders for the delivery of the possession of real property of the sale thereof. Twentieth. Interlocutory orders appointing or refusing to appoint receiver, and

interlocutory orders granting or dissolving, or overruling motions to dissolve temporary injunctions. Twenty-first. Interlocutory orders upon writs of habeas corpus: Provided, etc. * * * All appealable cases, other than those herein mentioned shall be taken to the appellate court."

It will be seen that by section 1 of this act the jurisdiction of the Supreme Court is limited to 21 classes of appealable cases. Under the express provision of the statute involved, all appealable cases other than those over which jurisdiction is invested in the Supreme Court, it is declared, shall be taken to the Appellate Court. By this provision of the case the entire residuum of appellate jurisdiction is swept into or lodged in that court. It will be noted that the character of the cases over which the Appellate Court is given final jurisdiction is quite important. In the absence of any of the questions enumerated or mentioned in the first clause of section 1, being involved, it includes or embraces all appealable cases for the recovery of money without regard to any limitation upon the amount. The amount may be a million dollars or over. The jurisdiction of the Appellate Court in cases for the recovery of money, of course, will include all cases for the recovery of damages on account of the wrongful death of a person, all injuries either to person or property at common law or under a statute; also, cases for the recovery of damages for the defamation of character, false imprisonment, malpractice, and to recover statutory penalties. That court is also invested with jurisdiction over insanity inquests, cases involving the rights and duties of common carriers, cases for divorce, and many others of importance. Under its jurisdiction the Appellate Court is authorized to finally decide for itself all questions arising in cases before it in regard to the admissibility of evidence and questions of practice and appellate procedure. Under the circumstances, the court, within the jurisdiction intrusted to it, has the power to declare or announce what in its judgment is the governing law of the state. It is true that it is required to follow the decisions of the Supreme Court; but, in the absence of any revisory power or control over its decisions invested in that court, who is to determine whether it has followed the decisions of the Supreme Court? With two exceptions the Appellate Court is given jurisdiction in all equity cases. Under the jurisdiction granted to it, it necessarily follows that it has the power to construe statutes and interpret contracts involved in any of the cases over which it has jurisdiction.

Section 2 of the act provides that: "Immediately upon the taking effect of this act the clerk of the Supreme and Appellate Courts shall transfer to the Supreme Court all cases then pending in the Appellate Court, not distributed, the jurisdiction of which is by this act conferred upon the Supreme

Court, and docket the same in the Supreme Court, and such clerk of the Supreme and Appellate Courts shall also transfer to the Appellate Court all cases then pending in the Supreme Court not distributed, the jurisdiction of which is by this act conferred upon the Appellate Court, and docket the same in the Appellate Court," etc.

Section 3 provides that: "All cases now pending in the Appellate Court and not distributed, and all cases hereafter appealed or transferred to the Appellate Court shall be distributed in the order of their submission and placed upon the docket of the division to which they are distributed, irrespective of the district from which such appeals may have been taken."

Section 4 declares that: "The jurisdiction of the Appellate Court in all cases in which jurisdiction is hereby conferred upon said court shall be final. * * *"

By section 5 all laws or parts of laws in conflict with the act are repealed, and section 10 of an act entitled "An act concerning appeals, increasing the number of judges of the Appellate Court, providing that the same shall sit in two divisions, defining their jurisdiction and the jurisdiction of the Supreme Court," etc., approved March 12, 1901, is expressly repealed.

Attorneys representing parties interested in undistributed cases pending on appeal in the Supreme Court, the jurisdiction of which, under provision of the act in question, is lodged in the Appellate Court, and which are required to be transferred to that court, have been permitted to appear in this proceeding, and by oral and written argument have raised the question in regard to the constitutional validity of this statute. The Attorney General, together with associate counsel, has appeared herein and seeks to uphold the validity of the act in question.

[1] That under the petition of the clerk of this court the constitutional validity of this act may be raised and decided is a proposition well settled. *Ex parte Griffiths*, Reporter, 118 Ind. 83, 20 N. E. 513, 3 L. R. A. 398, 10 Am. St. Rep. 107; *Ex parte Sweeney*, 126 Ind. 583, 27 N. E. 127; *Ex parte Brown*, 166 Ind. 593, 78 N. E. 553, and authorities there cited; *Ex parte Fitzpatrick*, 171 Ind. 557, 86 N. E. 964.

It is contended and argued with much force, by counsel opposing the validity of the act, that by the provisions of section 4, which declares that "the jurisdiction of the Appellate Court in all cases in which jurisdiction is hereby conferred upon said court shall be final," and by the express repeal of section 10 of the act of March 12, 1901 (Laws 1901, c. 247), the Legislature has attempted to make the Appellate Court co-ordinate with the Supreme Court and to withdraw from or deprive the latter court of its superior authority or power as invested in it by sections 1 and 4 of article 7 of the Constitution of this state. In the determination of

the questions herein involved, it is necessary to refer to and set out some of the provisions of the Constitution. By article 3, § 1, the powers of the state government are divided into three separate departments, namely, the legislative, the executive, including the administrative, and the judicial, and no person charged with the official duties under one of these departments shall exercise any of the functions of another except as in the Constitution expressly provided.

Turning to the provisions of the Constitution which deal with the judicial department of the state government, which provisions are embraced in article 7, and it will be seen that section 1 of that article declares that: "The judicial power of the state shall be vested in a Supreme Court, in circuit courts, and in such other courts as the General Assembly may establish."

Section 2 of the same article provides that: "The Supreme Court shall consist of not less than three, nor more than five, judges, a majority of whom shall form a quorum; they shall hold their offices for six years, if they so long behave well."

Section 4 declares that: "The Supreme Court shall have jurisdiction coextensive with the limits of the state in appeals and writs of error, under such regulations and restrictions as may be prescribed by law. It shall also have such original jurisdiction as the General Assembly may confer."

Section 5 provides that: "The Supreme Court shall, upon the decision of every case, give a statement in writing of each question arising in the record of such case and the decision of the court thereon."

By section 6 it is made the duty of the General Assembly to "provide by law, for the speedy publication of the decisions of the Supreme Court made under this Constitution. * * *"

A Supreme Court of this state has existed ever since the year of 1816, in which year our first Constitution was adopted and the state admitted into the Union. Section 1 of article 5 of the Constitution of 1816 declared that: "The judiciary power of this state both as to matters of law and equity, shall be vested in one Supreme Court, in circuit courts, and in such other inferior courts as the General Assembly may from time to time direct and establish."

In our Constitution of 1851 the above section of the Constitution of 1816, with some minor changes, was incorporated into section 1 of article 7, and, as then adopted, reads as follows: "The judicial power of the state shall be vested in a Supreme Court, in circuit courts and in such inferior courts as the General Assembly may establish." This section, as a part of the Constitution of 1851, remained unchanged for 30 years, during which time the phrase "such inferior courts," as therein contained, was construed by the Supreme Court as prohibiting the Legislature—impliedly at least—from creat-

ing courts on a parity in rank and jurisdiction with the circuit courts of the state. See *Clem v. State*, 33 Ind. 421; *Cropsey v. Henderson*, 63 Ind. 268.

The decisions in these cases, re-enforced by the opinion of able lawyers to the effect that all courts created by the Legislature must necessarily, by the force of the words "such inferior courts as the Legislature may establish," be inferior to the circuit courts, led up to a proposed amendment of section 1 of article 7 of the Constitution of 1851 empowering the General Assembly to establish courts which would not be inferior to the circuit courts. Consequently, in 1877, an amendment to this section was proposed by the Legislature of that year (Laws 1887, p. 162). By it the word "inferior" was eliminated from section 1, supra, and the word "other" was inserted instead. On account of the holding of the Supreme Court in *State v. Swift*, 69 Ind. 505, this amendment was not finally ratified by the electors of the state and made a part of the Constitution until March 14, 1881 (Laws 1881, p. 31).

It is insisted that, under our Constitution as amended in 1881, the Legislature can establish no court of a higher rank than the circuit courts; nor can it invest such a court so established with a larger jurisdiction than that which it may confer upon the circuit courts. As we view the case before us, the decision of this proposition is not essential to the question therein involved; therefore we pass it without consideration.

[2] It is manifest that section 1 of article 7 of the Constitution, as amended, neither expressly nor impliedly empowers the Legislature to establish a court equal in rank to the Supreme Court or in any degree co-ordinate with that tribunal.

Counsel, seeking to uphold the validity of the statute, advance the argument in support of section 4 that there is no legal right of appeal in any case; that, if an appeal is allowed, it is merely a matter of grace on the part of the legislative department. In respect to this question, we may at the very threshold announce that the cardinal point herein involved is not one in regard to what cases or to what courts litigants shall be allowed the right of appeal from judgments of the trial courts. The question involved is not one merely of private or personal benefit, but is one which concerns all persons of the state, and is not to be tied down solely to the mere rights of litigants. It will be noted that by section 1 of article 7 of the Constitution the judicial power of the state is vested in a Supreme Court, circuit courts, and such other courts as the General Assembly may establish.

The word "supreme," as used in connection with or in reference to courts, has a well-understood and settled meaning. It is a derivative word, derived from "super"; the latter signifying "over, above, beyond." See Webster's International Dictionary. Under the

word "court," in the Century Dictionary, it is said that the Supreme Court is "the designation usually prescribed by law for the highest court of the state or nation. * * *

In the United States the name is usually given to the court having the general appellate jurisdiction over inferior courts and original jurisdiction to supervise the proceedings of inferior courts." In 18 Am. & Eng. Ency. of Law, on page 38, it is said: "Supreme Courts are those which possess the highest and controlling jurisdiction."

The controlling power of the Supreme Court of this state within its functions has been frequently recognized and affirmed by that tribunal. *State ex rel. v. Noble*, 118 Ind. 350, 21 N. E. 244, 4 L. R. A. 101, 10 Am. St. Rep. 143; *Ex parte Griffiths*, supra; *Branson v. Studabaker*, 133 Ind. 147, 33 N. E. 98; *Pittsburgh, etc., R. Co. v. Peck*, 172 Ind. 562, 88 N. E. 939.

The last case cited arose on account of the Appellate Court calling in question the final and conclusive character of an order of the Supreme Court, transferring that case to the Appellate Court on the ground that jurisdiction thereover, under the law, was lodged in the latter court. In passing upon the question as there involved, the court said: "Under the Constitution of this state there is and can be but one Supreme Court. It is the highest judicial tribunal having appellate jurisdiction within the state, and is fully invested under the organic law with the right and power to determine, not only its own jurisdiction, but also has the power and authority ultimately and conclusively to determine, under the law, the jurisdiction of all other judicial tribunals within the state. By its decisions it determines what is the law of the land within its territorial jurisdiction, and all courts within the state, as well as all persons therein, are controlled by its decisions relative to what is the law, and should yield obedience thereto."

In *State ex rel. v. Noble*, supra, the court, among other things, said: "Under our Constitution, as amended, the Legislature may establish courts; but it cannot destroy the constitutional courts—the circuit courts and the Supreme Court—nor can it change their organization, nor redistribute their powers, for these courts owe their organization to the Constitution, and as the Constitution has ordained that they shall be organized, so they shall be. Judicial power distributed by the Constitution is beyond legislative control." Continuing further along in its opinion, the court said: "The duty of maintaining the separation of the departments of the government and the integrity and existence of the courts as established and organized by the Constitution is one of the most important that the judiciary is required to perform. It is the duty of the courts to uphold the Constitution as it is written, and to yield no part of their right or authority. Judges are chosen for the purpose of main-

taining the limitations of the Constitution, without which free government cannot exist. As said by the Court of Appeals of New York: "If this provision were intended solely for the protection of the court or its judges, they might waive it; but we do not think it was so intended. It was, in our judgment, like the whole judicial system of the state, intended for the benefit of the people, and to secure to litigants a forum in which they might have their controversies adjudged. The jurisdiction which the Constitution preserves in the courts named is inalienable, and carries with it the corresponding duty on the part of those courts to exercise it, when called upon in proper form to do so." *Alexander v. Bennett*, 60 N. Y. 204."

In *Branson v. Studabaker*, *supra*, it is said: "The Supreme Court is undoubtedly the highest judicial tribunal of the state, and takes its rank from the Constitution. As its rank is bestowed upon it by the Constitution, the Legislature cannot lower that rank or deprive it of the authority incident to its position as the superior judicial tribunal of the state. * * * It is not in the power of the Legislature to make the Supreme Court inferior, in any respect, to any other tribunal; but in it remains secure from legislative attack, the highest judicial power distributed by the Constitution. There must be in every state a court capable of exercising ultimate judicial power, otherwise there would be unending conflict. In this state there is a court invested with ultimate judicial power, and that is the Supreme Court. * * * The Legislature cannot, under the guise of conferring inferior appellate jurisdiction upon other tribunals, grant them unlimited appellate jurisdiction; but it may grant such tribunals appellate jurisdiction by limiting it to classes of cases not of the highest grade, and restricting its authority to appeals from recovery of a limited nature."

[3] That within the exercise of its functions and powers, under the Constitution, the Supreme Court of this state is in the full sense of that word supreme over the other two departments of the state government, including the administrative, and that it cannot be stripped or deprived by the Legislature of its powers and rights under the Constitution, is settled beyond successful controversy. Having partially considered the character and power of this tribunal, we pass a further consideration thereof for the present, and take up and consider the Appellate Court as established by the Legislature and the jurisdiction conferred upon it by that body.

It was created or established in 1891. See Acts 1891, p. 39. The Legislature in this act gave a reason for establishing this court that "there is a pressing demand for some measure for the relief of the Supreme Court." It was provided that the court should consist of five judges, and it was

invested with quite a limited jurisdiction over appealable cases: First, cases of misdemeanor; second, cases originating before a justice of the peace where the amount in controversy exceeds \$50; third, cases for the recovery of money where the amount in controversy does not exceed \$1,000; fourth, cases for the recovery of specific personal property; fifth, actions between landlord and tenant for the recovery of the possession of leased premises; sixth, all cases of appeals from orders allowing or disallowing claims against decedents' estates. It was provided that in all such cases the decision of the Appellate Court should be final. It was further provided, however, that, if the validity of a statute of the state or of the United States was involved, such cases should be certified and transmitted to the Supreme Court to be decided by the latter court. By an act of the Legislature passed in 1893 (see Acts 1893, p. 29) the jurisdiction of the Appellate Court over appeals was somewhat enlarged or extended so as to include all actions for the recovery of money where the amount in controversy did not exceed \$3,500, and also cases arising out of matters of probate. It was further provided by this amendatory act that, in all cases where the Appellate Court has jurisdiction, its decisions should be final. The exceptions to this jurisdiction were as follows: First, cases where the constitutionality of a statute, federal or state, or the validity of an ordinance of a municipal corporation, is in question, and such question is duly presented; second, suits in equity; third, where the title to real estate is in issue. The period of the existence of the Appellate Court under the act creating it was limited to six years from the 1st of March, 1891, and no longer. At the end of that time it was provided that the Supreme Court should assume the jurisdiction of all causes and other business pending in said Appellate Court. By an act of the Legislature in 1897 (Laws 1897, c. 9), four years additional time for its existence was given, and in 1899 (Laws 1899, c. 22) a further period of two years and two months was added to its existence. In each of these latter acts it is also expressly provided that "at the end of which time the Supreme Court shall assume jurisdiction of all causes and other business pending in said Appellate Court."

After the creation of the Appellate Court, much controversy arose among judges and lawyers of this state in regard to the constitutional validity of the act creating it. This was especially true in regard to the provision which declared that its decisions should be final in the absence of any authority giving the Supreme Court any supervening control thereover. It was contended by able lawyers that, under the circumstances, by this finality provision in the statute, the Appellate Court, to the extent of the ju-

jurisdiction conferred upon it, was made coordinate with the Supreme Court. In fact, on account of the supposed absence of authority on the part of the Supreme Court to exercise in some manner a revisory or reviewing right over the decisions of the Appellate Court in order to make them conform, if necessary, to the ruling precedents of the Supreme Court, and thereby keep them in harmony with those of the latter court, two lines of decisions were created. Consequently there arose much confusion in respect to the law which would control in a particular case. Under the circumstances as they then existed, that question seemingly depended upon the court, whether Appellate or Supreme, to which the cause might finally be appealed. To remedy this condition of affairs, and to eliminate from the act creating the Appellate Court the provision impressing its decisions unconditionally with finality, the Legislature in 1901 enacted a statute revising the law pertaining to that tribunal. This was entitled: "An act concerning appeals, increasing the number of judges of the Appellate Court," etc., approved March 12, 1901 (Acts 1901, p. 565). By it the number of judges of the Appellate Court was increased to six, and the court was authorized to sit in two divisions.

It was declared by section 9 of this act that: "No appealable case shall hereafter be taken directly to the Supreme Court unless it be within one of the following classes: First. Cases in which there is in question, and such question is duly presented, either the validity of a franchise, or the validity of an ordinance of a municipal corporation, or the constitutionality of a statute, state or federal, or rights guaranteed by the state or federal Constitution. Second. All prosecutions for felonies. Third. Actions to contest the election of public officers. Fourth. Cases of mandate and prohibition. Fifth. Cases of habeas corpus. Sixth. Actions to contest wills. Seventh. Interlocutory orders appointing or refusing to appoint receivers, and interlocutory orders granting or dissolving or overruling motions to dissolve temporary injunctions. Eighth. Proceedings to establish public drains and proceedings to change or improve water courses. Ninth. Proceedings to establish gravel roads." It was provided by this section that all other appealable cases should be taken to the Appellate Court.

By section 10 of this act it was declared that "the jurisdiction of the Appellate Court shall be final except under the following conditions: First. If in any case, two of the judges of either division are of the opinion that a ruling precedent of the Supreme Court is erroneous, the case, with a written statement of the reasons for such opinion, shall be transferred to the Supreme Court." The second condition was that the losing party in any case decided by either division of the Appellate Court might, within 30 days after

the overruling of his petition for rehearing by the Appellate Court, file in the Supreme Court an application for the transfer of the case to that court on the ground that the opinion of the Appellate Court contravened a ruling precedent of the Supreme Court, or that a new question of law was directly involved in the case and was decided erroneously by the Appellate Court. It was further provided that, if the application to transfer "be granted, the judgment of said division of the Appellate Court is thereby vacated, and the case shall be transferred to the docket of the Supreme Court." The third condition was that, in any case decided by either of the divisions of the Appellate Court, the losing party shall have the right to appeal to the Supreme Court when the amount in controversy, exclusive of costs and interest on the judgment of the trial court, exceeds \$6,000, etc.

[4] The purpose of the provision of section 10 of the act of 1901, which authorized transfers from the Appellate Court to the Supreme Court, was not in the interest of the losing litigant, but was to give the Supreme Court a revising hand over the opinions of the Appellate Court, when necessary, in order to control the declaration of legal principles contained therein. *Klein v. Nugent Gravel Co.*, 162 Ind. 509, 70 N. E. 801; *United States Cement Co. v. Cooper*, 172 Ind. 599, 88 N. E. 69. In this latter case the court said: "The obvious purpose of the Legislature in providing for this class of transfers from the Appellate Court to the Supreme Court was to keep the decisions of the two courts of appeal harmonious and consistent, and thus avoid the confusion that would arise from two incompatible lines of legal interpretation." Upon the same point, see, also, *Terre Haute, etc., Co. v. Roberts*, 91 N. E. 941, 942. This statute of 1901 expressly repealed all provisions of former acts limiting the existence of the Appellate Court, and thereby the life of that tribunal was continued indefinitely—at least until abolished by the Legislature.

It is well known that the drafting of this act of 1901 was—in part at least—the work of the judges then composing the Supreme Court and Appellate Court, and the provision therein allowing transfers on the application of the losing party in a case in the Appellate Court to the Supreme Court was to an extent modeled after the provision of Act Cong. March 3, 1891, c. 517, 26 Stat. 826 (U. S. Comp. St. 1901, p. 547), by which the Circuit Court of Appeals was created, which act provided that the decisions of that court in a certain class of appealable cases should be final; but further provided that, "in any such case as is hereinbefore made final in the Circuit Court of Appeals it shall be competent for the Supreme Court to require, by certiorari or otherwise, any such case to be certified to the Supreme Court for its review and determination with the same

power and authority in the case as if it had been carried by appeal or writ of error to the Supreme Court." The act of 1901, however, instead of authorizing the removal of cases from the Appellate to the Supreme Court by certiorari, provided a simple procedure for that purpose. The object of the provision in the act of Congress in authorizing the certification of cases from the Circuit Court of Appeals to the Supreme Court is fully disclosed in the case of *Forsyth v. Hammond*, 168 U. S. 506, 17 Sup. Ct. 665, 41 L. Ed. 1005. Judge Brewer, in speaking for the court in that appeal in respect to the act of Congress, *supra*, creating a Circuit Court of Appeals whose decisions in certain cases were declared to be final, said: "While this division of appellate power was the means adopted to reduce the accumulation of business of this court, it was foreseen that injurious results might follow if an absolute finality of determination was given to the Courts of Appeal. Nine separate appellate tribunals might by their differences of opinion, unless held in check by the reviewing power of this court, create an unfortunate confusion in respect to the rules of federal decision. * * * Cases of a class in which finality of decision was given to the Circuit Courts of Appeals might involve questions of such public and national importance as to require that a consideration and determination thereof should be made by the supreme tribunal of the nation. It was obvious that all contingencies in which a decision by this tribunal was of importance could not be foreseen, and so there was placed in the act creating the Courts of Appeal, in addition to other provisions for review by this court, this enactment: 'And excepting also that in any such case as is hereinbefore made final in the Circuit Court of Appeals it shall be competent for the Supreme Court to require, by certiorari or otherwise, any such case to be certified to the Supreme Court for its review and determination,' " etc.

To reassert what we have previously said, the provision of section 10 of the act of 1901, authorizing the transfer of cases from the Appellate Court to the Supreme Court, on the ground that the opinion of the Appellate Court contravened a ruling precedent of the Supreme Court, or that a new question of law is directly involved and was decided erroneously, was intended to give the Supreme Court of this state a revising hand over the decisions of the Appellate Court, as was the purpose of the act of Congress, *supra*, authorizing the Supreme Court of the United States to remove by certiorari cases from the Circuit Court of Appeals to the Supreme Court of the United States.

In 1907 the Legislature amended section 9 of the act of 1901 (Acts 1907, p. 237). By this amendatory statute the Supreme Court was given jurisdiction over certain other additional cases, among which were those

wherein the judgment of the trial court exceeded \$6,000. By this same act subdivision 3 of section 10 of the statute of 1901, which provided for appeals from the Appellate Court to the Supreme Court in cases of a money recovery in the lower court in excess of \$6,000, was repealed. The obvious reason for the repeal of this provision was that under this amendatory act an appeal from the trial court from a money judgment in excess of \$6,000 was to be taken directly to the Supreme Court.

The statute of 1901, as amended by the act of 1907, appeared to be satisfactory to both bar and bench of this state, and remained in full force and effect at the time the act of 1911 was passed.

[5] In view of the decisions of the Supreme Court in declaring the purpose for which the transfer provision in that act was inserted, we are unable to conjecture what cause actuated or prompted the Legislature of 1911 to change as it did the act of 1901, by declaring that the decisions of the Appellate Court shall be final, and by repealing section 10 of the act of 1901, which authorized transfers from the Appellate Court to the Supreme Court. After conferring upon the Appellate Court the enlarged jurisdiction as shown, including a class of cases which may involve the decisions of questions of great importance to the people of this state, the Legislature for some reason not apparent deemed it proper to declare that the decisions of the Appellate Court in all such cases should be unconditionally final; thereby attempting to deprive the Supreme Court of the right to revise or review such decisions in order to keep them in harmony or consistent with the law of the land as announced by the latter court and avoid conflicts and confusion in respect to the holdings of the two courts.

We believe that the act of 1901, in providing that the decisions of the Appellate Court should be final, subject to the conditions as therein prescribed under the Constitution, went to the boundary line of the power of the legislative department. By the act of 1911, however, the Legislature carved out a jurisdiction for the Appellate Court co-extensive with the limits of the state, and conferred upon it the power to review and supervise, on appeal, judgments rendered by trial courts within that territory in large and important classes of cases, and its decisions are made final in all appeals over which it is given jurisdiction. That the effect of the act is to make the Appellate Court within the jurisdiction conferred upon it co-ordinate with the Supreme Court, and to withdraw from the latter court all revising and reviewing power, and therefore make the Appellate Court supreme to that extent at least, is manifest. That such power, under our Constitution, cannot be exercised by the Legislature, is well settled by the au-

thorities to which we will hereafter refer. It is affirmed by this court in *Board of Commissioners, etc., v. Albright*, 168 Ind. 564, 574, 81 N. E. 578, 581, that: "So far as this court (i. e., Supreme) is concerned, the creation of a 'Supreme Court' gives to it its own place at the head of the judicial system. There cannot be a court of co-ordinate jurisdiction with this court, for otherwise it would not be supreme. But one Supreme Court was established or contemplated"—citing authorities.

[6] A leading authority on the point in controversy sums up the law as follows: "Where a court is by the Constitution placed at the head of the judicial system of a state, there being no appeal from its judgments to any other state tribunal, the Legislature cannot interfere with its existence or its supremacy, nor can that body alter the nature of its jurisdiction and duties, nor create a court of co-ordinate final jurisdiction, for no statute can in such case deprive the court of last resort of its rank as the highest and ultimate judicial power; but where the Constitution expressly or impliedly so permits, or *where its judgment is subject to* (our italics), review by the court of dernier ressort, or where its jurisdiction is so limited that it cannot equal that of the highest court, an intermediate appellate court may be created having even final jurisdiction, where the Constitution is not exclusive in respect to Supreme Courts as courts of last resort." 11 Cyc. 706. In further support of this proposition, see *Branson v. Studebaker*, 133 Ind. 149, 33 N. E. 98; *State ex rel. Hovey v. Noble*, 118 Ind. 350, 21 N. E. 244, 4 L. R. A. 101, 10 Am. St. Rep. 143; *Ex parte Griffiths*, 118 Ind. 83, 20 N. E. 513, 3 L. R. A. 398, 10 Am. St. Rep. 107; *Board of Commissioners v. Albright*, 168 Ind. 564, 81 N. E. 578; *Pittsburg, etc., Co. v. Peck*, 172 Ind. 577, 88 N. E. 939; *People v. Circuit Judge*, 37 Mich. 474; *Brown v. Kalamazoo Circuit Judge*, 75 Mich. 274, 42 N. W. 827, 5 L. R. A. 226, 13 Am. St. Rep. 438; *Henderson v. Beaton*, 52 Tex. 29; *State v. Jones*, 8 Rob. (La.) 573; *Flanigan v. Guggenheim Co.*, 63 N. J. Law, 647, 44 Atl. 762; *State v. Villins*, 140 Mo. 523, 41 S. W. 887; *Sharpe v. Robertson*, 5 Grat. (Va.) 518; *Traphagen v. Township*, 39 N. J. Law, 234; *Court of Appeals*, 9 Colo. 623, 21 Pac. 471; *Court of Appeals*, 15 Colo. 578, 26 Pac. 214; *People v. Richmond*, 16 Colo. 274, 26 Pac. 929; *Berkenfield v. People*, 191 Ill. 272, 61 N. E. 86; *State v. Nast*, 209 Mo. 708, 108 S. W. 563; *State v. Allen*, 5 Kan. 213; *Hildreth v. McIntire*, 1 J. J. Marsh. (Ky.) 206, 19 Am. Dec. 61; *Pate v. Wilmington*, 122 N. C. 877, 29 S. E. 334; *Rhyne v. Lipscombe*, 122 N. C. 650, 29 S. E. 57; *Elliott on Appellate Procedure*, §§ 2, 5, 25, 26, 72.

In *Court of Appeals*, 9 Colo. 623, 21 Pac. 471, the Supreme Court of Colorado held that an intermediate court having appellate and

final jurisdiction could not be legally created by the Legislature. The court in that case affirmed that: "The judicial power, both appellate and original, lodged by the Constitution in the Supreme Court, cannot be transferred to another court created by the Legislature in any manner so as to make its decisions and opinions final. This jurisdiction is lodged in 'a Supreme Court.' Two such courts with like jurisdiction and powers are not contemplated by the Constitution."

In *People ex rel. v. Circuit Judge*, supra, the question arose as to the power of the Legislature to deprive the circuit courts of any portion of their appellate jurisdiction over the courts of the justices of the peace. Chief Justice Cooley, who wrote the opinion of the court in that case, said: "Both these classes of courts are constitutional courts, and, so far as any jurisdiction is conferred upon either by the Constitution, it is beyond the reach of the legislative power. * * * While it may be and has been claimed that the appellate jurisdiction still remains, though some cases are removed from its scope, there can be no plausible argument, as we think, that the supervisory control is left unimpaired when as to a large class of cases it is wholly superseded, and the control conferred upon another tribunal. Any reasoning that would support such legislation would justify a like apportionment of the probate jurisdiction between the constitutional probate court and the municipal courts of legislative creation."

In *Brown v. Kalamazoo Circuit Judge*, 75 Mich. 274, 42 N. W. 827, 5 L. R. A. 226, 13 Am. St. Rep. 438, the court, in considering an act of the Legislature which attempted to make changes in the equity practice as such practice existed when the Constitution was adopted so as to confer upon a jury larger powers in equity cases, said: "As it is not competent for the Legislature to deprive the Supreme Court of its revisory jurisdiction over all other state tribunals, no legislation which practically destroys it is valid."

In *Henderson v. Beaton*, supra, an act of the Legislature created a commission, whose members were styled "Commissioners of Appeals," to relieve the accumulation of business in the Supreme Court and the Court of Appeals. The court in that case held that if, in a case involving life, liberty, or property, litigants were denied the right to resort to the constitutional courts of that state, and were required to go before different tribunals organized perhaps under unfavorable circumstances and in a manner less calculated to receive wise and impartial adjudications, the Constitution would be violated. It was there said that: "The constitutional courts are designed to secure the citizen in his rights and to enforce the observance of the constitutional limitations."

In *People v. Richmond*, supra, a question

quite similar to the one involved in the case at bar was considered. The Supreme Court in that case said: "There can be no doubt about the supremacy of the Supreme Court. This court is placed by the Constitution at the head of the judicial system of the state. From its judgments there is no appeal to any other state tribunal, and its determinations are binding upon the rest of the state judiciary. The Legislature cannot interfere with its existence or supremacy, nor can that body alter the nature of its jurisdiction and duties. And it follows of course that, without change in the fundamental law, the Legislature cannot create a court of co-ordinate final jurisdiction. In re Court of Appeals, 9 Colo. 623 [21 Pac. 471]; In re Court of Appeals, 15 Colo. 578 [28 Pac. 214]. Every tribunal established by statute, whether clothed with original or appellate powers, must, like the trial courts expressly named in the Constitution, be inferior to the Supreme Court, subject to its 'superintending control,' and guided by its decisions upon questions determined in the exercise of its appellate authority." (Our italics.)

In *Traphagan v. Township*, supra, the Supreme Court of New Jersey declared that the Legislature was "without capacity to change the nature of the Supreme Court, either by direct abridgment of its original power, or by weakening its authority by lodging it co-ordinately in some other tribunal."

In *Berkenfield v. People*, 191 Ill. 272, 61 N. E. 86, the Supreme Court of Illinois held that the act creating an Appellate Court therein involved was not unconstitutional because its judgments might be reviewed by the Supreme Court upon appeal.

In section 2 of Elliott's Appellate Procedure, it is said: "Where the Constitution defines the jurisdiction of a court, the Legislature cannot take it away, nor, indeed, change it in any material respect. As a corollary of this principle, it must follow that, where a Supreme Court is created by the Constitution with ultimate appellate jurisdiction, the Legislature, although it may have the power to establish courts, cannot take away the superior appellate jurisdiction. The Constitution of Indiana creates a Supreme Court and makes it the highest judicial tribunal of the state, so that, while inferior tribunals may be created, a higher one cannot be established by the Legislature. While the Legislature cannot rightfully or constitutionally take away the supreme appellate jurisdiction of the Supreme Court, it may regulate the procedure, designate the amount that shall authorize an appeal, and, within limits, designate the class of cases that may be appealed; but it cannot, under the guise of regulating the procedure or the right of appeal, take away the essential jurisdiction of that court as the highest court of error or appeals."

Continuing, in section 5 of the same work, it is said: "It is no doubt true that, under

the constitutional amendments of 1881, the Legislature may create *intermediate appellate courts* (our italics); but, as it cannot take from the Supreme Court the ultimate appellate jurisdiction, it would seem to follow that no statute can be valid which assumes to vest in any other tribunal than the Supreme Court jurisdiction of questions which require the highest expression of judicial judgment. Whether the Legislature can give any other tribunal than the Supreme Court jurisdiction over all cases involving simply a controversy as to the right of money is doubtful, for it seems that, even where money alone is in dispute, there must be some limit to the jurisdiction of an intermediate tribunal, otherwise it would not be inferior."

As we have seen, the Constitution expressly invests the Supreme Court with jurisdiction coextensive with the limits of the state in appeals and writs of error. No other court of appellate jurisdiction created by the Legislature can by that body be authorized to enter this domain of the jurisdiction of the Supreme Court to the entire exclusion of the supervising or reviewing jurisdiction of the latter court. *State ex rel. v. Hovey*, supra. No one would have the boldness to argue that the Legislature might divide the state into two districts, one north and the other south, and invest the Appellate Court with final jurisdiction over cases appealed from the trial courts in the Southern district, leaving the Supreme Court to have jurisdiction only over appealable cases arising in the Northern district. It is vain to argue that the act in question has due regard for the supremacy of the Supreme Court. That this is not true is apparent from the fact that it confers final jurisdiction upon the Appellate Court in all cases for the recovery of money without any limitations as to the amount and, in effect, excludes the Supreme Court from exercising any jurisdiction whatever in such cases. That this results in respect to such cases in making the Supreme Court virtually inferior to the Appellate Court is self-evident.

[7] By the provision "under such regulations and restrictions as may be prescribed by law" as contained in section 4 of article 7 of the Constitution, the Legislature is not empowered to entirely deprive the Supreme Court of appellate jurisdiction in all cases for the recovery of money. Section 2, Elliott on Appellate Procedure; *Curry v. Marvin*, 2 Fla. 411; *Alexander v. Bennett*, 60 N. Y. 204.

Certainly it does not alter the case that the Legislature, after wholly stripping the Supreme Court of all appellate jurisdiction in such cases, then by the act in question confers final jurisdiction thereover upon another court of its own creation. That which the Legislature is by the Constitution prohibited from doing directly it cannot do indirectly. The question with which we have to

deal, as the same is involved and presents itself by the statute under consideration, is a new one in this jurisdiction, and, as now presented, has never been before this court.

We will consider the cases referred to by counsel seeking to uphold the validity of the act. These cases arose soon after the creation of the Appellate Court, which, as shown, was established by the Legislature only temporarily. The first case is *Ex parte Sweeney*, 126 Ind. 583, 27 N. E. 127, which arose out of the request of the clerk of the Supreme Court for instructions in regard to what cases under the act creating an Appellate Court should be distributed by him to that court. No constitutional question either as to the validity of the court or its jurisdiction under the statute creating or establishing it was raised or considered in that case.

In *Branson v. Studabaker*, 133 Ind. 149, 33 N. E. 98, the jurisdictional question then raised was whether the title to real estate was in issue. If so, jurisdiction under the statute was in the Supreme Court. There is nothing said by the court in that appeal which militates in any way against our holding in the case at bar. The court in that appeal apparently based the validity of the statute creating the Appellate Court wholly upon the ground that its jurisdiction was so limited as to prevent it from equaling in authority the Supreme Court.

The case of *Newman v. Gates*, 150 Ind. 59, 49 N. E. 828, arose upon a petition for a writ of certiorari to be issued by the Supreme Court to the Appellate Court to require the latter to certify over the case of *Gates v. Newman*, 18 Ind. App. 392, 46 N. E. 654, in order that it might be determined by the Supreme Court whether the opinion of the Appellate Court in that case contravened or conflicted with the decision in *Goble v. Dillon*, 86 Ind. 327, 44 Am. Rep. 308. The court held that the decision of the Appellate court did not in any manner conflict with the decision in *Goble v. Dillon*, supra, and therefore the petition for the writ of certiorari was for this reason dismissed. Having reached that conclusion, it was unnecessary for the court to go into a consideration of the character of the Appellate Court or the authority of the Supreme Court to issue a writ of certiorari ordering a certification of the case in question. In the *Newman Case*, supra, however, it is said that: "There can be no doubt that the Legislature, in creating the Appellate Court, and particularly in the enactment of the section above cited (i. e., the section requiring the decisions of the Appellate Court to conform to the decisions of the Supreme Court) expressed its intention that the interpretation of the law in the courts of this state should remain uniform and consistent, and that such interpretation should be determined wholly by the decisions of the Supreme Court."

In concluding the consideration of the question in this case, we may say that the judges of this court, upon being inducted into office, are required to take a solemn oath to support the Constitution of the state. This duty can be performed no more sacredly by them than in upholding and maintaining the constitutional powers and authority invested in that tribunal.

[8] Without further comment, we conclude, and so hold, for the reasons herein given, that the act of the Legislature approved March 3, 1911, herein involved, is violative of and antagonistic to the Constitution of this state, and therefore invalid in all of its parts except section 3. Under the circumstances, section 5 of the act in question, which professes to repeal all laws or parts of law in conflict, and also section 10 of the act of 1901, must be held to be ineffectual and of no avail, and the act concerning appeals, increasing the number of judges of the Appellate Court, approved March 12, 1901, as amended by the act of 1907, remains in full force and effect in all of its parts. As section 3 of the act of 1911 is not dependent upon any of the invalid provisions of that act, it can stand, and the clerk of this court will be controlled thereby. It follows, and we so direct and order, that the petitioner, the clerk of this court, must disregard—except section 3—the act of 1911 as to all of its parts and provisions, and must be controlled by the act of 1901 as amended in 1907, which still stands and remains in full force and effect as it did at the time of the passage of the act of 1911, supra.

All of which is ordered by and adjudged by this court.

MONKS and MYERS, JJ., concur with JORDAN, C. J. MORRIS and COX, JJ., dissent.

MYERS, J. (concurring). If the members of the court were free to consult their individual disposition in this case, I should be disposed to lodge the responsibility with the Legislature, ignoring the results; but we are not thus free, and cannot escape the responsibility imposed upon us.

This court is charged under the Constitution with the duty of upholding the constitutional integrity of the court, and I am unable to bring myself to see it in any other light than that the act is the entering wedge to the ultimate destruction of the supremacy of the court, for if its jurisdiction to declare the supreme law of the land can be divested as it is proposed by the act, questions both small and great, in which all and the dearest interest of the most lowly citizen may be involved, or vast sums of money which may affect those interested even less than the small property of the humble citizen, it is but a step further, upon the same reasoning, to strip the court of practically all jurisdiction, certainly to the extent that its pro-

nouncements would cease to be the law of the land, and that such result is possible, is sufficient to require great caution, for the ensuing evils could not be measured. A high regard for a co-ordinate branch of government, imbued with as patriotic and just motives, and as high ideals, as this court, and as just desire to respect the limits of its jurisdiction, we know from the abundant history of the past has not prevented occasional infractions of the Constitution, and required the interposition of the check of the court.

It is urged that the act grew out of the exigencies of the times. It is to be said that much as the expedition of the business of those who are before the court is desirable it can never be a just reason for disregard of the organic law, one of the very purposes of which is to guard against the press of exigencies which may sweep away fundamental landmarks, or overthrow governments. Expediency can never be an excuse for a court overthrowing a Constitution. But upon the score of the exigencies presented by the increase of business in the Appellate Court by which, through the most exacting labor of its members, the business cannot be kept pace with, what would be the result if the act were held valid? There are pending in the Supreme Court 286 cases, in the Appellate Court 764 cases; 75 per cent. of the cases in the Supreme Court would be retained, and 45 per cent. of those in the Appellate Court transferred, leaving the latter court 479 cases, and the Supreme Court 523 cases, which will, at one stroke, set this court back at least $2\frac{1}{2}$ or 3 years, which is about the average time the Appellate Court is behind with its business while the state advanced, and other cases having precedence would greatly increase the disparity, so that suitors in that court of certain classes would not have their cases advanced, nor would those whose causes should be transferred to this court be any better off, for there is a limit to human endurance, to do the work, whilst those whose causes might be transferred from this court would be largely disadvantaged by the change, and to such pass would we all come, upon the doctrine of expediency. However much the doctrine of expediency may obtain in furnishing speedy remedies to suitors, and however much it is to be desired, there are deeper considerations when it comes to so wide a departure from the established rules as the act contemplates, and upon that question I do not put it upon any consideration of expediency, amount, or classes of cases as furnishing a guide, but in the inherent power of this court to declare the law of the land, without regard to amount, or classes of persons, or interests involved. The Constitution reads that: "The Supreme Court shall have jurisdiction coextensive with the limits of the state in appeals and writs of error, under such regulations and restrictions as may be pre-

scribed by law. It shall also have such original jurisdiction as the General Assembly may confer." Thus the court is by the Constitution vested with the supreme jurisdiction of appeals. It may have original jurisdiction when the Legislature confers it; but it is not dependent upon the Legislature for any appellate jurisdiction. That is fixed by the Constitution; that being true, what is meant by the phrase "under such regulations and restrictions as may be prescribed by law," as those words would be understood in the connection used, giving them their usual and natural meaning, and having in mind the conditions existing at the time of the adoption of the Constitution? It seems to me that "regulations" refer to the procedure, and "restrictions" not only to the procedure, but to the cases, or class of cases, in which appeals may be taken. For the moment I lay aside the question of the power of the Legislature to restrict appeals, to present another matter.

When the Constitution was adopted, the common-law writ of error was as well known as appeals, as they are recognized by the Constitution in all their common-law force. They could only be abolished as was done by the Code of 1852 (2 Rev. St. 1852, p. 158, § 550), if at all, by the substitution in their place of some remedy of similar effect, and it is highly probable that they cannot be abolished at all. However that may be, the Code of 1881 is silent as to the abolition of writs of error, and, under the rule, the common-law writ of error was revived. *Donaldson v. State*, 167 Ind. 553, 78 N. E. 182; *Baum v. Thomas*, 150 Ind. 378, 50 N. E. 357, 65 Am. St. Rep. 368.

Hence, if it could be abolished as a rule of procedure, it was certainly revived, and in force in all its common-law vigor, and is a constitutional and prerogative writ of this court, to be exercised when and as the court shall see fit, so that, even if the act of 1911 could be held to be effective, the right to the writ of error remains.

It had its origin in the common law, and was adopted in the United States as a part of the common-law system. The common law by express statute is adopted in this state, with some qualifications, and, unless abolished by statute, the writ still remains as an available remedy.

If the act of 1911 could be upheld, the result would be the same in the reserve power of this court, and it is the only possible ground upon which it can be upheld; but it would not have been passed had that condition been regarded as possible. *Wicart v. Dauchy*, 3 Dall. 327, 1 L. Ed. 619; *Ex parte Thistleton*, 52 Cal. 220; *Langworthy v. Baker*, 23 Ill. Orig. Ed. 484 (Freeman & Gross Ed. 430); *Willoughby v. George*, 4 Colo. 22.

It has been held that the writ cannot be abolished by the Legislature, where the pow-

er to issue it is by the Constitution vested in a court. *Harrison v. Trhdee*, 27 Ark. 59; *Martin v. Simpkins*, 20 Colo. 438, 38 Pac. 1092; *Baier v. Schermerhorn*, 96 Wis. 372, 71 N. W. 600; *Buttrick v. Roy*, 72 Wis. 164, 39 N. W. 345.

The right to a writ of error exists independently of any statutory or constitutional provisions, by force of the common law, in all cases where jurisdiction is exercised in inferior courts according to the course of the common law, and without further action by the Legislature. *Haines v. People*, 97 Ill. 161; *Stebbins v. Anthony*, 5 Colo. 273; *Reece v. Knott*, 3 Utah, 436, 24 Pac. 759; *Sarchet v. United States*, 37 U. S. 143, 9 L. Ed. 1033; *Bevins v. Ramsey*, 52 U. S. 185, 13 L. Ed. 657; *Wilson v. Wald*, 2 Wash. T. 376, 7 Pac. 857; *Klein's Appeal*, 11 Wkly. Notes Cas. 449; *United States v. Gilson*, 1 Idaho, 364; *United States v. Halley*, 118 U. S. 233, 6 Sup. Ct. 1049, 30 L. Ed. 173; *In re Cooke*, 15 Pick. (Mass.) 234; *Prentice v. King*, 39 Neb. 816, 58 N. W. 277; *Baxter v. Trustees*, 16 Ohio, 56; *Langworthy v. Baker*, *supra*; *Smith v. Gibson*, 25 Neb. 511, 41 N. W. 360; *Doty v. Moore*, 16 Tex. 591; *Bryant v. Stearns*, 16 Ala. 302; *Gore v. Ray*, 69 Mich. 114, 36 N. W. 739; *Lewis v. Wallick*, 3 Serg. & R. 410; *Stiles v. Tonn*, 45 Vt. 520; *Cooper v. Summers*, 1 Sneed (Tenn.) 453.

Here we have the writ provided for by the express language of the Constitution.

But it is sought to uphold the act of 1911 upon the ground of the right of the Legislature to restrict or deny appeals. The question to my mind lies deeper. The Legislature has given a right of appeal in a great variety of cases; these appeals are therefore impressed with the constitutional right, not of any suitor to have any particular court determine his case, but the right to have the supreme law of the land declared as such, independently of any particular case, though it would have to be done in a case before the court, and that cannot be done, so long as the right to be heard is restricted to another court. It may be much abler in point of the personnel of its members, and they may be, and are presumed to be, imbued with as high motives, and desire to pronounce the law, but they cannot in the nature of things, speak *ex cathedra*; that alone is the province of the Supreme Court if it is to exist with its ancient prerogatives, and jurisdiction under the Constitution. Neither can a co-ordinate court take its place, or exercise its jurisdiction, and the effect of the act of 1911, whatever its purposes, and however well intended, can have no other effect as to the class of cases submitted to it, and that a large and important class.

It is sought by the able counsel for the state, while admitting that there can in the nature of things be but one Supreme Court, to make a distinction between juris-

diction and authority; that is, that authority to determine certain classes of cases finally, and without the power of revision as to the law, may be given to inferior courts without affecting or taking away the jurisdiction of the Supreme Court. To my mind the thing cannot be. The authority to determine a case is jurisdiction to determine it, and, if authority to determine it finally is given, that is supreme jurisdiction as to that case, and to that extent supersedes the jurisdiction of the Supreme Court as effectually as to divide its jurisdiction, which is by the Constitution declared to be coextensive with the limits of the state.

It is also urged that the jurisdiction of the Supreme Court is still coextensive with the limits of the state. That is true by the very force of its creation, and its jurisdiction extends not only over the limits of the state, but by the force of its character, and jurisdiction over the subjects of litigation, which are by the statute made appealable to the extent at least of the reserve power in the court, to declare the law of the commonwealth. But if this act can be upheld, which the writer would much like to see done, and has sought to do, if it could be, out of regard to a co-ordinate branch of the government, where shall and will the line be drawn? Once the power of subtraction is conceded, no limit can be placed, and the evils which may follow cannot be forecast, so that it seems to me that safety can only lie in the denial of the power sought to be invoked, and conferred by the act.

MORRIS, J. (dissenting). I cannot concur in the opinion of the majority of the court in this cause, and the importance of the statute, held by the majority to be unconstitutional, as well as the legal questions presented, impel me to state reasons for dissenting in an opinion of unusual length.

Inasmuch as the act of 1901, defining the jurisdiction of the Supreme and Appellate Courts, as amended in 1907, is held valid in the majority opinion, it will be instructive to first ascertain just what changes in the act of 1901 were made by the act of 1911. An examination of the acts discloses the fact that no change whatever is made in sections 1, 2, 3, 4, 5, 6, 8, 9, 10, 11, 12, 13, 15, 16, 17, and 18, of the act of 1901 as amended in 1907, and the jurisdiction of the Supreme Court, as defined in the above sections, is unchanged by the act in controversy.

By section 7 of the former act, the Supreme Court was given jurisdiction in "proceedings to construe wills, in which no other relief is asked." The act of 1911 changes this section to read as follows: "All actions in which the construction of a will is involved."

The effect of this change is to greatly enlarge the jurisdiction of the Supreme Court and correspondingly reduce that of the Appellate Court, which, under the old act, had ju-

risdiction of all proceedings involving the construction of wills, except, in the very rare cases, where no relief was asked except the construction of the instrument.

Section 14 of the former act gave the Supreme Court jurisdiction in appeals wherein a money judgment was rendered for \$8,000 or more. Under the act of 1911, jurisdiction in such cases is transferred to the Appellate Court. The number of such cases is comparatively small, and they are usually determined by common-law rules.

Section 14 of the act of 1911 confers on the Supreme Court jurisdiction of "all actions involving the title to real estate or the possession thereof." Under the act of 1901 as amended in 1907, the Appellate Court had jurisdiction of nearly all such actions. The effect of this change is to greatly enlarge the jurisdiction of the Supreme Court not only as to the number of cases, but also as to the conceded importance thereof.

Section 15 of the act in controversy gives the Supreme Court jurisdiction in "all cases involving the granting or refusal to grant injunctions," and section 16 thereof confers on this court jurisdiction of "all cases for the specific performance of contracts." Under the former act, the jurisdiction of cases, designated in the above sections, was vested in the Appellate Court. Actions for injunction and specific performance are of purely equitable cognizance, and cover a wide and important field in our jurisprudence. The transfer from the Appellate to the Supreme Court of these two classes of cases, coupled with that of all cases where the title to or possession of real estate is involved, and also that of all cases where the construction of a will is involved, has the effect of giving the Supreme Court jurisdiction of a great body of causes of equitable jurisdiction, and on consideration it must be conceded that these changes transfer from the Appellate to the Supreme Court the most important equity cases.

Section 17 of the act of 1911 gives the Supreme Court jurisdiction of all probate matters, including estates of decedents, infants, and persons of unsound mind, and all matters incidental thereto, and all suits pertaining thereto. Under the former act, such cases—and they are very numerous—were taken to the Appellate Court.

The jurisdiction of the Supreme Court in cases involving the validity of franchises, and ordinances of municipal corporations, the constitutionality of statutes and rights guaranteed by the state or federal constitutions; in criminal prosecutions, election contests; in actions of mandate, prohibition and quo warranto; cases of habeas corpus and actions to contest wills; actions to establish drains and improve water courses; condemnation proceedings; actions to establish and vacate highways; judgments granting or denying liquor licenses; contempt cases; applications for admission to the bar to practice law, and disbarment proceedings, and

appeals from interlocutory orders—are left precisely in the act of 1911 as it formerly existed.

The act of 1901, as amended in 1907, and the act of 1911, contain the same residuary clause conferring on the Appellate Court jurisdiction of all appealable cases except those in which the jurisdiction was, by the act, specifically vested in the Supreme Court. This clause reads as follows: "All appealable cases, other than those herein mentioned shall be taken to the Appellate Court." Acts 1911, p. 201; Acts 1907, p. 237; Acts 1901, p. 585.

The act in controversy repeals that portion of the act of 1901 which, in certain cases, provided for the transfer of causes from the Appellate to the Supreme Court. This act, as construed by the Supreme Court, authorized the transfer of a case only when the *opinion*, filed by the Appellate Court, declares a rule in conflict with a ruling precedent of the Supreme Court, or, when the *opinion* of the Appellate Court announces an erroneous rule on a new question of law. However grossly erroneous the mandate of the Appellate Court may have been, when the record was taken into consideration, or however unjust to the litigant may have been the action of the Appellate Court, when tested by the pleadings, evidence, and judgment of the trial court, no relief was granted the losing party on a petition to transfer, unless the opinion of the Appellate Court asserted an erroneous doctrine, and then only as an incident thereto. The sole purpose of the law was to enable the Supreme Court to control the statements of legal principles as contained in the opinions of the Appellate Court, and was in no manner intended to secure to the litigant a review of his case on the merits. *City of Huntington v. Lusch*, 163 Ind. 268, 71 N. E. 647; *Grand Rapids, etc., R. Co. v. Railroad Com.*, 167 Ind. 216, 78 N. E. 981, and cases cited. When a cause was transferred, however, the Supreme Court then determined it on its merits, and in such case the litigant got a review of the cause on the merits. The Appellate Court is not required to give any opinion on affirming a judgment. In that event, there could possibly be no transfer, and an appellant could have no chance for incidental relief. *Burns' Stat.* 1908, § 1401.

The act of 1901 provided that, whenever in the opinion of the Supreme Court there is a disparity between the number of the cases pending in the two courts, the Supreme Court may order a specified number of cases pending in the Appellate Court to be transferred to the Supreme Court, and there determined in the same manner as if they had been originally appealed to it. *Burns' Stat.* 1908, § 1405. This section of the 1901 act was neither repealed nor modified by the act under consideration. By the act of 1911, the jurisdiction of the Appellate Court is final, except in cases where two or more of the judges of the Appellate Court are of the opinion

that a ruling precedent of the Supreme Court is erroneous, in which event such cases are to be transferred to the Supreme Court. Section 4.

By the act of 1901, as amended in 1907, the jurisdiction of the Appellate Court was final in such cases, unless transferred to the Supreme Court, because two judges of either division of the Appellate Court concluded that a ruling precedent of the Supreme Court was erroneous, or unless transferred by the Supreme Court because of the erroneous declarations of law in Appellate Court opinions. Acts 1901, § 10; Acts 1907, § 3. This latter provision, found in section 10, is repealed by the act of 1911, as above stated.

As no one questions the act because it transfers from the Appellate Court to this court jurisdiction in large classes of cases, such matter will not be considered.

There is left, therefore, but two questions in this controversy. The act of 1911 takes from the Supreme Court jurisdiction of cases when there is a money judgment of \$6,000 or over, and it takes from the Supreme Court jurisdiction of petitions to transfer conferred by the second clause of section 10 of the act of 1901. In no other respect whatever was the jurisdiction of the Supreme Court lessened by the act of 1911. If the General Assembly violated the Constitution by repealing a section of a statute enacted by the Legislature in 1901, or if it violated the Constitution in taking from the Supreme Court jurisdiction in appeals from money judgments for \$6,000 or over, then the act must fail; otherwise it must stand.

It will scarcely be contended that the Legislature of 1911 did not have the power to repeal the transfer act, enacted, for the first time, in 1901. The only limitations on the power of the General Assembly to repeal former acts, of which I am aware, is the provision of the federal Constitution forbidding the states from enacting laws impairing the obligation of contracts, and the provisions of our own Constitution preventing the decrease of judges' salaries during the terms for which they have been elected. Of course, neither of these provisions have any application here. To admit that a Legislature may enact an irrepealable law is to concede that it may alter the very Constitution from which it derives its authority, and eventually deprive succeeding assemblies of all power. Cooley's Constitutional Limitations (7th Ed.) 174. That the Legislature acted within the scope of its authority in repealing this enactment is not debatable.

But in the majority opinion it is asserted that the cardinal point here involved is not what cases or to what courts appeals may be taken—not a question of personal or private right to be tied down solely to the rights of litigants, but one which concerns all the persons of the state.

I cannot comprehend why a litigant, whose title to property depends on the correct ap-

plication of a rule of law, can be constitutionally denied a review of his cause, and thereby be denied the protection of the law, and yet the general public, with no pecuniary interest involved, can have the right to demand a review, and have the correct rule of law declared. No authority is cited to support the proposition, and I am unable to find any.

But, aside from its novelty, this doctrine cannot possibly apply to any matter in issue here. If it be conceded that the Constitution guarantees to the general public the right to have the law of the land declared with absolute accuracy, by the Supreme Court, this act cannot, by any conjecture even, be declared to violate such right. The act does not hint even at affecting anything but the rights of litigants, with appealable cases, in the Appellate Court. In the classes of cases designated as appealable to the Appellate Court, it puts the stamp of finality on the litigation. The language of the statute is as follows: "The jurisdiction of the Appellate Court in all cases in which jurisdiction is hereby conferred upon said court, shall be final." Section 4. The clause conferring jurisdiction is as follows: "All appealable cases, other than those herein mentioned" (those appealable to the Supreme Court) "shall be taken to the Appellate Court." To constitute a case there must be a subject-matter presented to the court by a party. As this statute pertains only to appeals by persons—natural or artificial—I submit that the only question here involved is the power of the Legislature to limit the rights of parties, in appeals in certain classes of cases, to a review thereof by the Appellate Court.

Our statutory appeal gives practically all the relief granted by the common-law writ of error and the original proceeding by appeal introduced into equity practice from the civil law. 2 Cyc. pp. 511-517.

The Legislature of 1852 abolished the distinction between actions at law and suits in equity, and at the same time abolished the writ of error. 2 Rev. St. 1852, art. 27, § 550, p. 158. It has never been restored. Since then, to 1901, no other method of review was known to our law except by appeal. The limited scope of review, provided in the transfer act of 1901, was wholly new to our law, purely of statutory creation, and died with the repeal of the statute in 1911. This leaves us where we were previous to 1901, with the appeal as the only method of review, unless the Constitution itself guarantees some additional remedy. It will scarcely be contended such remedy can be found in the language of the Constitution. It provides simply that the "Supreme Court shall have jurisdiction * * * in appeals and writs of error, under such regulations and restrictions as may be prescribed by law." No one has ever questioned the power of the Legislature to abolish the

writ of error. Even if it had not, in express terms, done so, our statutory appeal, comprehensive as it is, would probably have abolished it by implication. 2 Cyc. 517.

As only appeals and writs of error are mentioned in the Constitution, and the latter having been constitutionally abolished, the General Assembly may undoubtedly limit a litigant's right to have his cause reviewed, by resort to appeal. And this act in controversy has so limited it.

It is, however, suggested in the majority opinion that the act of 1901 might have been held unconstitutional, had it not been for section 10, which provided for a limited review by transfer, and, with that repealed, the classification of causes appealable to the Supreme Court would have been unconstitutional.

Classifications, to be valid, must not be merely arbitrary, but must have some reason for support, inherent in the subject-matter. It therefore becomes proper to consider the conditions surrounding the enactment of this act in 1911.

The transfer act of 1901, in actual practice, had proven unsatisfactory to the bar of the state, because it provided for no review of a case on its merits.

At the fourteenth annual meeting of the State Bar Association of Indiana, held in Indianapolis in July, 1910, the committee on judicial administration and remedial procedure, by its chairman, the Honorable Wm. A. Ketcham of the Indianapolis bar, reported for adoption by the association, and presentation to the General Assembly of 1911 a resolution seeking the amendment of the transfer act, so as to provide on petition to transfer for a review of the record on its merits. After full debate, as shown by the report of the proceedings, the resolution was adopted. Proceedings Indiana Bar Association 1910, pp. 190-207.

On the other hand, when the act in question was passed, on March 3, 1911, division No. 1 of the Appellate Court, which had jurisdiction of appeals from the Second or Northern district, was deciding cases where the transcripts had been filed in the spring of 1908. Owing to the less volume of business in the Southern district, division No. 2 was not so far behind. Litigants in the Northern district with appeals pending in the Appellate Court were required to wait from two to three years, after the filing of the transcripts, for a decision. The result was to practically nullify the section of our Constitution which requires that "justice shall be administered * * * speedily and without delay." The Supreme Court had the right to take over cases from the Appellate Court and decide them; but, owing to the fact that about two-fifths of the time of the judges of the Supreme Court was taken in considering petitions to transfer, it had not, at that time, taken over any Appellate Court cases since May, 1906. During the year

preceding this enactment, the Supreme Court had transferred from the Appellate Court about 16 cases, under the petition to transfer statute. Of these cases, the result reached by the Appellate Court was approved in five cases and disapproved as to the remainder. The above were conditions which confronted the Legislature of 1911, when it entered on the enactment of some measure for relief. The result was this act, which abolishes the petition for transfer, divides the jurisdiction between the courts by a classification of cases based entirely on their nature, greatly increases the classes of cases given to the Supreme Court, and which it will be enabled to handle, by reason of the repeal of the transfer act. It also denies persons with appeals decided against them in the Appellate Court any right to a review of their causes by the Supreme Court.

Three courses were open to the members of the Legislature: First, to ignore the mandate of the Constitution which guarantees a speedy administration of justice, and permit the result of the law's delay to continue its work of bankrupting litigants, or compelling them to accept the terms offered by their adversaries outside of the court; second, to create another appellate court, with an expense greatly adding to the burdens of the taxpayers of the state; third, to repeal the transfer act, and thus enable the Supreme Court to devote the time thus saved—probably two-fifths—to the consideration of large classes of cases of which the Appellate Court then had jurisdiction, to classify the cases of which each court shall have jurisdiction by their nature, thus preventing any substantial conflict of decisions, and to make the judgment of the Appellate Court, in causes of which it has jurisdiction, final and conclusive by denying the litigant a right to appeal therefrom to the Supreme Court.

Our Constitution gives the Supreme Court no supervising or superintending control over the lower courts, as do the Constitutions of many states, among which may be named Michigan, Wisconsin, and Colorado; and even in such states it has been uniformly held that such control applies only to keeping inferior courts in the bounds of their jurisdiction. *People v. Richmond*, 16 Colo. 274, 26 Pac. 929. The Constitution says nothing about the rank of the Supreme Court or any other court; but giving to the word "rank" the meaning of standing, or sphere of action, it does by necessary implication make this court the one of highest rank. The Constitution does not attempt to fix any standard of consistency for the decisions of any of the courts. Had it so attempted, it would have failed. The law is not, never was, and never can be, an exact science.

We measure distances and surfaces with yard sticks and rod poles. We weigh substances with balances. For these purposes we have standards on which all agree. But

when it comes to laws—rules of action—whether written by the Legislature or declared by courts, there is, and can be, no fixed standard by which to determine their wisdom. These rules change necessarily with the changes in habits, customs, and industries of the people. Man was not endowed with absolute wisdom, and we cannot say of any single decision of a court that it declares a rule that should stand forever, unmodified.

This statute requires the Appellate Court to follow the decisions of the Supreme Court. The presumption is it will do so. If not, the Legislature can abolish the court at any time. The judges of that court take the same oath of office taken by the judges of this court. Surely bad faith will not be imputed to the judges of that court in advance. *Hanly v. Sims* (1911) 94 N. E. 401. The judges of the Appellate Court are elected by the voters of the entire state, just as the judges of the Supreme Court are selected. They receive the same compensation for their services. There is no reason why the people may not elect judges of the Appellate Court possessing learning and wisdom equal to that possessed by judges of the Supreme Court. They might be superior in these respects.

The Appellate Court has been in existence for two decades. The opinions of the court, printed in the 45 volumes of Appellate Court Reports, are a sufficient vindication of the learning and wisdom of those judges who have honored the state by their valuable contributions to our jurisprudence; and the integrity of those formerly selected, and the improbability that the entire people of the state will in the future select appellate judges of inferior character, ought to disarm suspicion.

Under this act, the Appellate Court will have for its determination causes involving new questions of law for which no precedent may be found. Some of these questions might be decided differently from what they would be if decided by the Supreme Court; but, as the Supreme Court will not be called on for decisions in such cases, there will be but one line of decisions.

But it may be suggested that the Appellate Court may decide that a matter involves a new question of law, when in the opinion of the Supreme Court, if permitted to decide, it would be held governed by a rule formerly declared by the Supreme Court, because it frequently happens that judges of equal learning and probity arrive at different conclusions. This may be conceded, and yet the question remains: Whose decision would be preferable? It is just as likely as not that the Appellate Court, under the facts supposed, took the better view. As was said before, there is no absolute standard by which matters of this character can be determined. The Supreme Court of the United States is the greatest judicial tribunal in the world.

Yet it will not be claimed that its decisions are always consistent. At least, it frequently happens that four of its nine judges contend in dissenting opinions that the majority opinion is in conflict with another line of decisions. That great tribunal frequently acknowledges previous errors by overruling former decisions. And so it is with this court. In *Board v. Allman* (1895) 142 Ind. 573, 42 N. E. 206, 39 L. R. A. 58, this court had, for the thirtieth time, before it for consideration the question of implied liability of counties for the negligence of their officers in erecting and keeping bridges in repair. The Supreme Court had 29 times decided that in such cases the counties were liable. The Appellate Court, being required by statute to follow the decisions of the Supreme Court, had similarly determined 8 cases brought before it. After mature consideration, in the *Allman* Case, the Supreme Court overruled the previous 37 cases; thus, in the one case, overruling more than twice as many decisions as it did those of the Appellate Court in the year preceding this enactment. Time has vindicated the wisdom of this court in its action in the *Allman* Case, and its action has met with the approval of the legal profession and the people of the state. In *Western Union Telegraph Co. v. Ferguson*, 157 Ind. 64, 60 N. E. 674, 1080, 54 L. R. A. 846, transferred to the Supreme from the Appellate Court with the recommendation of the judges thereof that this court overrule former decisions which held that actions could be maintained against telegraph companies for damages for mental anguish alone, resulting from the company's negligence, this court overruled *Reese v. Western Union, etc., Co.*, 123 Ind. 294, 24 N. E. 163, 7 L. R. A. 583, and a large number of appellate cases following it. Many other similar cases might be cited. I merely refer to these cases to show that absolute consistency in judicial opinions in the same court is not attainable, even if desirable.

The law is a practical science, ordained for practical people. Constitutions are made, laws enacted, and decisions of courts promulgated, to enable the people the better to enjoy life, liberty, and the fruits of their industry. The purpose in establishing this court was not to create a school of jurisprudence, however desirable such a school might be, but was primarily to administer justice, as near as it may be approximated, between suitors who properly presented their causes; and, secondarily, to preserve the decisions and reasons therefor, given in the opinions, for the use and guidance of others who might be, or become, similarly situated.

While the Supreme Court has the capacity to receive jurisdiction of all controversies, and the Legislature may confer on it jurisdiction of all questions, including those of quasi judicial nature, usually left to councils, boards of commissioners, tax commissioners, and other boards, it was never con-

templated, even in the infancy of the state, that every dispute should be reviewed by it. Even at that time, when the state contained but a small fraction of its present population, it would have been impossible for this court to have disposed of more than a small fraction of such business. From the very beginning, the jurisdiction of this court was restricted. Within certain limits, as to the amount in controversy, appeals from the circuit court were prohibited, in a large class of cases, from the beginning until now, and during a great portion of that time the decision of the circuit court was final, even in matters involving rights guaranteed by the federal and state Constitutions. *Colliery, etc., Co. v. American, etc., Co.*, 157 Ind. 111, 60 N. E. 941. Certain street improvements, involving vast interests, reports of appraisers appointed by the lower court, are final. *Randolph v. Indianapolis*, 172 Ind. 510, 88 N. E. 949.

Under our law, the state board of tax commissioners fixes the valuation of railroad properties in the state, on which taxes, running into the millions, are annually collected from the companies. Our Constitution requires a just valuation of all property for purposes of taxation. In fixing this valuation of railroad property, however grossly erroneous and unjust, the action of the state board is final, in the absence of fraud. *Cleveland, etc., R. Co. v. Backus*, 133 Ind. 513, 33 N. E. 421, 18 L. R. A. 729. The aggrieved party in such case cannot even get a hearing in the circuit court. The quasi judicial boards of various kinds annually determine the amounts of money to be taken from the people and corporations of the state, by assessments, etc., aggregating, probably, more in value than is determined by all the courts of the state. No doubt there is much error and injustice in the decisions of the various boards; but such decisions are not reviewable, simply because the Legislature has not seen fit to confer jurisdiction thereof on the courts.

Much stress is laid on that portion of the act which takes from the Supreme Court jurisdiction to review money judgments, in actions on contract, or in tort, because the Appellate Court is given final jurisdiction of causes that might involve "millions." So far as the question of amount goes, a still greater objection might be urged against state tax, and other boards, of a quasi judicial nature.

But the assembly was warranted in limiting the right of appeal in such cases, for the reason that actions of this character are largely governed by common-law or well-settled equity rules, and their determination usually only requires the application of well-settled principles of law. Another reason is that this class of cases is a numerous one, and it was necessary to draw the line of classification somewhere. Another strong reason is that from the very beginning, probably for the reasons above stated, limitations were fixed on the right to appeal in

that class of cases. The first Congress which convened after the adoption of the federal Constitution prohibited appeals where the amount involved was less than \$2,000. During the following century similar restrictions were applied in every American commonwealth. In recent years there has been a tendency to limit appeals classified by the nature of the action, rather than the amount involved. The new Constitution of New York forbids a classification resting on the amount in controversy.

No court has ever decided, and probably never will, that a classification based on the amount in controversy, solely because the amount is small, is valid. Such holding would violate the equality of privileges clause of our Constitution. The suit involving \$500 may be just as important to litigants in one action as one for \$50,000 is to those in another. Whether or not this be so, both the letter and spirit of the Constitution would be violated by opening the doors of a court of justice to one, and closing them against his less opulent neighbor.

To say that the Supreme Court of Indiana, whose jurisdiction is coextensive with the state, will hear the causes of only those who have \$6,000 or more at stake, simply because enough money is not involved in other cases, would be abhorrent to the principles of any republican form of government, or even to those of any modern monarchy. Usually no reasons have been given by the courts for sustaining classifications based on the amount in controversy, except that the Legislature have so decreed, because it has always been recognized that the legislative department of the government was invested with the unqualified power to apportion the jurisdiction of the courts, except where expressly restrained by the organic law; and, where Legislatures act within the scope of their authority, courts may not inquire into the reasons which inspired the enactments. But, if such inquiry is permissible, the reasons are obvious and valid.

When the people, by their Constitution, create their highest court of review, and make no attempt to give it jurisdiction of any particular class of cases, and know that it is impossible for such court to determine all the controversies that will arise, they thereby, by sheer necessity, invest the legislative department with the power to exclude from the consideration of such court certain classes of cases; for they guarantee the speedy administration of justice. With the necessity of excluding some classes, the next problem is: What classes shall be so marked? We would all agree that those should be excluded in which the inferior courts would be least likely to err, especially where these classes embrace numerous causes and would greatly relieve the burden of the highest court. This is what this act has done, for in no class of cases is the law so well settled as in that of money judgments. Of course there are exceptions. In

this class will necessarily be embraced some classes of peculiar importance, involving entirely new questions of law; but no law can be enacted that may not work some unfairness in a particular instance. Even our statutes of descent do that in numerous cases. Coupled with this is the other reason that this class embraces so many cases that it will greatly relieve the burden on the dockets of the Supreme Court.

It is true that the latter court would not have had its burdens greatly increased by leaving judgments for \$6,000 or over, in the Supreme Court; but there would have remained whatever objection there may be to the danger of two lines of decisions.

Moreover, as the Appellate Court already under the act of 1901, as amended, had exclusive jurisdiction of actions to foreclose mortgages, in unlimited amounts, no very good reason could be assigned by the Legislature for discriminating in favor of those, among others, who had judgments on notes not secured by mortgage. In my judgment the Legislature did not violate our Constitution in taking from the Supreme Court, and giving to the Appellate, jurisdiction of appeals where the judgment was for money in excess of \$6,000.

The question here is not a new one. The Indiana Constitution, in so far as the Supreme Court is concerned, is modeled after the federal Constitution. The Constitutions of most of the states, in this particular, are the same. In a few, the Constitution, in express terms, defines, in whole or in part, the jurisdiction of the highest court. In such cases, of course, there can be no question. But in most of the states, as in ours, the Constitution simply created the court and invests it with appellate jurisdiction, co-extensive with the limits of the state, under such restrictions and regulations as the Legislature may prescribe. As litigants are prone to exhaust every resource, in appealing their causes, this principle has been presented to the Supreme Court of the United States, and of the several states, with similar Constitutions, each time the legislative department of the government has greatly restricted the right of appeal to the highest court. The rule reduced from these decisions is as follows:

Where the right to appeal from the judgment of an inferior court to the Supreme Court, or court of supreme authority, called by some other name, is not expressly secured by the Constitution, the Legislature may, in its discretion, make the decision of the inferior court final. This rule has been recognized in its entirety in Indiana.

In *Brownlee v. Whitesides*, 8 Blackf. 80, the Supreme Court of Indiana held there was no right of appeal from the circuit to the Supreme Court, in probate causes. This was because the statute made no provision therefor.

In the recent case of *Amacher v. Johnson*

(1910) 91 N. E. 928, this court held: "The Constitution of the state does not grant to any party either the right to a new trial or the right of appeal to this or any other court. Such a right depends upon the provisions of the statutes, and a new trial can only be granted, or an appeal taken, when authorized by statute, and then only in the manner upon the conditions, and for the reasons, named in the statute. *Elliott's App. Proc.* §§ 75, 76, 77; *Lake Erie, etc., R. Co. v. Watkins*, 157 Ind. 600, 62 N. E. 443, and cases cited; *Hughes v. Parker*, 148 Ind. 692, 695, 48 N. E. 243, and cases cited; *Evansville, etc., R. Co. v. City of Terre Haute*, 161 Ind. 26, 35, 36, 67 N. E. 636, and cases cited; *Brown v. Brown*, 168 Ind. 654, 655, 80 N. E. 535; *State v. Rockwood*, 159 Ind. 94, 95, 64 N. E. 592, and cases cited; *Kepler v. Rinehart*, 162 Ind. 504, 70 N. E. 806, and cases cited; *Randolph v. City of Indianapolis*, 172 Ind. 510, 88 N. E. 949; *Smith v. Long*, 43 Ind. App. 668, 88 N. E. 356. See, also, *Porter v. Industrial Printing Co.*, 26 Mont. 170, 183, 66 Pac. 839, 67 Pac. 67; *State ex rel. v. Dist. Court*, 28 Mont. 123, 125, 126, 72 Pac. 412; *Wright v. Mathews*, 28 Mont. 442, 444, 72 Pac. 820; *State ex rel. v. Dist. Court*, 29 Mont. 176, 178, 74 Pac. 414; *Vreeland v. Edens*, 35 Mont. 413, 421, 89 Pac. 735; *Harrington v. Butte, etc., R. Co.*, 36 Mont. 478, 483, 93 Pac. 640; *Saylor v. Duel*, 236 Ill. 429, 86 N. E. 119, 19 L. R. A. (N. S.) 377, and note."

That this opinion is unqualifiedly sustained by a long line of harmonious decisions of this court appears from a consideration of the following cases:

In *Sims v. Hines* (1889) 121 Ind. 534, 23 N. E. 515, involving the right of this court to review certain matters arising in a street assessment, it was held by this court: "There can be no doubt that the Legislature has power to declare what questions shall be, and what questions shall not be, tried on appeal. It has, indeed, the authority to deny an appeal, and to make the decision of the municipal officers final and conclusive. * * * If the Legislature can, as the authorities declare it may do, entirely deny an appeal, there can be no question as to its right to limit the questions which may be tried."

In *Randolph v. Indianapolis* (1909) 172 Ind. 510, 88 N. E. 949, it was held that the judgment of the Marion superior court was final in a matter relating to assessments for street improvements. The court used this language in its opinion: "The statute before us provides that the report of appraisers appointed by the court 'shall be final and conclusive' upon all parties thereto. No appeal from such report or appraisal is specially authorized, and none exists."

In *Whittem v. State* (1871) 36 Ind. 196, involving the right of appeal in a contempt case, this court said: "We are confronted at

the threshold of this investigation with the question of whether the appellant had a right of appeal, and whether this court has the jurisdiction to review the finding and judgment of the court below. The power and jurisdiction of the courts in this state are fixed and determined by the laws of their creation, and the right to appeal from an inferior court to this court is provided by the Code."

In *Hughes v. Parker* (1897) 148 Ind. 692, 48 N. E. 243, the court used this language: "More than this, we may observe that the right to an appeal is, and always has been, statutory. *Elliott's App. Proceed.* § 75, and following note to section 354. In this case before us, as said in *Slms v. Hines*, 121 Ind. 534 [23 N. E. 515], the Legislature had the authority to deny an appeal, and to make the decision of the municipal officers final and conclusive."

In *Rupert v. Martz* (1888) 116 Ind. 72, 18 N. E. 381, this court held: "There are no vested rights in the law generally, nor in the legal remedies, and hence changes in them by the Legislature do not fall within the constitutional inhibition, unless they are of such a character as to materially affect the obligation of contracts. *Davis v. Rupe*, 114 Ind. 588 [17 N. E. 163]; *Bryson v. McCreary*, 102 Ind. 1 [1 N. E. 55], and cases there cited. The statute providing for a review of judgments is not a contract, nor can it be properly said that it enters into contracts made by contracting parties, either as a part of the contracts or as a part of the remedy. If such a statute confers a right at all, the right thus conferred is a mere statutory right, and, having been conferred by the Legislature, it may be changed or taken away by the Legislature."

In *Brown v. Porter* (1871) 37 Ind. 206, the court held the decision of the circuit court, sitting as a court of appeals from the commissioners in court, in liquor license cases, was final, and the Supreme Court had no power of review. The opinion was by Worden, C. J., in the course of which the following language was used: "In the case of *Board of Commissioners of Parke Co. v. Lease*, 22 Ind. 261, it was held that, under this statute, no appeal lies to this court. We adhere to that decision. See, also, *State v. Vierling*, 33 Ind. 99. The language of the statute is a little ambiguous; but we think it was the intention of the Legislature that no appeal should lie to this court in such cases. Perhaps the reason was that the time of this court should not be consumed in the decision of controversies of such character."

In *Brown v. Brown* (1907) 168 Ind. 654, 80 N. E. 535, this court said: "The right of appeal is given by statute, or it does not exist."

In *Evansville, etc., R. Co. v. City of Terre Haute*, 161 Ind. 26, 67 N. E. 686, it was held: "The right of appeal is not a natural or inherent one. It does not exist at common

law, and in this state it is conferred wholly by statute, and, when once conferred, it may be subsequently withdrawn by the Legislature, unless in so doing some provision of the organic law of the state is violated."

In *Bear v. Reese* (1909) 44 Ind. App. 465, 89 N. E. 522. It was held that the judgment of the circuit court was final in that (drainage) case. This court in its opinion says: "Our attention has not been called to any statute, nor do we know of any, expressly or impliedly, authorizing this appeal. Without such a statute, no right of appeal exists. *Hughes v. Parker*, 148 Ind. 692 [48 N. E. 243]; *Pittsburgh, etc., Ry. Co. v. Gillespie*, supra."

The first assembly, after the adoption of the Constitution of 1851, under its power to regulate and restrict appeals and writs of error, abolished the latter altogether, and provided strict regulations for appeals by which every failure to assert a legal right at the proper time waived such right. *Hornberger v. State*, 5 Ind. 300; *Huntington Co. v. Brown*, 14 Ind. 193.

In *State v. Rockwood* (1902) 159 Ind. 94, 64 N. E. 592, the court, in passing on the right of the state to appeal in a contempt proceeding used the following language: "The right of appeal exists only in those cases where it is given by statute. 'The right to an appeal is and always has been statutory, and does not exist at common law. It is a remedy which the Legislature may in its discretion grant or take away, and it may prescribe in what cases, and under what circumstances, and from what courts, appeals may be taken; and, unless the statute expressly or by plain implication provides for an appeal from a judgment of a court of inferior jurisdiction, none can be taken.' *Sullivan v. Haug*, 82 Mich. 548, 46 N. W. 795, 10 L. R. A. 263; *Lake Erie, etc., R. Co. v. Watkins*, 157 Ind. 600, 605 [62 N. E. 443]."

In *Board, etc., v. Albright*, 168 Ind. 564, 81 N. E. 578, the court had under consideration the constitutionality of an act giving a superior court of a certain county the exact jurisdiction conferred on circuit courts, and in the course of the opinion said: "In *Commonwealth ex rel. v. Hipple* (1871) 69 Pa. 9, it was held that, under a provision of the Pennsylvania Constitution authorizing the creation of 'other courts,' it was competent to establish criminal courts having concurrent jurisdiction with criminal courts existing under the Constitution; the court saying: 'The Constitution having neither defined nor limited the jurisdiction of the courts named in the Constitution, or of those to be afterwards established, the power to create new courts and new law judges carried with it the power to invest them with such jurisdiction as appear to be necessary and proper, and to part and divide the judicial powers of the state, so as to adapt them to its growth and change of circum-

stances.' When the Constitution of the state required that such courts as might be created should be 'inferior' to the circuit courts, their relative rank was properly tested by the extent of their jurisdictions; but, with the word 'other' substituted, it appears to us that no possible constitutional objection could exist to the creation of a court which shared with the circuit court its jurisdiction and its power. As applied to the case in hand, we may appropriately borrow the observation of this court, in *Combs v. State* (1866) 26 Ind. 98, 99: 'Large communities require more time for the transaction of judicial business than small ones, and, if one court cannot do the business, there must be more created.' * * * 'The only direct provision, however, which is found in the Constitution of 1851, concerning the jurisdiction of the circuit courts, is that they 'shall have such civil and criminal jurisdiction as may be prescribed by law.' Const. 1851, art. 7, § 8. This gives to the General Assembly power to fix the extent of their jurisdiction. Board, etc., v. Gwin (1894) 136 Ind. 562 [36 N. E. 237], 22 L. R. A. 402; *Brown, Jurisdiction* (2d Ed.) par. 14. No question of making said courts inferior to the highest nisi prius courts is here involved. When an attempt is made, by the narrowing of their jurisdiction, to put them in the category of inferior courts, it will be time enough to vindicate their right. The hope of constitutional government for the future does not require that the legislative power should in all cases be bound down by iron bands."

In *Branson v. Studabaker* (1892) 133 Ind. 147, 33 N. E. 98, in holding the act valid which conferred final jurisdiction on the Appellate Court in certain classes of cases, this court held: "The statute creating the Appellate Court does not apply to one class of litigants. * * * It applies to all litigants, and makes no attempt to classify by individuals or parties. The basis of the system of classification is the difference in classes of cases, and not in the situation of parties or persons. The statute is general and uniform, inasmuch as it makes a general classification, and operates uniformly upon all the classes included in the system adopted. * * * The provisions of the statute creating the Appellate Court, and authorizing the transfer to that court of cases appealed to this court, prior to its enactment, are valid. There is no vested right in a remedy or in a tribunal."

One of the leading cases on this subject is *Lake Erie, etc., R. Co. v. Watkins*, 157 Ind. 600, 62 N. E. 443. This case has not only been frequently approved in Indiana, but has been regarded as an authority by the courts of other states, and by all the text-book writers. The following language was used in the opinion: "That a party to a suit or action has no vested right to appeal or prosecute a writ of error from one

court to another, in the absence of constitutional protection in that respect, is a well-settled proposition. Neither by instituting nor by defending an action to a suit does a party thereby acquire a vested right to a decision from a particular court or tribunal. This doctrine, so universally asserted and supported by the authorities, is but an affirmation or extension of the familiar principle that there is no vested right in a remedy. In *Sullivan v. Haug*, supra [82 Mich. 548, 46 N. W. 795, 10 L. R. A. 263], the court said: 'The right to an appeal is and always has been statutory, and does not exist at common law. It is a remedy which the Legislature may in its discretion grant or take away, and it may prescribe in what cases, and under what circumstances, and from what courts appeals may be taken; and, unless the statute expressly or by plain implication provides for an appeal from a judgment of a court of inferior jurisdiction, none can be taken.' " Continuing, this court says: "An examination of paragraph 4 of article 7 discloses that it does not define or mention the class of cases in which the Supreme Court shall have appellate jurisdiction. It is therein declared that this court shall have such jurisdiction 'under such regulations and restrictions as may be prescribed by law.' While it is certainly true that the Legislature, under this provision of our fundamental law, is not authorized to deprive the Supreme Court entirely of its appellate jurisdiction, still the Legislature may not only from time to time enlarge such jurisdiction, but it may also contract the same as public policy may demand or require. It may designate the amount that may authorize an appeal, and, within reasonable limits, it may prescribe the class of cases in which appeals can be taken, and from what courts or tribunals they may be prosecuted. The policy of the framers of our Constitution seems to have been, not to prescribe absolutely the boundaries or limits of the jurisdiction of our courts, but to allow a legislative discretion in that respect in order that the varying demands and changing necessities of the people might be satisfied. See *Branson v. Studabaker*, 133 Ind. 147 [33 N. E. 98], and authorities there cited; *People v. Richmond*, 16 Colo. 274, 28 Pac. 929; *McClain v. Williams*, 10 S. D. 332, 73 N. W. 72, 43 L. R. A. 287, 289; 2 Ency. P. & Pr. pp. 14, 19, and the many authorities hereinbefore cited."

To the same effect, see *Barnes v. Wagener* (1907) 169 Ind. 511, 82 N. E. 1037; *Kepler v. Rinehart* (1904) 162 Ind. 504, 70 N. E. 806; *Bosley v. Ackelmire*, 39 Ind. 536; *Newman v. Gates*, 150 Ind. 59, 49 N. E. 826; *Board v. Davis*, 136 Ind. 503, 36 N. E. 141, 22 L. R. A. 515; *Ex parte Sweeney*, 126 Ind. 583, 27 N. E. 127.

In 1803, the question here involved was presented to the Supreme Court of the

United States in the case of *Clarke v. Bazadone*, 1 Cranch, 212, 2 L. Ed. 85, 95. A writ of error issued from the Supreme Court to the federal court for the territory northwest of the River Ohio, to reverse a judgment rendered in that court against Clarke. Mason, for plaintiff in error, contended that the Supreme Court possessed a general superintending power over all the other federal courts, resulting from the nature of a Supreme Court, independent of any express provisions of the Constitution, or laws of the United States. The decision of the court was as follows: "The court quashed the writ of error, on the ground that the act of Congress had not authorized an appeal or writ of error from the general court of the Northwestern Territory, and therefore, although from the manifest errors on the face of the record they felt every disposition to support the writ of error, they were of opinion they could not take cognizance of the case."

In *Durousseau v. U. S.*, 6 Cranch, 307, 3 L. Ed. 232, in an opinion by John Marshall, C. J., it was held: "This court, therefore, will only review those judgments of the Circuit Court of the District of Columbia, a power to re-examine which is expressly given by law."

In *Daniels v. Railroad Co.*, 3 Wall. 250, 18 L. Ed. 224, the same court said: "To come properly before us, the case must be within the appellate jurisdiction of this court. In order to create such jurisdiction in any case, two things must concur: The Constitution must give the capacity to take it, and an act of Congress must supply the requisite authority. The original jurisdiction of this court, and its power to receive appellate jurisdiction, are created and defined by the Constitution; and the legislative department of the government can enlarge neither one nor the other. But it is for Congress to determine how far, within the limits of the capacity of this court to take, appellate jurisdiction shall be given, and, when conferred, it can be exercised only to the extent and in the manner prescribed by law. In these respects it is wholly the creature of legislation."

The doctrine first announced in *Clarke v. Bazadone*, supra, more than a century ago, has been adhered to ever since by that court, in the scores of cases wherein the question was presented.

In *The Paquete Habana*, 175 U. S. 677, 20 Sup. Ct. 290, 44 L. Ed. 320, the following language is used: "The judiciary acts of the United States, for a century after the organization of the government under the Constitution, did impose pecuniary limits upon appellate jurisdiction. But all this has been changed by Act March 3, 1891, c. 517 [26 Stat. 826], establishing the Circuit Court of Appeals, and creating a new and complete scheme of appellate jurisdiction, depending upon the nature of the different

cases, rather than upon the pecuniary amount involved. By that act, as this court has declared, the entire appellate jurisdiction from the Circuit and District Court of the United States was distributed, according to the scheme of the act, between this court and the Circuit Court of Appeals thereby established, by designating the classes of cases, of which each of these courts was to have final jurisdiction."

In *Huguley Mfg. Co. v. Galetton Cotton Mills*, 164 U. S. 290, 22 Sup. Ct. 452, 46 L. Ed. 546, the court says: "Act March 3, 1891, c. 517, 26 Stat. 826 [U. S. Comp. St. 1901, pp. 547, 549], provides, in section 6, that the Circuit Court of Appeals shall have appellate jurisdiction to review judgments and decrees of the Circuit Courts in all cases in which a direct appeal is not allowed, by section 5, to this court, and that the judgments and decrees of the Circuit Court of Appeals shall be final in all cases in which the jurisdiction is dependent entirely upon diversity of citizenship. The general intention of the act was to distribute the appellate jurisdiction, and to permit an appeal to only one court."

The act of Congress of March 3, 1891, also provided for a limited review of the decisions of inferior courts by the Supreme Court, by writ of certiorari. This review, depending entirely on the authority therefor, conferred by the act of Congress, would fall with a repeal of the act.

"Although the appellate powers of this court are given by the Constitution, they are nevertheless limited and regulated by acts of Congress." *National Exchange Bank of Baltimore v. Peters*, 144 U. S. 570, 12 Sup. Ct. 767, 36 L. Ed. 545.

"It has been held, in an uninterrupted series of decisions, that this court exercises appellate jurisdiction only in accordance with the acts of Congress upon the subject." *Colorado Central Mining Co. v. Turck*, 150 U. S. 138, 14 Sup. Ct. 35, 37 L. Ed. 1030.

In the case of *Sharpe v. Robertson* (1849) 5 Grat. (Va.) 518, there is revealed more learning and careful research than in any decision on this subject. The statute there under consideration created a special Court of Appeals with jurisdiction to determine annually 70 cases pending for more than two years on the Supreme Court docket. The act was passed to provide relief for the Supreme Court, which was more than two years behind with its labors, and had on its docket more than 500 cases. Peculiar interest attaches to the case because it construed the Virginia Constitution of 1829, which was similar to that of the United States and of Indiana; and especially because the convention which formulated that Constitution was presided over by Ex-President James Monroe, and Ex-President James Madison and John Marshall, then Chief Justice of the Supreme Court of the United States, were members of the convention, the latter having been chairman of the

judiciary committee. The debates of the convention show that Chief Justice Marshall was frequently interrogated during the convention as to the proper construction of certain clauses of the Constitution, as adopted. He was asked if the resolution (which was adopted) did not leave the jurisdiction of the courts to be fixed by law, and his reply was: "The gentleman from Chesterfield (Leigh) has understood the language of those resolutions correctly. No doubt was entertained in the judicial committee that the whole subject of the jurisdiction of the courts, and the change of their form, should be submitted entirely to the Legislature. There was no question on the subject." *Debates Virginia Const. Con. 1829, p. 616.*

The Virginia Constitution, on this subject, was practically the same as ours, and read as follows:

"The judicial power shall be vested in a Supreme Court of Appeals, in such superior courts as the Legislature may from time to time ordain and establish, and the judges thereof, in the county courts, and in justices of the peace. * * * the jurisdiction of these tribunals and of the judges thereof, shall be regulated by law."

"* * * It was thus made the duty of the Legislature to create a Supreme Court of Appeals. * * * This duty being performed, the tribunal so constituted stood in the judicial system, as the Supreme Court of Appeals, contemplated by the Constitution, with the capacity to receive appropriate jurisdiction as the Legislature thought proper, from time to time, to confer upon it.

"The regulation by law of the jurisdiction of the several courts of the commonwealth embraces the distribution of the judicial power amongst them; in regard to which there is no limitation, except such as arises out of the distinctive character of the tribunals, so far as designated by the Constitution. The jurisdiction of the Supreme Court is to be appellate, or of that nature in a liberal sense; that of the other courts may be original or appellate—the jurisdiction may be civil or criminal. There can be no appeal from the Supreme Court to the superior courts, nor from the latter to the county courts; but on the other hand there is no constitutional right of appeal from the county to the superior courts, nor from the latter to the Supreme Court. The legislative department has authority to terminate litigation where it pleases, but cannot protract it beyond the Supreme Court.

"The jurisdiction of this court is constitutionally supreme, not because it is final, but because it cannot be otherwise. The jurisdiction of the other courts may be rendered final by legislative permission, during which they have a kind of supremacy, but not in a constitutional sense. Thus the right of appeal from the county courts to the superior courts may be withheld or restrained at the discretion of the Legislature. But, in the na-

ture of things, no appeal can be allowed from the Supreme Court of Appeals to any other tribunal.

"The jurisdiction of the Supreme Court of Appeals is therefore, of necessity, final; but the extent of it is a matter dependent wholly upon the legislative will. It may be broad or narrow as the discretion of the Legislature may dictate. It may be made to embrace the whole appellate judicial power, or a small portion of it only. It may be confined to civil controversies, or to actions at common law, or to suits in equity, or to actions or suits of a peculiar description. It may exclude civil controversies altogether and be restricted to criminal causes. It may, from time to time, be extended or withheld, or withdrawn, as to the legislative mind may seem most expedient.

"The policy which led to the constitutional requirement of a Supreme Court of Appeals is sufficiently obvious, and needs no exposition. But it was a policy which could not be carried out by the fundamental law itself, without undertaking to regulate thereby the jurisdiction of the several courts; and to have done this by a law so permanent in its nature would have precluded such alterations in the distribution of the judicial power, as experience should suggest, and the changing wants and interests of the country at future periods should require. Indeed, it would have been incompatible with the unlimited power given to the Legislature to establish superior courts, whether of civil or criminal, common-law or equitable, original or appellate, jurisdiction, and to modify, change, or abolish them at pleasure. It was therefore deemed best to ordain the establishment of a Supreme Court of Appeals, and to leave its practical usefulness unreservedly to the care and wisdom of the legislative department. * * *

"The judicial power is exhausted in a cause when there has been a final and irreversible adjudication of it by a court of competent jurisdiction, whether original or appellate. * * *

"The supremacy of this court is to be found, not in the *extent of its jurisdiction*, or the *amount of its business*, but in the paramount force and authority of its adjudications—a force acting directly, in controlling, without being controlled by, other tribunals—an authority operating indirectly, from the respect and deference due to the highest tribunal known to the Constitution and the laws. The influence of its authority extends beyond the range of its power. It is not limited by its actual, but is coextensive with its potential, jurisdiction—with its capacity to receive from the laws unlimited control over all cases decided by the subordinate tribunals. The conformity of the other courts to its principles is not a slavish submission to the lash of power, but a willing and cheerful obedience yielded from a sense of propriety and duty.

"The *authority* of the Supreme Court, as distinguished from its *power*, is not the less obligatory upon a subordinate tribunal, because the same has not yet been subjected, or only partly subjected, to its jurisdiction. The principles of the civil and criminal law are in many respects the same, and the same questions may arise in the administration of both. The general court is still the court of last resort in criminal cases; and yet can it be supposed that, in the adjudication of a criminal cause, that tribunal would not be governed by a principle applicable to it, which has been settled by decisions of the Supreme Court? Or does any one seriously believe that the *latter* would be bound to *conform* to the decisions of the *former*, because in the *present* state of the law the same are *irreversible decisions*, not only of the circuit courts and the county courts, but even of justices of the peace?

"If the foregoing view be correct, in what respect does the law in question invade the Constitutional supremacy of this court? It provides for the trial, annually, by the special court of appeals thereby constituted, of the 70 eldest cases ready for hearing, which shall have been depending more than two years in the branch of the Supreme Court held at Richmond. The effect of this law is, by a uniform regulation, to withdraw from this court a portion of its business, and send it to the determination of another forum. Its operation is, in the first place, to reduce the docket within a reasonable compass, and afterwards to keep it in the same condition. It affects the *jurisdiction*, and not the *supremacy* of the court. In truth, the difficulty of this question, it seems to me, has arisen from *confounding* the *jurisdiction* of the court with its *supremacy*, which are far from being identical; the former is derived from the *laws*, and the latter from the *Constitution*; the former is *temporary* and *mutable*, the latter *permanent* and *immutable*; the former is the field for the exercise of *judicial power*, the latter is, in itself, the exercise of that power.

"The moment that it is ascertained that this court continues supreme, it follows, from the same principles, that the tribunal organized by the law in question is *neither supreme nor co-ordinate*. It is true that its adjudications are final and irreversible; but not more so than those of the general court in criminal cases; not more so than many of those of the circuit courts, of the county courts, and of justices of the peace. The right of appeal from that tribunal to this does not exist to-day; but the Legislature may allow it, to any extent, to-morrow. On the other hand, it is beyond legislative power to authorize appeals from this Supreme to the special court. The special court is a subordinate tribunal, as much as any other superior court which the legislative department may, in its discretion, from time to time, establish; and is as much bound to de-

fer to the authoritative decisions of the Supreme Court of Appeals.

"In ordaining that there should be a Supreme Court of Appeals, the Constitution did not designate what portion of judicial power it should exercise. All judicial power was vested in it, and the county courts, and such superior courts as might be established, and the judges thereof. But no attempt was made to define their jurisdiction. * * * The construction of the Constitution is not to be entered upon in a spirit of distrust towards the legislative department, for, if that be felt and acted, our system of government would become impracticable. There is no internal force which can be brought to bear, so as to compel the Legislature to discharge any of its functions. By abstaining to elect a Governor, we may be left without an executive; by refusing to pass laws, or repealing those in existence regulating the jurisdiction of the courts, and the judges, the judicial power would be in abeyance. Such extreme suppositions lead to no practical result. But, to remove all doubt as to the discretion intended to be confided to the Legislature, it is expressly declared that the jurisdiction of these tribunals, and the judges thereof 'shall be regulated by law.' In the language of Judge Marshall, as recorded in the debates of the convention (page 505): '*The article leaves the whole subject open to the Legislature. They may limit or abridge the jurisdiction of all the courts as they please.*' And again: 'The whole subject of jurisdiction is submitted absolutely and without qualification to the power of the Legislature.' In the exercise of this discretion, they have portioned out the jurisdiction amongst the different courts; and, in doing so, have withheld, from the jurisdiction of the Supreme Court of Appeals, all cognizance of criminal cases; and in civil cases have restricted it (with certain exceptions) to controversies where the matter involved amounted in value to \$100 or upwards. They could, in their discretion, have limited it to any other sum.

"There being no limitation on the discretion of the Legislature, in the regulation of the jurisdiction of the court, the supremacy which characterizes and distinguishes it from other tribunals cannot be affected by legislation bearing merely on the jurisdiction confided to it. It is not the less supreme, because no appeal lies to it from the judgment of the general court in criminal cases. It would still remain the Supreme Court, though jurisdiction in the cases of wills, or any other branch of jurisprudence, should be denied it.

"Nor does its supremacy result from the exercise of appellate jurisdiction. Every court in the commonwealth is an appellate court in certain cases. Nor is it a consequence of the finality of its decision in cases of appeals; for the judgments of every other court are final within certain limits,

whether the case be brought before them by appeal or original process. Nor does its supremacy depend on the importance of the controversies submitted to its cognizance. The general court by the existing law decided finally in cases involving the life of the citizen. The principle upon which the supremacy of the court rests is not to be found in any of these circumstances. We have courts endowed with all these attributes, and yet they are confessedly subordinate tribunals. It is the consequence of the fact, that the form of the court cannot be changed or modified at the will of the Legislature; it must exist as a Supreme Court, or not at all; and because its judgments are not only final by the law giving it jurisdiction, but there exists no power to subject them to revision; otherwise it would cease to be the highest, and, if so, the court of the last resort. The court can act in no case except by virtue of, and in the mode prescribed by, law; and the Legislature may, at their discretion, enlarge or limit its jurisdiction; but, when it has acted upon a case confided to its jurisdiction, the judgment is binding upon all. Though existing laws may make the judgments of other courts final within certain limits, or over a particular class of cases, or in all cases decided by them, the Legislature can, by a different regulation, subject all the decisions to be pronounced by such courts to review in some higher tribunal, or the Supreme Court. But it is incompetent on the part of the Legislature to subject a decision, which may be rendered by this court, to revision elsewhere. No tribunal exists, or under the Constitution can be called into existence, which can reverse its judgments. Being thus irreversible, its judgments stand, from the necessity of things, as authoritative expositions of the law, whenever the same question arises in other cases. * * * The judges of the special court are as much bound to yield to the authority of the Supreme Court of Appeals, as are the judges and justices of the inferior courts, where the question arises in cases in which their decisions are final. The court falls within the class of superior courts, which the Legislature may, from time to time, ordain and establish, and assign to it such jurisdiction as the Legislature may think proper, and make its decisions final or subject them to revision, as the Legislature may deem expedient. It cannot then be a co-ordinate tribunal.

"The Constitution does not declare that the right of appeal to the court of last resort should be allowed in every case. And as it could not, for obvious reasons, give the right in every case, it made no provision for any case. It declared that the court of last resort should be established, leaving it to the Legislature to determine, from time to time, what jurisdiction it should exercise; in the confidence that it would be organized, and its jurisdiction so regulated,

as to enable it to fulfill its appropriate functions, and exert, when necessary and deemed expedient, a controlling authority over inferior tribunals."

The creation of the special court was held constitutional, although it went far beyond the scope of our Appellate Court act, and did, in effect, apportion the jurisdiction of the Virginia Supreme Court, just as the act under consideration by this court, in *Board v. Albright*, supra, apportioned the jurisdiction of the circuit court, created by our Constitution.

The same principle was decided in the same way in *Floyd v. Quinn*, 24 R. I. 147, 52 Atl. 880, in an opinion reviewing the American authorities. The court says:

"A Constitution does not usually deal with details. * * * Hence nothing is determined by our Constitution, beyond the vesting of complete judicial power in our courts and the requirement that there shall be one Supreme Court.

"Taken in the order of a convenient review, the defendant's first proposition is that the Constitution, by creating a Supreme Court, thereby conferred upon that court exclusive jurisdiction, *ex vi termini*, to grant new trials, which is the power brought in question in this case, and that this power cannot be taken away or diminished.

"We do not question that in establishing a Supreme Court there is something in a name. The provision that there shall be a Supreme Court clearly implies that it is not to be subordinate to any other court or tribunal, and that it is to exercise the highest of the judicial functions. * * * It is to be a court of last resort. * * *

"It does not follow, however, that all cases can go to that court, by appeal or petition, and that there can be no final decision except by that court, if a party desires it. This is apparent, both from principle and practice.

"There can be no claim that the vesting jurisdiction in the Supreme Court, in our Constitution, is more imperative than that in the federal Constitution. * * *

"As to the federal Constitution, Hamilton said in the *Federalist*, No. 81, interpreting this clause: 'The power of constituting inferior courts is evidently calculated to obviate the necessity of having recourse to the Supreme Court in every case of federal cognizance. I should consider everything calculated to give, in practice, an unrestrained course to appeal, as a source of public and private inconvenience.'

"Chief Justice Marshall, of the United States Supreme Court, a member of the convention to revise the Constitution of Virginia in 1829, spoke upon the words relating to the courts, including the Court of Appeals, 'The jurisdiction of these tribunals shall be regulated by law,' * * * as follows: '*The article, as it now stands, leaves the whole subject open to the Legislature.*'

They may limit or abridge the jurisdiction of all the courts as they please. If the Legislature choose to give them all chancery jurisdiction, or, if they shall think fit, to limit their jurisdiction in common-law cases to a specific sum, the Legislature can do so. The whole subject of jurisdiction is submitted absolutely and without qualification to the Legislature. * * * It is beyond question that all jurisdiction on appeals does not necessarily go to the Supreme Court. * * * A careful analysis of the numerous cases cited by the defendant to the contrary shows that, almost without exception, they depend upon special constitutional provisions, which have been infringed by a legislative act. In such cases there can be no doubt. When constitutional provisions are clear, they are imperative, both upon the legislator and the courts. When they are not clear, they must be construed. *But, when there are no express provisions upon a subject, they must be left to legislation.* * * *

The Legislature and judiciary are co-ordinate branches of the government; but both are created by the people in the Constitution. The presumption is that the people trust the Legislature equally with the courts, and all the more so, because the Legislature is more directly amenable to the people. If, in the distribution of judicial jurisdiction, the Legislature imposes unreasonable or unsatisfactory provisions, the people have it in their power at once to change such provisions by choosing legislators who will give them satisfactory laws. But the unwise use of power does not render the exercise of it, under an express grant, unconstitutional. The question before us is not one of the policy of the law, but of its constitutionality."

The fallacy in the defendant's argument is in his assumption that all appellate jurisdiction goes to the Supreme Court, which, as we have seen, is not so; and, secondly, in his failure to distinguish between the *exercise of jurisdiction* and the *distribution of jurisdiction*.

"Under the Constitution the General Assembly can exercise no judicial jurisdiction, but it can regulate and distribute it."

In *People v. Richmond* (1891) 18 Colo. 274, 26 Pac. 929, the Supreme Court of Colorado, in a long and learned opinion, held valid an act creating a "Court of Appeals" which provided that no appeal to, or writ of error from, the Supreme Court, should lie to review the final judgment of such Court of Appeals in actions where the value of the property in controversy did not exceed \$2,500. Session Laws of Colo. 1891, p. 118. This act, unlike our Appellate Court act, did not require the Court of Appeals to follow the decisions of the Supreme Court. The opinion explains and distinguishes the former decisions of the court in Court of Appeals, 9 Colo. 623, 21 Pac. 471, and Court of Appeals, 15 Colo. 578, 26 Pac. 214.

The Constitution of Colorado, with reference to this question, is as follows:

Article 6, § 1: "The judicial powers of the state * * * shall be vested in a Supreme Court, district courts, county courts, justices of the peace, and such other courts as may be provided by law."

Article 6, § 2: "The Supreme Court, except as otherwise provided in this Constitution, shall have appellate jurisdiction only, which shall be coextensive with the state, and shall have a *general superintending control over all inferior courts*, under such regulations and limitations as may be prescribed by law."

The court held that the act did not create a court of co-ordinate jurisdiction with the Supreme Court, or, unconstitutionally, deprive it of jurisdiction, by making the judgment of the Court of Appeals final in certain classes of cases. The same objections were made to that act, as to the one in controversy here. Extracts from the opinion are as follows:

"Authorities need not to be cited in support of the proposition that he who asserts the unconstitutionality of a statute must establish beyond a reasonable doubt the conflict or inconsistency which renders it void. It is not enough for him to *vaguely insist that the act questioned is obnoxious to some unexpressed intent or spirit supposed to pervade the Constitution*; he must point out the specific provision, or provisions, of that instrument, transgressed. Another elementary rule to be borne in mind throughout the following discussion is that the Constitution operates upon the lawmaking branch of the government purely as a limitation; and that the Legislature possesses plenary authority in the enactment of laws except as such authority is expressly, or by clear implication, therein denied. * * * It is asserted that a part at least of the authority given the Court of Appeals undermines the constitutional supremacy and jurisdiction of the Supreme Court, and is therefore as fully prohibited by the Constitution as if express inhibiting words were found therein. If this contention be correct, it is either because a constitutional right of the citizen is denied, or because some constitutional provision relating to the Supreme Court or its jurisdiction is invaded. * * * A constitutional provision unalterably defining and fixing in all respects such jurisdiction would be a serious misfortune. The constitutional policy seems to have been, not to specify absolutely the extent and boundaries of the jurisdiction of all the courts, but to allow a large legislative discretion, so that the varying demands and the ever-changing necessities of the people may from time to time be adequately provided for. * * * Neither of the foregoing constitutional provisions * * * fairly inhibits the Legislature from saying, within reason, at what particular stage, or in what particular court,

a specified kind of ordinary litigation shall end. It would seem that, when the sutor has had a full, fair, and impartial judicial hearing guaranteed by section 6 of the Bill of Rights, the constitutional duty of the state is performed, and he ought not to complain. * * * Care was taken to provide that the appellate authority of the court shall be coextensive with the territorial boundaries of the state, and, had it been the intention to extend and forever continue its final appellate *power* over *all litigation*, such intention would have been expressed. * * * Aside from the rule of construction that forbids courts from holding statutes void so long as a reasonable doubt of their validity remains, this, or a similar measure, is supported by direct constitutional sanction, as well as by potent considerations of public and private justice. Section 6 of the Bill of Rights, already mentioned, not only guarantees to the citizen a remedy for every legal injury suffered, but also provides that such remedy shall be enjoyed *without delay*. It is an open secret that the reviewing branch of our judicial machinery has for years been unable to give this provision full force and effect. * * *

"The Supreme Court might, by disregarding rules of construction, declare all acts of a particular General Assembly void, and thus nullify its entire work; but it is highly unreasonable to surmise that this tribunal will ever be guilty of such revolutionary conduct. To suppose that either department of government will make the most vicious and illegal use possible of the powers conferred is to suppose a proceeding subversive of the government itself. * * *

"The present statute does not undertake to create a tribunal superior to, or co-ordinate with, the Supreme Court. The Court of Appeals is given no original jurisdiction whatever, and no independent superintending control over other courts; neither is it authorized to answer executive and legislative questions. * * * It is important to remember that a material distinction exists between the supremacy of the Supreme Court, and certain features of its jurisdiction. As has been well said, the supremacy of such a court is to be found, not in the extent of its jurisdiction, or the amount of its business, but in the paramount force and authority of its adjudications.' * * *

"The litigant cannot, as a matter of right, assert that he will come to this tribunal by appeal, for such appeals remain creatures of statute, and, in the absence thereof, do not exist. He cannot claim a vested right to bring his case to this court by writ of error; for, while this writ in most cases is a writ of right at the common law, it may by statute, unless the Constitution forbids, be limited or abolished altogether. * * *

"It may be that, as counsel suppose, the views entertained by the Court of Appeals

in cases within its final supervision will sometimes differ from those promulgated under like circumstances, by the Supreme Court. But it is believed that, in such instances, the Court of Appeals will voluntarily yield its judgment to that of the higher tribunal. Something must always be trusted to the disposition of judges to act for the general harmony and good, as well as to their honesty and legal discrimination. Should direct contrariety of opinion arise in the same case, however, as counsel seem to fear, an appropriate remedy will undoubtedly be found to enforce the law as declared by the Supreme Court, and thus vindicate both the interest of the sutor and the supremacy of this tribunal. * * *

"We cannot favor the supposition that the Legislature may in the future, directly or indirectly, undertake to deprive this tribunal of its jurisdiction, appellate or original. When that body attempts, if it ever should, to interfere with the existence of supremacy of this court, or to change the nature of its jurisdiction or duties, or to render it an 'idle and empty pageant,' the court will undoubtedly decline to recognize such usurpation of authority and illegal action; but, until that time arrives, the discourtesy towards another branch of the government will not be committed of indulging the presumption that a willful effort may be made to thus impair the judicial system and lessen its usefulness."

To the same effect, see *People v. Court of Appeals*, 24 Colo. 188, 49 Pac. 38.

The Constitution of Illinois provides that the Supreme Court shall have jurisdiction in four classes of cases, viz., criminal cases, and those in which a franchise, a freehold, or the validity of a statute is involved. Consequently, in *Berkenfield v. People*, 191 Ill. 272, 61 N. E. 96, which was a criminal case, the court decided that the Supreme Court could not be deprived of jurisdiction thereof. But in other cases the Supreme Court of Illinois had repeatedly held that the right to appeal is purely statutory. In *Saylor v. Duel* (1908) 236 Ill. 420, 86 N. E. 119, 19 L. R. A. (N. S.) 377, the court says: "In this state the right of appeal in any case is purely statutory, with the possible exception of certain classes of cases enumerated in section 2 of article 6 of the Constitution of 1870, in which the right of appeal from the Appellate to the Supreme Court in certain enumerated cases seems to be guaranteed by the Constitution." To the same effect is *Chicago, etc., R. Co. v. Fisher*, 141 Ill. 614, 31 N. E. 406; *Young v. Stearns*, 91 Ill. 221.

In *Croveno v. Atlantic, etc., R. Co.* (1896) 150 N. Y. 225, 44 N. E. 968, it was held that a statute making the judgment of an inferior appellate court final, in personal injury cases, was valid. The court says: "In determining the right of appeal, we must consider that it is not a natural or inherent

right, but rests on the statute *alone*, and may be *taken away* by the Legislature unless conferred by the organic law of the state. The jurisdiction of the Court of Appeals is designated and created by law, *and it has no other*.

In *Hewlett v. Elmer*, 103 N. Y. 156, 8 N. E. 387, it was held: "The jurisdiction of the Court of Appeals is designated and created by law. It has no other"—citing *Batterman v. Finn*, 40 N. Y. 340; *Delaney v. Brett*, 51 N. Y. 78; *Grissler v. Fowler*, 55 N. Y. 675.

In *Portland v. Gaston*, 38 Or. 533, 63 Pac. 1051, the Supreme Court of that state held: "The Legislature has the power to define in what cases, and under what circumstances, and in what manner, an appeal may be taken to this court."

In *Western American Co. v. St. Ann Co.*, 22 Wash. 158, 60 Pac. 158, it was held by the Supreme Court of that state, while their Constitution in express terms provided that that court should have appellate jurisdiction in all cases, this provision was not self-executing, and, in a class of cases where the Legislature had made no provision for appeal to that court, none could be entertained.

In *Fleishman v. McWhorter*, 54 W. Va. 161, 46 S. E. 116, it was held: "It is within the power of the Legislature to prescribe the cases in which, and the courts to which, parties shall be entitled to bring a cause for review. * * * The law gives one trial in every cause of action. As to some, the judgments and decrees of the trial court may be reviewed; as to others, they may not. There is a remedy for every wrong, but in some cases it is more ample, and may be pursued farther than in others."

In *Dismukes v. Stokes*, 41 Miss. 430, in a learned and elaborate opinion, the court says: "When the Legislature has passed laws regulating the mode of proceeding and limiting the cases, and the courts in which the right may be exercised, the rules prescribed must be followed, because they are purely such as the Legislature has power to enact. Nothing appears to be more clearly within the legislative power over matters pertaining to public policy, than the question: In what cases and to what courts shall a party be entitled to an appeal or writ of error?"

In *Sullivan v. Haug*, 82 Mich. 548, 46 N. W. 795, 10 L. R. A. 263, quoted with approval by this court in *Lake Erie*, etc., R. Co. v. *Watkins*, *supra*, it was held that the right to a review of a judgment of an inferior court is, and always was, at the discretion of the Legislature. This doctrine has ever been maintained in Michigan, although their Constitution expressly gives the Supreme Court supervising control over inferior courts. *Kundinger v. Saginaw*, 59 Mich. 355, 26 N. W. 634; *Harvey v. Judge*, 63 Mich. 572, 30 N. W. 188; *Mitchell v. Bay*

Probate Judge (1909) 155 Mich. 550, 119 N. W. 916.

In a great number of cases, this question has been presented in Wisconsin, which has a clause in its Constitution granting the Supreme Court superintending power over inferior courts. In *State v. Chittenden*, 127 Wis. 468, 107 N. W. 500, the Supreme Court says: "Counsel fail to distinguish between appellate jurisdiction, and the right to appeal. The former only is granted by the Constitution; the latter is a mere legislative creation. The Legislature is supreme in the matter. It may grant the right of appeal from some inferior courts and not from others, or from courts only, or from courts and tribunals in some cases, and not in others, and, having granted it, take it away."

It held to the same effect in *Puffer v. Welch* (1910) 141 Wis. 304, 124 N. W. 406.

In *Mau v. Stoner* (1905) 14 Wyo. 183, 83 Pac. 218, it was held: "It is well settled that, in the absence of a direct constitutional requirement, the right of appeal does not exist, unless expressly conferred by statute. * * * Unless it is guaranteed as a matter of right in the Constitution, the Legislature has power to pass laws not only regulating the mode of procedure, but limiting the cases in which the right may be exercised. * * * Hence it may be said that, in both England and the United States, the whole matter of appellate review is regulated almost entirely by statute law."

South Dakota's Constitution is similar to that of Michigan. In a leading case (*McClain v. Williams*, 10 S. D. 332, 73 N. W. 72, 43 L. R. A. 287, 289) it was held: "None of the provisions of the Constitution prohibit the Legislature from limiting appeals to a defined class of cases, and *prescribing at what stage, and in what court* ordinary litigation shall end. The right to an appeal * * * depends upon the statute when not *specially granted by the Constitution*."

The same principle is declared by the highest courts, in the following cases: *Chattanooga v. Keith* (1905) 115 Tenn. 588, 94 S. W. 62, 5 Am. & Eng. Ann. Cas. 859, with annotations on page 860; *Blum v. Brownstone*, 50 Cal. 293; *Gen. Custer Min. Co. v. Van Camp*, 2 Idaho, 40, 3 Pac. 22; *Paducah v. Ragsdale*, 122 Ky. 425, 92 S. W. 13; *Hager v. Adams*, 70 Iowa, 746, 30 N. W. 36; *Snoddy v. Pettis Co.*, 45 Mo. 361; *Hanika v. State*, 87 Neb. 845, 128 N. W. 526; *Atwood v. Whipple*, 48 Ohio, 308, 28 N. E. 674; *Wagner v. State*, 42 Ohio St. 537; *Com. v. Hipple*, 69 Pa. 9; *U. S. ex rel. Brightwood R. Co. v. O'Neal*, 10 App. Cas. (D. C.) 244; *Golding v. Jennings*, 1 Utah, 135; *Minneapolis v. Wilkin*, 30 Minn. 140, 14 N. W. 581; *Anderson v. Brown*, 6 Fla. 299; *Arnsperger v. Crawford* (1905) 101 Md. 247, 61 Atl. 413, 70 L. R. A. 497; *Leavenworth v. Barber*, 47 Kan. 29, 27 Pac. 114.

In New Jersey the jurisdictions of all constitutional courts are established as they

existed prior to the date of the present Constitution. *Newark, etc., R. Co. v. Kelley*, 57 N. J. Law, 855, 32 Atl. 223.

Special express constitutional provisions are found in the organic laws of Arkansas, and some other states.

The authorities on this question might be almost indefinitely multiplied, for in many of the states the question has been considered almost, if not quite, as often as in Indiana.

The eminent counsel who have appeared in this cause and argued against the constitutionality of the act have not cited any authority in conflict with the rule declared in the foregoing cases, except in occasional instances, where the right of appeal to the court of last resort is expressly given by constitutional provision.

Text-book authorities declare the same rule.

"It should be remembered that appeals are exclusively of statutory origin, and that no appeal to either court (Supreme or Appellate) can be maintained except as given by statute." *Ewbank's Manual*, § 58.

"It is laid down by the authorities that the right of appeal is purely a statutory one, and this is undoubtedly the general rule. A party who brings an action does not by such an act acquire a vested right to a decision from a particular tribunal." *Elliott's App. Proc.* § 75.

The majority opinion in this case squarely overrules more than a score of its own decisions—a number greater than that of Appellate Court cases overruled by this court in a whole year. It establishes a principle first contended for before the United States Supreme Court in 1803, and by that court then repudiated, and repudiated ever since, when presented, by that court, and the highest courts of every American commonwealth having a Constitution similar to ours. It holds for naught the opinions of Marshall and Hamilton and other illustrious persons who formulated the provisions in Constitutions on which ours is modeled. All this is done because it is believed the supremacy or dignity of this court is, or may be, assailed by the legislative department of the government. For that reason, also, it leaves the docket of the Appellate Court burdened with probably 800 cases, and the clause in our Constitution guaranteeing a speedy administration of justice an unredeemed pledge. More than that, it fastens a principle on our jurisprudence that forbids relief in the future by any practical method short of amendment to our Constitution; and it must not be forgotten that, when such amendment is made, the cardinal duty of the court to administer justice between suitors will be declared in unmistakable terms, and at whatever cost to the rank and dignity of this court.

In my opinion this act was not intended to, and does not, affect the supremacy, rank, or

dignity of this court. It only transfers, to the jurisdiction of the Appellate Court, judgments for money, in excess of \$8,000, and repeals the supervisory transfer law of 1901, modeled after the certiorari act of Congress of 1891.

In no just sense can the Appellate Court be said, by this act, to be made one of co-ordinate jurisdiction with the Supreme Court. It cannot overrule the opinions of the Supreme Court. It must follow them. It cannot determine the bounds of its own jurisdiction. This court does that. It can decide no constitutional question. Wills, injunctions, titles to real estate, the validity of statutes, ordinances, and franchises, and in fact all the most important classes of causes are embraced in the exclusive jurisdiction of this court, and, no doubt, enough is given to keep it busy. If not, the statute gives this court the right to transfer to it, for decision, all classes of cases appealed to the Appellate Court.

If the decisions of the Appellate Court do not follow those of this court, it may at any time be abolished by the Legislature, and the volumes containing its published opinions, owned by the state, and kept in the Supreme Court library, may be destroyed. No such power over this court exists.

In my opinion the act in question is not only valid, but was designed to afford assistance in a situation calling for immediate relief, and it is unfortunate that such relief must be postponed.

COX, J. (dissenting). While not agreeing wholly with all that is said therein by way of argument and illustration and collateral to the primary question discussed, yet I heartily concur in the conclusion reached by MORRIS, J., in his very clear and exhaustive opinion, that the act in question, approved March 3, 1911, is a valid exercise of legislative power. At the same time, the wisdom of the act seems to me to be exceedingly doubtful.

Prior to the amendment of section 1 of article 7 of our state Constitution, March 14, 1881, this court was so overwhelmed by the accumulation of cases before it for decision that the necessary delay in deciding cases worked great hardship on litigants. Under the provisions of the Constitution before the amendment just mentioned, the Legislature was without power to create any tribunal to relieve the Supreme Court of any part of its great burden of appellate jurisdiction, and we know judicially that the amendment in question was proposed and adopted primarily to remedy that particular difficulty. *State ex rel. Hovey v. Noble* (1888) 118 Ind. 350, 364, 21 N. E. 244, 4 L. R. A. 101, 10 Am. St. Rep. 143. Under the augmented power granted the General Assembly by the people by this particular amendment, the Appellate Court was originally cre-

ated. The amendment to the Constitution was made and the Appellate Court created, all with a definite purpose in the minds of the sovereign people of the state of taking from this court a portion of its then existing appellate jurisdiction, for its relief and the consequent speeding of the administration of justice. This amendment did not impair or threaten the supremacy of this court and action by the General Assembly by virtue of it in creating the Appellate Court and vesting it with a part of the jurisdiction which had before been given into the keeping of this court did not, but, on the contrary, it had been uniformly held by this court that the various acts of the Legislature creating and giving jurisdiction to that court were valid. The act of 1911 does no more, in effect, than to restore to this court a part of the jurisdiction which the General Assembly had by the amendment of 1881 been given power to take away, and which it had by previous acts taken away and bestowed upon the Appellate Court. At the time of the passage of this act, the Southern division of the Appellate Court had become far behind the Northern division with its work, because of the greater number of cases falling in the first instance to it, and both divisions of that court were for the same reason incumbered with a greater number of undecided cases than this court. The purpose of the act of 1911, therefore, manifestly was in the main to equalize the number of cases pending before the two courts, to the end that all litigants pursuing the right of appeal should have the equal advantage of the earliest practicable decision of their cases.

My doubt of the wisdom of the act arises from the fact that under existing statutes this same result could have been brought about in a more efficacious way. Under the provisions of section 12 of the act of 1901 defining the jurisdiction of the Appellate Court (Burns 1908, § 1396), that court had, and still has, the power to equalize by transfer any undue disparity in the number of cases pending on the dockets of the two divisions of the court, and by section 1405, Burns 1908, the Supreme Court has the power to equalize the disparity in the number pending on the dockets of the Appellate Court and its own by a transfer of cases from that court to this. These provisions left in the courts the power of equalizing and with them the knowledge on which to act was always present and certain. But with the wisdom or otherwise of the act we cannot deal. That is a legislative question. And if it should result from the act in question, if enforced, that the greater number and more difficult cases should fall to the jurisdiction of this court, and a greater delay necessarily result in the decision of those cases of greater public concern which are committed to it for determination, I can well

believe that a change would again be demanded at the hands of the General Assembly at its next session.

(176 Ind. 162)

CLUTHE et al. v. EVANSVILLE, MT. C. & N. RY. CO. (No. 21,729.)

(Supreme Court of Indiana. June 22, 1911.)

RAILROADS (§ 32*)—CORPORATE EXISTENCE—FORFEITURE OF CHARTER—COLLATERAL PROCEEDINGS.

Burns' Ann. St. 1908, § 5318, provides that, if any railroad corporation authorized to condemn land shall not, within three years after its incorporation, begin the construction of its road and expend thereon 5 per cent. of the amount of its capital and finish the road and put it in full operation in 10 years thereafter, its act of incorporation shall be void. *Held*, that such act is not self-executing, but that forfeiture can only arise from a judicial sentence at the instance of the state in a direct proceeding, and cannot be taken advantage of or enforced in a collateral proceeding to condemn land for a right of way.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 63-69; Dec. Dig. § 32.*]

Appeal from Supreme Court, Vanderburgh County; Alexander Gilchrist, Judge.

Condemnation proceedings by the Evansville, Mt. Carmel & Northern Railway Company against William B. Cluthe and others. From an order overruling a demurrer to objections interposed, objectors appeal. Affirmed.

William Reister and Harry C. Dodson, for appellants. Frank Littleton, Walker & Walker, and Duncan C. Givens, for appellee.

MYERS, J. Appellee, an alleged corporation of the state of Indiana, instituted an action to condemn certain described lands for its uses as a steam railway, under the eminent domain act of 1905 (Burns 1908, § 929 et seq.). Appellants filed objections, five in number, but have presented here only the fifth, which is as follows: "That the plaintiff has no right to exercise the power of eminent domain for the use sought, for the reason that articles of incorporation, by and through which plaintiff incorporated under the laws of this state, were filed in the office of the Secretary of State, in the state of Indiana, on the 1st day of August, 1906, and that the plaintiff did not within three years after its incorporation begin the construction of its road, and expend thereon 5 per cent. of the amount of its capital, and therefore its act of incorporation is void." A demurrer was sustained as to each ground of objection, and appellants appeal.

Their appeal is grounded upon section 5318, Burns 1908, of the general railroad act, reading as follows: "If any such corporation shall not, within three years after its incorporation, begin the construction of its road, and expend thereon five per cent. of the amount of its capital and finish the road

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

and put it in full operation in ten years thereafter its act of incorporation shall become void." Upon the theory that the act is self-executing, and that the failure to comply with that section, ipso facto, operates to annul the incorporation, whilst appellee contends that the forfeiture can only arise from a judicial sentence, at the instance of the state, and that, as the objection does not allege that judicial forfeiture had been declared, the objection was not well taken. It is true that it has been held that such statutes are self-executing. Two notable cases are *In re Brooklyn, etc., Co.*, 72 N. Y. 245, and *Brooklyn v. Brooklyn*, 78 N. Y. 524, but a later case in that state (*New York, etc., Co. v. Smith*, 148 N. Y. 540, 42 N. E. 1088) marks the distinction, and the rule in that and most of the states, as does *Day v. O. & L. Co.*, 107 N. Y. 129, 13 N. E. 765, that such clauses as are embodied in section 5318, supra, render the charter voidable at the instance of the state. The distinction is not clearly drawn in *New York v. Smith*, supra, between conditions subsequent and limitations of the life of corporations, though the court refused to extend the doctrine of the cases in 72 and 78 New York. To the same effect are *Briggs v. Cape Cod Co.*, 137 Mass. 71, disapproving *Crease v. Babcock*, 23 Pick. (Mass.) 334, 34 Am. Dec. 61, the former opinion being approved in *Bybee v. Oregon, etc., Co.*, 139 U. S. 663, 11 Sup. Ct. 641, 35 L. Ed. 305, which also disapproves the 72 and 78 New York cases, and *Oakland v. Oakland, etc., Co.*, 45 Cal. 365, 13 Am. Rep. 181. See, also, *Utah v. Utah, etc., Co.* (C. C.) 110 Fed. 879, where the language is very similar to that of the statute before us; *Frost v. Frostburg Co.*, 24 How. 278, 16 L. Ed. 637; *Atchafalaya Bank v. Dawson*, 13 La. 497; *La Grange, etc., Co. v. Rainey*, 7 Cold. (Tenn.) 420; *Brown v. Wyandotte Co.*, 68 Ark. 134, 56 S. W. 862; *Young v. Webster*, 75 Iowa, 140, 39 N. W. 234; *Attorney General v. Superior, etc., Co.*, 93 Wis. 604, 67 N. W. 1138; *N. Y., etc., Co. v. N. Y., etc., Co.*, 52 Conn. 274; *Bloch v. O'Conner*, 129 Ala. 528, 29 South. 925.

Cases such as *In re Brooklyn Bridge*, supra, *Brooklyn Co. v. Brooklyn*, supra, *Oakland v. Oakland, etc., Co.*, supra, *Commonwealth v. Lykens, etc., Co.*, 110 Pa. 391, 2 Atl. 635, *Ford v. Kansas City, etc., Co.*, 52 Mo. App. 439, and others, may be distinguished on the ground that there is a distinction between a condition subsequent, by reason of the failure of which dissolution may be forced at the instance of the state, and an express provision terminating the life and power of the corporation, and such distinction is drawn in *Bybee v. Oregon, etc., Co.*, supra, and *Elizabethtown, etc., Co. v. Green*, 46 N. J. Eq. 118, 18 Atl. 844. Whatever may be the rule in other states, or the supposed basis upon which it rests, it is set-

tled in this state that a cause of forfeiture of the charter of a corporation, not judicially declared in a direct proceeding at the instance of the state, cannot be taken advantage of or preferred in a collateral proceeding. *Smith v. Cleveland, etc., Co.*, 170 Ind. 382, 81 N. E. 501; *Doty v. Patterson*, 155 Ind. 60, 56 N. E. 668; *Williams v. Citizens' Ry.*, 130 Ind. 71, 75, 29 N. E. 408, 15 L. R. A. 64, 30 Am. St. Rep. 201; *Cincinnati Co. v. Clifford*, 113 Ind. 460, 15 N. E. 524; *Western Plank Road Co. v. Central, etc., Co.*, 116 Ind. 229, 18 N. E. 14; *Logan v. Vernon, etc., Co.*, 90 Ind. 552, and cases cited; *North v. State*, 107 Ind. 356, 8 N. E. 159; *Barren Creek Co. v. Beck*, 99 Ind. 247; *Jussen v. Board*, 95 Ind. 567; *Baker v. Neff*, 73 Ind. 68; *Danville, etc., Co. v. State*, 16 Ind. 456.

The court did not err in sustaining the demurrer to the objection, and the judgment is affirmed.

(48 Ind. A. 117)

CITY OF HUNTINGTON v. BARTROM.

(No. 7,130.)

(Appellate Court of Indiana, Division No. 1.
June 21, 1911.)

1. MUNICIPAL CORPORATIONS (§ 821*)—DEFECTIVE SIDEWALKS—INJURY TO PEDESTRIAN—JURY QUESTION.

Whether a seven-year old child injured on a defective sidewalk was sui juris, and was guilty of contributory negligence, *held*, under the evidence, a jury question.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1754-1756; Dec. Dig. § 821.*]

2. MUNICIPAL CORPORATIONS (§ 755*)—SIDEWALKS—DUTY TO PEDESTRIAN.

In the absence of negligence of a municipal corporation in failing to make or keep its sidewalks reasonably safe for travel, it is not liable for injury to a traveler.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1587-1590; Dec. Dig. § 755.*]

3. MUNICIPAL CORPORATIONS (§ 768*)—SIDEWALKS—REASONABLE SAFETY.

A sidewalk constructed of crushed stone in a thinly settled part of a city is not so defective as to make the city liable for injury to a pedestrian because a stone $2\frac{1}{4}$ inches in diameter is permitted to protrude $\frac{3}{4}$ of an inch above the general surface of the sidewalk, especially where the stone is rounded.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1622, 1624, 1625; Dec. Dig. § 768.*]

4. MUNICIPAL CORPORATIONS (§ 763*)—SIDEWALKS—MAINTENANCE—MUNICIPAL DUTY.

While a city must use ordinary care in making and keeping sidewalks reasonably safe for public travel, it does not owe the same degree of care as to sidewalks in remote parts of the city as those constantly used.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1612-1615; Dec. Dig. § 763.*]

Appeal from Circuit Court, Huntington County; Samuel E. Cook, Judge.

Action by Paul E. Bartrom, by Jacob Bar-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes

trom, his next friend, against the City of Huntington. Judgment for plaintiff, and defendant appeals. Reversed, with instructions.

Emmett O. King, John Q. Cline, and Claude Cline, for appellant. Lesh & Lesh, for appellee.

HOTTEL, J. Action for damages against appellant by Paul E. Bartrom, by his next friend, Jacob Bartrom, on account of injury alleged to have been sustained by said Paul E. by reason of his stumbling and falling over an alleged protruding stone in one of the sidewalks of said city. The complaint was in one paragraph, the sufficiency of which is not questioned by this appeal. An answer in general denial was filed, and cause tried by jury, which returned a general verdict for appellee in the sum of \$250, with which answers to interrogatories were filed. Upon the conclusion of appellee's evidence, the appellant moved the court to direct the jury to return a verdict in its favor, which was overruled. Appellant also moved for judgment on the answers to interrogatories and for new trial, each of which motions was by the court overruled. Exceptions were properly saved to each of said rulings of the court below upon each of said motions, and the questions presented by said rulings are now presented to this court by proper assignment of error.

The answers to interrogatories present the case in the light most favorable to appellant's contention. We quote enough of the interrogatories and the answers thereto and the substance of others necessary to a correct understanding of the question presented by the ruling on said motion for judgment thereon. They are as follows: Clark street is one of the public streets of the city of Huntington, and runs south from William street in said city through a thinly settled portion of said city. On its east side there was a four-foot sidewalk constructed of crushed stone, some of the small stones of which protruded or stuck up above its general surface at the point where plaintiff was injured. Plaintiff was born October 18, 1899, and his injury complained of occurred October 12, 1906. For some time prior to receiving such injury, plaintiff had been attending school on said William street, during which time he passed over said sidewalk four times a day, and knew "there were some stones sticking up slightly above the general surface of said sidewalk." On said October 12, 1906, plaintiff had good eyesight and was enjoying "fairly good health," and all right mentally, and when returning home from school about 4 o'clock p. m. of said day passed over said walk going south and running thereon, and while so running fell. We now quote the other interrogatories and answers literally, omitting numbers: "Q. If plaintiff fell upon or over a stone in said sidewalk, how high did said

stone extend above the general surface of said sidewalk? A. Three-fourths of an inch. Q. What was the diameter in inches of said stone where it protruded or stuck through said sidewalk? A. Two and one-half inches. Q. Was said stone rounded and sloped down from its highest part to the gravel in the general level of the walk? A. Yes. Q. Could plaintiff have seen the stone over which he is alleged to have fallen if he had used ordinary care? A. Yes. * * * Q. What was the distance between the stone over which plaintiff is alleged to have fallen and the outer edge of said sidewalk? A. 18 inches. Q. What was the distance between the said stone and the inner line of said walk next to the Balzer lot? A. 32 inches. Q. Was there any obstruction in said walk on the 12th day of October, 1906, when plaintiff fell, between the said stone and either edge of the said walk that would prevent or hinder plaintiff from passing around or to the side of this stone? A. No. Q. Could plaintiff have seen and stepped over said stone at said time if he had looked? A. Yes."

[1] Appellant insists that these answers to interrogatories show that Paul Bartrom, the injured party, whom we will hereinafter refer to as appellee, was sui juris, and under the law guilty of negligence contributing to his injury. With this contention we cannot agree. The finding of the jury shows that the boy lacked a few days of being seven years old, and while it is true, as appellant urges, that the answers to interrogatories show that the protruding stone in the sidewalk over which the answers find that the appellee fell was one which could be as easily seen and avoided by a boy as by an adult, and that appellee in fact knew of the existence of said protruding stone, and by the exercise of ordinary care could have avoided the same, yet we think the character of this obstruction was such that it would not be at all likely to appeal to a boy of the years of appellee as being a danger to be watched and avoided when passing it on the sidewalk. In any event, the questions whether or not appellee was sui juris and whether or not he contributed to his own injury were both questions of fact for the jury, and by their general verdict the jury has settled this question against the contention of appellant, and we cannot say that upon this question there is irreconcilable conflict between such verdict and the answers of the jury to interrogatories. If the weakness of the general verdict rested alone upon this conflict, we would not be disposed to disturb it.

[2] But, when we consider the conflict between the general verdict and the answers to interrogatories upon the character of the obstruction over which appellee stumbled and fell, a more serious question arises. Upon this question the jury find that the walk in question was one made of crushed

stone, passing through a thinly settled portion of the city, and that the protruding stone therein over which the appellee fell was $2\frac{1}{2}$ inches in diameter and extended "above the general surface of said sidewalk $\frac{3}{4}$ of an inch." If the answers showed no more than the above, we think there would be serious doubt as to appellant's liability, but there is a further and controlling fact found by these answers, viz., that said protruding stone was "rounded and sloped down from its highest part to the gravel in the general level of the walk." In the absence of negligence on the part of a municipal corporation in failing to make or keep its sidewalks in a reasonably safe condition for travel, no action will lie against such corporation for injury sustained by a traveler upon such walks. *City of Michigan City v. Boeckling*, 122 Ind. 39, 40, 41, 23 N. E. 518; *City of Indianapolis v. Cook*, 99 Ind. 10, 15; *City of Franklin v. Harter*, 127 Ind. 446, 447, 448, 26 N. E. 882. A municipal corporation does not warrant or insure the safety of its streets. The law requires of it only that it exercise ordinary care and skill in making and keeping its sidewalks in a reasonably safe condition for travel by persons who exercise ordinary care. *City of Michigan City v. Boeckling*, supra; *City of Indianapolis v. Cook*, supra; *City of Franklin v. Harter*, supra.

[3] To hold the appellant liable under the answers to interrogatories here made by the jury would be to change the rule above quoted with reference to the care which the law imposes upon municipal corporations in the matter of keeping their sidewalks ordinarily safe for public travel from that of ordinary care to one of extraordinary care, almost, if not impossible, of attainment, and would be an inducement and invitation to litigation that would result in expenses and burdens upon such municipalities far beyond any possible benefit that might in rare instances inure to some traveler on the street unfortunate enough to be actually injured by an obstruction of the character found by the jury in this case to have been the cause of appellee's fall and injury.

[4] The answers also find that this walk passed through a thinly settled portion of said city, and the law does not require that a city shall use the same degree of care over such remote walks that are used but little as over those nearer the center of the city and constantly used. We do not mean by this to say that a city shall not use ordinary care in the making and keeping all of its sidewalks reasonably safe for public travel, but what would be ordinary care with reference to a seldom traveled sidewalk in a remote part of the city, either in the construction of the walk in the first instance and the selection of the material to be used therein, or in the manner of its construction, or its maintenance after construction,

might fall short of such degree of care as to a much traveled walk near the center of such city. "While there is no precise rule to gauge the different degrees of care required for different walks, depending on their locality and amount of use," cities are only to be held "to a reasonable degree of care and watchfulness over all their walks wherever they may be." *City of Rockford v. Hollenbeck*, 34 Ill. App. 40, 43, 44; *Fitz v. City of Boston*, 4 Cush. (Mass.) 365, 368, 369.

The complaint in this case charges no negligence on the part of the city in the character of the material used in the original construction of the walk, and the defect or obstruction found by the jury as causing appellee's fall, and injury therefrom is no more than might occur in such walks where the ordinary care that the law requires in such cases had been used in maintaining and keeping such sidewalk reasonably safe for travel. Upon the question here involved the Supreme Court in the case of *City of Michigan City v. Boeckling*, supra, said: "The basis of the action for an injury sustained because of a defect in a street is the negligence of the municipal corporation in failing to keep the street in a reasonably safe condition for travel. If there is no breach of this duty, there is no right of action, and, if there is no want of ordinary care, there is no breach of duty. A municipal corporation does not warrant the safety of its streets, for its legal obligation is to exercise ordinary care and skill in making and keeping its streets in a reasonably safe condition for travel by persons who exercise ordinary care." Again, in the case of *City of Indianapolis v. Cook*, supra, the Supreme Court said: "A city is not an insurer against accidents upon its streets and sidewalks. It is simply required to keep its streets and sidewalks in a reasonably safe condition for persons traveling in the usual modes by day and night, and using ordinary care. A man may stumble and fall anywhere, in a house or in a street, but, because he happens to fall in the street, it follows by no means that the city is responsible for the injury he receives. There are slight inequalities in sidewalks, and other trifling defects and obstructions against which one may possibly strike his foot and fall, but, if injury might be avoided by the use of such care and caution as every reasonably prudent person ought to exercise for his own safety, the city would not be liable." To the same effect is the case of *City of Franklin v. Harter*, supra; *Shirts, Negligence in Indiana*, § 1237.

We have found several cases from other states more directly applicable to the facts found by the jury in the case at bar. One especially in point is the case of *Newton v. Worcester*, 174 Mass. 181, at page 188, 54 N. E. 521, at page 523, in which the court says: "By the evidence, including the photo-

graph used at the trial and shown to us at the argument, here was a brick sidewalk, with some depressions varying 'from one-half of an inch to two inches in depth caused by some of the bricks being depressed and some being elevated.' 'There were no projections or sharp corners,' and 'the surface of the depressions was smooth.' We do not think the jury were warranted in finding upon this evidence that this way when bare was not reasonably safe and convenient for public travel." (Our italicizing in above quotations.) See, also, *Raymond v. Lowell*, 6 Cush. (Mass.) 524, 53 Am. Dec. 57; *City of Covington v. Manwaring*, 113 Ky. 592, 68 S. W. 625; *Haggerty v. City of Lewiston*, 95 Me. 374, 50 Atl. 55.

We think it clear, under the authorities, supra, that the facts found by the jury in this case as to the size, character, etc., of the protruding stone over which appellee fell shows that, if an obstruction, it was not of such a character as to charge appellant with actionable negligence for permitting the same to be in its sidewalk, and that the motion for judgment on the answers to interrogatories should have been sustained by the court below. We have carefully examined the evidence in this case, and find that the answers to the interrogatories are supported thereby, and no different result would likely be reached by granting a new trial.

Judgment reversed, with instructions to the court below to render judgment in favor of appellant on the answers to interrogatories.

(48 Ind. App. 92)

LEVENTHAL v. CRAMPTON. (No. 7,290.)

(Appellate Court of Indiana, Division No. 2.
June 20, 1911.)

1. APPEAL AND ERROR (§ 518*)—RECORD—AMENDED PLEADING.

A pleading which goes out of the record by reason of its amendment cannot be considered for any purpose on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2347; Dec. Dig. § 518.*]

2. APPEAL AND ERROR (§ 301*)—ASSIGNMENTS OF ERROR—GROUNDS—NEW TRIAL—MOTION.

That the court erred in refusing to permit defendant to make certain proof on the trial is not ground for an independent assignment of error, under the rule that errors of law occurring at the trial must be included in the motion for a new trial.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 301.*]

3. APPEAL AND ERROR (§ 757*)—NEW TRIAL—DENIAL—BRIEFS.

A specification that the court erred in overruling defendant's motion for a new trial could not be reviewed, where neither the motion for a new trial nor the substance thereof was set out in defendant's brief.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3092; Dec. Dig. § 757.*]

4. APPEAL AND ERROR (§ 242*)—RECEPTION OF EVIDENCE—OFFERS OF PROOF.

An offer of proof on which no ruling was made after objections had been sustained to several questions propounded to a witness cannot be reviewed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1417-1425; Dec. Dig. § 242.*]

5. APPEAL AND ERROR (§ 877*)—PREJUDICE.

Defendant could not object on appeal to the refusal of a requested charge tendered by plaintiff.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3567; Dec. Dig. § 877.*]

Appeal from Superior Court, Vigo County; John E. Cox, Judge.

Action by Harry C. Crampton against Isaac Leventhal. Judgment for plaintiff, and defendant appeals. Affirmed.

H. J. Baker, Chas. S. Batt, and Hughes & Caldwell, for appellant. Josia T. Walker, for appellee.

ADAMS, J. Action by appellee against appellant to collect a commission alleged to be due appellee, as a broker, in procuring the exchange of a stock of goods belonging to appellant for certain real estate.

Under the head of "What the issues were," the appellant in his brief makes the following statement: "The complaint was in one paragraph, and alleged that appellee was a broker; that he had been employed by appellant to procure for him a trade for a stock of goods belonging to appellant; that he did much work in securing one willing to trade for said stock; and that he did bring to appellant one Albert C. Barley, with whom appellant entered into a written contract to trade said stock of goods; and that his services were reasonably worth \$400. The appellant answered in two paragraphs. The first was a general denial; the second paragraph alleged fraud and misrepresentation upon the part of the appellee in procuring appellant to enter into the contract with Albert C. Barley. A demurrer was sustained to said second paragraph of answer; the same was amended and refiled. A demurrer was sustained to said amended second paragraph of answer, and the same was again amended and refiled, to which amended second paragraph of answer a demurrer was sustained. The cause was then submitted to a jury for trial, and judgment was rendered against appellant for the sum of \$315 and costs."

In addition to the above statement, the appellant's briefs, by way of recital, show that a number of instructions were tendered by the appellee and given by the court, and that four instructions were tendered by the appellant and refused by the court; that the appellant filed a motion and reasons for a new trial, which motion was overruled by the court, and time given in which to file a bill of exceptions. No further statement of the record appears in appellant's brief.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

The errors assigned and relied upon for reversal are (1) the court erred in sustaining appellee's demurrer to appellant's second paragraph of answer; (2) the court erred in sustaining demurrer to appellant's second paragraph of amended answer; (3) the court erred in sustaining demurrer to appellant's amended second paragraph of answer; (4) the court erred in refusing to permit appellant to prove under his general denial all of the terms of the contract between appellant and appellee; (5) the court erred in overruling appellant's motion for a new trial.

[1] The error predicated upon the sustaining of the demurrer to the second paragraph of answer evidently relates to the demurrer to said paragraph as finally amended. A pleading which goes out of the record by reason of its amendment cannot be considered for any purpose on appeal. Neither this paragraph of answer as amended, nor the demurrer thereto, nor the substance of either, is set out or argued in the appellant's brief. This specification of error must therefore be deemed to be waived, under the rules of this court.

[2] The fourth specification of error—that the court erred in refusing to permit appellant to make certain proof on the trial—does not constitute ground for an independent assignment of error. Errors of law occurring at the trial must be included in the motion for a new trial.

[3, 4] The fifth specification of error is not available, for the reason that neither the motion for a new trial, nor the substance thereof, is set out in appellant's brief. In argument, however, appellant's counsel say that they proffered certain material evidence by competent witnesses, and that the court refused to permit such evidence to be introduced, which refusal was assigned as one of the reasons for a new trial. While we are not required to search the record for errors to reverse a case, which appellant has not pointed out, we have in this case examined the record, and find that in each case the offer to prove was made after the court had ruled upon the objections made to the several questions propounded, and no ruling appears on such offers to prove. Under the repeated decisions of this court, no question is presented by a record of this kind. *Gunder v. Tibbits*, 153 Ind. 591, 607, 608, 55 N. E. 762; *Standish v. Bridgewater*, 159 Ind. 386, 387, 65 N. E. 189; *Shenkenberger v. State*, 154 Ind. 630, 634, 57 N. E. 519; *Siple v. State*, 154 Ind. 645, 652, 57 N. E. 544; *Whitney v. State*, 154 Ind. 673, 580, 57 N. E. 398; *Wilson v. Carrico*, 155 Ind. 570, 575, 58 N. E. 847; *Mark v. North*, 155 Ind. 575, 581, 57 N. E. 902; *State ex rel. v. Cox*, 155 Ind. 593, 597, 58 N. E. 849; *Chicago, etc., R. Co. v. Linn*, 30 Ind. App. 88, 93, 65 N. E. 552; *Farmers' Insurance Co. v. Yetter*, 30 Ind. App. 187, 192, 65 N. E. 762.

[5] Counsel also in argument state that certain instructions tendered by the appellee were refused by the court, but how appellant could be injured by such refusal is not disclosed. There was clearly no error in overruling the motion for a new trial.

As this is the only question presented by the brief, the judgment is affirmed.

NESS v. BOARD OF COM'RS OF MARSHALL COUNTY. (No. 7,481.)^a

(Appellate Court of Indiana. June 22, 1911.)

1. COUNTIES (§ 117*)—CONTRACTS—BIDS—DEFECTS—WAIVER.

The failure of bidders for the repair of a county courthouse to file with their bids the noncollusion affidavit prescribed by Burns' Ann. St. 1908, § 5807, is not waived by the fact that the form used was furnished by the county auditor.

[Ed. Note.—For other cases, see Counties, Cent. Dig. § 188; Dec. Dig. § 117.*]

2. COUNTIES (§ 118*)—CONTRACTS—BIDS—DEFECTS—WAIVER.

The failure of the bidders for the repair of a county courthouse to file with their bid the affidavit required by Burns' Ann. St. 1908, § 5807, is not waived by the fact that the board of county commissioners or their attorney gave another and insufficient reason for rejecting the bids.

[Ed. Note.—For other cases, see Counties, Cent. Dig. § 189; Dec. Dig. § 118.*]

3. OFFICERS (§ 103*)—STATUTORY POWERS—CONTRACTS—VALIDITY.

One dealing with public officers of limited and statutory powers must, at his peril, ascertain for himself that the law is followed.

[Ed. Note.—For other cases, see Officers, Dec. Dig. § 103.*]

4. COUNTIES (§ 118*)—CONTRACTS—BIDS—VALIDITY.

A bid to repair the courthouse of a county according to plans calling for specified work and materials, and for fancy decoration for the courtroom according to special design submitted, is not defective for failing to bid on the item for the decoration of the courtroom, where there were no plans on file therefor designating the kind of decoration.

[Ed. Note.—For other cases, see Counties, Cent. Dig. § 189; Dec. Dig. § 118.*]

5. COUNTIES (§ 118*)—CONTRACTS—BIDS—VALIDITY.

A bid to repair a courthouse of a county according to plans calling for specified work and materials and for decoration of the courtroom, according to a special design submitted, is not aided by the bidder fixing an amount for the decoration and adding the words, "Design to be submitted," because, in the absence of plans designating the kind of decoration, the bidder may not comply with the law requiring the plans to be on file, and the contract of the bidder for the decoration is invalid.

[Ed. Note.—For other cases, see Counties, Cent. Dig. § 189; Dec. Dig. § 118.*]

6. COUNTIES (§ 118*)—CONTRACTS—BIDS—IRREGULARITIES.

Where a bid for the repair of a courthouse of a county was identical in meaning with the specifications calling for bids, notwithstanding the addition of an improper stipulation making the bid conditional on his receiving the contract for the entire job, the court may treat the in-

^a other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes rehearing denied. Superseded by opinion in Supreme Court, 88 N. E. 33. Rehearing denied, 93 1002.

sertion of the words as mere irregularities not affecting the rights of any one.

[Ed. Note.—For other cases, see Counties, Cent. Dig. § 189; Dec. Dig. § 118.*]

7. COUNTIES (§ 118*)—CONTRACTS—BIDS—IRREGULARITIES.

The specifications for installing steam heating in the courthouse of a county did not provide for the use of an old boiler in the courthouse, but the county commissioners tested the old boiler and thereafter, and, before advertising for bids, entered of record an order showing that the old boiler would be used and the notice to bidders contained a provision to that effect. A bid for the steam heating contained the words "using old boiler and new valves." *Held*, that the insertion of the quoted words was a harmless irregularity, and did not invalidate the contract for the heating.

[Ed. Note.—For other cases, see Counties, Dec. Dig. § 118.*]

8. COUNTIES (§ 118*)—CONTRACTS—BIDS—VALIDITY—QUESTION FOR COURT.

In a suit to enjoin the performance of a contract to repair a county courthouse, the court must determine whether there has been a substantial compliance with the statute regarding the subject, and the construction placed on bids by the county commissioners is immaterial.

[Ed. Note.—For other cases, see Counties, Dec. Dig. § 118.*]

9. COUNTIES (§ 118*)—REPAIR OF COURTHOUSE—CONTRACTS—BIDS—VALIDITY.

The board of county commissioners of a county adopted plans for the repair of the courthouse. The plans and instructions to the bidders called for separate bids on separate items specified, including electric wiring and plumbing, each consisting of a single item. A bidder for the entire work submitted bids for the electric wiring and the plumbing, but each bid contained the words, "This bid conditional upon being awarded all the work." *Held*, that the quoted words materially altered the bids because the bidder could not be required to take the contract for either unless he was awarded all the work, and his contract for the plumbing and electric wiring was invalid.

[Ed. Note.—For other cases, see Counties, Dec. Dig. § 118.*]

10. COUNTIES (§ 118*)—CONTRACTS—BIDS—NOTICE.

A notice to bidders for the repair of the county courthouse which sets forth the fact that the plans divide the work into four parts, the general contract, the heating, the plumbing, and the electric wiring, and for the construction of a surveyor's room as a part of the general contract, and that bidders in bidding should bid separately on the specifications for the construction of the surveyor's room, remodeling windows, and decoration of the courtroom, and also bids in the alternative for wood and tile floor, and metal and tile roofing, and that each bid should be accompanied by a non-collusion affidavit, is sufficient within Burns' Ann. St. 1908, § 5954, providing for the publication of notice of the general nature of the proposed work, etc.

[Ed. Note.—For other cases, see Counties, Dec. Dig. § 118.*]

On petition for further rehearing. Granted and former opinion modified and judgment reversed in part and affirmed in part.

For original opinion, see 91 N. E. 618, and for opinion on first rehearing see 93 N. E. 283.

Harley A. Logan and L. M. Lauer, for appellant. E. C. Martindale, Charles Kellison, and Miller & Dowling, for appellee.

FELT, P. J. On January 23, 1909, the board of commissioners of Marshall county presented to the county council of said county a petition and estimate for the repair and remodeling of the courthouse of said county. In this petition it was stated, among other things, that the board proposed to prepare a room in the basement of the courthouse for the county surveyor. Acting upon this petition, the county council made an appropriation as follows: "That there be appropriated out of the county funds of said county the following sums. * * * For repair of courthouse, including heating apparatus therefor and other necessary repairs, \$15,000. * * * Said appropriation of \$15,000 is to be used or expended on the courthouse as follows: Repairing or reroofing, remodeling tower with illuminating dial, painting outside and painting and decorating inside, repairing old floors or putting in new ones, if necessary, on first floor." On February 10, 1909, the county council made an order specifically authorizing the construction of three toilet rooms on the second floor, and for the rewiring for electric lighting. And on June 5th said council made a further order specifically authorizing the repair and remodeling of the windows, provided the whole cost did not exceed the whole amount of the appropriation. Acting upon these various appropriations, the board of commissioners on March 1, 1909, employed architects and caused plans and specifications to be prepared for the repairs and changes that were to be made, which plans and specifications were duly filed in the auditor's office, as required by law. On March 2, 1909, the board of commissioners of said county made an order fixing the date when the plans should be placed on file, and as a part of the order provided that "the advertisement shall state that in case the old boiler after test shall show that it is in good condition, no new boiler will be purchased, but, if after test is made and the boiler is shown not to be in good condition, then bids on new boiler will be considered." At a subsequent meeting of the board of commissioners, June 7th was fixed as the date on which bids would be received, and the order provided "that the board advertise for bids on the repair of the courthouse, as per the plans and specifications now on file, except the old boiler is to be used, and may be transferred to some other part of the basement." The published notice of the letting also stated, "old boiler to be used."

The plans and specifications divided the work into four parts—the general contract, the heating, the plumbing, and the electric wiring. Provision was made for the con-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes

struction of a surveyor's room in the basement, as a part of the general contract. It was also provided that bidders in bidding upon the general contract should bid separately upon the specifications for construction of the surveyor's room, remodeling windows, and decoration of the courtroom; also bids in the alternative for wood and tile floor and metal and tile roofing. The bids for the heating, plumbing, and electric wiring were to be separate. These instructions were set out in the published notice to bidders, which also stipulated that each bid should be accompanied by a noncollusion affidavit, as required by section 5897, Burns 1908. The auditor prepared forms with the approval of the board of commissioners for bids to be furnished to possible bidders, in accordance with section 5958, Burns 1908 (section 41, Acts 1899, p. 343). The form for the bid on the general contract was as follows:

Blank Bid for General Contract.

To the Honorable Board of Commissioners of Marshall County.

Gentlemen: We propose to do the remodeling of your Court House according to plans and specifications prepared by Griffith & Fair, Architects, Ft. Wayne, Ind., on the General Contract as follows:

(1) For all the work called for in the plans and general specifications, excepting the new floor for the entire first story, the new roof, the finishing off of the surveyor's office, stairway, etc., to connect the same, changing sash, glass, etc., and fancy decorating.

\$.....

(2) Oak floor as specified for the entire first floor.

\$.....

(3) Terrazzo floor and marble sanitary base.

\$.....

(4) Galvanized iron roof as specified, without any additional sheathing or extra supports.

\$.....

(5) Tile roof as specified with additional sheathing, etc.

\$.....

(6) Surveyor's office finished up in the room where the present boiler is now located.

\$.....

(7) Remodeling windows with new sash, plate glass, etc., according to specifications.

\$.....

(8) Fancy decorating for the court room according to special design submitted, for the sum of.

\$.....

[Signed]

And for the steam heating as follows:

Blank Bid for the Steam Heating.

To the Honorable Board of Commissioners of Marshall County.

Gentlemen: I propose to do the steam heating according to plans and specifications prepared by Griffith & Fair, Architects, Ft. Wayne, Ind. for the sum of

\$.....

[Signed]

The blanks for the bids for the plumbing and for the electric wiring were in the same form as that for the steam heating.

Upon the general contract appellant and Everly & Wallace bid without change, except that appellant did not bid on the eighth

specification of said bid for decorating the courtroom. Appellee O'Keefe used the form supplied, but inserted in his bid under the general specifications the words: "This bid and bond is filed conditional that I am awarded all of the work that is to be performed under the general specifications." He also bid on the eighth specification, "On design to be submitted," \$300. And on the contract for the wiring, heating, and plumbing appellant, Everly & Wallace and the others bid separately on the blanks as prepared and furnished by the auditor, without change or alteration. But appellee O'Keefe inserted after each of said bids the words: "This bid conditional upon being awarded all the work." And in his bid on the heating contract, before stating the amount, he also inserted the words: "Using old boiler and new valves." Each of said bidders filed with his bids a noncollusion affidavit, but the affidavits of all but appellee O'Keefe seem to have been made in conformity with section 5959, Burns 1908 (section 42, Acts 1899, p. 361), instead of section 5897, as designated in the notice and required by the statute. The affidavits so filed failed either to include the affidavits of the agents of the bidders or to show that they had no agents present at the letting. Appellee O'Keefe filed a noncollusion affidavit in conformity with section 5897. The contract for all the work was awarded to O'Keefe. The contract for the whole work was entered into on June 8, 1909, and on June 18th appellant instituted this suit, as a taxpayer, seeking to enjoin appellee O'Keefe from performing said contract, and to enjoin the appellee board from paying out any money thereon. Upon final hearing, the court enjoined the performance of the eighth specification, viz., the decoration of the courtroom, but refused to enjoin the performance of the remainder of the contract. Appellant filed bond and took this appeal.

It is insisted that the bids of appellant and the other bidders, except O'Keefe, were properly rejected for the reason that a proper noncollusion affidavit was not filed. Section 5897, Burns 1908, being section 5 of an act of the General Assembly of 1907 (see Acts 1907, p. 582), provides: "No bid for the building or repairing of any courthouse * * * shall be received or entertained by the board of commissioners of any county in this state unless such bid shall be accompanied by an affidavit signed and sworn to by the bidder and each of his agents or representatives present at the time of filing such bids"—specifying what statements such affidavits must contain. The provisions of the statute leave no room for construction. The affidavit must include the verified statement of the bidder and his agent, or agents, present at the letting, and, if there be no agent present, this fact must be affirmed and not left to conjecture or speculation.

[1, 2] The fact that the form used may have been furnished by the auditor, or that

the commissioners or their attorney may have given another and an insufficient reason for rejecting the bid of appellant, in no way corrects or waives the omission of a fact required by the statute.

[3] No proposition is more firmly established than that persons dealing with public officers of limited and statutory powers must, at their peril, ascertain and know for themselves that the law is followed. *Rissing et al. v. City of Ft. Wayne*, 137 Ind. 427, 432, 37 N. E. 328; *Silver, Burdett & Co. v. Ind. State Board, etc.*, 35 Ind. App. 438, 462, 72 N. E. 829; *State ex rel. v. Stout*, 26 Ind. App. 446, 457, 59 N. E. 1091.

[4] Appellant's bid was not defective for failure to bid on item 8, the decoration of the courtroom, for the reason that no specifications or plans therefor were on file with the county auditor, designating the kind or character of the decoration to be furnished.

[5] Nor was the bid of appellee O'Keefe aided by fixing an amount for this item, and adding the words "design to be submitted." He could not know this or any other statement, supply specifications or comply with the law requiring them to be on file with the auditor, and his contract as to the decoration is therefore invalid.

It is contended that the contract of O'Keefe is invalid because of the statements inserted in his bids; that he did not bid separately on anything, or offer to construct either class of work separately; that the stipulations which he added to each of his bids made them all conditional upon his receiving all of the work and is an alteration prohibited by the statute, and renders his bids invalid, and the board, therefore, had no right to receive or consider them. Whether the alterations or additions were of such a substantial character as to bring the bids within the prohibitions of the statute is the point at issue. The specifications, the instructions to bidders and the blank forms submitted each called for separate bids upon the various classes of work, viz., the general contract which should contain alternative bids upon different grades of flooring and roofing and a separate bid upon the surveyor's room, the heating contract, the plumbing contract, and the wiring contract. Upon each of these separate classes each bidder was notified to compete with the others. This was the common ground upon which all were required to meet, and to permit a bidder to select another and different ground and to submit a different proposition from that specified, and different from that which other bidders were notified would be received and considered, certainly would not conduce to free, open and honest competition which the law seeks to obtain. *Board, etc., v. Pashong*, 41 Ind. App. 69, 83 N. E. 383. It is well established that where the statute prescribes the manner in which an officer or board, exercising purely statutory powers, shall enter into a contract binding upon the municipality, the

manner or method so prescribed must be strictly followed. *Board, etc., v. Pashong*, supra; *Board, etc., v. Gillies*, 138 Ind. 667, 38 N. E. 40; *Wrought Iron Bridge Co. v. Board*, 19 Ind. App. 672, 48 N. E. 1050; *Zorn v. Warren-Scharf, etc., Co.*, 42 Ind. App. 213, 84 N. E. 509. If the words added to either of O'Keefe's bids enabled him to bid upon a basis different from that required by the notice and the specifications, then the words added made such "alteration in the form of said bid" as the statute prohibits, for the plain purpose of the statute is to place all bidders upon common ground, and to secure fair and honest competition. The language inserted in the bid, on the work covered by the general specifications, is, "This bid and bond is filed conditional that I am awarded all the work that is to be performed under the general specifications." While the specifications provided for separate bids on different items covered by the general specifications, they also contained the following provision: "General contract will include all of the work shown on plans and in specifications, with the exception of the steam heating, plumbing and electric wiring. The steam heating, plumbing and electric wiring will be let under one contract and under separate specifications." As to the general contract, it is clear the added words in O'Keefe's bid did not change his relations to the county or to the other bidders, for the words inserted only restated a condition already shown by the specifications, and, with or without the added words, the bid was on the same basis, and meant the same as every other bid. In either case the successful bidder received a contract for all the work covered by the general specifications. The words did not alter the form of the bid, for it still complied with the requirements of the statute, the prescribed forms, and the specifications on file in the auditor's office.

[6] The words inserted in the bid amount to an irregularity which is not to be commended or encouraged; but, where no possible harm can result and the bid is identical in meaning after the addition of the words with that expressed before the words were inserted, the court is justified in treating their insertion in the bid as a mere irregularity not affecting the rights of any one. *Zorn v. Warren-Scharf, etc., Co.*, supra, 42 Ind. App. 224, 84 N. E. 509.

[7] Looking to the form of the bid for the steam heating, and to the specifications therefor, it will be seen that the bid contained but one item, and O'Keefe inserted in his bid therefor the words, "using old boiler and new valves." The specifications do not provide for the use of the old boiler, but the board of commissioners caused the old boiler to be tested, and thereafter and before advertising for bids entered of record an order showing that the old boiler would be used and the notice to bidders contained a provision to that effect. On these facts the in-

section of the foregoing words clearly amount to only a harmless irregularity, and do not invalidate the heating contract. In his bids for electric wiring and plumbing, each consisting of a single item, O'Keefe inserted the words: "This bid conditional upon being awarded all the work." It is contended that the words inserted should be limited to the work upon which each bid was made, and that such must have been the construction placed upon them by the board of commissioners.

[6] The construction placed upon the words by the county commissioners is wholly immaterial here, for the question is not one of construction by the parties, but we are to determine whether there has been a substantial compliance with the provisions of a plain statute. *Zorn v. Warren-Scharf, etc., Co.*, supra, 42 Ind. App. 222, 84 N. E. 509; *Rissing v. City of Ft. Wayne*, supra; *Wrought Iron Bridge Co. v. Board, etc., supra*.

[9] The same reasoning that shows the added words on the bid under the general specifications does not amount to a material alteration leads to the conclusion that the words inserted in the bids for the electric wiring and plumbing do amount to a material alteration. These bids, and the specifications therefor, cover but one item, and it is unreasonable to say that in adding the words, "This bid conditional upon being awarded all the work," it was only intended to include the work covered by that particular bid. It is a self-evident proposition that the bid covered all of the single item it included, and we cannot believe the words were intended to secure to the bidder only the work covered by the particular bid in which they were inserted. There seems to be but one reasonable conclusion to be drawn from this language, and that is that by its use the bidder intended to, and did, so condition his bids for the electric wiring and plumbing that he could not be required to take the contract for either unless he was awarded all the work to be done under the general specifications. Other bidders could be required to contract for the separate and special parts of the work covered by their bids other than that of the general specifications; but by this condition in his bid O'Keefe relieved himself from that requirement, and could only be compelled to take the electric wiring and plumbing on the condition named in his bids. As a result of this, he was not competing for that part of the work on the same basis as other bidders. In so doing he violated the statute by effectually altering the form and meaning of the two bids containing the unlimited demand for "all the work" or none.

Our conclusion is that the words inserted in O'Keefe's bid under the general specifications and those inserted in the bid for the heating were not material alterations, and in no way changed the nature or character of those bids from what they were before the

words were inserted. On the other hand, the words inserted in the bids for plumbing and the electric wiring were material alterations, the effect of which was to place these bids on a basis entirely different from those of other bidders and from the prescribed forms, in this: That O'Keefe was relieved from taking the work covered by each of those bids, unless he secured all the work. This violated the plain terms of the statute and prevented competition intended to be secured by the law.

Appellant also insists that the performance of O'Keefe's contract should be enjoined for the further reason that there was no appropriation for the construction of the surveyor's room. Section 5942, Burns 1908, provides: "No board of county commissioners, officer, agent or employé of any county shall have power to bind the county by any contract or agreement, or in any other way, to any extent beyond the amount of money at the time already appropriated by ordinance for the purpose of the obligation attempted to be incurred, and all contracts and agreements, express or implied, and all obligations of any and every sort, beyond such existing appropriation, are declared to be absolutely void." It will be observed that the county council in making the appropriation for the repairs on the courthouse specifically directed how the money thus appropriated should be expended. It made no general appropriation for repairs, but made specific appropriation for specific repairs, and in these enumerated items there is no item that could possibly be construed as covering the construction of the surveyor's room. There was no appropriation for this work, and therefore the contract for the construction of the surveyor's room is void. *State v. Board*, 185 Ind. 262, 74 N. E. 1091.

The question arises whether these alterations in the bids for the plumbing and electric wiring and the want of an appropriation for the surveyor's room invalidate the whole contract. We are of the opinion that they do not. Separate bids were asked for and received on the particular work of each of these items or parts of the whole job. The amount of each is easily separable from the other portions of the contract. No good reasons can be given for annulling the valid parts of the contract, where, as here, they are easily separable from the parts that are invalid. There is full legal warrant for enforcing the contract, so far as valid, and enjoining the execution of its parts which are invalid and unenforceable because of the failure to comply with the provisions of the statute. *City of Valparaiso v. Valparaiso City Water Co.*, 30 Ind. App. 316, 65 N. E. 1063; *Kimball et al. v. City of Cedar Rapids (C. O.)* 100 Fed. 802; *Colt v. City of Grand Rapids*, 115 Mich. 493, 73 N. W. 811; *City of Greenville v. Greenville Waterworks Co.*, 125 Ala. 625, 27 South. 764.

It is, however, insisted by appellees that

appellant was guilty of laches in not earlier instituting his suit. Whether the defense of laches can be interposed in a case like the present we do not determine. The record discloses that at the time of the letting appellant was present and objected to the contract being given appellee, among others, upon the ground that his bids had been altered, as above indicated, and appellant's attorney at that time notified appellees that, if the law was as he thought it to be, the performance of the contract let thereunder would be resisted in the courts. Ten days thereafter this suit was brought. It would therefore appear that the proceeding was as timely as could ordinarily be expected under all the circumstances. It is also insisted by appellees that the appellant's complaint is not sufficient. The complaint is long and contains a great amount of surplusage and many statements that would indicate that appellant had an idea that the performance of the contracts should be enjoined for the reason that the contract was not let to the lowest bidder; but there was no motion to make the complaint more specific or definite and certain. The complaint does set forth the facts necessary to show the invalidity of O'Keefe's bid, and the contract that was entered into thereon, in so far as they apply to the construction of the surveyor's room, the decorating of the courtroom, the plumbing and electric wiring, and it specifically asks that its performance be enjoined by reason thereof. The complaint is therefore sufficient to withstand a demurrer.

[10] The notice given was sufficient under section 5954, Burns 1908.

There is no dispute as to the facts here set out, and it is thereby shown that the contract of O'Keefe is invalid and unenforceable as to the construction of the surveyor's room, the decoration of the courtroom, the plumbing and electric wiring, and that its performance should be enjoined to that extent, but that the contract is valid as to the heating and the work under the general specifications. The court below enjoined the decoration of the courtroom only. Having failed to enjoin the construction of the surveyor's room, the electric wiring, and the plumbing, the judgment to that extent cannot be sustained. The character of the work covered by the bids and contracts, and justice to the parties, do not require that a new trial be granted. It is our view that justice will best be subserved if the judgment of this court be such as to terminate further litigation, and, under this state of affairs, we are empowered, by section 702, Burns 1908, to do this.

It is therefore the order of this court that the judgment be reversed in so far as it denies an injunction against the construction of the surveyor's room, the plumbing, and electric wiring, and the carrying out of the

contracts with O'Keefe in so far and to the extent that they relate to the construction of the surveyor's room, the plumbing, and electric wiring; and the court below is directed to enter judgment perpetually enjoining the construction of the surveyor's room, the plumbing, and electric wiring, and the carrying out of those parts of the contracts with appellee O'Keefe which provide for the construction of the surveyor's room, the plumbing, and electric wiring. In all other respects the judgment is affirmed.

HOTTEL, MYERS, ADAMS, and IRACH, JJ., concur. LAIRY, C. J., not participating.

(203 N. Y. 225.)

PEOPLE v. SERIMARCO.

(Court of Appeals of New York. May 30, 1911.)

1. HOMICIDE (§ 269*)—PREMEDITATION AND DELIBERATION—EVIDENCE—SUFFICIENCY.

Evidence in a murder trial held to require submission of issues of premeditation and deliberation.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 563; Dec. Dig. § 269.*]

2. HOMICIDE (§ 22*)—MURDER IN THE FIRST DEGREE—ESSENTIALS.

To constitute murder in the first degree, there must not only be an intention to kill, but also a deliberate and premeditated design.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 35-38; Dec. Dig. § 22.*]

3. HOMICIDE (§ 341*)—INSTRUCTIONS.

One convicted of murder in the first degree on sufficient proof was not prejudiced by failure to instruct more fully on manslaughter in the first degree.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 721; Dec. Dig. § 341.*]

Appeal from Supreme Court, Trial Term, Westchester County.

Giuseppi Serimarco was convicted of murder in the first degree, and he appeals. Affirmed.

George C. Andrews, for appellant. Lee Parsons Davis, Dist. Atty., for the People.

WERNER, J. On the 6th day of January, 1910, in the town of Mamaroneck, in the county of Westchester, one Savario Feddo, otherwise known as Fido, met his death by the hand of the defendant, Guiseppi Serimarco. The immediate cause of death was a stab wound inflicted by the defendant upon the body of Fido at a point about one inch above the left groin, extending into the posterior abdominal wall, and severing the external iliac artery. The defendant was thereafter indicted for the crime of murder in the first degree, and later he was brought to trial and convicted. The evidence clearly established the death of Fido and the defendant's responsibility for it. These facts have never been at issue, and the only questions in the case are (1) whether the evidence

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes

as to the premeditation and deliberation charged against the defendant was of sufficient weight and cogency to warrant the submission to the jury of the charge of murder in the first degree, and (2) whether there was any error in the charge of the learned trial court to the jury.

The evidence which bears directly upon the question whether the defendant committed the crime of murder in the first degree is comprehended in a very few words, and its significance can only be appreciated after a recital of all the circumstances which cluster around the homicide. As is indicated by the names of the deceased and the defendant, they were both Italians. They were acquaintances, if not friends. On the afternoon of the homicide the defendant and one Alloy met in a saloon at Mamaronock. There they played cards for about three hours, and during that time each drank about five glasses of beer. At about 5 o'clock in the afternoon they left the saloon and proceeded to the house of one Tomasso Lorocco, where they remained for supper, during the course of which three pints of beer were consumed by the nine or ten persons who partook of the meal. Meanwhile a young son of Lorocco was sent downstairs to ask if Fido would allow his rooms to be used for dancing, and if he would play for the dancers. The boy returned, saying that Fido did not wish to play, as he was tired from the hard work of the day, and must start again early on the morrow. Thereupon the defendant went down to importune the deceased, and soon returned with a message that the latter had consented to play. The party went downstairs and dancing began. Fido played upon the violin. Beer was sent for, and the dancers paused occasionally to partake. The defendant danced so vigorously as to become considerably heated, and he stopped for a drink. He asked Alloy if there was more beer, whereupon Alloy poured out what was left in the pitcher, less than half a glass, and handed it to the defendant, who took it and threw glass and contents at Alloy, who escaped by dodging. Alloy approached the defendant with some words of friendly remonstrance, when the latter struck him a blow with the fist. At this juncture the deceased interfered as a peacemaker, with the traditional result. Having suggested to the defendant that he did not want any trouble or quarreling over so slight a matter, Fido put his hands upon the defendant and pushed him to a seat in a chair which stood near the wall.

[1] This is the point at which the story of what happened bears directly upon the question of premeditation and deliberation. The defendant, being seated in the chair, and having "sat a little while," according to the statement of Florio, the only witness called by him, addressed the deceased and

said, "I would like to get my handkerchief from the overcoat," referring to an overcoat which hung on a hook attached to the wall behind the chair. The defendant stood up, reached for the coat pocket, and drew therefrom a large knife with an open, rigid blade, which he instantly plunged into the abdomen of the deceased, with the result already stated. The testimony of this defendant's witness upon this point is corroborated by every one of the six Italian witnesses called for the prosecution, and is contradicted by no one. The mere statement of this evidence discloses the purpose for which it was elicited, and its exact pertinence to the one feature which differentiates the crime of murder in the first degree from the crime of murder in the second degree. It bore directly and cogently upon the question whether there was time for reflection or deliberation between the first murderous impulse and the actual commission of the act. The defendant's suggestion that he would like to get his handkerchief from his coat pocket, followed by his production of the deadly knife, is a demonstration of the working of his mind. He apparently realized that if, without explanation or subterfuge, he should reach for his overcoat pocket, his attempt might be anticipated by Fido and the others, who were interested in preventing further trouble. It was his evident purpose, therefore, to throw them off their guard, and he chose a method which discloses his conscious thought. What could have been more natural, and more likely to disarm suspicion, than his simple request that he be allowed to get his handkerchief? It seems like trifling with reason and common sense to discuss at length this feature of the trial, and we leave it with the suggestion that the evidence not only justified, but required, the submission to the jury of the two elements of premeditation and deliberation.

[2] This is a case precisely covered by the fine definition of Judge Earl in *People v. Majone*, 91 N. Y. 212. To constitute the crime of murder in the first degree, there must not only be an intention to kill, but also a deliberate and premeditated design to kill. "Such design must precede the killing by some appreciable space of time. But the time need not be long. It must be sufficient for some reflection and consideration upon the matter, for choice to kill or not to kill, and for the formation of a definite purpose to kill; and, when the time is sufficient for this, it matters not how brief it is. The human mind acts with celerity which it is sometimes impossible to measure, and whether a deliberate and premeditated design to kill was formed must be determined from all the circumstances of the case." Without this bit of evidence disclosing the defendant's mental operations, it might have been prudent, if not necessary, for the trial justice to have withdrawn from the jury the consideration

of the charge of murder in the first degree; but, with that evidence in the case, it was for the jury to decide whether the defendant had exercised premeditation and deliberation in forming his intent to kill.

[3] Counsel for the defendant suggests, rather than argues, that the charge of the learned trial court was not quite fair to the accused. He says that the question was not whether the defendant was guilty, "but of what was he guilty—murder in the first degree, murder in the second degree, or manslaughter in one of its degrees?" Defendant's counsel urges that because the justice defined at length the crime of murder in the first degree, and only read the statutory definition of manslaughter in the first degree, the defendant's cause must have been prejudiced. The fact that the jury convicted the defendant of murder in the first degree is a sufficient answer to this contention. It is apparent that the defendant could not have been prejudiced by the failure of the trial justice to charge more fully upon the subject of manslaughter in the first degree; for the jury had the right to return a verdict of guilty of murder in the second degree, if in their judgment the evidence warranted such a verdict. The fact that they did not find such a verdict precluded the possibility of finding a verdict based upon guilt of a still lower grade of homicide, and thus it is evident that the failure of the learned trial justice to charge more fully upon the subject of manslaughter in the first degree was not of the slightest consequence in the case.

To all this we may add that the charge was exceedingly clear and plainly fair. The defendant has been ably defended by competent counsel, he has had an impartial trial, the review of the record discloses no errors, and the judgment of conviction must be affirmed.

CULLEN, C. J., and HAIGHT, WILLARD BARTLETT, HISCOCK, and COLLIN, JJ., concur. CHASE, J., absent.

Judgment of conviction affirmed.

(202 N. Y. 123)

ADENAW v. PIFFARD et al.

(Court of Appeals of New York. May 9, 1911.)

WITNESSES (§ 176*)—COMPETENCY—TRANSACTION WITH DECEDENT.

In replevin brought by one since deceased, decedent's deposition, that when defendants refused to deliver the property, she had never parted with the ownership, did not permit a defendant within Code Civ. Proc. § 829 to testify to an oral agreement between decedent and her, upon which a counterclaim was based, whereby decedent agreed to place property in a

common home, to become defendant's on decedent's death, etc.

[Ed. Note.—For other cases, see Witnesses, Dec. Dig. § 176.*]

Appeal from Supreme Court, Appellate Division, Fourth Department.

Action by Louise C. Adenaw, M. Emeline McMillan's executrix, against Pauline A. Piffard and another. From a judgment of the Fourth Appellate Division (137 App. Div. 470, 121 N. Y. Supp. 825), overruling plaintiff's exceptions and awarding judgment for defendants, plaintiff appeals. Reversed, and new trial granted.

William Ritchie for appellant. John F. Connor for respondents.

WILLARD BARTLETT, J. This is an action of replevin originally brought by Mrs. M. Emeline McMillan in her lifetime against the defendants, who are husband and wife, to recover the possession of certain chattels, the value of which is conceded to have been \$2,215.70. The complaint alleged that the chattels were the property of the plaintiff, who was entitled to the possession thereof; but that the defendants became possessed of the same in June, 1899, and, though often requested to deliver them to the plaintiff before the commencement of the action, had refused and still refuse so to do.

The defendants in their separate answers denied that at the time of the commencement of the action the plaintiff was entitled to the possession of the chattels mentioned in the complaint, or that the defendants had ever wrongfully detained the same. They also set up a counterclaim which is the principal feature of the case. The averments of this counterclaim may be concisely stated as follows: On November 2, 1898, the plaintiff and Mrs. Pauline A. Piffard, one of the defendants, entered into an agreement whereby Mrs. Piffard agreed to purchase for a home the Piffard homestead in Livingston county in this state, and to establish a home therein for herself and her own family and for the plaintiff and maintain the same during the plaintiff's lifetime. Mrs. Piffard undertook to furnish suitable board for the plaintiff and her maid, and stabling and care for the plaintiff's team; the declared purpose of the agreement being "that the relation of parent and daughter which for a number of years previous thereto had existed between the plaintiff and this defendant should be continued, and that the plaintiff and this defendant and her family during the lifetime of the plaintiff should live together as members of one family." In consideration of the covenants by Mrs. Piffard, Mrs. McMillan agreed to place and leave in the aforesaid home in the possession of the said defendant and her family certain property and furniture for their joint use during

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

the lifetime of the plaintiff which upon her death should become the sole property of Mrs. Piffard. She also agreed to pay to Mrs. Piffard toward the maintenance of the home \$100 a month for at least eight months in each year. "In consideration of the said defendant having for a number of years prior thereto lived with the said plaintiff as a daughter and companion constantly caring for, serving and aiding the plaintiff and in settlement and satisfaction of the plaintiff's obligation to the said defendant for said services," Mrs. McMillan further agreed to leave Mrs. Piffard by will part of a parcel of real estate known as No. 152 Broadway in the city of New York of the value of \$47,833, and that, if for any reason she should fail to leave such interest to Mrs. Piffard, then Mrs. McMillan would pay her claim, and compensate her by leaving to her by will an amount in cash or securities equal in value to Mrs. McMillan's interest in said real estate.

In the counterclaim it was further alleged that Mrs. McMillan about June 1, 1899, placed in the Piffard homestead in the possession of Mrs. Piffard the chattels mentioned in the complaint and sought to be recovered in this action which had ever since remained in Mrs. Piffard's possession under the provisions of the aforesaid agreement, all of which Mrs. Piffard had carried out and fully performed. It was also alleged that Mrs. McMillan had failed and neglected to perform the provisions of the aforesaid agreement on her part, but in violation thereof in the years 1902 and 1903 had removed from the said home certain of the aforesaid chattels and had failed to pay the stipulated \$100 a month since May 1, 1903, and had denied and repudiated the said agreement, to the damage of Mrs. Piffard in the sum of \$60,559, for which amount the defendant Pauline A. Piffard prayed judgment in her favor. Mrs. McMillan died before the trial and the action has been continued in the name of her executrix, the present plaintiff. The trial resulted in a verdict in favor of the defendant Pauline A. Piffard for \$55,818.92. The trial court directed that the plaintiff's exceptions should be heard in the first instance by the Appellate Division. They were overruled, and the case now comes here on appeal from the judgment directed by the Appellate Division upon the verdict.

This record presents a striking illustration of the perils of litigation. An old lady commences a lawsuit to recover possession of \$2,000 worth of personal property, and as the outcome her estate is cast in damages in the sum of nearly \$60,000. In anticipation of her inability to attend the trial, Mrs. McMillan's deposition was taken during her lifetime and a portion thereof was read as a part of the plaintiff's case. The trial court held that this evidence permitted the defendant Pauline A. Piffard to testify to

the oral agreement between herself and Mrs. McMillan upon which the counterclaim was based. The question whether the plaintiff thus opened the door so as to relieve Mrs. Piffard from incompetency to testify to a personal transaction with a deceased party under section 829 of the Code of Civil Procedure is the principal question in the case. I think that the learned trial judge erred in ruling as he did on this point, and that, inasmuch as the error related to the very gist of the counterclaim, it requires us to grant a new trial.

In her deposition Mrs. McMillan testified that she was the plaintiff in the action, residing at Geneseo, N. Y., and was 71 years of age; that she caused to be delivered at the residence of Mrs. Piffard, the defendant, a certain amount of furniture and bric-a-brac which she should say was correctly set forth in her complaint; and that the articles were delivered about June, 1899, having previously been in her possession, and that she was the owner thereof on June 1, 1899, and had been for a long time prior thereto, having acquired them by purchase. She further testified that she had demanded the delivery of the property from the defendants in the fall of 1903, before the commencement of the action, but they had not delivered it to her; that it had not been taken from her by any warrant for the collection of a tax or fine or by virtue of any execution or attachment; that she had never sold or mortgaged the property; and "that at the time of the refusal of the defendants to deliver the property to her she had never parted with the ownership." It is this last statement that is relied upon by the respondents as opening the door to the testimony of Mrs. Piffard relative to the alleged oral agreement to devise the New York real estate to her. The argument is that this declaration of ownership by Mrs. McMillan negated any transaction whereby it was claimed she agreed to transfer to Mrs. Piffard her real estate in New York City, and hence that Mrs. Piffard could properly be allowed to give affirmative testimony tending to show that such a transaction took place. The flaw in this argument is obvious. It might be perfectly true that Mrs. McMillan had never parted with the ownership of the personal property described in the complaint or mortgaged it, and yet she might have made the very agreement pleaded by the defendants as the basis of the counterclaim. That agreement as stated in the answer of Mrs. Piffard did not provide for any change in the ownership of the articles which Mrs. McMillan was to place in the Piffard homestead until the death of Mrs. McMillan when, as the answer states, "the said articles, property and furniture should become the sole property of the defendant Pauline A. Piffard." All the interest in the property which the alleged agreement gave to Mrs. Piffard during Mrs. McMillan's life-

(208 Mass. 571)

time was the right to use it jointly with Mrs. McMillan. Under section 829 of the Code of Civil Procedure, Mrs. Piffard was prohibited from testifying concerning a personal transaction or communication between her and Mrs. McMillan, unless the testimony of Mrs. McMillan had been given in evidence concerning the same transaction or communication. Mrs. Piffard, however, was permitted to testify freely and fully, over the objection and exception of plaintiff's counsel expressly based on this section of the Code, to the alleged oral agreement by Mrs. McMillan substantially as pleaded in the counterclaim. In my opinion there is not one word in the extract read from Mrs. McMillan's deposition which refers or can fairly be held to refer in the remotest degree to any such transaction.

The case presents another serious question. It will have been observed that the counterclaim was sought to be enforced by the defendants during the lifetime of Mrs. McMillan. At the conclusion of the charge, counsel for the plaintiff asked the trial judge to instruct the jury "that the alleged agreement by which Mrs. McMillan was to bequeath the furniture and property she had to the Piffard homestead, and to devise an interest in her real property by will to the defendant Pauline A. Piffard, is not enforceable in this action." The court refused so to charge, and plaintiff's counsel duly excepted. This exception raises the question whether the anticipatory breach of a contract to devise property by will entitles the promisee to maintain an action to recover damages for such breach prior to the death of the promisor. In *Kelly v. Security Mutual Life Ins. Co.*, 186 N. Y. 16, 19, 78 N. E. 584, 585, Judge Vann said: "The rule that renunciation of a continuous executory contract by one party before the day of performance gives the other party the right to sue at once for damages is usually applied only to contracts of a special character, even in jurisdictions where it obtains at all," and he points out that in some states the principle is not recognized in any way, whatever, saying that in this state it seems to be limited to contracts to marry, contracts for personal services, and contracts for the manufacture or sale of goods. A majority of the court, however, do not think it necessary to pass upon this question now, but prefer to place our reversal upon the erroneous ruling on evidence which has been discussed.

On account of that error, the judgment must be reversed and a new trial granted, with costs to abide the event.

CULLEN, C. J., and GRAY, HAIGHT, VANN, CHASE, and COLLIN, JJ., concur.

Judgment reversed, etc.

IGO v. CITY OF CAMBRIDGE.

SAME v. L. D. WILLCUT SONS CO.

(Supreme Judicial Court of Massachusetts. Middlesex. May 18, 1911.)

1. MUNICIPAL CORPORATIONS (§ 799*)—"DEFECTIVE STREET"—QUESTION FOR JURY.

Where the water department of a city dug an excavation in a street four feet wide and four or five feet long to lay or repair a water pipe, without taking any precaution to warn travelers of any danger, the jury could find that the street was defective, under Rev. Laws, c. 51, § 1, requiring highways to be kept in repair.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1659; Dec. Dig. § 799.*]

For other definitions, see *Words and Phrases*, vol. 2, p. 1935.]

2. MUNICIPAL CORPORATIONS (§ 800*)—DEFECTIVE STREETS—PROXIMATE CAUSE OF INJURY.

Under Rev. Laws, c. 51, § 18, making cities liable for damages for defective ways, a city, digging a trench to lay or repair a water pipe in a street, and permitting an individual to erect or maintain an engine house nearly opposite the unguarded trench, thereby narrowing the roadway, is not liable for injuries to a traveler, caused by his team becoming frightened by steam escaping from the engine and causing them to plunge into the trench, unless his loss of control of the team was momentary only, and would have been regained if the wagon had not been plunged into the trench; but where the horses were beyond his control when the accident happened, and but for their fright the wagon would not have fallen into the trench, the city is not liable.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1666-1671; Dec. Dig. § 800.*]

3. MUNICIPAL CORPORATIONS (§ 809*)—DEFECTIVE STREETS—LIABILITY OF PERSON CAUSING—LICENSEE IN STREET.

A contractor to construct a building, who obtains a permit from a city to erect and maintain a temporary engine house for the engine in a part of a street not closed to public travel, has no exclusive use of the street; but it must, in the operation of the engine, use reasonable care not to frighten passing teams.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1688-1694; Dec. Dig. § 809.*]

4. MUNICIPAL CORPORATIONS (§ 821*)—DEFECTIVE STREETS—LIABILITY OF PERSON CAUSING—QUESTIONS FOR JURY.

Whether an engineer, in charge of an engine in a street, maintained there under a permit from the municipality, was guilty of negligence in starting the engine before he ascertained whether a team was passing in such proximity that the operation of the engine might imperil the safety of travelers, *held*, under the evidence, for the jury.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1745-1757; Dec. Dig. § 821.*]

5. MUNICIPAL CORPORATIONS (§ 821*)—STREETS—INJURIES TO TRAVELERS—CONTRIBUTORY NEGLIGENCE—QUESTIONS FOR JURY.

A contractor obtained a permit to maintain, in a city street, an engine for use in the construction of a building. The street was not closed to public travel. The city dug a trench to lay or repair a water pipe in the street nearly opposite the engine. A traveler's horses became frightened by escaping steam, causing

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

his wagon to be plunged into the trench. Prior to the accident the horses had not shown signs of fright. The remaining part of the street was sufficient in width for his team to pass safely. He had no reason to anticipate the act of the engineer in starting the engine without ascertaining whether a team was passing. *Held*, that the traveler was not, as a matter of law, guilty of negligence.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1745-1757; Dec. Dig. § 821.*]

Report from Supreme Judicial Court, Middlesex County; Jabez Fox, Judge.

Actions by Michael J. Igo against the City of Cambridge and against the L. D. Willcut Sons Company. The jury found for plaintiff against each defendant, and the case was reported to the Supreme Judicial Court. Judgment for first defendant entered, and judgment for plaintiff against second defendant.

These were two actions of tort brought by plaintiff to recover damages for injuries while a traveler on a public highway in the city of Cambridge, and were tried together before a jury. The water department of the city dug an excavation in the street to lay or repair a water pipe. The excavation was four feet wide and four or five feet long. There was no barrier, railing or flag placed around the excavation, and no one was stationed there to notify travelers of any danger. The L. D. Willcut Sons Company, under a license from the city, maintained in the street near the excavation an engine house and engine for use in the erection of a building.

Henry R. Skinner and Samuel A. Fuller, for plaintiff. Norman F. Hesseltine and Dickson & Knowles, for defendant L. D. Willcut Sons Co. James F. Aylward, for defendant City of Cambridge.

BRALEY, J. [1] If it became necessary for the water department of the defendant city either to lay or to repair a water pipe in the public way over which the plaintiff was driving when injured, the jury could find that to open a trench of the dimensions stated, without taking any precautions to warn travelers of the danger, rendered the street defective and unsafe. *Norwood v. Somerville*, 159 Mass. 105, 33 N. E. 1108; *Torphy v. Fall River*, 188 Mass. 313, 74 N. E. 465; *Rev. Laws*, c. 51, § 1. [2] To maintain the action, the plaintiff under *Rev. Laws*, c. 51, § 18, must prove that the defect was the sole cause of his injuries. The city had authorized the defendant company to erect a temporary engine house on a portion of the street nearly opposite the excavation, which narrowed the roadway, and as the plaintiff's team was passing the engineer started the engine. The escaping steam, apparently discharged into the street, so frightened the horses that they began to run, and

while uncontrollable the wagon plunged into the trench, when the plaintiff was thrown from his seat to the ground. If the loss of control could have been found to have been only momentary, and instantly would have been regained if the wagon had not come in contact with the defect, the plaintiff would have been entitled to recover, as the city does not contend that he was careless, or that it did not have notice of the defect. *Babson v. Rockport*, 101 Mass. 93. But it having been undisputed that the horses were beyond his control when the accident happened, and but for their fright the wagon would not have fallen into the trench, the verdict for this defendant was rightly ordered. *Titus v. Northbridge*, 97 Mass. 258, 93 Am. Dec. 91; *Horton v. Taunton*, 97 Mass. 266; *Fogg v. Nahant*, 98 Mass. 578; *Id.*, 106 Mass. 278; *Lynn Gas & Electric Light Co. v. Meriden Ins. Co.*, 158 Mass. 570, 586, 33 N. E. 690, 20 L. R. A. 297, 35 Am. St. Rep. 540.

[3] The defendant company, outside of the portion occupied by its engine house under the permit, had no exclusive use of the street, which had not been closed to public travel. If permitted for its own convenience and benefit to maintain and operate the engine, yet it knew, or could be found to have known, that the street was being concurrently used by the public. It is common knowledge that horses are likely to become restive, and perhaps unmanageable from fright, caused by the hissing sound of emitted steam, and the defendant was required in the operation of the engine to use reasonable care not to frighten passing teams. [4] It was for the jury, and not for the court to determine, if the defendant's engineer, who seems to have had convenient facilities for observation, acted with reasonable care in starting the engine before he ascertained whether a team was passing in such proximity that its operation might imperil the safety of travelers. If the jury found that the engineer was negligent, the defendant was responsible for the accident, which as we have said would not have happened if the horses had not been so frightened, as to pass from the plaintiff's control. *Butman v. Newton*, 179 Mass. 10, 60 N. E. 401, 88 Am. St. Rep. 349.

[5] The plaintiff, whose horses previously had not shown signs of fright, undoubtedly was aware that the trench was on his right, with the engine house on his left, but he also knew that the remaining portion of the street was sufficient in width for his team to pass safely, under visible conditions, and he had no reason to anticipate the defendant's negligence. It could not be ruled as matter of law that he acted carelessly. *Stoliker v. Boston*, 204 Mass. 522, 534, 90 N. E. 927, and cases cited. In accordance with the terms of the report, judgment for the defend-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

ant is to be entered on the verdict in the first case, but in the second case the plaintiff is to have judgment for the sum of \$1,500.

So ordered.

(84 Oh. St. 194)

HARRIS et al. v. WALLACE MFG. CO.

(Supreme Court of Ohio. April 18, 1911.)

(Syllabus by the Court.)

SPECIFIC PERFORMANCE (§ 105*)—LACHES.

Because of plaintiff's laches, a court of equity will refuse to decree the specific performance of a contract to assign future improvements in a patented invention where the defendant, believing the later to be a wholly independent invention, not embraced in the contract to assign, and, acting upon that belief and with the plaintiff's full knowledge, devotes four years to the expenditure of money and effort to perfect the latter device and to create a market for it.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 325-341; Dec. Dig. § 105.*]

Error to Circuit Court, Cuyahoga County.

Action by the Wallace Manufacturing Company against J. Harris and others. Judgment for plaintiff, and defendants bring error. Reversed.

On June 18, 1906, the Wallace Company brought suit in the court of common pleas against the plaintiffs in error for the specific performance of a contract whereby it was alleged that J. Harris had on June 1, 1901, agreed—imputing for brevity of statement to both parties the consequences of the acts and omissions of their respective predecessors in right and title—to transfer and assign to it all the improvements in gas burners which he might thereafter invent. This contract was an incident to and a part of an assignment to the Wallace Company of an invention covered by letters patent No. 681,052, which was for an acetylene illuminating burner issued August 20, 1901. The present suit is to enforce the claim of the Wallace Company that by that agreement it became entitled to an invention for a gas stove burner covered by letters patent No. 704,635, issued July 1, 1902, to J. Harris and by him assigned to the Harris Company. The later patent was in no sense an improvement upon the illuminating device embraced in the transaction of June 1, 1901, although it is now claimed by the Wallace Company that in view of the principles involved and the terms of the contract of June 1, 1901, the later invention is embraced in that contract. Upon securing the later patent Harris and Harris Company made arrangements to manufacture stove burners under it, and the company continued the manufacture of the stoves thereunder with expenditures of time and money to perfect the device and secure a market for it until the beginning of this

suit. During all this time, the Wallace Company and persons representing it and its predecessors in title and right had full knowledge of the business conducted under the later patent by the plaintiffs in error, witnessed it without objection and without assertion of the right which it now alleges. There is substantial evidence tending to prove that just prior to the purchase of the later invention by the J. Harris Company all interest in it was expressly disclaimed by the Wallace Company. The record presents other facts not material to the view we take of the case. The circuit court found for the Wallace Company and decreed the transfer of the later invention to it in accordance with the prayer of the petition.

Foster, Foster & Hartman and Messrs. Herrick & Hopkins, for plaintiffs in error. Parsons & Fitz Gerald, for defendant in error.

SHAUCK, J. (after stating the facts as above). Counsel for the plaintiffs in error present several propositions which in view of the reasons stated, and authorities cited, would be entitled to careful consideration before the judgment under review should be affirmed. It is urged that the J. Harris Company is the purchaser of the later invention for value, and without notice, either actual or constructive, of the rights which the Wallace Company now assert, or of the facts out of which it is claimed that those rights arise. The claim of the Wallace Company that there was constructive notice introduces conflicting views respecting the requirements of constructive notice of rights in property of this character.

It is further urged that, in view of the obvious differences in the devices manufactured under the two patents and the wide dissimilarity between the uses to which they are appropriate, the later should not be regarded as an improvement upon the former within the meaning of the contract of June 1, 1901. The claim of the Wallace Company of identity of principle introduces a subject upon which the expert witnesses are not in accord.

It is further urged that the contract upon which the original plaintiff counted is a contract in gross to assign all future inventions, that it is not incident to a contract of employment, and that it is not therefore such a contract as will be specifically enforced.

Respecting the evidence tending to show the Wallace Company's disclaimer of interest in the later invention at the time of the purchase of its rights thereunder by the Harris Company, counsel for the plaintiff in error admits the general rule that, when there is opportunity, the facts out of which an equitable estoppel is claimed to arise must be pleaded, and that in the present case they

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

are not pleaded by the Harris Company to which they would be availing but only by J. Harris to whom they would be unavailing because he has assigned his interest. But since in this state of the pleadings the evidence to establish an estoppel was admitted without objection, is it not entitled to be considered, notwithstanding the absence of such allegations as would make it competent?

Finally, counsel for the plaintiff in error urge that the delay of the Wallace Company and its predecessors during four years to assert the right, whose enforcement it now seeks, should, upon settled principles, deny it consideration in a court of equity. If this point is well taken, the others need not be examined further. To this point the oft-approved statement of Lord Camden in *Smith v. Clay*, 3 Bro. C. C. 640, is appropriate: "A court of equity which is never active in relief against conscience or public convenience has always refused its aid to stale demands where a party has slept upon his rights and acquiesced for a great length of time. Nothing can call forth this court into activity but conscience, good faith, and reasonable diligence." Indeed, the fundamental truth has found a condensed expression in the familiar maxim, equity aids the vigilant, not those who slumber on their rights. The restraining influence of that maxim may be seen throughout the administration of equitable relief. It regards the just and important considerations that rights should be asserted before lapse of time may have added to the difficulty and uncertainty in judicial inquiry, and before acquiescence may have encouraged the adverse party to so change his position with respect to the subject that the enforcement of the right would impose unnecessary loss or hardship upon him. Certainly the rule also regards circumstances, if any appear, reasonably justifying or excusing the delay, and it regards conduct of the defendant, if any there appears, by which he may have encouraged such delay. What delay will be fatal to the assertion of an equitable right is not always, perhaps not usually, to be determined from lapse of time alone. So potent with respect to that question may be the attendant circumstances that even the delay of four years in the pres-

ent case, it is conceivable, might find equitable excuse. In considering the circumstances attending the delay in the bringing of this suit, distinction between the parties and their predecessors in right may be ignored. Throughout the four years the J. Harris Company was openly operating under the second of the patents here brought into view, and expending time and money in perfecting and bringing to sale an acetylene heating device in which it created a monopoly. Of all they did in that regard the Wallace Company was fully aware from the beginning to the end of the four years. It is not necessary to impute to the Wallace Company a deliberately formed design to secure, without return, a market for the second device created by the labor and expenditure of the Harris Company. So widely different in appearance and application were the two devices, that it probably did not at any time in the four years occur to either party that the later patent was an improvement upon the former within the terms of the contract of June, 1901. The Harris Company was guilty of no fraud or concealment, and it cannot be held to a fuller comprehension of the rights of the Wallace Company than it had. Upon the assumption we are now making, that the later invention was an improvement on the former, it must in the equitable view be regarded as the misfortune of the plaintiff if it did not know the extent of its rights, as it must be regarded as its want of conscience if it knew of those rights and did not make an earlier assertion of them. The case presents no consideration which would justify a court in decreeing the specific performance of the contract after a delay of four years in the assertion of the alleged right. On the contrary, there are conspicuously present the unnecessary hardship to the defendant and the suggestion of insecure foundations of decrees which have given to laches a recognized place among equitable defenses.

Judgment reversed and judgment for plaintiffs in error.

Judgment reversed.

SPEAR, C. J., and DAVIS, JOHNSON, and DONAHUE, JJ., concur.

(176 Ind. 281)

RYAN v. STATE. (No. 21,906.)

(Supreme Court of Indiana. June 29, 1911.)

1. FINES (§ 18*)—FORFEITURES (§ 9*)—REMISSION—POWER OF GOVERNOR.

Const. art. 5, § 17, providing that the Governor shall have power to remit fines and forfeitures under such regulations as may be prescribed by law, only authorizes the remission of fines and forfeitures by the Governor in pursuance of provisions of law.

[Ed. Note.—For other cases, see Fines, Cent. Dig. § 19; Dec. Dig. § 18;* Forfeitures, Cent. Dig. § 11; Dec. Dig. § 9.*]

2. COSTS (§ 819*)—CRIMINAL LAW—"FINES AND FORFEITURES"—REMISSION.

The words "fines and forfeitures," as contained in Const. art. 5, § 17, authorizing the Governor to remit such fines and forfeitures as may be prescribed by law, do not include costs in a criminal case.

[Ed. Note.—For other cases, see Costs, Dec. Dig. § 319.*]

For other definitions, see Words and Phrases, vol. 3, pp. 2810-2813, 2893-2899; vol. 8, p. 7665.]

On motion by appellant to be relieved from costs on appeal. Denied.

For former opinion, see 92 N. E. 340.

B. F. Harness, B. C. Moon, and Warren R. Voorhis, for appellant. Arthur G. Manning, James Bingham, A. G. Cavins, E. M. White, and W. H. Thompson, for the State.

MONKS, J. Appellant has filed a motion to be relieved from the costs in this case on the ground that the Governor of the state, after the judgment of the court below had been affirmed, "remitted said fine and costs assessed in favor of the state of Indiana and the county of Howard in said cause, which remission is in full force and includes all costs taxed in this court."

[1] The Attorney General has appeared and contests said motion on the ground that section 17 of article 5 of the Constitution of this state, which provides that "he (the Governor) shall have power to remit fines and forfeitures under such regulations as may be prescribed by law," and section 7438, Burns 1908, only authorize the remission by the Governor of fines and forfeitures and not the remission of costs. It has been held in this state that the Governor can only remit fines and forfeitures in pursuance of the provisions of law. *State v. Dunning*, 9 Ind. 20, 23, 24.

[2] At the time when a part of the costs in a criminal case was taxed and adjudged on conviction against the defendant in favor of certain officers, it was uniformly held that the Governor had no power to remit the costs due such officers. *State v. Farley*, 8 Blackf. 229; *State v. Dunning*, 9 Ind. 20; *Griffin v. Wilcox*, 21 Ind. 370, 393; *Law v. Vierling*, 45 Ind. 25. Under existing laws, the costs which were formerly taxed and adjudged on conviction in favor of such officers

are now taxed and adjudged on conviction in favor of the county and state, and such officers are paid for their services by the state or county out of its own treasury. The costs are the property of the state or county the same as they were the property of the officers under former laws, and are intended to reimburse, in part at least, the state and county for the salaries paid to such officers. In *Anglea, etc., v. Commonwealth*, 10 Grat. (Va.) 696, it was held that a pardon did not release a convicted person from costs incurred in his prosecution due the state. The court said: "The fine is imposed for the purpose of punishment. * * * But with regard to costs it is different. They are exacted simply for the purpose of reimbursing to the public treasury the precise amount which the conduct of the defendant has rendered it necessary should be expended for the vindication of the public justice of the state and its violated laws. It is money paid, laid out, and expended for the purpose of repairing the consequences of the defendant's wrong. It is demanded of him for a good and sufficient consideration, and constitutes an item of debt from him to the commonwealth. * * * The right to enforce payment of them is a mere incident to the conviction, and thereby vested in the commonwealth for the sole purpose of replacing in the treasury the amount which the defendant himself has caused to be withdrawn from it. And it can make no substantial difference whether the money is going directly to the witnesses and others who are entitled to be paid for their services in the prosecution, for the commonwealth, having paid them, stands by substitution in their place." It is evident that the words "fines and forfeitures" used in the Constitution and the statute passed thereunder do not include costs, and that the Governor of this state has no power to remit the costs due the state or county in a criminal case.

The motion of appellant is therefore overruled.

(176 Ind. 226)

ROBINSON v. HORNER. (No. 21,904.)

(Supreme Court of Indiana. June 28, 1911.)

1. FRAUDS, STATUTE OF (§ 56*)—AGREEMENT FOR THE SALE OF LAND—PARTNERSHIP.

Where a written contract provided that plaintiff and defendant should purchase certain lands, each contributing a specified portion of the price, the title to be taken in the name of defendant, the land kept for 90 days and sold on certain terms, and the proceeds divided among plaintiff and defendant according to specified proportions, the contract was not within the statute of frauds as an agreement to purchase and sell lands, but created a partnership to purchase and sell lands on speculation, not within the statute.

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. §§ 135-139; Dec. Dig. § 56.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes 95 N.E.—36

2. CONTRACTS (§ 238*)—WRITTEN PARTNERSHIP CONTRACT—PAROL MODIFICATION.

Where plaintiff and defendant contracted in writing to speculate in lands as partners, the contract was subject to modification by a parol agreement based on a sufficient consideration.

[Ed. Note.—For other cases, see Contracts, Dec. Dig. § 238.*]

Appeal from Superior Court, Tippecanoe County; Henry V. Vinton, Judge.

Action by Alfred C. Robinson against Cornelius M. Horner. From a decree sustaining a demurrer to plaintiff's complaint, he appeals. Reversed and remanded, with directions.

Robert C. Pollard and Charles R. Pollard, for appellant. Edwin P. Hammond, William V. Stuart, and Dan W. Simms, for appellee.

JORDAN, C. J. Transferred from the Appellate Court under section 1405, Burns 1908.

This action was originally commenced by appellant against appellee in the White circuit court upon a complaint in three paragraphs. The venue was finally changed to the superior court of Tippecanoe county. The plaintiff withdrew the first paragraph of his complaint. A demurrer for want of facts was sustained to each of the remaining two paragraphs. By leave of court the plaintiff filed what is termed a second amended third paragraph of complaint. A demurrer for want of facts was also sustained to this third amended paragraph. Thereupon appellant refused to further plead, but elected to stand upon the second paragraph and the second amended third paragraph of his complaint. Judgment was then rendered against him on demurrer. From this judgment, he appeals, and assigns as errors the separate rulings of the court in sustaining the demurrer to the second paragraph of the complaint, and also in sustaining it to the second amended third paragraph of that pleading.

By the second paragraph of the complaint, the plaintiff, Alfred C. Robinson, alleged that he and the defendant, Cornelius M. Horner, on the 7th day of August, 1895, entered into a written agreement for the purchase of a certain tract of land in Jasper county, Ind.; that by the terms of said agreement plaintiff and defendant were each to pay a certain part of the purchase money of said real estate, and that the title of said land was to be taken in the name of the defendant, Horner. The latter was to sell the same and to pay to the plaintiff the portion of the purchase money which the plaintiff had invested in the land, and also to pay to him one-half of the profits arising out of the sale of the land. A copy of the written agreement upon which the complaint is based was filed with the complaint and made a part thereof, and is as follows:

"Memorandum of agreement, entered into

this 7th day of August, 1895, between Cornelius M. Horner, party of the first part, and Alfred C. Robinson, party of the second part, both of the town of Monon, in White county, in the state of Indiana, witnesseseth:

"That the parties hereto have this day entered into a partnership limited to ninety days, for the purchase of the following described real estate, to wit. [Here the real estate is described and set out, being a total of 570 acres situated in Jasper county, Indiana.] Which is this day purchased from the heirs at law of Zachariah Miller through William M. Miller, one of the heirs and from William M. Miller, attorney in fact for the other six Miller heirs, \$500 of the consideration has been paid by said party of the second part, and \$3,620 has been and is to be paid by the said party of the first part, and the title to said land has been placed in the said party of the first part, Cornelius M. Horner.

"And it is agreed, first, that the said party of the first part is to take charge of said farm, and is to receive and collect all of the rents for the crops growing on said farm, during the cropping season of 1895, that is, said rents and profits are to be collected by the said party of the second part, and turned over to said party of the first part as rapidly as collected, and he is to keep and retain possession of said proceeds until the sale of said lands, providing the same is sold within ninety days from this date, and when said lands are sold, if sold within ninety days, then the money arising from the rents and profits, and the sale of said land is to be divided as follows: The said party of the first part is to be paid the amount he has in said land, \$3,620.00, if he has paid out said amount (there being a small claim against said land for ditch assessments, amounting to \$39.92 which it may not be practicable for these parties to pay) and the said party of the second part will be entitled to receive his \$500.00 that he has in said land, and the balance of the money received for the land over and above the amount put in by said parties hereto, is to be equally divided and shall be regarded as profits, that is, all the money received from said land over and above ninety-one hundred and twenty (9,120) dollars and all the money collected for rents shall be regarded as profits in this enterprise, and shall be equally divided between the parties of this contract, but in the event that said land is not sold within ninety days during the existence of this contract, then the said party of the first is to have everything, and the said party of the second part is to forfeit his \$500.00 that he has now invested in this land. It is further agreed and understood between the parties of this contract, that the taxes of 1895, which are a lien on said land, are to be paid by the party of the second part. In the event that they

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

cannot be shoved off onto the party to whom said land is to be sold, if sold within ninety days, otherwise the said party of the second part is to pay the same, at any time required by the statute without any penalty or interest attaching.

"In witness whereof, the parties hereto have this day signed their names to this contract in duplicate. * * * August 7, 1895. C. M. Horner. A. C. Robinson."

The paragraph further alleges that in pursuance of said agreement the land was purchased on said date, and the deed was taken in the name of said Cornelius M. Horner; that the plaintiff paid \$500 of the consideration and the defendant Horner \$8,620; and that the plaintiff and defendant were put in possession of said land. It is further alleged that after the making of said written contract and the purchase of the land, and before the expiration of the 90 days, as stipulated in said contract, that by reason of the facts that the land was run down and the fences and buildings thereon were in such a condition as not to make said land merchantable property, and that it could not be put into a merchantable condition within a period of 90 days, the defendant called upon the plaintiff, and he and the plaintiff orally agreed that the time limit of 90 days should be extended, and that the price at which it was agreed said land should be sold should be changed from \$20 per acre to \$25 per acre, and that the plaintiff and defendant should continue as partners under said written agreement until such time as the land could be placed in repair and made merchantable property, and that the land should be held until \$25 per acre could be obtained therefor. In consideration of all which, the defendant Horner agreed to waive his right to have forfeited the \$500 as provided by the written agreement, in the event the land was not sold within the period of 90 days, as stipulated under the written agreement.

Plaintiff further alleged that he took possession of the land as agent for both; that the first year he collected the rents and accounted for the same to Horner; that after the first year Horner took possession of the land and collected the rents, each party endeavoring to sell the land, until on or about the 1st day of September, 1899, at which time the defendant, Horner, sold the land for the sum of \$21,375 and received the money, but refuses to pay to this plaintiff one-half of the profits thereof and the consideration due; that plaintiff has made demand on him for said payment and said defendant has refused, leaving the profits thereof, \$12,225, one-half of which is due the plaintiff, and the \$500 paid by plaintiff, making \$7,000, due this plaintiff, with interest thereon from the 1st day of September, 1899.

It is further charged that the defendant has received from the rents and profits of said land \$1,000, one-half of which belongs

to plaintiff. Wherefore it is alleged there is due plaintiff the sum of \$7,500, with interest thereon from the 1st day of September, 1899, in all the sum of \$10,000, all of which is due and unpaid, and for which the plaintiff demands judgment for the sum of \$10,000, and for all other proper relief.

In the second amended third paragraph of the complaint, it is alleged that on the 7th day of August, 1895, plaintiff and defendant entered into a written agreement of a limited partnership for the purpose of purchasing certain real estate described and set forth in said written contract, situated in Jasper county, state of Indiana. By the terms of said agreement, plaintiff and defendant were each to pay a portion of the purchase money therefor, and the title was to be taken in the name of the defendant, Horner; that he and the plaintiff were to sell the land, out of which the plaintiff was to have the purchase money by him invested, and one-half of the profits of said sale, and the defendant was to receive the amount paid by him in the purchase of said real estate, and after the payment of incidental expenses each party was to receive one-half of the profits derived from said real estate. The remainder of this paragraph is substantially the same as the second. A copy of the agreement filed with and made a part of the third amended paragraph is the same as that filed with and set out in the second paragraph of the complaint.

Counsel for appellee contend that neither the second paragraph of the complaint nor the second amended third paragraph of complaint states a cause of action, for the following reasons: (1) The contract set forth in each of the paragraphs is for the sale of lands, and to be enforceable it must have been in writing, as required by the statute of frauds. (2) Since the original contract must have been in writing, any modification thereof must also have been in writing. (3) Since the contract rests partly in writing and partly in parol, it must be treated as a parol contract. (4) The alleged parol modification of the original contract is void for uncertainty.

[1] The first point advanced by appellee evidently is not well taken, for the reason that each of the paragraphs in question discloses that the parties to this action entered into a written agreement constituting a partnership between them, to continue for the period of 90 days, for the purchase and sale for speculation of certain described lands. As shown, a copy of this written agreement, bearing date of August 7, 1895, is filed with and made a part of each of the paragraphs. This agreement, after describing the 570 acres of land situated in Jasper county, Ind., recites that this land "is this day purchased from the heirs at law of Zachariah Miller," etc., and that "\$500 of the consideration has been paid by said party of the second part (appellant herein) and \$8,620 has been and is to be paid by the said party of the first

part, and the title to said land has been placed in the said party of the first part, Cornelius M. Horner," appellee herein. The agreement then proceeds to stipulate in respect to the manner in which the parties shall deal with the land and in the collection of the rents and profits, until the sale of the land, which, as stipulated, is to be made within 90 days. The agreement contains provision for a settlement between the parties after the sale of the land has been made. Out of the proceeds of such sale, each party is to be paid the amount of money which he paid for the purchase of the land, and the remainder of the proceeds, together with the rents and profits collected, is to be regarded as profits, to be equally divided between the parties, etc. The written agreement contains a provision that in the event the land is not sold during the period of 90 days—the existence of the contract—that the party of the second part shall forfeit the \$500 paid by him.

The effect of this agreement was to constitute appellant and appellee partners in the purchase and sale of the land in question. Under the agreement each was to share equally in the net profits arising out of the particular transaction. The agreement did not contemplate a purchase of and transfer of any land from one of the parties to the other. Under the agreement neither was the vendor nor vendee of the other in respect to the land in controversy. Under the circumstances, if the agreement entered into by appellant and appellee to become partners to purchase and sell the land as a matter of speculation had been wholly in parol, it would not, as authorities affirm, have been affected by that provision of our statute of frauds which requires a contract for the sale of lands to be in writing.

That persons may form a partnership for the purchase and sale of real estate in like manner as they may when dealing in personal property is a well-settled rule. Such a partnership may be constituted, either for purchasing and selling lands generally, or it may be formed and limited to a single deal or transaction in real estate. It is true that there is some conflict in the authorities as to whether such a partnership can be formed under a parol agreement. That it can, without such agreement being affected by the statute of frauds, is well settled by the great weight of authorities. See *Holmes v. McCray*, 51 Ind. 358, 19 Am. Rep. 735, and authorities there cited; *Bates v. Babcock*, 95 Cal. 479, 30 Pac. 605, 16 L. R. A. 745, 29 Am. St. Rep. 133, and authorities cited; *Jones v. Davies*, 60 Kan. 309, 56 Pac. 484, 72 Am. St. Rep. 354; *Rice v. Parrott*, 76 Neb. 501, 107 N. W. 840, 111 N. W. 583; *Larkin v. Larkin*, 46 Misc. Rep. 179, 93 N. Y. Supp. 198; *Chester v. Dickerson*, 54 N. Y. 1, 13 Am. Rep. 550; *King v. Barnes*, 109 N. Y. 287, 16 N. E. 332; *Greenwood v. Marvin*, 111 N. Y. 423, 19 N. E. 228; *Meagher v.*

Reed, 14 Colo. 335, 24 Pac. 681, 9 L. R. A. 455; *Flower v. Barnekoff*, 20 Or. 132, 25 Pac. 370, 11 L. R. A. 149; *Richards v. Ginnell*, 63 Iowa, 44, 18 N. W. 668, 50 Am. Rep. 727; *Treat v. Hiles*, 68 Wis. 344, 32 N. W. 517, 60 Am. Rep. 858; *Morrill v. Colehour*, 82 Ill. 618; *Newell v. Cochran*, 41 Minn. 374, 43 N. W. 84; *Black v. Black*, 15 Ga. 449; *Welland v. Huber*, 8 Nev. 203; *Hunter v. Whitehead*, 42 Mo. 524.

[2] What we have said upon the question that a valid and enforceable contract forming a partnership for the purchase and sale of lands may be created by parol is in answer to the contention of appellee that the verbal modification of the original agreement, as pleaded and set forth in the paragraphs in question, should have been in writing, for the reason that the original agreement forming the partnership was required to be in writing, and therefore could not be modified or changed by a subsequent oral agreement. It is disclosed by each of the paragraphs of the complaint that the real estate which was the subject of the partnership was, for the reasons therein stated, not in a merchantable condition, and it could not be placed in such a condition within the short period of 90 days; that if sold within that time it would result in a loss and sacrifice. It appears that in order to prevent this it became necessary to extend the limit of the partnership. Consequently the parties made a verbal agreement, whereby they modified and changed the original written agreement. That they had a right upon sufficient consideration to change the written agreement by a subsequent one orally made is well settled by the authorities. *Billingsley v. Stratton*, 11 Ind. 396; *Toledo, St. Louis, etc., Ry. Co. v. Levy*, 127 Ind. 168, 28 N. E. 773, and authorities there cited; *Hastings v. Lovejoy*, 140 Mass. 261, 2 N. E. 776, 54 Am. Rep. 462. In the latter case the court said: "It is also now well settled that ordinarily a written contract, before breach, may be varied by a subsequent oral agreement, made on a sufficient consideration, as to the terms of it which are to be observed in the future. Such a subsequent oral agreement may enlarge the time of performance, or may vary any other terms of the contract, or may waive and discharge it altogether."

In the points and authorities set forth in appellee's brief, no point is made that there was not an adequate consideration for the verbal contract made by the parties, modifying and changing the written agreement; hence we give no opinion on that question. Appellee is shown by the pleading to have acted under the verbal modification of the original contract, and to have held the real estate thereunder until he was enabled to sell it for the cash sum of \$21,375, being \$37.50 per acre. Under the circumstances, therefore, when he is called to account by appellant, his partner, he is not in a posi-

tion to urge or contend that the oral modification of the original contract is void for uncertainty. The character of this action and the theory upon which the complaint proceeds is a suit in equity by one partner to compel his copartner to account. We think that each of the paragraphs to which a demurrer was sustained is sufficient in facts to put appellee upon his answer, and that the court therefore erred in sustaining the demurrer thereto.

Judgment reversed, and cause remanded to the lower court.

MYERS, J., did not participate in this decision.

(176 Ind. 214)

MESSEL v. STATE (No. 21,844.)

(Supreme Court of Indiana. June 27, 1911.)

1. CRIMINAL LAW (§ 1130*)—APPEAL—RECORD—MOTION FOR NEW TRIAL—BRIEFS.

Where defendant's motion for a new trial is not set out in his brief on appeal, which also did not contain any motion for peremptory instruction, nor the instructions given, offered, and refused, but only disconnected fragments of the testimony of only a part of the witnesses was set out, there was a violation of Supreme Court rule 22 (55 N. E. vi), which would authorize a refusal to consider rulings relating to evidence, the instructions, and motion for new trial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2965-2970; Dec. Dig. § 1130.*]

2. RAPE (§ 43*)—EVIDENCE—CORPUS DELICTI—CONDITION OF PROSECUTRIX.

In a prosecution for rape, evidence of physicians who had examined prosecutrix, detailing her condition with relation to the crime charged as they found it to be, and giving their opinion that such condition was due to sexual intercourse, was admissible to establish the corpus delicti, and was not objectionable because it did not connect defendant with prosecutrix's condition.

[Ed. Note.—For other cases, see Rape, Cent. Dig. § 65; Dec. Dig. § 43.*]

3. RAPE (§ 48*)—EVIDENCE—COMPLAINT OF CRIME.

Where prosecutrix died shortly after defendant's arrest, evidence that she made complaint, but not what she said, was admissible.

[Ed. Note.—For other cases, see Rape, Cent. Dig. §§ 67-69; Dec. Dig. § 48.*]

4. CRIMINAL LAW (§ 563*)—EVIDENCE—CORPUS DELICTI.

The corpus delicti of an offense may be proved by circumstantial evidence.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1269; Dec. Dig. § 563.*]

5. CRIMINAL LAW (§ 535*)—EXTRAJUDICIAL CONFESSION.

An extrajudicial confession of accused, while not sufficient to prove the corpus delicti, may be considered with independent corroborative facts, not of themselves sufficient to establish the corpus delicti beyond a reasonable doubt to prove that the offense was committed.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1225, 1226; Dec. Dig. § 535.*]

6. CRIMINAL LAW (§ 535*)—CORPUS DELICTI—CONFESSION.

Where, in a prosecution for rape, the corpus delicti has been established by independent evidence, the connection with it of the person charged as the perpetrator of the crime may be established by his voluntary extrajudicial confession alone.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1225, 1226; Dec. Dig. § 535.*]

7. RAPE (§ 51*)—EVIDENCE—VERDICT.

In a prosecution for rape, evidence held to justify conviction.

[Ed. Note.—For other cases, see Rape, Cent. Dig. §§ 71-77; Dec. Dig. § 51.*]

8. CRIMINAL LAW (§ 1090*)—APPEAL AND ERROR—INSTRUCTIONS—REVIEW.

No question based on instructions given or refused can be considered on appeal, where the instructions given or refused, and the exceptions arising thereon, have not been made a part of the record by bill of exceptions.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2818; Dec. Dig. § 1090.*]

Appeal from Circuit Court, Vanderburgh County; C. A. De Bruler, Judge.

Clark Messel was convicted of rape and he appeals. Affirmed.

Ernest J. Crenshaw, for appellant. Thomas M. Honan, Thos. N. Branaman, Edwin Corr, and Jas. E. McCullough, for the State.

COX, J. Appellant was convicted by a jury of the crime of rape, his 11 year old daughter being the victim, and was adjudged to suffer imprisonment for life as his punishment as provided by the Criminal Code (Burns 1908, § 2250).

From the judgment of conviction this appeal is prosecuted on one assignment of error—that the trial court erred in overruling the motion for a new trial. Under this assignment of error, it is stated in the brief of appellant that the errors relied on for reversal are (1) in the admission of certain designated testimony over appellant's objection; (2) in the court's refusal to strike out that testimony; (3) in overruling a motion claimed to have been made by appellant at the close of the testimony for the state to instruct the jury to find for the appellant; (4) that the court erred in failing to instruct the jury as to the different degrees of, or offenses included in, the crime as charged in the indictment, and in instructing the jury as to the crime of rape only.

[1] A rigid adherence to the fifth clause of rule 22 (55 N. E. vi) of the rules of this court would prevent a consideration of any of these questions, for there is a failure to make appellant's brief comply with the requirements of that part of the rule. The motion for a new trial is not set out therein or any part of it, nor is any motion for such peremptory instructions, nor are any instructions either given or offered and refused, and disconnected fragments of the tes-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

timony of a part only of the witnesses who testified in the case is set out. But, as the offense of appellant is of the gravest and most atrocious character, his punishment fixed by law and the sentence of the court severe, as he prosecutes his appeal as a poor person, as his counsel is manifestly of limited experience, and as the case must be affirmed in any event, we therefore give consideration to the questions sought to be presented. But in doing this in this instance we do not want to be understood as intending to weaken the force of the rule named, which was promulgated for a salutary purpose, or in any sense approving or excusing a neglect to comply with it.

[2] Two practicing physicians and surgeons, one the police surgeon of the city of Evansville and the other coroner of Vanderburgh county, were called as witnesses for the state, and were permitted to testify, over the objection of appellant, that they had made a physical examination of the child victim of the alleged crime, to detail the condition of her person with relation to such crime as they found it to be, and to give their opinions that such condition was due to sexual connection. The reception of this testimony and refusal to strike it out form the basis of appellant's first and second presentation of error as above stated. That the court did not so err is clear and firmly settled. *Polson v. State*, 137 Ind. 519, 35 N. E. 907; *People v. Benc*, 130 Cal. 159, 62 Pac. 404; *People v. Figueroa*, 134 Cal. 159, 66 Pac. 202; *State v. King*, 117 Iowa, 484, 91 N. W. 768; *Gifford v. People*, 148 Ill. 173, 35 N. E. 754; *State v. Teipner*, 36 Minn. 535, 32 N. W. 678; *State v. Scott*, 172 Mo. 536, 72 S. W. 897; *Pless v. State*, 23 Tex. App. 73, 3 S. W. 576; *Lawson*, Expert and Opinion Ev. (2d Ed.) p. 123; *Underhill*, *Crim. Ev.* (2d Ed.) § 412; 33 Cyc. pp. 1470, 1475.

The objection is made that the testimony did not connect the appellant with the condition of the child as a cause. This was not necessary. Two things were necessary to be proven beyond a reasonable doubt it is true before appellant could be convicted, namely, the corpus delicti—the fact that the crime of rape had been committed on the child—and the agency of appellant in the commission of that crime. The evidence under consideration was competent and material evidence in proving the first. With the fact proven beyond a reasonable doubt that she had been sexually used, and also that she was under 12 years of age, the corpus delicti would be proven, for, being unable to give consent, sexual connection with her would be within the ban of the law. It must be obvious that proof of the corpus delicti may be made without first connecting the person charged. *People v. Tarbox*, 115 Cal. 57, 46 Pac. 896; *People v. Darr*, 3 Cal. App. 50, 84 Pac. 457.

That there was ample evidence to submit the question of appellant's guilt to the jury

and indeed to fully sustain their verdict seems to us to be entirely clear. At the trial the child did not testify. The evidence shows that she died three days after the appellant's arrest, but from what cause it does not appear. It shows that she was then but two weeks more than 11 years old. The two physicians before referred to testified in behalf of the state to the examination which they had made on the person of the child, and stated that they found the outer parts of her sexual organs enlarged, the hymenial membrane totally destroyed, and such a condition present as in their opinion could only have been caused by sexual connection. An officer of the local board of children's guardians testified the child had made complaint to him of appellant's conduct towards her. This officer also testified that appellant had admitted to him that he had subjected the child to intercourse with him, and gave the confession in detail. He further testified that, when appellant was arraigned in the city court for preliminary examination, he had pleaded guilty. Like testimony of admissions of guilt and of appellant pleading guilty in the city court was given in behalf of the state by two other witnesses, members of the detective force of the city of Evansville.

[3] It was competent to prove the fact that the victim of the alleged crime made complaint, although she was not a witness. This is the rule where the victim is dead or is incompetent to testify by reason of infancy or imbecility, but it does not permit of course proof of what she said. *People v. Figueroa*, 134 Cal. 159, 66 Pac. 202; 33 Cyc. 1468.

[4] The corpus delicti may be proved by circumstantial evidence the same as any other material fact necessary to be proved. *Flower v. United States*, 118 Fed. 241, 247, 53 C. C. A. 271; *Dimmick v. United States*, 135 Fed. 257, 263, 70 C. C. A. 141; *Isaacs v. United States*, 159 U. S. 487, 490, 16 Sup. Ct. 51, 40 L. Ed. 229; *Stocking v. State*, 7 Ind. 326, 330; *McCulloch v. State*, 48 Ind. 109, 112, 113; *Seifert v. State*, 160 Ind. 464, 470, 67 N. E. 100, 98 Am. St. Rep. 340; *Griffiths v. State*, 163 Ind. 555, 558, 559, 72 N. E. 563; 12 Cyc. 488; 6 Am. & Eng. Ency. of Law (2d Ed.) p. 582, and authorities there cited; 7 Am. & Eng. Ency. of Law (2d Ed.) pp. 862, 863; *Gillett*, *Crim. Law* (2d Ed.) § 873.

[5] The extrajudicial confession of the defendant alone is not sufficient to prove the corpus delicti; but such confession may be considered with independent corroborative facts, not of themselves sufficient to prove the corpus delicti beyond a reasonable doubt, to prove that the offense was committed. 6 Am. & Eng. Ency. of Law (2d Ed.) pp. 569, 582; 12 Cyc. 484; *State v. Guild*, 10 N. J. Law, 163, 18 Am. Dec. 404; *Winslow v. State*, 76 Ala. 42, 47; *Sullivan v. State*, 49 Tex. Cr. R. 633, 51 S. W. 375; *Ryan v.*

State, 100 Ala. 94, 95, 14 South. 868; People v. Badgley, 16 Wend. (N. Y.) 53, 59; State v. Hall, 31 W. Va. 505, 509, 7 S. E. 422; Gray v. Com., 101 Pa. 380, 386, 47 Am. Rep. 733; Com. v. Tarr, 4 Allen (Mass.) 315, 316; Blackburn v. State, 23 Ohio St. 146, 164; State v. Jacobs, 21 R. I. 259, 261, 43 Atl. 31; People v. Tarbox, 115 Cal. 57, 62, 46 Pac. 896; Griffiths v. State, 163 Ind. 555, 559, 72 N. E. 563. Here, then, we have as the state's case not only competent independent evidence to prove the corpus delicti, but the support added to it of appellant's extrajudicial confession and his admission of guilt when arraigned in court for preliminary examination.

[6] In a prosecution for rape, such as this, when the corpus delicti has been established by independent evidence, the connection with it of the person charged as the perpetrator of the offense may be established by a voluntary extrajudicial confession alone, and surely by a confession made in open court by an uninfluenced plea of guilty. Indeed, the rule seems to be that upon such a confession as the latter both the corpus delicti and the instrumentality of the person charged may rest. State v. Icenbice, 126 Iowa, 16, 101 N. W. 273; People v. Tarr, supra; Griffiths v. State, 163 Ind. 555, 559, 72 N. E. 563; State v. Guild, 10 N. J. Law, 163, 18 Am. Dec. 404; 12 Cyc. 483; 33 Cyc. 1487; 6 Am. & Eng. Ency. of Law (2d Ed.) pp. 582, 586.

[7] To meet the above, the most salient facts in evidence for the state, the appellant presented two physicians who had made no examination of the child against whom the offense was charged to have been committed, who testified as experts that her condition might have been brought about by other causes, but admitted that it was entirely consistent with one or more acts of intercourse with appellant. This testimony and that of the appellant, whose testimony aside from a rather unsatisfactory denial of both the charge and his confession did not meet that of the state, constituted the substance of the defense. With this evidence before them with the support of minor parts and phases of it which we have not felt necessary to detail, we cannot feel otherwise than that a different verdict by the jury would have been a miscarriage of justice.

[8] No question based on the instructions given or not given can be considered, for instructions given or refused and the exceptions arising thereon must be presented to this court for review by making them a part of the record by bill of exceptions, which has not been done in this case. Donovan v. State (1907) 170 Ind. 123, 83 N. E. 744; Stucker v. State (1903) 171 Ind. 441, 84 N. E. 974; Carr v. State (1911) 93 N. E. 1071.

Finding no error in the record, the judgment is affirmed.

(176 Ind. 221)

MACBETH-EVANS GLASS CO. v. JONES. (No. 21,878.)

(Supreme Court of Indiana. June 27, 1911.)

1. APPEAL AND ERROR (§ 1078*)—WAIVER OF ERROR—BRIEFS.

An assignment of error not discussed in appellant's brief is waived.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4256-4261; Dec. Dig. § 1078.*]

2. CONSTITUTIONAL LAW (§ 205*)—WAGES—PAYMENT—REGULATION—ATTORNEY'S FEES—MASTER'S LIABILITY.

Burns' Ann. St. 1908, §§ 7996, 7999, requiring employers engaged in manufacturing enumerated articles of merchandise and in mining to pay their employes at least once every two weeks, and authorizing the assessment of a reasonable attorney's fee as a part of the damages in an action by an employe to recover wages due him, where the employer fails for ten days after demand to pay the wages, was not unconstitutional as violating Bill of Rights, § 23, prohibiting the granting to any citizen or class of citizens privileges not granted equally to all citizens on the same terms.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 591-624; Dec. Dig. § 205.*]

3. APPEAL AND ERROR (§ 762*)—BRIEFS—AMENDMENT.

Where appellant failed to incorporate in his brief a condensed recital of the evidence in narrative form as required by the rules of the Supreme Court, so as to permit review thereof, such defect could not be cured by incorporating the same in appellant's reply brief; since appellee would have no right to reply thereto except on obtaining permission.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3097; Dec. Dig. § 762.*]

4. MASTER AND SERVANT (§ 80*)—ACTION FOR WAGES.

In an action by a servant to recover wages withheld under the provisions of a contract of employment, the burden held to be on the employer to show that plaintiff voluntarily left his employment, so as to bring him within the operation of a provision of the contract forfeiting part of the employe's wages in such case.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 80.*]

Appeal from Circuit Court, Grant County; H. J. Paulus, Judge.

Action by Albert Jones against the Macbeth-Evans Glass Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Transferred from Appellate Court under Burns' Ann. St. 1908, § 1405; Acts 1901, p. 590.

B. H. Campbell, E. R. Call, Joseph F. Cowern, and Frederick E. Matson, for appellant. Grant A. Deuter, Harley F. Hardin, and Marshall Williams, for appellee.

MORRIS, J. This was an action by appellee against appellant. The complaint was in two paragraphs.

The first paragraph alleges that defendant is a corporation engaged in manufacturing glassware as an article of merchandise; that in 1906, at defendant's request, plaintiff be-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes

gan working for defendant as an iron mold blower in the manufacture of glass, and continued in such employment until June, 1907; that defendant agreed to pay plaintiff the reasonable value of his services, which are alleged to be \$700; that there remains due and unpaid on the account, \$100; that in June, 1907, plaintiff demanded payment of the account, which was refused. It is further alleged that in bringing the action plaintiff was compelled to employ an attorney and he demands judgment for the balance due him on account and the value of his attorney's services. The second paragraph alleges: That plaintiff entered into a written contract with defendant in October, 1906, whereby plaintiff promised to work for defendant as an iron mold blower at its factory at Marion, and defendant promised to keep him in its employ for five years. Pursuant to the terms of the written contract, plaintiff worked for defendant until June, 1907, when defendant, without any fault on the part of plaintiff, discharged him. That during the time of his employment he earned, under the terms of the contract, \$700, of which sum \$70 is due and unpaid. That demand therefor was made and refused in June, 1907. That plaintiff was compelled to employ an attorney to bring this action, and judgment is demanded for the balance of the account and the value of plaintiff's attorneys fees. The complaint was filed August 20, 1907. The written contract was not filed with the second paragraph of the complaint, because, as alleged, it was in defendant's possession, who refused to permit plaintiff to take, copy, or see it. The defendant filed an answer in three paragraphs, as follows: First, general denial; second, payment. The third alleges a written contract of employment for five years, a copy of which is filed with the answer, and by one of the terms of which 10 per cent. of the wages earned was to be retained by defendant as a guaranty for the faithful performance of the contract, and, for any breach of which the money so retained was to be paid to the company as liquidated damages for the breach. It is further alleged that plaintiff worked for a period under the terms of the contract, and afterwards voluntarily, without the consent of defendant, quit its service. That the money sued for in the complaint is the 10 per cent. retained, and by reason of plaintiff's breach of the contract in voluntarily quitting defendant's service he ought not to recover. There was a trial by the court, and finding and judgment for plaintiff for the amount of the account sued on and the further sum of \$25 for attorney's fees.

Appellant filed a motion for a new trial, assigning four reasons therefor, viz.: The decision is contrary to law, not sustained by sufficient evidence. The assessment of the amount of recovery is erroneous being too large. The court erred in admitting in evi-

dence testimony of the value of plaintiff's attorneys fees.

[1] Appellant in this court assigns two errors, viz., overruling its motion for a new trial, and that the complaint does not state facts sufficient to constitute a cause of action. The latter is waived by failure to discuss it in appellant's brief.

[2] The lower court made an allowance for plaintiff's attorneys fees under section 7996 and section 7999, Burns' Stat. 1908 (Acts 1887, p. 13). Appellant contends that in any view of this matter such action was unwarranted, because this statutory provision violates clause 23 of article 1 of our Constitution. The contrary was held by this court in the case of Macbeth-Evans Glass Company v. Amama, 95 N. E. 228, decided at this term. At the trial of this cause, it was admitted that appellee earned during his employment \$714.35, and that the amount paid him was \$643.45. The judgment of the lower court was for the difference between the above amounts and for attorney's fees. The appellant contends that the court erred in overruling the motion for a new trial because the evidence shows that plaintiff was working under the written contract, and that he voluntarily quit defendant's service, and thereby forfeited any right to the 10 per cent. retained wages. Appellee meets this contention with the proposition that the court is not bound to consider any point requiring an examination of the evidence, because appellant in its brief wholly failed to incorporate therein a condensed recital of the evidence in narrative form. The only attempt to comply with the fifth clause of rule 22 of this court in the preparation of appellant's brief was a statement of counsel's conclusion as to the facts established. It does not state the name of any witness, whether the evidence was written or oral, or whether given for plaintiff or defendant. Appellant's brief was filed December 4, 1908. Appellee's brief was filed December 31, 1908. On January 22, 1909, appellant filed a petition for leave to amend his brief so as to comply with the rules of the court. If this petition was ever presented to the court, or any action taken on it, the record does not disclose the fact. On March 19, 1909, appellant voluntarily withdrew his petition for leave to amend his brief. On February 8, 1909, appellant filed its reply brief, which supplied the defects in the original. The only part of the evidence which is set out in appellee's brief is a part of appellee's testimony, as follows: "I entered the employ of the Macbeth-Evans Glass Company under the contract some time in July, 1906, and remained in its employ until the latter part of May, 1907. The occasion of my leaving the employ of the company at that time was that Michael O'Connor discharged me. He was foreman over the men, and had authority to discharge employes of the factory."

No doubt, on proper showing, the Appellate Court would have granted appellant's petition to amend the brief.

[3] If this had been done, appellee would have had an opportunity to answer the matters set out by the amendment. Appellant chose to insert the new matter in his reply brief. Under the rules, appellee had no right to file another brief. The Appellate Court might, on application, have granted appellee the right under such circumstances to file an additional brief. But we do not believe that such a burden should be placed on an appellee. It is not necessary here to set out the reasons for the adoption of the rules of the Supreme and Appellate Courts, nor the construction placed thereon by the courts. That has been often done before. *Gates v. Baltimore, etc., R. Co.*, 154 Ind. 338, 56 N. E. 722; *Kelly v. Bell*, 172 Ind. 590, 88 N. E. 58; *Ireland v. Huffman*, 172 Ind. 278, 88 N. E. 508; *Albaugh v. Lynas* (App. 1911) 93 N. E. 678, and cases cited. We therefore conclude that appellee is correct in his claim, and that it is not the duty of this court to examine the evidence to determine whether or not this cause should be reversed. However, the record is very brief, and we have examined it.

[4] Two witnesses only testified in behalf of plaintiff—he and Hardy Harden. The latter gave evidence merely as to the value of attorney's fees. No witness testified on behalf of defendant. It merely offered in evidence the written contract on which it based its defense in the third paragraph of answer. This was admitted in evidence, and thereupon the plaintiff rested. The burden was on appellant to establish the fact that appellee voluntarily quit its service. The lower court found for the plaintiff on this issue. While appellee's testimony is in some respects contradictory, this court is not warranted in holding that the lower court erred in its finding for plaintiff in regard to the terminating of the plaintiff's service.

Appellee maintains that the written contract did not bind appellee to remain in appellant's employ for any definite period. In view of the conclusion reached, it is unnecessary for the court to construe the contract and consider the question of validity of the forfeiture clause therein, and no opinion on that question is expressed.

There is no reversible error in the record. Judgment affirmed.

(176 Ind. 151)

DANIELS v. BRUCE et al. (No. 21,845.)
(Supreme Court of Indiana. June 21, 1911.)

1. VENUE (§ 36*)—SALE OF LAND.

Under Decedents' Estates Act 1881 (Burns' Ann. St. 1908, § 2852), § 111, providing for petitions to the circuit court for sale of decedents' real estate to pay debts when the personal estate is insufficient, a change of venue may be taken from a county in which an estate is pending for settlement, where proper and timely application is made.

[Ed. Note.—For other cases, see Venue, Dec. Dig. § 36.*]

2. VENUE (§ 84*)—SALE OF LAND.

Even if a change of venue were improper in a proceeding by an administratrix to sell real estate to pay debts, having consented to a change to a court which had jurisdiction of the subject-matter, she cannot complain after an adverse judgment of want of authority for the change.

[Ed. Note.—For other cases, see Venue, Dec. Dig. § 84.*]

3. COURTS (§§ 24, 37*)—JURISDICTION—WAIVER.

Jurisdiction of the subject-matter of a suit cannot be waived by failure to object, nor conferred by consent on a court that does not possess it.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 76-78, 147-151; Dec. Dig. §§ 24, 37.*]

4. COURTS (§ 17*)—"JURISDICTION OF SUBJECT-MATTER."

"Jurisdiction of the subject-matter" is the power to hear and determine cases of the general class to which particular proceedings belong.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 17.*]

For other definitions, see Words and Phrases, vol. 4, pp. 3886, 3887.]

5. COURTS (§§ 24, 37*)—JURISDICTION OF SUBJECT-MATTER.

Notwithstanding defective proceedings, jurisdiction may be given over subject-matter of which a court has jurisdiction by consent and agreement, or waiver through failure to make timely and specific objection.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 76-78, 147-151; Dec. Dig. §§ 24, 37.*]

6. EXECUTORS AND ADMINISTRATORS (§ 343*)—PROCEEDINGS TO SELL REAL ESTATE—DISMISSAL.

Under Decedents' Estates Act 1881 (Burns' Ann. St. 1908, §§ 2852, 2859), §§ 111, 117, requiring an administrator to file a petition to sell real estate to pay decedent's debts when the personal estate is insufficient, it was not error to refuse to permit an administratrix to dismiss such a proceeding while the court was announcing an adverse finding.

[Ed. Note.—For other cases, see Executors and Administrators, Dec. Dig. § 343.*]

7. EXECUTORS AND ADMINISTRATORS (§ 342*)—ALLOWANCES—CONCLUSIVENESS.

Allowances by a circuit court to an executor and his attorney on the executor's resignation are reviewable in a proceeding by the administrator de bonis non to sell real estate to pay debts, especially when minor heirs and purchasers from other heirs are parties, and their lands are to be subjected to sale to pay such allowances.

[Ed. Note.—For other cases, see Executors and Administrators, Dec. Dig. § 342.*]

8. APPEAL AND ERROR (§ 1078*) — BRIEFS — SUFFICIENCY.

An objection to a finding as being contrary to law is waived, where no points or authorities are stated or cited in the brief.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4256-4261; Dec. Dig. § 1078.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes

Appeal from Circuit Court, Gibson County; O. M. Welborn, Judge.

Proceeding by Kate B. Daniels, administratrix against Abby D. Bruce and others. From an interlocutory order for the sale of real estate to pay debts, the administratrix appeals individually. Affirmed.

See, also, 93 N. E. 675.

Walker & Walker, for appellant. John W. Brady, Lucius C. Embree, Morton C. Embree, and Spencer, Brill & Hatfield, for appellees.

COX, J. This is an appeal from an interlocutory order for the sale of real estate, made on the petition of appellant as administratrix de bonis non with the will annexed of the estate of William B. Daniels, her deceased husband, to make assets to pay the debts of his estate.

The proceeding was instituted by James Lauer, executor of the deceased, in the Vanderburgh circuit court, in which court the settlement of the estate was pending and which had issued to him his letters of executorship. A change of venue was granted on the motion and affidavit of one of the appellees, and the proceeding sent to the Posey circuit court. Upon the written agreement of the parties, it was from there sent to the Vanderburgh superior court. This latter court not having jurisdiction of the subject-matter, the proceeding was on motion transferred to the Vanderburgh circuit court. While pending in that court, Lauer resigned, and appellant was appointed administratrix de bonis non with the will annexed and substituted as the petitioner. Lauer had obtained a decree of sale, and this she tried to make sale under, and failed for want of service on some heirs and other necessary parties, being restrained from proceeding under that order. She then filed a petition and made such persons parties to the proceeding. And again, on motion and affidavit of another of the appellees, the venue was changed to the Posey circuit court. Subsequent to this the appellant filed in the Posey circuit court another petition, designated an amended petition, and summons was issued to each of the parties defendant thereon on issues formed, and matter proceeded to trial on such petition in that court. Before the completion of the trial, that term of the Posey circuit court ended, and by consent of the parties the case was taken to the Gibson circuit court, and the trial was there finished before the same judge who was presiding judge of both the Posey and Gibson circuit courts, and the order made from which this appeal is prosecuted.

[1] By proper assignments of error, it is first contended by appellant that the Gibson circuit court was without jurisdiction to hear and determine the proceeding. It is urged as the basis of this contention that, as that section of the decedents' act authorizing the filing of a petition by an administrator for the sale of real estate of the decedent re-

quires such petition to be filed in the court in which the estate is pending for settlement, and as no provision is made in that act for a change of venue, the court having original jurisdiction has also exclusive jurisdiction of such a proceeding. And it is insisted that no change of venue in such a proceeding can be taken to, or the jurisdiction conferred upon, a circuit court of another county by agreement or other waiver.

The section of the statute authorizing a petition to sell real estate, in section 111 of the decedents' estates act of 1881, being section 2852, Burns' 1908, provides as follows: "Whenever an executor or administrator shall discover that the personal estate of a decedent is insufficient to satisfy the liabilities thereof, he shall, without delay, file his petition in the circuit court issuing his letters, for the sale of the real estate of the deceased, to make assets for the payment of such liabilities."

The law governing the same matter, which had long been in force prior to the enactment of the above section, did not specifically provide where the original jurisdiction was lodged, but provided generally that the court having jurisdiction should order the sale. 2 Gavin & Hord, p. 506. There arose some confusion under that statute whether the petition should be filed in the first instance in the court of the county where the land was, or in that in which the estate was pending for settlement. *Ex parte Shockley*, Guardian (1860) 14 Ind. 413; *Williamson v. Miles* (1865) 25 Ind. 55; *Jones v. Levi* (1880) 72 Ind. 586.

The first case in this court involving the jurisdiction of such a proceeding under the act of 1881, supra, was *Vail, Executor, v. Rinehart* (1885) 105 Ind. 6, 4 N. E. 218, in which Howk, J., writing the opinion of the court, said: "Under this section of the statute, it is clear that the circuit court, which issues the letters testamentary or letters of administration upon the estates of a decedent, has exclusive original jurisdiction of a petition for the sale of his decedent's real estate, in whatever county the same may be situate, to make assets for the payment of the liabilities of such decedent's estate." It is to be noted that the learned judge, adhering to his well-known care in using words to convey an exact meaning, used the words "exclusive original jurisdiction." We think he used the word "original" as limiting the exclusiveness of the jurisdiction in the institution of the proceeding, and at least leaving open the question whether it might not be subsequently submitted to the jurisdiction of the court of another county having jurisdiction of the general subject-matter of decedents' estates, by change of venue. The question then arises, Is there authority for granting a change of venue in such a proceeding from the county where the exclusive original jurisdiction is lodged?

The identical question seems never to have

been decided by this court. That the practice of granting such change of venue has been more or less general throughout the state has become known to this court through the examination of the records of appealed cases. The latest instance of this practice is *Ditton v. Hart, Administratrix*, 95 N. E. 119, decided this term. Doubtless many land titles throughout the state rest on sales made on orders of the court to which the venue had been changed. The decedents' estates act by its terms neither grants nor withholds the right to a change of venue from the county or a change of judge; it is silent as to this as it is in many other matters of practice necessary in carrying out all of the objects of the statute, except as it is provided in section 121 (*Burns' 1908*, § 2863) that the hearing in certain particulars shall be conducted "as in other cases."

It has been held that a drainage proceeding, which is quite as much a special statutory proceeding and *sui juri* as a proceeding by an administrator to sell real estate, is so far a civil action that the act providing for a change of venue (*Burns' 1908*, § 422) is applicable to it. *Bass v. Elliott* (1885) 105 Ind. 517, 5 N. E. 663. And such act is held applicable to a proceeding for the appointment of a guardian for a person of unsound mind. *Berry v. Berry* (1896) 147 Ind. 176, 46 N. E. 470. And in proceedings to contest an election. *Weakley v. Wolf* (1897) 148 Ind. 208, 47 N. E. 466. And in proceedings supplementary to execution. *Burkert v. Bowen* (1885) 104 Ind. 184, 3 N. E. 768. And in a proceeding to disbar an attorney. *In re Darrow* (1910) 92 N. E. 369. See, also, *Joseph v. Schnepfer* (1890), 1 Ind. App. 154, 27 N. E. 305; *McConahey's Estate v. Foster* (1898) 21 Ind. App. 416, 52 N. E. 619; *Goodbub v. Hornung* (1890) 127 Ind. 181, 26 N. E. 770.

Furthermore, it is settled that a claim against a decedent's estate is a civil action within the meaning of the above statute relating to a change of venue (*Lester v. Lester, Executor* [1880] 70 Ind. 201), and that the same statute is applicable to a proceeding by an administrator to sell real estate. *Scherer v. Ingerman, Administrator* (1886) 110 Ind. 428, 11 N. E. 8, 12 N. E. 304. In the latter case it was said: "In many regards the decedents' act does not provide a complete mode of procedure. That is so in relation to the proceedings by which the administrator may reach real estate for the payment of debts. Where a complete mode of procedure is not thus provided, we must look to the Civil Code, and apply the rules of pleading and practice provided for civil actions. To the extent that such rules of pleading and practice must be applied, the proceeding is a civil action." It was there held that a party defendant was entitled to a change of judge under the provisions of the Code (section 422, *Burns' 1908*) which reads in part: That "the court in term, or the judge thereof in vacation, shall change

the venue of any civil action upon the application of either party," etc.

Following the part of section 422 quoted, it gives the causes for which changes of judge or from the county may be had. Since the authority to change the venue from the judge, and that to change the venue from the county, are derived from the same statute, both being conferred by that part of the section above quoted, it would seem that the authority to change from the county exists whenever there is authority to change from the judge. In a proceeding to sell real estate, the title may be litigated, a fraudulent conveyance may be set aside, and many issues may be required to be tried therein of a nature which clearly characterizes them as issues in civil actions. We therefore conclude that, upon a proper and timely application, a change of venue from the county in which the estate is pending for settlement may be taken. If reasons exist making such practice unwise, the Legislature may prohibit it.

[2, 3] Moreover, if it should be granted that appellant's contention that there is no authority for a change of venue from the county in such a proceeding is sound, it still does not follow that the Gibson circuit court was devoid of jurisdiction. It is of course true that jurisdiction of the subject-matter cannot be waived by failure to object, or conferred by consent or express agreement on a court that does not possess it; and, if the Gibson circuit court did not have jurisdiction of the subject-matter of the action, then appellant's objection thereto, raised by her motion in arrest and assignment of error in this court, would be timely. *Brown on Jurisdiction* (2d Ed.) § 10. But the jurisdiction of the Gibson circuit court within its territory of the subject-matter of the class of proceedings to which this belongs was identical with that of the Vanderburgh circuit court within its territory. The jurisdiction of each was plenary; was derived from the same source, and at the same time. Both had jurisdiction of the general subject-matter of the settlement of decedents' estates and of proceedings to sell real estate in aid thereof.

[4] Jurisdiction of the subject-matter is the power to hear and determine cases of the general class to which the proceedings then before the court belong. *Brown on Jurisdiction* (2d Ed.) § 3, note 3; 11 Cyc. p. 669; 17 Am. & Eng. Ency. (2d Ed.) p. 1066; *State ex rel. Egan v. Wolever* (1890) 127 Ind. 306, 26 N. E. 762; *Chicago, etc., R. Co. v. Sutton* (1891) 130 Ind. 405, 30 N. E. 291; *Jones v. Cullen* (1895) 142 Ind. 335, 342, 40 N. E. 124; *Gold v. Pittsburgh, etc., R. Co.* (1899) 153 Ind. 232, 242, 53 N. E. 285; *Yates v. Lansing*, 5 Johns. (N. Y.) 282.

[5] Where there is jurisdiction of the general subject—that is, of the general class of cases to which the particular case belongs—jurisdiction may be given over it by consent or agreement, or objection thereto may be waived by failure to make timely and specific

objections. *Center Township v. Board* (1886) 110 Ind. 579, 10 N. E. 291; *Tucker v. Sellers* (1891) 130 Ind. 514, 518, 30 N. E. 531; *McCoy v. Able* (1891) 131 Ind. 417, 420, 30 N. E. 528, 31 N. E. 453; *Perkins v. Hayward* (1892) 132 Ind. 95, 105, 31 N. E. 670; *Eel River R. Co. v. State ex rel.* (1895) 143 Ind. 231, 42 N. E. 617; *Mankin v. Pennsylvania Co.* (1902) 160 Ind. 447, 67 N. E. 229; *Elliott's Appellate Procedure*, §§ 499-503.

Appellant had raised no objection to the change of venue to the Posey circuit court, and there she voluntarily filed the amended petition on which the case was tried; she expressly consented to the change to the Gibson circuit court, and there she waged a contest over the issue formed. No objection was raised by her to the jurisdiction of the Gibson circuit court until a judgment was rendered which was injurious to her interests as an individual. We do not believe that it is in accordance with the law or its policy to thus allow a party to trifle with courts of general jurisdiction, to submit to their adjudication her cause, and, when defeated upon the merits, to claim that all that has been done is without effect.

[6] While the court was engaged in announcing its finding, the appellant sought to dismiss the proceeding, and the court declined to permit this to be done. It is earnestly contended that the motion was timely, and that in this the court erred, and the cause should be reversed. We are convinced that the rule applicable to the ordinary action or suit of an individual litigant suing to enforce or preserve his personal rights, which allows him control over his action to the extent of the right of timely dismissal of it is not applicable to this proceeding. The appellant was administering a trust as an officer of court. The duty of selling the real estate of the decedent to pay his debts was imposed on her by section 111 of the decedents' estates act (Burns' Stat. 1908, § 2852). She was the hand of the court, acting under and subject to its guidance and control, for the purpose of effecting a speedy and just settlement of the estate of the decedent. The court whose servant she was had inherent power growing out of its probate jurisdiction to require her to institute such a proceeding, if she appeared lax in heeding the express mandate of the statute. Moreover the statute (section 2859, Burns' 1908) expressly gives the court power, and requires it in such a case upon petition of a creditor, to order an executor or administrator to institute the proceeding, under penalty of removal from the trust. Such a proceeding cannot be subject to the control of the executor or administrator as to whether it shall be begun, continued to the end, or abandoned. That control must necessarily rest with the court. To hold otherwise would be to say that the servant was greater than the master. It follows, then, that the court did not err in refusing to permit the dismissal,

al, and that whether appellant's motion therefor was timely is immaterial.

[7] It is finally argued by counsel for appellant that the finding of the trial court is not sustained by sufficient evidence, and is contrary to law. In part this claim is based on the following facts: Lauer, executor, appellant's predecessor in the trust, at the time of his resignation, had procured from the Vanderburgh circuit court an allowance to himself of \$2,700 for his services as executor and to his attorney an allowance of \$1,600. These allowances had been, before the filing of her petition in this proceeding, assigned to appellant for value. At the time of trial, \$650 had been paid on the attorney's allowance, but nothing on that of the former executor. The court found these allowances were excessive, and that of the executor was reduced to \$750, while that of the attorney was reduced to \$650, the amount which had been paid on it. Appellant contends that no evidence whatever was introduced to sustain the reduction, and that the court acted arbitrarily in making it. In this appellant is not sustained by the record, which contains the testimony of an attorney of 20 years' experience in the practice, familiar with the value of services of executors and attorneys in the settlement of estates, which fully warranted the court's finding in this particular. These allowances by the Vanderburgh circuit court were only prima facie correct, and were subject to review and a contest of their correctness in a proceeding to sell real estate to pay debts, especially when as here minor heirs and purchasers from other heirs are parties, and whose lands are to be subjected to sale for the payment of such allowances. *Riser v. Snoddy* (1856) 7 Ind. 442, 65 Am. Dec. 740; *Cole v. Lafontaine* (1882) 84 Ind. 446; *Jackson v. Weaver* (1884) 98 Ind. 307; *Scherer v. Ingerman*, supra; *O'Haleran v. O'Haleran* (1885) 115 Ind. 403, 17 N. E. 917; 18 Cyc. 739, 740. See, also, *Collins v. Tilton* (1877) 58 Ind. 374; *Fraim v. Millison* (1877) 59 Ind. 123; *Watkins v. Romine* (1885) 106 Ind. 378, 7 N. E. 193; *Glessner v. Clark* (1894) 140 Ind. 427, 39 N. E. 544; *Burns' 1908*, § 2838.

It is also claimed that there is a lack of evidence to sustain the court's finding in the matter of the amount of other claims against the estate filed and allowed by the executor. The court in its finding fixed the amount of these claims at a sum somewhat smaller than appellant's counsel in their brief claim them to be, and smaller than their aggregate as filed and allowed. But the current reports of the executor and of appellant as his successor show that a number of them had been paid. Indulging the presumption, as we must do in the absence of an affirmative showing to the contrary, that the trial court's finding is correct, we cannot say that in this particular it is not sustained by the evidence. We do this the more cheerfully from the firm conviction to which we are forced by the dis-

closures of the record that the estate has suffered greatly by waste, mismanagement, and improper delay in its settlement.

[8] Counsel in argument make another objection to the finding of the court as being contrary to law, but no point or authorities are stated or cited relating thereto, and their argument cannot supply that omission, which works a waiver of the question.

The judgment is affirmed.

(176 Ind. 643)

INDIANA TRUST CO. v. GRIFFITH.

(No. 21,408.)¹

(Supreme Court of Indiana. June 30, 1911.)

1. INSANE PERSONS (§ 65*)—INVESTMENT OF FUNDS—ORDER OF COURT—NECESSITY.

A guardian need not obtain an order of court before investing funds of the ward, unless the statute so requires; but he assumes the risk if he does not obtain an order.

[Ed. Note.—For other cases, see *Insane Persons*, Cent. Dig. § 110; Dec. Dig. § 65.*]

2. INSANE PERSONS (§ 65*)—INVESTMENT OF FUNDS—CARE REQUIRED.

A guardian cannot excuse an unprofitable investment of his ward's funds by showing that he used the same care that an ordinarily prudent man might use concerning his own property; he being required to exercise prudence with a view to probable income, as well as probable safety, of the capital.

[Ed. Note.—For other cases, see *Insane Persons*, Cent. Dig. § 114; Dec. Dig. § 65.*]

3. INSANE PERSONS (§ 65*)—TRUST COMPANIES—INVESTMENT OF FUNDS.

Burns' Ann. St. 1908, § 4953, giving the directors of a trust company discretionary power to invest funds of wards, etc., in securities not expressly prohibited, does not diminish the care required of guardians generally in making investments, and does not absolve a trust company, acting as guardian, from liability for loss in subsequent depreciation in the value of private corporate stock purchased without order of court.

[Ed. Note.—For other cases, see *Insane Persons*, Cent. Dig. § 114; Dec. Dig. § 65.*]

4. TRUSTS (§ 218*)—INVESTMENT OF FUNDS—TRUSTEE'S LIABILITY.

A trustee using his own discretion in investing the trust funds is liable for loss incurred through depreciation; but if he makes the investment by order of court, after presenting the facts, he is not liable.

[Ed. Note.—For other cases, see *Trusts*, Cent. Dig. §§ 310-313; Dec. Dig. § 218.*]

5. STATUTES (§ 212*)—CONSTRUCTION—WORDS.

Words used in a statute are presumed to have been used in the sense in which they have been judicially construed, unless the statute discloses a contrary intent.

[Ed. Note.—For other cases, see *Statutes*, Cent. Dig. § 289; Dec. Dig. § 212.*]

6. CONSTITUTIONAL LAW (§ 48*)—CONSTRUCTION.

In construing statutes, construction favoring constitutionality is preferred.

[Ed. Note.—For other cases, see *Constitutional Law*, Cent. Dig. § 46; Dec. Dig. § 48.*]

7. INSANE PERSONS (§ 65*)—INVESTMENT OF FUNDS—NEGLIGENCE.

It is negligent for a guardian to invest practically all the funds in his hands in stocks and bonds of fluctuating and uncertain value.

[Ed. Note.—For other cases, see *Insane Persons*, Cent. Dig. §§ 110, 114; Dec. Dig. § 65.*]

8. INSANE PERSONS (§ 42*)—APPROVAL OF REPORTS—EFFECT.

Approval of a guardian's reports showing improper investment of funds does not preclude subsequent action to compel him to account for moneys so invested, with interest thereon.

[Ed. Note.—For other cases, see *Insane Persons*, Cent. Dig. §§ 64-67; Dec. Dig. § 42.*]

Appeal from Probate Court, Marion County; Merle N. A. Walker, Judge.

Action by Humphrey C. Griffith, by next friend, against the Indiana Trust Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Ayres, Jones & Hottel and Kealing & Hugg, for appellant. William Bosson, for appellee.

COX, J. This action was brought by appellee, as next friend of Pleasant H. Griffith, a person of unsound mind, by petition in the court below which has jurisdiction of such guardianship; in which petition he seeks to compel appellant, as the guardian of such ward, to take out of the estate of the latter certain bonds and stocks (naming them) of the value of \$98,297.52, which the current report of appellant, filed in 1908, shows had been purchased with the funds of the trust, and which it is alleged had depreciated in value; and the petition prays that appellant guardian be required to account to the estate for the moneys so invested, together with interest on the same.

Appellant's demurrer to the petition was overruled, and thereupon it filed an answer in two paragraphs. The substance of appellant's answer is that it had invested the trust funds in stocks and bonds, as alleged in the petition, of certain named public service, railroad, and other private corporations in and outside of the state of Indiana, and in nontaxable bonds of Indiana municipal corporations, except that item 1 set out therein of \$1,300, stock of the Indiana National Bank, belonged to and was owned by said Pleasant H. Griffith before the said Indiana Trust Company was appointed his guardian, and that it had received that stock from its predecessor in the trust as a part of the assets of the estate of the ward, and except that the second item of stock mentioned in the petition, being \$9,500 worth of Atlas Engine Works, 6 per cent. preferred stock, has been sold by this guardian for its full value, and at and for the full price paid by it for such stock, and that the Brown-Ketcham Iron Works, 6 per cent. preferred stock of the value of \$3,000, being the third item of stock set out in the petition, was purchased by this guardian on April 28, 1903, under the special order and direction of the court; that it admitted that in its reports prior to 1906 appellant did not itemize the bonds in question by their names and specific value and cost, etc., of a certain aggregate sum for which it claimed credit, but that in its sixth report to the

¹For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes
1 Rehearing denied.

court, in 1906, it did report such bonds specifically by name, character, and cost and claimed credit for the aggregate sum, which then amounted, for said bonds, to \$56,033.50, and that such report was approved by the court; that since such report it has purchased additional bonds of the same character to the amount of \$38,279.02, and has in its seventh report, in 1908, specified the same and claimed credit for that additional sum; that the depreciation in the value of such bonds at the market value is not more than \$5,000.

It is further alleged that "the bonds were valid, genuine, and regular, * * * and that it invested said moneys in said bonds for the reason that they were, and it in good faith believed the same to be, safe, sound, desirable, and profitable investments of the money of its said trust, * * * and that the matter of the investment of said moneys in said bonds was submitted to the board of directors of said Indiana Trust Company, guardian aforesaid, and that said board fully and duly investigated and examined said bonds and stocks and their values and securities, and after such investigation and examination directed and ordered said moneys invested in said bonds at and for the amounts paid for them by this guardian, and for the amounts at which they were reported to the court, and that said investments were made in good faith."

Appellee demurred to this answer for want of facts to constitute a defense to the petition. This demurrer was sustained, and appellant elected to stand upon its answer and refused to plead further, whereupon the court decreed that appellant should take out of its account with the estate the bonds (designating them), and that it should charge itself with the amount invested by it in the purchase of them, to wit, \$93,997.32, together with interest at the rate of 6 per cent. from the date of the decree, and rendered judgment against appellant for costs. From this judgment, this appeal is taken, and the errors assigned are based on the rulings of the court in overruling appellant's demurrer to the petition and in sustaining appellee's demurrers to the two paragraphs of answer.

The central and vital question is whether the provisions of the act of 1893, authorizing the incorporation of loan and trust and safe deposit companies (Acts 1893, p. 344; Burns 1908, §§ 4942 to 4950), grant to such a company a discretion so broad and plenary in the investment of the funds of a ward or other cestui que trust that, when exercised without submitting the question to the court in which supervision of the trust rests and acting on its order, it is absolved from liability for loss in the subsequent depreciation in value of the investment.

It is from the authority granted by that act that appellant received its appointment as guardian of the estate of Griffith at the

hands of the lower court, and it is contended by its counsel that the sixth subdivision of section 10 of the act, being section 4953, Burns 1908, grants it the wide and exonerative discretion in investing the estate of its ward indicated above. That part of the act from which it is insisted such authority and discretion is derived reads as follows: "Sixth. The directors of any such corporation shall have discretionary power to invest all moneys received by it on deposit or in trust in any such personal securities as are not hereinafter expressly prohibited; and it shall be held responsible to the owners, or cestui que trust, of such moneys, for the validity, regularity, quality, value and genuineness of all such investments and securities at the time the said investments are so made, and for the safe-keeping of the evidences and securities thereof, but if any special direction, agreement or trust is imposed upon, made or conferred in and by the order, judgment or decree of any court; or by the terms and conditions of any last will and testament, or other document, contract, deed, conveyance or other written instrument, as to the particular manner in which, or the particular class or kind of securities, funds or property, whether real or personal, the same shall be invested in, then the said corporation shall follow and carry out such order, judgment, decree or other appointment, contract, deed, conveyance or other written instrument, and in such case such company shall not be held liable or responsible for any loss, damage or injury which may occur or be incurred by any person or cestui que trust by reason of its performance of such trust as aforesaid."

It is contended that, under the discretionary power vested in appellant under the first part of this provision, it is given a wide latitude in the selection of securities for investment; that it is required to exercise only good faith and due care in the selection of the securities it may choose to buy; that liability is not continued after the time such investments are made for the value of such securities; and that it is not necessary to procure an order from the court, authorizing such investment, to absolve it from liability.

[1] It is necessary for a guardian to get an order from the court before investing the funds of the ward only when the statute so provides. When it is not provided, the guardian is vested with a discretion. 21 Cyc. 8788; 17 Am. & Eng. Ency. of Law (2d Ed.) 432; 89 Am. St. Rep. 292, note; Gary v. Cannon, 38 N. C. 64; Mather v. Knox, 34 La. Ann. 410; Durrett's Guardian v. Commonwealth, 90 Ky. 312, 14 S. W. 189; Sherry v. Sansberry, 3 Ind. 320. But while such investments may be made, yet, if made without an order from the court, the risk is with the guardian. In re Cardwell, 55 Cal. 137; Nagle v. Robins, 9 Wyo. 211, 62 Pac. 154, 796; Coffin v. Bramlitt, 42 Miss. 194, 97 Am. Dec. 449; Clark v. Anderson, 76

Ky. 111; *Robertson v. Robertson's Trustee*, 130 Ky. 293, 113 S. W. 138, 132 Am. St. Rep. 368, and note; *Sheery v. Sansberry*, 3 Ind. 320; *Tucker v. State ex rel.*, 72 Ind. 242; *Woerner's Am. Law of Guardianship*, p. 211; 21 Cyc. 88. See, also, *Brown v. Wright*, 39 Ga. 96, 101; *McIntyre v. People*, 103 Ill. 142; *Hughes v. People*, 10 Ill. App. 148; *Carlyle v. Carlyle*, 10 Md. 440; *Forrester v. State*, 46 Md. 154.

[2] There is little authority to show that a trustee may excuse himself by showing that he has conducted the business of investing his trust funds in the same manner that an ordinarily prudent man of business might do with his own property. The trustee must conduct himself faithfully and exercise a sound discretion. He is to observe how men of prudence, discretion, and intelligence manage their own affairs, not in regard to speculation, but in regard to the permanent disposition of their funds, considering the probable income, as well as the probable safety, of the capital invested. A business man of more than average caution may, and often does, assume intentional risks in the investment of his own property; for the sake of obtaining a greater than an ordinary income, he will often invest in such a manner that the risk of ultimate loss is considerable, and such speculative use of his property would not be regarded as illegitimate, nor as deserving of any censure. No such risk is permitted to the trustee. *King v. Talbot*, 40 N. Y. 76; *Mills v. Hoffman*, 26 Hun (N. Y.) 594; *Adair v. Brimmer*, 74 N. Y. 539; *Worrell's Appeal*, 23 Pa. 44; *Ihmsen's Appeal*, 43 Pa. 431; *Kimball v. Reding*, 31 N. H. 352, 64 Am. Dec. 333; *Clark v. Garfield*, 8 Allen (Mass.) 427; *Brown v. French*, 125 Mass. 410, 28 Am. Rep. 254; *Dickson's Appeal*, 152 Mass. 184, 25 N. E. 99, 9 L. R. A. 279; *Davis' Appeal*, 183 Mass. 499, 67 N. E. 604; *Mattocks v. Moulton*, 84 Me. 545, 24 Atl. 1004; *Smith v. Smith*, 7 J. J. Marsh (Ky.) 238; *Durrett's Guardian v. Commonwealth*, supra; *Learoyd v. Whitely*, 12 App. Cas. 727, 733; 17 Am. & Eng. Ency. of Law, 435, 437; 13 Am. Law Reg. 201; 25 Am. Law Reg. 217, 225. See note to *Nyce's Estate*, 40 Am. Dec. 506. See note to *Schmidt v. Shaver*, 89 Am. St. Rep. 292. See note to *Robertson v. Robertson's Estate*, 132 Am. St. Rep. 372; 3 Pomeroy's Eq. Jurisp. (3d Ed.) §§ 1071, 1704.

[3] The use of the words "discretionary power" does not render the guardian any the less liable on failure to properly invest and manage the trust. They do not relieve the appellant of the high degree of care and prudence required of guardians. The only effect they have is to leave the guardian free to select the investment, but the care required of the guardian in making the selection is in no wise diminished. Indeed, the care to be exercised must be commensurate with the freedom given. *Holcomb v. Holcomb*, 11 N. J. Eq. 281; *In re Cant*, 5 Dem.

Sur. (N. Y.) 269; *Bogart v. Van Velsor*, 4 Edw. Ch. (N. Y.) 755; *Clark v. Garfield*, 8 Allen (Mass.) 427; *Davis' Appeal*, 183 Mass. 499, 67 N. E. 604; *Kimball v. Reding*, 31 N. H. 352, 64 Am. Dec. 333; *Pray's Appeal*, 84 Pa. 100; *Hart's Estate*, 203 Pa. 480, 53 Atl. 384; *Warren v. Pazolt*, 203 Mass. 328, 346, 89 N. E. 381; *In re Hirsch's Estate*, 116 App. Div. 367, 101 N. Y. Supp. 893; *Id.*, 188 N. Y. 584, 81 N. E. 1165; 66 Cent. L. J. 244; 25 Am. Law Reg. 217, 225; *Woerner's Am. L. of Guardianship*, p. 207 et seq.; 3 Pom. Eq. Jurisp. (3d Ed.) § 1073.

[4] The rule has prevailed in this state that a trustee exercising his own discretion in the matter of the investment of the trust fund was liable for loss incurred by depreciation; while if he made investment by order of court, after a presentation of the facts, he was absolved from liability for such loss. In the case of *Tucker v. State ex rel.*, 72 Ind. 242, it was held by this court that an investment of trust funds in the stock of an ordinary business enterprise by a trustee of an express trust, appointed by court, without an order of court, is an abuse of his discretionary control over the funds so invested, and involves a breach of his duty as such trustee. And the rule so declared is in entire harmony with the great weight of authority.

[5] True this case was decided before the act in question was passed and became a law; but, since there is nothing in the act showing an intention not to adopt the limitation placed on the discretionary power of a guardian by the rule as voiced in that case, it must be presumed that the Legislature in enacting the statute, and that part of it above quoted, meant to adopt such limitation; for if the Legislature use words which have received a judicial construction they are presumed to be used in that sense, unless the contrary intent can be gathered from the statute. 2 Lewis' *Sutherland Stats. Const.* (2d Ed.) § 399, pp. 758, 759, and cases cited under note 36; 26 Am. & Eng. Ency. of Law (2d Ed.) 607; *Burk v. State*, 27 Ind. 430, 431; *State v. Berdett*, 73 Ind. 185, 188, 38 Am. Rep. 117; *Western Union, etc., Co. v. Scircle*, 103 Ind. 227, 229, 2 N. E. 604; *Board v. Bailey*, 122 Ind. 46, 48, 23 N. E. 672; *Sopher v. State*, 169 Ind. 177, 181, 81 N. E. 913, 14 L. R. A. (N. S.) 172; *Truelove v. Truelove*, 172 Ind. 441, 444, 86 N. E. 1018, 88 N. E. 516, 27 L. R. A. (N. S.) 220.

The rule as it existed at the time of this enactment must have been known to and in the mind of the lawmaking power. Under it guardians and other trustees possessed certain discretionary duties with regard to the control over and investment of the trust funds. An exercise of the discretion, without submission to the supervisory direction of the court having jurisdiction was at the risk of the guardian or other trustee if loss incurred; while an exercise of the discretion

under the approval and direction of the court absolved from loss. As we see it, clause 6, *supra*, does nothing more than declare that the same rule shall also apply to the companies brought into life by the statute and authorized to act as guardian when acting in such a trust capacity by appointment—in short to apply the same measure of duty and responsibility to trust companies acting in a trust capacity as to a private person so acting. A contrary intent is not disclosed by the provisions of the statute. The clause above quoted does not declare that there shall be no liability when such a company acts solely and independently of the discretion granted to it. It does expressly declare that there shall be none of its action taken upon the specific direction of the court.

[6] Moreover; statutes are to be so construed as to sustain their constitutionality, rather than to place upon them a construction which would render them invalid. 26 Am. & Eng. Ency. of Law (2d Ed.) p. 640; *Brown v. Buzan*, 24 Ind. 194; *Phenix Ins. Co. v. Burdett*, 112 Ind. 206, 13 N. E. 705; *McCreery v. Fallis*, 162 Ind. 255, 67 N. E. 673; *United States Ex. Co. v. State*, 164 Ind. 196, 73 N. E. 101; *Hargis v. Board*, 165 Ind. 194, 73 N. E. 915.

The construction of clause 6 contended for by appellant might well cast doubt on its validity. It would place natural persons acting as guardians, or in other trust capacities, in a class on which the law imposed narrower powers and a greater liability than on these corporations, while acting in exactly the same fiduciary relations. Whether this can be done without a violation of constitutional limitations may well be doubted.

It must follow that the investment of the trust funds by appellant guardian without authority of court was, under the rule existing in this state and generally outside, an abuse of its discretionary control of its trust. Manifestly to give the statute the meaning contended for by appellant would place trust funds at the mercy of guardians. The rule that there must be the directive order of court to work absolution to the guardian for loss is a wholesome one in this day of promotion, exploitation, and the underwriting of the obligations of industrial enterprises.

In this state the rule announced in *Tucker v. State ex rel.*, *supra*, approaches the strictness of the English rule announced in *Clough v. Bond*, 3 Mylne & Craig, 490. Some of the states in early days broke away from the strict English rule and adopted a less fixed standard. See *Harvard College v. Amory*, 9 Pick. (Mass.) 446, which is the leading case on this point. But the reasons advanced therein for not adopting the English rule in all its strictness, requiring an investment of trust funds in real estate or government securities, no longer exists, and the tendency is properly towards the full strictness of that rule. 3 Pom. Eq. Jurisp. (3d Ed.) § 1074;

Woerner's Am. Law of Guardianship, pp. 211, 212; *Perry on Trusts* (6th Ed.) § 456.

From the latter we quote: "There are now national, state, county, town, and city bonds in sufficient amounts to absorb all trust funds seeking investment, and it is not to be denied that such investments are more permanent and safe. It may be admitted that great public emergencies and national dangers have an unfavorable effect upon the value of public securities; but such emergencies and dangers have the same effect upon the stocks of private corporations. In addition to these depressing influences the capital of such companies runs the risks and chances of trade, business, and speculation. Calamities that depress public credit seldom occur; while the risks of trade are constant. It would seem to be the wiser course to withdraw the funds settled for the support of women, children, and other parties who cannot exercise an active discretion in the protection of their interests, as much as possible from the chances of business. It may be said that settlors may always do this by directing in what manner the funds settled by them shall be invested. But it would seem to be wiser for the court to establish the safest rule in the absence of special directions, and leave to the settlor, if he prefers, to direct a less safe investment." A further relaxation of the rules governing guardians cannot be sanctioned.

[7] But if all the above be not true—and we grant appellant that it is required only "to exercise such diligence and care in discharging its duty as ordinarily prudent men exercise in reference to their own affairs"—can it then be said the ordinarily prudent man invests practically his entire wealth in stocks and bonds, many of which are of fluctuating and uncertain value? To state the question is to answer it in the negative. See *Dickson's Appeal*, *supra*; *Davis' Appeal*, *supra*; *Warren v. Pazolt*, *supra*.

[8] The mere fact that the several current reports filed by appellant were approved by the court is no bar to appellee's action, for the approval of the various reports were *ex parte* proceedings such as are usually made in passing accounts current of guardians and partial reports of executors and administrators. "Ex parte orders made by the court in the matter of a guardianship or of approval of action theretofore taken by him, like those made in the settlement of estates, are regarded as *prima facie* correct, but are, as a rule, within the control of the court making them, until final settlement of the guardianship. Such orders may, at all times before final settlement or discharge of the guardian, be set aside, corrected, or modified, if the requirements of justice demand it." *State ex rel. Wiseman v. Wheeler*, 127 Ind. 451, 26 N. E. 552, 1008; *State ex rel. v. Peckham*, 136 Ind. 199, 202, 36 N. E. 28; *Candy v. Hanmore*, 76 Ind. 125, 128; *Daniels, Adm'x, v. Bruce*,

95 N. E. 569, this term; 21 Cyc. 179; 15 Am. & Eng. Ency. of Law (6); Henry's Probate Law, § 712.

It may be that part of the bonds in which appellant invested the funds of its trust were of a class universally approved, but no question is presented as to the scope of the judgment rendered; the sufficiency of the petition and answers thereto being alone involved.

Finding no error in the record, the judgment of the lower court is affirmed.

(176 Ind. 701)

DANIELS v. BRUCE et al. (No. 21,848.)
(Supreme Court of Indiana. June 22, 1911.)

Appeal from Circuit Court, Gibson County; O. M. Welborn, Judge.

Petition by Kate B. Daniels, administratrix, against Abby D. Bruce and others. From an interlocutory order for sale, Kate B. Daniels appeals as an individual defendant. Affirmed.

Woodfin D. Robinson and William E. Stilwell, for appellant.

COX, J. This is an appeal from an interlocutory order for the sale of real estate, made on the petition of Kate B. Daniels, as administratrix de bonis non with the will annexed of the estate of William B. Daniels, her deceased husband, to make assets to pay the debts of his estate. To that petition she was made a party defendant as an individual, and prosecutes a separate appeal; but the questions involved are identical with those presented and determined in the appeal of Kate B. Daniels, Administratrix, etc., v. Abby D. Bruce et al., 95 N. E. 569, No. 21,845, decided by this court this term, and, on the authority of that case and for the reasons therein given, the judgment is affirmed in this appeal.

(177 Ind. 311)

CLEVELAND, C. C. & ST. L. RY. CO. v. LYNN. (No. 21,650.)¹

(Supreme Court of Indiana. June 20, 1911.)

1. APPEAL AND ERROR (§ 1097*)—DETERMINATION ON PRIOR APPEAL—LAW OF CASE.

The determination by the Supreme Court on appeal is the law of the case on a subsequent appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4358-4368; Dec. Dig. § 1097.*]

2. RAILROADS (§ 350*)—CROSSING ACCIDENT—LOOK AND LISTEN.

A person crossing a railroad track at a crossing is not required, as a matter of law, under all circumstances or conditions, to look and listen at a particular time, in a particular direction, or from a particular place.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1165-1192; Dec. Dig. § 350.*]

3. RAILROADS (§ 344*)—CROSSING ACCIDENT—DUTY TO LOOK—COMPLAINT.

Where plaintiff was struck by a train approaching from the northeast as he was crossing defendant's double tracks at a crossing, the fact that it was alleged that the train came from the northeast, and that the view from that direction was obstructed by a watch-house, and that there was no obstruction alleged to the south and east, did not justify an inference that plaintiff was under no obligation to look southeast, but should have kept looking to the northeast, or looked in that direction after he passed

the watch-house; it being his duty, also, to look to the southeast, to guard against possible danger from that direction.

[Ed. Note.—For other cases, see Railroads, Dec. Dig. § 344.*]

4. RAILROADS (§ 344*)—CROSSING ACCIDENT.

Where a complaint for injuries at a railroad crossing alleged that on the day plaintiff was injured he, with others, was engaged in moving a watch-house and had just placed it, and that his view to the north would have been obstructed by the watch-house, about 20 feet west of the track, continuously up to a point 8 or 9 feet from the west track, it would be construed as alleging that the obstructions related to the time of setting the watch-house and of the accident, and was not objectionable as referring to the date of filing the complaint.

[Ed. Note.—For other cases, see Railroads, Dec. Dig. § 344.*]

5. RAILROADS (§ 344*)—CROSSING ACCIDENT—CONTRIBUTORY NEGLIGENCE—COMPLAINT.

Plaintiff alleged that the C. company, by which he was employed, had a large number of men and side tracks parallel with defendant's double tracks; that he was engaged with fellow servants in removing a watch-house, which occasioned the obstruction to his view of defendant's trains approaching from the northeast across defendant's tracks; that when he got to the southeast corner of the watch-house, which was located nine feet west of the west track, he stopped and looked up defendant's track for 250 feet, and listened, but saw no train approaching on that track; that he then looked to the southeast, took two or three steps in the avenue toward defendant's tracks, and just as he got one of his feet over the west rail of defendant's west track he was struck by an engine approaching from the northeast, negligently operated in violation of law, and in violation of the city ordinance, limiting speed of trains to five miles an hour, and which approached without sounding a whistle or bell, or other warning. Held, that the facts so alleged did not require a finding that plaintiff was negligent as a matter of law, on the theory that he was bound to see and hear what, by looking and listening, he would have seen or heard, the conditions being such that it was possible that he might not have seen or heard, though he looked and listened, when considered in connection with defendant's duty to ring the bell, and not to move the train in excess of five miles an hour.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1107-1112; Dec. Dig. § 344.*]

6. RAILROADS (§ 327*)—CROSSING ACCIDENT—DUTY TO STOP.

A traveler about to cross a railroad track is not required to stop before attempting to cross, unless it is necessary in order to see.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1043-1056; Dec. Dig. § 327.*]

7. TRIAL (§ 296*)—INSTRUCTIONS.

In an action for injuries at a railroad crossing, the court charged that plaintiff, when approaching and attempting to cross the track, was not required, as a matter of law, to look and listen at any particular point, or at any particular time, nor was he required, as a matter of law, to look in one direction at a particular time and in another direction at another particular time; the law only requiring that he should have looked and listened at such time, at such places, and in such directions as a person exercising ordinary prudence would have done under similar circumstances, as shown by all the evidence in the case. The court also charged that plaintiff was bound to use ordinary care as he approached and attempted to

¹For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes
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²Modified on rehearing, 98 N. E. 67. Rehearing denied.

cross the tracks, and if, as he approached, he exercised the care of an ordinarily prudent person under all the circumstances, and was unable to see and hear the locomotive until it was too late to avoid a collision, he was not negligent. *Held*, that the latter instruction, when construed with the former, under evidence showing violation of a speed ordinance and a failure to ring the bell, was not objectionable as ignoring the look and listen rule, and as permitting the jury to say whether plaintiff was required to look and listen.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 705-713; Dec. Dig. § 296.*]

8. RAILROADS (§ 351*)—CROSSING ACCIDENT—INSTRUCTIONS.

An instruction that persons desiring to cross a railroad at a crossing are entitled to do so and are only required to exercise ordinary care, and that to constitute such care one approaching the crossing must use his senses of sight and hearing, and take all reasonable precautions to avoid injury, the kind and degree of care depending on the circumstances of each case, was not objectionable as authorizing the jury to excuse plaintiff from the duty of looking and listening, nor on the theory that the law fixes the quantum of care to be used in that the traveler is bound to look and listen in addition to using ordinary care.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1193-1215; Dec. Dig. § 351.*]

9. RAILROADS (§ 312*)—CROSSING ACCIDENT—SIGNALS—STATUTES.

Burns' Ann. St. 1908, § 5431, requiring railroads to give signals on approaching highway crossings, does not apply to crossings in cities and incorporated towns where the railroads are subject to police regulations and city ordinances regulating speed and signals.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 993; Dec. Dig. § 312.*]

10. APPEAL AND ERROR (§ 1064*)—INSTRUCTIONS—PREJUDICE.

Where, in an action for injuries at a highway crossing in a city, the court instructed that a city ordinance, providing that whistles should not be sounded within the city, except in making necessary track signals, and such as were absolutely necessary to prevent injuries to persons and property other than that of the railroad company, was in force, defendant was not prejudiced by an instruction consisting of a copy of Burns' Ann. St. 1908, § 5431, with reference to railroad signals at highway crossings.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 1064.*]

11. APPEAL AND ERROR (§ 1067*)—HARMLESS ERROR—INSTRUCTIONS.

Where there was no evidence of plaintiff's health, except as to his physical condition arising from the injury, and the damages were restricted to his injuries, defendant was not prejudiced by refusal of an instruction that the jury should consider every particular phase of plaintiff's injuries, including loss of time, if any, with reference to his condition and ability to earn money in his business or calling, to limit the same to loss arising from the injury.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 1067.*]

12. NEGLIGENCE (§ 65*)—"CONTRIBUTORY NEGLIGENCE"—"INCURRING RISK."

In actions arising out of noncontractual relations, the term "incurring risk" is synonymous with "contributory negligence."

[Ed. Note.—For other cases, see Negligence, Dec. Dig. § 65.*]

For other definitions, see Words and Phrases, vol. 2, pp. 1540-1547; vol. 8, p. 7617.]

13. TRIAL (§ 252*)—INSTRUCTIONS—APPLICABILITY TO EVIDENCE.

Where, in an action for injuries at a railroad crossing, there was no evidence that the watchman was absent from his post of duty, a requested charge based on the hypothesis that the watchman was absent at the time of the accident was properly refused.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 596-612; Dec. Dig. § 252.*]

14. RAILROADS (§ 351*)—CROSSING ACCIDENT—INSTRUCTIONS.

Where plaintiff's view of defendant's track to the northeast was obstructed by a watch-house, and the train by which he was struck at the crossing approached without signal, and at a speed in violation of a city ordinance, an instruction that, if plaintiff placed or assisted in placing the watch-house, he could not be excused from failing to see and observe the approach of the train that struck him, without any qualification, was properly refused.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1193-1215; Dec. Dig. § 351.*]

15. TRIAL (§ 253*)—INSTRUCTIONS.

In an action for injuries at a railroad crossing, a requested charge that where an injury results from an accident that ordinarily careful and prudent men, in the exercise of ordinary care, would not have foreseen and anticipated as likely to occur, the law regards it as clearly accidental, and for such injury no one is liable, was properly refused as ignoring the question of defendant's negligence per se in failing to ring the bell and reduce speed to conform to speed and bell ordinances enforceable at the time and place of the accident.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 613-623; Dec. Dig. § 253.*]

16. RAILROADS (§ 348*)—CROSSING ACCIDENT—EVIDENCE—VERDICT.

In an action for injuries at a railroad crossing, by plaintiff being struck by a train approaching at an illegal rate of speed, without a signal, evidence held to sustain a verdict for plaintiff.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1138-1150; Dec. Dig. § 348.*]

17. DAMAGES (§ 132*)—PERSONAL INJURIES—EXCESSIVE DAMAGES.

Plaintiff, a man 44 years old, in good health, with an expectancy of 24 years, and earning from \$1.75 to \$2.50 a day, was injured at a railroad crossing by defendant's negligence. His left limb was amputated two inches below the knee, and his left arm was left crooked, weak, and inefficient; he being only able to use the thumb and index finger. He was four months in the hospital, and also suffered an injury to his back from which the flesh sloughed off to the bones in a space as large as one's hand. At the time of the trial, he still suffered pain from the leg and back; the back being tender and sore. He could not rest against anything; could not sleep on his back or left side; was sleepless, and much reduced in flesh. Though he had some earning capacity, it was greatly reduced and would be expected to grow less. *Held*, that a verdict for \$15,000 was not excessive.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 372-385; Dec. Dig. § 132.*]

Appeal from Circuit Court, Putnam County; J. W. Rawley, Judge.

Action by Robert R. Lynn against the Cleveland, Cincinnati, Chicago & St. Louis Railway Company. From a judgment for plaintiff for \$15,000, defendant appeals. Affirmed.

L. J. Hackney, F. L. Littleton, T. C. Grooms, and Lamb, Beasley, Douthitt & Crawford, for appellant. John O. Piety and Silas A. Hays, for appellee.

MYERS, J. This is the second appeal in this cause. 171 Ind. 589 (1908) 85 N. E. 999, 86 N. E. 1017. Upon the return of the cause to the court below, a further or fourth paragraph of complaint was filed, to which a demurrer was addressed for want of facts sufficient to constitute a cause of action, and overruled, and that ruling is the first alleged error presented.

[1] The allegations of this paragraph with reference to looking and listening, which is the ground of attack on this paragraph, are identical with the allegations of the second and third, which were before the court on the former appeal, where the same contention was made as here, viz., that the complaint shows that appellee did not look or listen until he was within two or three steps of the track, at which time he was looking to the southeast, when he was immediately struck by a train coming from the northeast, he having alleged a previous looking to the northeast, and showing a train going in that direction on the easterly of a double track; the insistence being that his failure to see or hear the train coming from the northeast constitutes contributory negligence as a matter of law.

[2] It was determined on the former appeal, under the same allegations, that it cannot be said as a matter of law that, under all circumstances or conditions, looking and listening at a particular time, in a particular direction, or from a particular place, is required. *Chicago, etc., Co. v. Fretz*, 173 Ind. 519, 90 N. E. 76; *Greenawaldt v. Lake Shore Co.*, 165 Ind. 219, 74 N. E. 1081; *Cleveland, etc., Co. v. Stewart*, 161 Ind. 242, 68 N. E. 170; *Stoy v. Louisville, etc., Co.*, 160 Ind. 144, 66 N. E. 615; *P. C. C. & St. L. Co. v. Burton*, 139 Ind. 357, 37 N. E. 150, 38 N. E. 594; *Chicago, etc., Co. v. Hedges*, 105 Ind. 398, 7 N. E. 801; *Greany v. Long Island Co.*, 101 N. Y. 419, 5 N. E. 425; *Case v. Chicago, etc., Co. (Iowa)* 126 N. W. 1037; *Minot v. Boston, etc., Co.*, 73 N. H. 317, 61 Atl. 509; *Chicago, etc., Co. v. Keegan*, 112 Ill. App. 338; *Oldenburg v. N. Y., etc., Co.*, 124 N. Y. 414, 26 N. E. 1021; *Elliott on Railroads* (3d Ed.) § 1197a, and cases cited.

The only material allegations of the fourth, different from the second and third, are that in the two latter there is no direct allegation as to the direction from which the train which struck appellee came; while in the fourth it is alleged that it came from the northeast. The opinion of the court in the former appeal discloses that other allegations of the second and third paragraphs were such as to disclose that the train came from the northeast. The able counsel earnestly insist that a different question is presented by the fourth paragraph, in the alle-

gation of the train coming from the northeast; but the application of the rule declared in the former appeal and former cases does not seem to us to change the situation. The same obstruction and the same surrounding conditions are alleged in the second and third paragraphs.

[3] Appellant's contention amounts to this: That as, under the allegations, appellee first looked to the northeast, and then to the southeast, where there were not alleged to be any obstructions, and the train came from the northeast, he should have either looked first, or kept looking in that direction, or looked after he passed the watch-house. The complaint alleges that the view to the northeast was obstructed until appellee reached a point within eight or nine feet of the west track; that the track was double, and from a short distance south of the point where he was located curved considerably to the south and east, and that east and south of these tracks were the yards of another railway company, in which were many tracks and switches curving with the main tracks of appellant. It is not averred which of the two tracks was used for the north-bound, or which for the south-bound, trains; and we cannot say, because there is not alleged to have been an obstruction to the south and east, that he was under no obligation to look south and east, and should have looked to the northeast. It was his duty, in any event, to look to the southeast, because he could not excuse himself for not looking in that direction, also, to guard against possible injury. *Pittsburgh, etc., Co. v. Selvers*, 162 Ind. 234, 87 N. E. 680, 70 N. E. 133; *Stoy v. Louisville, etc., Co.*, supra; *Malott v. Hawkins*, 159 Ind. 127, 63 N. E. 308; *Morford v. Chicago, etc., Co.*, 158 Ind. 494, 63 N. E. 857.

The fact that no obstruction is alleged to the south and east, and might require less attention than in looking to the northeast, in any event only shows a difference in the degree of care required as to one direction rather than another, and still leaves the question as to the care which is alleged as to looking to the northeast, and, as the allegations are the same in each paragraph on that question, it must be held to have been determined, as it was specifically, as is shown by the opinion on the former appeal. It is urged that, as it is alleged that the track was straight to the northeast, and no other obstruction than the watch-house is alleged, it must be taken that after he had passed the watch-house he could have seen; but it is averred that he stopped and looked up the track 250 feet, to see if any train was approaching from that direction, and also listened, but did not see any train approaching, nor hear one. The former appeal directs attention to this allegation, coupled with showing the distance the train would travel in a few seconds and the possibility that the train was not within 250 feet. If

appellant had desired a more specific allegation as to what distance to the northeast the track was straight, or as to what was meant by a considerable distance, it should have made a motion for that purpose. The question was determined adversely to appellant on the former appeal, in which it was squarely held that his failure to look to the north after passing the watch-house was not, as a matter of law, negligence.

[4] It is next urged that, as the allegation is that a person approaching the track from the west "would have his view of defendant's tracks to the north obstructed until," it could only refer to the date of filing the complaint, and does not relate to the time of the incident, and is not an averment that the watch-house did obstruct the view. The allegations show that on the day appellee was injured, with others he was engaged in moving a watch-house, and had just placed it, and that his view to the north would have been obstructed by said watch-house about 20 feet west of the track, continuously up to a point within 8 or 9 feet of the west track. The allegations show the obstructions to relate to the time of setting the watch-house, and of the accident, and is a sufficient allegation of the obstruction, for, if it would obstruct, necessarily it did.

It is next urged that, as appellant has alleged in detail just what he did, there is a clear inference of contributory negligence, based upon the theory that he was bound to see and hear what, by looking and listening, he would have seen or heard. But the difficulty with appellant's position on that point is that that is asking us to assume that he was bound to look or listen at a particular place, in a particular direction, at almost a particular instant of time, irrespective of other relations or conditions. It might be a fair inference of fact, but there is in it just the difference between looking or listening where the court can say that he must have seen or heard, and looking and listening under conditions where it is possible that he might not have seen or heard, with the added duty of appellant to have a bell ringing, and to move not exceeding five miles per hour.

[5] The allegations are that the Chicago & Eastern Illinois Company had a great number of main and side tracks east of, and parallel with, appellant's tracks, and that appellee was an employe of the former company, and that at the time of the accident he was engaged with his co-workers in removing the watch-house which occasioned the obstruction of which he complains from the south side of Third avenue to the north side, and that after setting the watch-house appellee started from a point on the north side of said avenue, about 20 feet west of appellant's west track, to cross said defendant's tracks, and when he got to the southeast corner of the watch-house (which is elsewhere alleged to have been in di-

mensions nine feet north and south, and six feet east and west, and nine feet west of the west track) "he stopped and looked up defendant's tracks for a distance of about 250 feet, to see if any train was approaching from that direction, and also listened and did not see any train approaching from that direction on defendant's west track, and neither did he hear any train approaching on said track, but he saw and heard a train on said defendant's east track north of said avenue, going northeast, whereupon plaintiff looking to the southeast, to see if any trains were approaching from that direction, took two or three steps in said avenue towards defendant's tracks, and just as he got one of his feet over the west rail of defendant's west track the defendant, by and through its servants and agents in charge of a locomotive engine drawing a train of cars approaching said avenue from the northeast, unlawfully, carelessly, negligently, and in violation of the laws of the state of Indiana, and in violation of said ordinance, within the corporate limits of said city, ran said locomotive engine and train of cars, without sounding the whistle or ringing the bell, as required by law, and without giving any notice or warning whatever," and struck appellee, etc. It is alleged that but for this neglect the injury would not have occurred. It thus sufficiently appears that appellee was a traveler over the street at the crossing. The cases of Chicago, etc., Co. v. McCandish, 167 Ind. 648, 79 N. E. 903, and South Bend, etc., Works v. Larger, 11 Ind. App. 367, 39 N. E. 209, are not in point. In the former there was no showing that the injured person had any right to be where he was, or that there was any duty to keep a bell ringing. In the Larger Case, appellee was a licensee only. Here it is shown that appellee was a traveler, and in a place where he had a right to be.

The evidence shows without contradiction that appellant's tracks north of Third avenue were in a direct line for 2,700 feet, and ran in a general northerly direction, but slightly east of north. The only obstruction to the vision north and east was the watch-house which appellant, within a few minutes, had placed on the north side of, but near to, the sidewalk on that avenue, the east line of the watch-house being 10 feet west of the west rail of appellant's west track. The watch-house was 16.2 feet north and south, 8.2 east and west, and 8 feet high. There were no physical connections between the tracks from Third avenue north for a distance of 2,700 feet. Appellee's statement of the injury was that he had no previous knowledge that the two tracks were operated by appellant, and that the first time he had been on the west side of the tracks was on the morning of the injury, when, as directed by his foreman, he took four other workmen and moved the watch-house from the south

side of Third avenue to the north side, and that it took about 40 minutes for them to move it across and set it in position. He started to a tool box for a rule; the tool box was a little east of south, near a cinder pit upon which they had been working, and the cinder pit was 575 feet from the shanty, but across several tracks. When he started, he was on the west side of the watch-house, near the southwest corner, on the north side of Third avenue; that he went east six or eight feet, and looked up the track north 250 or 300 feet, and could see no further on account of the corner of the watch-house; that he looked east, and saw the flagman 60 or 80 feet east of him; that he did not look north again, because he thought he had looked far enough, and saw nothing, and it looked clear to him, and then turned and started diagonally across the street and tracks, and did not again look north, and when he had gone three or four steps, and gone ten or twelve feet, and as he was about to advance his left foot over the west rail, he was struck by a train coming from the north. The evidence varies as to the speed of the train; some witnesses putting it as much as 25 to 30 miles an hour, others at 12 or 15, but no one at less than 8. The engineer fixes it at from 8 to 12 miles an hour. The speed ordinance was 5 miles per hour, and required the continuous ringing of the bell. To the south and east the tracks were unobstructed for a distance of about 1,100 feet though a two-degree curve to the east set in 400 feet from the watch-house. At any point between the watch-house and west rail of the tracks, the tracks northeast were straight and unobstructed 2,700 feet.

Upon this state of the evidence, the court charged the jury by the fourth instruction as follows: "It cannot be said as a matter of law that plaintiff while approaching and attempting to cross defendant's tracks at Third avenue, should have looked and listened for approaching locomotive engines and trains at any particular point, or at any particular time, or that he should have looked in one direction at a particular time, and in another direction at another particular time. These are questions for you to determine. The law simply says that he should have looked and listened at such time, at such places, and in such directions as a person exercising ordinary prudence would have done under the circumstances surrounding the plaintiff at the time, as shown by all the evidence in this case." By the fifth instruction: "The plaintiff under the law was bound to use ordinary care as he approached and attempted to cross defendant's tracks at Third avenue, and if the evidence shows that as he approached and attempted to cross said track he exercised that degree of care that an ordinarily prudent person would have exercised under all the circumstances surrounding him, as shown by all the evidence in this case, and was unable to hear

and see the locomotive engine approaching, until it was too late to avoid a collision, then he was not guilty of contributory negligence." By the sixth instruction the jury were instructed that: "Persons who desire to cross a railroad track at a point where a highway crosses the same have a right to do so, and are only required to exercise ordinary care in doing so. To constitute such care, one approaching a railroad crossing must use his senses of sight and hearing, and take all reasonable precautions to avoid injury by passing locomotives, engines, and trains. The kind and degree of care to be taken must depend upon the circumstances of each case. The traveler is required to act as a person exercising ordinary care and prudence would act under the circumstances surrounding him." No other instructions were given upon the subject of looking or listening.

[6] It is objected, as to the fifth instruction, that the law fixes the quantum of care required of a traveler about to cross railroad tracks, and that it requires him to stop and look and listen. The rule does not go so far as to require stopping, unless it is necessary, in order to see, that he should stop. *Elliott on Railroads* (3d Ed.) §§ 1166a, 1167. The rule in *Malott v. Hawkins*, supra, on that point goes no further than to hold that the traveler must use ordinary care to select a place from which to look or listen. If the rule in *Pittsburgh, etc., Co. v. West*, 34 Ind. App. 95, 69 N. E. 1017, should obtain upon the subject of the presumption of seeing, it should be restricted, as in that case, to what is within the range of vision, unless the traveler fails to exercise ordinary care in selecting the place from which to look.

[7] The instruction is to be considered with relation to other established rules of law, and other evidence, and especially with the fact shown by the evidence of the existence of an ordinance limiting speed to five miles per hour, and requiring the continuous ringing of the bell, and it is shown by the evidence that appellee had knowledge of the speed ordinance, and had a right to rely upon it. It is objected to the fifth instruction that it ignores the look and listen rule, and leaves it to the jury to say that appellee was not required to look and listen, and that it was sufficient that he should have used ordinary care to acquit him of negligence, "though he failed to stop and look and listen." The instruction is not open to the criticism made, when taken in connection with the fourth charge upon the subject of using his senses, and taking all reasonable precautions for his safety.

[8] The objection to the sixth instruction is that it leaves it to the jury to excuse appellee from looking and listening. It need hardly be suggested that ordinary care requires the use of the senses of sight and hearing, and their application to conditions where seeing and hearing will be of practical

avail, and the instruction requires all reasonable precautions to be taken, which include the use of those senses. The instruction is also assailed upon the ground that it is claimed that the law fixes the quantum of care to be used by a traveler in cases of this kind, and it is not enough that he use ordinary care, and use his senses of sight and hearing, but he must assume that there is danger, and act upon that assumption; that he must listen for signals, and look attentively up and down the track; and upon another ground, that the court cannot tell the jury the kind of care to be exercised, and leave it to the jury to determine that ordinary care does not require the traveler to look and listen. These two positions as to the same instruction lead to a legal solecism, for, if the law fixes the quantum of care in every case by a hard and fixed rule, then the court must so charge, and that results directly in the jury being told the kind of care that is to be exercised, which is well understood to be ordinary care. We are not able to see that the instruction is open to these objections.

Instructions 9, 10, and 11 requested by appellant, and given, presented the question of the increased vigilance required in the presence of known dangers, or hazards, and were not otherwise materially different from the questions presented by instructions 4, 5, and 6. It would be inexpedient, if not impossible, to lay down a hard and fast rule upon the subject of the quantum or character of care required in every case, or to go further than the courts have gone in applying a general rule, by saying that reasonable care must be used in view of all the circumstances and conditions, in which are involved the necessary elements of looking and listening and their attendant consequences, the requirement to stop when necessary, in order to see or hear, to look or listen from positions where their exercise will be of avail in seeing or hearing, the requirement of increased caution in the presence of known dangers, or signals; but, after all, each case must stand upon its own peculiar circumstances and facts.

Other general instructions given on the subjects of credibility of witnesses, looking, listening, and care are assailed by appellant. We have examined each of them with care; they are numerous and voluminous, and it would unduly extend this opinion to set them out, but we are unable to discover harmful error in them.

[9, 10] Instruction 14 consisted of the reading of section 5431, Burns 1908, on the subject of signals at highway crossings. The instruction was in no wise applicable in this case as to a crossing signal. The proviso of the act was for the purpose of marking the distinction between rural highway crossings, and the police regulations in cities and incorporated towns; and the section is to be taken in connection with the ordinance which, by

section 5, provided that whistles shall not be sounded "within the city, except in making necessary track signals, and such as may be absolutely necessary to prevent injury to persons and property other than their own," etc.; and upon appellant's application the court instructed the jury that this ordinance was in force, so that in no event could appellant be harmed by the instruction, or the jury misled, believing that whistling was required. *Cleveland, etc., Co. v. Miles*, 162 Ind. 646, 70 N. E. 985.

[11] Complaint is made of instruction 15, on the question of the assessment of damages, in which the language is used, "You may consider every particular phase of his injuries, loss of time, if any, with reference to his condition and ability to earn money, in his business or calling;" it being urged that it should have been added, "arising from the injury," or some such phrase. There was no evidence as to his condition, other than his physical condition arising from the injury, and the damages are restricted to his injuries. *Vandalia Coal Co. v. Yemm*, 92 N. E. 49, and cases there cited.

[12] By appellant's fourteenth instruction, the court was requested to instruct the jury that, if appellee was in possession of his faculties, and knew and appreciated the obstruction created by the watch-house, and went voluntarily upon the crossing without taking the precaution to advise himself as to trains approaching, as fully as he could have done without the watch-house, he incurred the risk, and cannot recover. "Incurring the risk" is properly applicable to the relation of master and servant, and while it is sometimes referred to in the discussion of cases, except in case of master and servant, it is so used only as a synonym for "contributory negligence."

Appellant's contention is based upon some of the language used in *Indiana, etc., Co. v. O'Brien*, 160 Ind. 266, 65 N. E. 918, 66 N. E. 742, where there is a discussion of the comparative meaning, force, and application of the terms, but it will be seen that the decision is grounded upon the proposition that incurred risk is a species of contributory negligence, in actions arising out of noncontractual relations, for the provision of the statute as to the burden of proof of contributory negligence is held to apply, and also that it was not necessary to negative knowledge, in order to make a good complaint in that case as against the rule where assumption of risk is required to be negated. The cases are collected and discussed in that case. There is perhaps a distinction in the law of master and servant between contributory negligence and acceptance of the risk, which is well stated in the text of *Thompson on Negligence*, § 4611; *Labatt, Master and Servant*, §§ 305, 306. Aside from this feature of the instruction, the point is disposed of by the opinion on the former appeal, that it cannot be said, as a matter of

law, that a traveler is required to look from any particular position, regardless of all other considerations. The question was fully covered by the nineteenth instruction requested by appellant, which is stronger and more specific as to the duty of appellee than the fourteenth.

Instruction 16 was predicated on the doctrine of contributory negligence from voluntarily selecting a place for looking, where seeing is partially obstructed, based upon the rule in *Lundergan v. N. Y. Cent. Co.*, 203 Mass. 460, 89 N. E. 625. The distinction between that case and this is that in that case there was no requirement for signals, and, as is said in that case, with respect to a traveler seeing gates open, but the watchman absent, and the traveler not knowing that the gates were temporarily out of use, he was justified in regarding this as a circumstance indicating that he might cross in safety, and if nothing more appeared it would be for the jury to say to what extent he was bound to extend his watchfulness, and this was practically the position stated in the former appeal, upon the question of appellee being required to look after he passed the watch-house, taken in connection with appellant's duty to give the required signal, and the limit of speed.

[13] Instruction 20 was properly refused, as it goes to the question of the watchman being absent from his post of duty, but the evidence shows that the watchman was at the crossing, and there is no evidence that appellee knew where he should be, or that he was not where he should be.

[14] Instruction 27 is too broad. It tells the jury that, if appellee placed or assisted in placing the watch-house, "he cannot be excused from failing to see and observe the approach of defendant's train which struck him," without any qualification.

[15] By the twenty-ninth instruction the court was requested to instruct that, "where an injury results from an accident that ordinarily careful and prudent men in the exercise of ordinary care would not have foreseen and anticipated as likely to occur, the law regards it as purely accidental, and for such injury no one can be held liable." The court gave the following: "If you believe from the evidence that the injury to the plaintiff was caused by a mere accident, then your verdict should be for the defendant." It is claimed that this leaves the jury to determine, as a matter of law, what is an accident. The court also instructed the jury that negligence is the doing, or omitting to do, something which a person of ordinary prudence in the exercise of ordinary care would or would not do or omit, under the circumstances. Appellant's requested instruction states that abstract question of law correctly, as does also that given; but appellant's

request ignores the question of negligence per se in the failure to ring the bell, and the speed ordinance, where there is express duty, coupled with the known dangers in approaching crossings, and where a careful and prudent man might reasonably expect danger and collision—the very thing to be guarded against, and for which the ordinance was enacted—so that appellant was not harmed by the failure to give the instruction.

Other questions are presented as to admission and rejection of evidence. We have examined them in detail; they each involve uncontradicted or immaterial facts, or were properly admitted or rejected.

[16] In the absence of the signal, and with a rate of speed greatly in excess of the speed ordinance, we cannot say that the evidence does not support the verdict. It may have been a fair inference by the jury, as appellant knew of the speed ordinance, and with an ordinance requiring the continuous ringing of the bell, that if these precautions had been observed he would not have been injured, even though he did not look further than 250 feet to the northeast, for with a train within that distance he might, both from the rate of speed required and from a ringing bell, have avoided the injury, or passed in safety; at least, upon the question of his alleged negligence, the matter was for the jury under all the evidence.

[17] The damages are claimed to be excessive. Appellee's left leg was amputated two inches below the knee; the left arm left crooked, weak and inefficient; only the thumb and index finger being of use. He was four months in a hospital; he suffered an injury to his back from which the flesh sloughed off to the bones in a space as large as one's hand; he still suffers pain from the leg and back; the back is tender and sore, and he cannot rest against anything; cannot sleep on his back or left side, and does not rest well; is sleepless, and is much reduced in flesh. Though he has some earning capacity, it is greatly reduced and may reasonably be expected to grow less from the injuries. He was 44 years old, in good health, with an expectancy of 24 years. When at work, he earned from \$1.75 to \$2.50 per day. The measure of recovery cannot be determined with a fine distinction, or approximate accuracy, on account of the elements of pain and mental suffering, if no other, and is largely a matter in the discretion of a jury, and we are only authorized to disturb judgments when it appears that they are produced by prejudice, partiality, or corruption, and nothing of that character appears. The judgment is rather larger than is usual, but not such as under the evidence to shock the conscience of the court, and is affirmed.

(176 Ind. 263)

INDIANA UNION TRACTION CO. v. REYNOLDS. (No. 21,869.)

(Supreme Court of Indiana. June 29, 1911.)

1. NEGLIGENCE (§ 113*)—PERSONAL INJURIES—COMPLAINT—CONTRIBUTORY NEGLIGENCE.

Where a complaint, after alleging the facts and circumstances of defendant's alleged negligence in operating a street car by which plaintiff was injured, charged that on account of such negligence plaintiff was injured, in that he was thrown from his wagon onto the street, receiving permanent injuries to his shoulder, spinal column, and back, by reason of which he had been confined to his bed a great part of the time since the accident, etc., and that at the time of the injury he was in good health and was earning \$5 per day, that his wagon was damaged in the sum of \$20, that he suffered great mental and physical pain on account of such injuries, and had been injured in the sum of \$5,000, for which he demanded judgment, the reference to injury to his wagon should be treated as surplusage, and the complaint construed to state a cause of action for personal injuries only, and was therefore not objectionable for failure to negative contributory negligence, under Burns' Ann. St. 1908, § 362, making unnecessary for plaintiff in a suit for negligent personal injuries to plead lack of contributory negligence.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 186-193; Dec. Dig. § 113.*]

2. TRIAL (§ 191*)—INSTRUCTIONS—PROVINCE OF JURY—INVASION.

In an action for injuries to a traveler in collision with a street car, an instruction that the rights of a street car and other vehicles to use the street are equal; that neither has a superior right over the other, except that the street car runs on a track and cannot turn out of the way; that the driver of a wagon about to cross the track in a populous city has the right to assume that those in charge of the car will exercise reasonable care in running it; that the operatives of the car in question had no greater right to the crossing than plaintiff, except the right of priority in passing, and had no right to do any act that would mislead plaintiff and expose him to needless danger; and that if the jury found from the evidence that defendant ran the car which injured plaintiff, if such injury occurred, so close to the car preceding that the noise and rumble and ringing the bell of the leading car drowned the signals and sound of the bell of the car that committed the injury, then defendant was negligent, and the jury should find for plaintiff, unless he was guilty of contributory negligence—was erroneous as invading the jury's province, and as implying that plaintiff was misled and exposed to needless danger by the manner in which the car was run, since, though they found that the noise of the preceding car did drown the signals of the following car, it was still for the jury to determine whether, under all the circumstances, that constituted negligence.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 420-431; Dec. Dig. § 191.*]

Appeal from Superior Court, Grant County; P. H. Elliott, Judge.

Action by John W. Reynolds against the Indiana Union Traction Company. Judgment for plaintiff, and defendant appeals. Reversed, with instructions.

Transferred from the Appellate Court under section 1405, Burns' Ann. St. 1908 (Acts 1901, p. 590).

J. A. Van Osdol, Kittinger & Diven, and Carroll & Dean, for appellant. Williams & Clawson and Todd & Rauch, for appellee.

COX, J. Appellee sued appellant for personal injuries alleged to have been received by him by reason of appellant's negligence in running one of its cars against the wagon which the appellee was driving across the tracks of appellant at a street crossing in the city of Marion, Ind. The complaint was in two paragraphs, and demurrers were overruled to each of them. From a judgment on a verdict for appellee, this appeal is prosecuted by appellant.

[1] It is first contended that the trial court erred in overruling appellant's demurrer to the first paragraph of the complaint. The particular defect of the complaint, which it is insisted it bears, does not require that the pleading in full shall be set out, but the following part of it will disclose the basis of appellant's contention. After alleging the facts and circumstances of appellant's alleged negligence, the complaint concludes: "That on account of said negligence said plaintiff was injured, in that he was thrown from said wagon in which he was riding on the said street, thereby receiving permanent injuries of the shoulder, spinal column, and back; that said injuries have caused the said plaintiff to be confined to his bed a great part of the time since said accident, and have left the said plaintiff in such condition that he is unable to dress himself. That at the time of said injury the said plaintiff was earning, and when in good health did earn, five (\$5.00) dollars per day; that his wagon was damaged in the sum of twenty (\$20.00) dollars; that he has suffered great mental and physical pain on account of said injuries; and that he has been injured in the sum of five thousand (\$5,000.00) dollars. Wherefore plaintiff prays that he be given judgment in the sum of five thousand dollars," etc.

The specific and only objection to the sufficiency of this paragraph of the complaint is that it contains no allegation that appellee was free from contributory negligence. It is urged that, as it contains a statement that appellee's wagon was damaged in the sum stated, it is a complaint for injuries to property, and that, as the act of 1890, Burns 1908, § 362, placing the burden of proving contributory negligence on a defendant, does not change the rule of pleading in negligence cases when the injury is to property, this paragraph is bad without such allegation of appellee's freedom from contributory negligence.

It is clearly apparent that this paragraph of complaint seeks a recovery for injuries to the person of appellee alone, and not for injuries to his wagon. It nowhere alleges, by any direct allegation, that the wagon was

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

injured by the acts of negligence averred, but only the disconnected statement is made "that his wagon was damaged in the sum of twenty (\$20.00) dollars." No damages are asked for this loss; but, on the contrary, it is alleged that appellee sustained injuries in the sum of \$5,000, and for that sum judgment is asked. The statement which is quoted from the complaint, of damages to the wagon, is mere surplusage. Moreover the record shows that the appellee was not seeking a recovery for damages done to his wagon, and that the trial proceeded on the theory that a recovery was sought for personal injuries alone. The court's instructions defining the measure of damages included only injuries to appellee's person. The court did not err in overruling the demurrer to this first paragraph of complaint. *Oellitic Stone Co. v. Ridge* (1907) 169 Ind. 639, 83 N. E. 246.

The trial court gave to the jury eight instructions requested by the appellee, and gave all of the instructions (11 in number) requested by appellant. Counsel for appellant challenge the accuracy of an instruction given at the request of appellee, relating to the burden of proving contributory negligence. The fault found with this instruction is based on the same objection that was made to the ruling on the first paragraph of complaint, that the action was for damages to the property of appellee, as well as to his person. What has been said in disposing of the question raised as to the sufficiency of that paragraph of complaint disposes of the objection to this instruction contrary to appellant's contention.

[2] Earnest complaint is made of instruction No. 10 given by the court at the request of appellee, and which reads as follows: "The rights of a street car and other vehicles to the use of a street are equal. Neither have a superior right over the other; except to the extent that a street car runs on a track, and cannot turn out of the way. The driver of a wagon about to cross a street car track in a populous city has a right to assume that those in charge of a street car will exercise reasonable care in the running of said cars. The street car company in the case before you had no greater right to the crossing than the plaintiff, except the right to priority in passing, and it had no right to do any act that would mislead the plaintiff and expose him to needless danger; and, if you find from the evidence in this case that the defendant ran the car which injured the plaintiff, if such injury occurred, so close to another car that the noise and rumble and ringing of the bell of the leading car drowned the signals and sound of the bell on the said car which committed the injury, then I instruct you that the defendant was guilty of negligence, and you should find for the plaintiff, unless the evi-

dence shows that he was guilty of contributory negligence."

Appellee's complaint charged negligence on the part of appellant in running the car, which it is alleged struck him, at a high and dangerous rate of speed along a street in the city of Marion; in running it in violation of a city ordinance limiting the speed at which appellant might run its cars; and in running such car in close proximity to a preceding car. Appellee was driving alongside of the track on which the cars were running, and his destination requiring him to turn across the tracks of appellant onto a cross street, he did so immediately after the foremost car passed him, and was struck by the one following. In view of the fact that the case made by the evidence is not free from doubt, and that other instructions given are subject to criticism, the instruction above set out is indefensible, and requires that the case be reversed. It invades the province of the jury. Whether the fact that appellant ran the car which struck the appellee so close to the preceding car that the noise and rumble and ringing of the bell of the leading car drowned the signals and sound of the bell on the car which struck appellant was not only a question of fact to be determined by the jury, but, if found, it was for the jury to determine whether, under all the circumstances of the case, it constituted negligence on the part of appellant. The instruction is also objectionable on the ground that it is subject to the implication that the jury were told by the court that appellee was misled and exposed to needless danger by such running of the cars. This, also, was a fact for the jury to determine.

Instructions numbered 6 and 11 of the instructions given at the request of the appellee, it may be said without setting them out at length, are subject to objection, in that the acts therein stated as entitling appellee to recover, if proved, are not coupled with his injury as a causation.

The judgment is reversed, with instructions to the trial court to grant a new trial.

(48 Ind. A. 186)

BROWNELL IMPROVEMENT CO. et al. v.
NIXON et al. (No. 7,391.)

(Appellate Court of Indiana. June 28, 1911.)

1. MUNICIPAL CORPORATIONS (§ 570*)—STREET IMPROVEMENTS—ENFORCEMENT OF LIENS—PRIORITY.

A suit to foreclose street improvement liens is one of equitable cognizance, and where the facts confessed under the pleadings show liens of equal, but not of superior, rank with those sought to be enforced, the court must make such order as to such liens as the facts warrant.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1284; Dec. Dig. § 570.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

2. MUNICIPAL CORPORATIONS (§§ 488, 489*)—STREET IMPROVEMENTS—NOTICE TO OWNERS—SUFFICIENCY.

Where an owner of land was present when a city council awarded a contract for a street improvement, and during the improvement was frequently on the street improved, and never objected to the improvement, or challenged the validity of the proceedings, or notified the contractor that the contract was illegal, he must be deemed to have had knowledge of the improvement.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1147-1152; Dec. Dig. §§ 488, 489.*]

On petition for rehearing. Overruled.
For former opinion, see 92 N. E. 693.

MYERS, J. On petition for a rehearing, appellees seem to think that our opinion on the question of priority of liens should state whether it is based on the facts averred in the answer of Patton and others, second improvement lienholders, or upon the facts as found by the court. At our former consideration of this case we took the facts in the answer as admitted. The complaint contained the usual allegations of fact in such cases. It alleged that these defendants held liens against said real estate inferior to the liens of plaintiffs, and called upon the defendants to answer as to any interest or liens claimed by them against the real estate described in the complaint. The answer brought before the court all of the proceedings of the second improvement, beginning with the declaratory resolution passed by the common council, and each step thereafter, including the issue of the bonds to the contractors, and their subsequent assignment to these defendants, whereby they claimed to hold liens superior to the liens of the first improvement.

[1] Conceding that appellants, by their action in withdrawing their reply to the answer, admitted all of the facts averred in said answer, such motion would not authorize the court to measure such facts by any other rule of law than that applicable to facts pleaded as a defense to plaintiffs' claim of superiority. Facts confessed can have no more force than facts established in any other manner. If they failed to show superiority, but instead showed liens of equal rank with those sought to be enforced, then the court should have made such order in the premises as the facts under the law authorized. The case was one of equitable cognizance, and as such the court was not without authority to make such order in the premises as justice and right between the parties seemed to warrant.

[2] Again it is insisted that a part of the property now owned by Nixon was at the time the improvement was made owned by Samuel Cade, and, although Mrs. Nixon may have known that the improvement was being made, her knowledge would have no binding force on the then owner of the property. This is all true, and while it must be admitted

that the court did not find in so many words that Cade knew the work was going on, yet it was found that Cade was present at the time the common council awarded the contract to Palmer, and that Mrs. Nixon, his daughter, resided on one of Cade's lots abutting upon the improved portion of the street, at the time the improvement was being made, and that while a large number of men and teams were at work making said improvement he visited his daughter from one to three times a week. From such facts but one conclusion must follow, and that is that Cade knew the improvement was being made. It is found as a fact that he at no time objected to the improvement to the contractor, nor does it appear that he at any time challenged the validity of the proceedings of the common council, or notified the contractor that the contract was illegal, or that he would contest any assessment made against him on account of such improvement. At our former consideration of this case, we concluded that the common council had jurisdiction of the person of Cade at the time the assessments sued on were made.

Counsel, in support of their petition for a rehearing, have discussed other questions, which were considered and decided at the former hearing of this case, and with the decision of those questions we are still satisfied.

The petition for a rehearing is overruled.

(48 Ind. A. 166.)

PENNSYLVANIA ELEVATOR & SUPPLY CO. et al. v. FOSNOTTE. (No. 7,287.)

(Appellate Court of Indiana. June 27, 1911.)

1. APPEAL AND ERROR (§ 193*)—OBJECTIONS—COMPLAINT—SUFFICIENCY.

A complaint, when attacked for the first time on appeal, is sufficient where there is no essential allegation wanting, and the facts alleged bar another action.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1226-1240; Dec. Dig. § 193;* Pleading, Cent. Dig. §§ 1355-1374.]

2. APPEAL AND ERROR (§ 193*)—ACTION FOR PRICE—COMPLAINT—SUFFICIENCY—"SOLD."

Under Burns' Ann. St. 1908, § 343, providing that the complaint shall contain a statement of the facts constituting the cause of action in plain language, so as to enable a person of common understanding to know what is intended, a complaint which alleges that defendants are jointly indebted to plaintiff in a specified sum for hay "sold" and delivered by plaintiff to defendants during a specified time, and which includes an itemized statement of account, is sufficient when attacked for the first time on appeal; the word "sold" implying a contract of sale of an article for a specified sum.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1226-1240; Dec. Dig. § 193;* Pleading, Cent. Dig. §§ 1355-1374.]

For other definitions, see Words and Phrases, vol. 7, pp. 6540-6542; vol. 8, p. 7801.]

3. APPEAL AND ERROR (§ 931*)—EXTENT OF REVIEW—WEIGHT OF EVIDENCE.

The court on appeal, in considering the sufficiency of the evidence to sustain the findings, will consider the evidence alone which is most

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

favorable to the successful party, including the facts proved and such inferences as may be reasonably deduced therefrom.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 931.*]

4. PRINCIPAL AND AGENT (§ 123*)—LIABILITY OF PRINCIPAL—TRANSACTIONS BY AGENT WITH THIRD PERSON—EVIDENCE.

Evidence held to justify a finding that one sold and delivered hay to a buyer pursuant to arrangements made with the buyer's agent, making the buyer liable for the price.

[Ed. Note.—For other cases, see Principal and Agent, Dec. Dig. § 123.*]

5. APPEAL AND ERROR (§ 1078*)—QUESTIONS REVIEWABLE—WAIVER OF ERRORS.

A claim of error, not supported by any argument of appellant, will not be considered on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4256-4261; Dec. Dig. § 1078.*]

Appeal from Superior Court, Marion County; Pliney Bartholomew, Judge.

Action by Isaac Fosnotte against the Pennsylvania Elevator & Supply Company and another. From a judgment for plaintiff, defendant named appeals. Affirmed.

John O. Spahr and James A. Ross, for appellant. Addison C. Harris and Henry H. Hammer, for appellee.

IBACH, J. This was a suit filed in the Marion superior court by Isaac Fosnotte, appellee, against appellant, Pennsylvania Elevator & Supply Company, and Elmer I. French, on account, for a quantity of hay alleged to have been sold by Fosnotte to said defendants during the month of September, 1908.

The complaint is as follows: "Isaac Fosnotte complains of Pennsylvania Elevator & Supply Company, a corporation organized and doing business under the laws of the state of Indiana in said state, and of Elmer I. French, and says: That said defendants are jointly and severally indebted to plaintiff in the sum of one hundred and fifty dollars with the interest thereon, for hay sold and delivered by plaintiff to said defendants, during the month of September and year 1908, a bill of particulars of which is filed herewith and made a part hereof, marked 'Exhibit A,' that said money is past due and unpaid; wherefore," etc.

Exhibit A: "Pennsylvania Elevator & Supply Company and Elmer I. French, to Isaac Fosnotte, Dr." Here follow the dates and amounts of hay delivered on each respective day, and the value thereof.

To this complaint appellants each filed his answer in general denial. The cause was tried by the court without the intervention of a jury, who rendered judgment against both defendants in the sum of \$122.95, from which judgment Pennsylvania Elevator & Supply Company alone appeals, and assigns as reversible errors: First. The complaint

does not state facts sufficient to constitute a cause of action. Second. The court erred in overruling appellant's motion for a new trial. This motion is based upon the statutory points that the decision of the cause is not sustained by sufficient evidence, and the decision of the court is contrary to law.

[1] No demurrer was filed to the complaint, and by appellant's first assignment of error it is attacked for the first time in this court. Such being the case, the complaint will be held sufficient, if there is no essential allegation wanting, and the facts alleged will bar another action.

[2] The objection made by appellant to the complaint is that it does not contain an averment that the sale was made at the instance and request of the defendants, and that it fails to show a contract of any kind. These points have been fully decided by the courts adversely to appellant in the case of Curran v. Curran, 40 Ind. 477, 478, and in a later case (Radebaugh v. Scanlan, 41 Ind. App. 116, 117, 82 N. E. 544). In the determination of the latter case, this court, quoting from 2 Kent's Commentaries (12th Ed.) p. 468, with approval, say: "A sale is a contract for the transfer of property from one person to another for a valuable consideration, and three things are requisite to its validity, viz., the thing sold, which is the object of the contract, the price, and the consent of the contracting parties." The word "sold" therefore signifies a contract of sale of some article of value made between the parties for a valuable consideration. From this it follows necessarily that a contract of sale implies an article sold, a price for the same, and the mutual consenting on the part of the contracting parties.

Section 343, Burns' Statutes 1908, provides that the complaint shall contain "a statement of the facts constituting the cause of action in plain and concise language without repetition and in such manner as to enable a person of common understanding to know what is intended." The complaint before us, including the itemized statement of account, which is a part of it, substantially complies with the requirements of our Code, and a person of common understanding, we believe, would have no trouble in knowing what was intended. Whether a demurrer to the complaint for want of facts should have been sustained, if presented to the court trying the cause below, we are not called upon to decide; but we do now hold it sufficient, since it is attacked for the first time in this court, where the rules of construction are not applied so strictly as where a pleading is attacked by demurrer.

[3] The controlling question presented by this appeal is the sufficiency of the evidence to sustain the finding, and in the consideration of that proposition we will not weigh the evidence, but will consider that evidence

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

alone which is most favorable to appellee, and this includes, not only the facts which are found, but also such inferences as may be reasonably deduced from such facts proven.

[4] We have carefully considered all the evidence in the case, and that most favorable to appellee, and the inferences which we are justified in drawing therefrom show the following facts: A short time before the opening of the state fair at Indianapolis, in the year 1908, appellee was a farmer living in Hamilton county, near the Marion county line. He called at a certain stable in the fair grounds, over the main entrance of which was a sign one yard wide and fourteen feet long, containing the following words in large, plain letters, "Pennsylvania Elevator & Supply Company, Hay and Grain." He arranged with a man, afterwards found to be French, "to haul them a load of loose hay each day of the fair, and a load of clover, baled." In the building where he first met French was a great deal of straw and all kinds of hay and corn and oats. Appellee testified that he saw the sign over the door, and negotiated for the sale of the hay with French and later with one Mr. Gray, the general manager of the Pennsylvania Elevator & Supply Company, appellant.

After the delivery of the first two loads of hay, said Gray drove to the residence of appellee, about 12 miles distant from Indianapolis, and said to appellee, "We have to have more hay; instead of one load each day, we must have two loads each day." After that appellee furnished them with two loads each day, instead of one. It also appears from the testimony of the men who delivered the hay that when such deliveries were made both French and Gray were engaged at work about the hay and grain barn, and both gave orders about unloading the hay. Gray assisted one of the witnesses, a driver for appellee, to locate a baler, so that no delay might occur in having the loose hay baled when delivered, and he also requested witness to bring another load the following Monday. After the close of the fair, appellee not having been paid, attempted to locate the parties buying, and, being unable so to do, he placed the account with his attorney, who immediately notified the parties. French called at the office of the lawyer, examined the statement, figured it, and said "the hay was all right, but that he had doubt as to whether the last two loads were delivered; that he would see the company and see what the figures were." Mr. Gray, who testified that he was the general manager of the appellant, in answer to a telephone call concerning the account, said to the attorney "not to be too fast—not to bring suit until he had an opportunity to see French;" that the business at the fair grounds had not

been profitable. The amount of hay so sold and delivered was shown in evidence, the price of the same, and that appellee had not been paid.

The conversation had with Gray, and his conduct about the place of business and in the apparent management of the same, shows his connection with the purchase of the hay in suit. When these facts are considered in connection with the further facts that a sign of the size and character shown was placed over the main door of the particular place of business, advertising the identical business in which his principal was engaged in the city of Indianapolis, and that he was working about the place during the entire week of the fair, we are fully authorized to draw the conclusion that appellee believed that at the time he made his sale and delivery of the hay that he was dealing with the appellant company.

The Supreme Court of this state, in determining the case of *O. M. Cockrum Co. v. Klein*, 165 Ind. 627, 74 N. E. 529, a case very similar to the one at bar, said: "The main question before the jury was the identity of the purchaser. It is not essential to a valid sale that it should be consummated in the name of the real purchaser. If the purchaser is sued for the price and his identity is made out, the contract is not changed by its appearing to have been made by him in the name of another. So, under the facts of this case, if the two-barrel order was made over the signature of O. M. Cockrum, that was by no means conclusive that the sales were made to him."

In the case before us, all the business was transacted with French and Gray. This is by no means conclusive that the sales were made to them individually. When Gray observed the sign of his principal company over the door of the place of business, if it was not appellant's business, that was the time for Gray to have spoken, and that was the time for him to have notified appellee. And when he assisted in making the purchases from appellee in the manner the evidence shows he did, his knowledge and his acts, under all the facts proven, became the knowledge of appellant and the acts of appellant, and it must be bound thereby. The evidence is not in all respects satisfactory, yet it is sufficient to warrant the finding of the lower court.

[5] Appellant also claims that the court erred in permitting appellee to answer a certain question propounded to him. This claim, however, is not supported by any argument, and we are not called upon to consider it, and we do not consider it, for the further reason that counsel say in their brief "it was no doubt harmless."

No reversible error having been found, the judgment is affirmed.

(48 Ind. A. 150)

WILSON v. JACKSON HILL COAL & COKE CO. (No. 7,629.)(Appellate Court of Indiana, Division No. 2.
June 23, 1911.)**DEATH (§ 38*)—STATUTES—LIMITATIONS.**

The coal mining act (Laws 1907, c. 157, § 27; Burns' Ann. St. 1908, § 8597) provides that for any injuries to person or property occasioned by a violation of the act, or for a willful failure to comply with any of its provisions, a right of action against the operator shall accrue to the party injured for the direct injury sustained thereby, and, in case of loss of life by reason of such violation, a right of action shall accrue first to the widow, etc., and Burns, § 285, declares that, where death of one is caused by the wrongful act or omission of another, the personal representatives of the person killed may maintain an action therefor, but that action shall be commenced within two years, and that the damages shall inure to the exclusive benefit of the widow or widower, as the case may be, etc. *Held*, that though such sections are in *pari materia*, and must be construed together, a right of action for death of one killed by a violation of the coal mining act did not accrue until death occurred, and hence was not barred by the fact that the decedent lived for more than two years after receiving the injuries which resulted in his death.

[Ed. Note.—For other cases, see Death, Cent. Dig. § 53; Dec. Dig. § 88.*]

Appeal from Circuit Court, Sullivan County.

Action by Rosa N. Wilson against the Jackson Hill Coal & Coke Company. From an order sustaining a demurrer to the complaint, plaintiff appeals. Reversed, with instructions.

William L. Slinkard, for appellant. Lee Fenton Bays and Fred Fenton Bays, for appellee.

ADAMS, J. The appellant, as the widow of one James P. Wilson, brought this action against the appellee for damages accruing to herself and her three children on account of the death of her husband, who, as shown by the averments of the complaint, was injured through the fault and negligence of the appellee on the 3d day of October, 1904, and survived until the 7th day of March, 1907, when on account of said injuries, he died. The complaint is in one paragraph, and, as no question is raised as to the sufficiency of the allegations of duty, negligence, injury, and damages, as set out therein, a more extended statement of the facts averred in the complaint is unnecessary. The appellee filed its demurrer to the complaint upon the ground that the same did not state facts sufficient to constitute a cause of action. The demurrer was sustained by the court, and the appellant refusing to plead further, and electing to abide by her exception to the ruling of the court, judgment was rendered against the appellant for costs.

The only error relied upon for reversal by appellant is that the court erred in sustaining the appellee's demurrer to the appellant's

complaint, and the only question argued by either side in the presentation of this appeal is whether or not the action of the appellant was barred by the statute of limitation. The appellee insists that, as the complaint shows on its face that the husband of appellant lived for more than two years after receiving the injuries complained of, no right of action arose in favor of the widow. The suit was brought under section 8597, Burns 1908, being section 27 of the coal mining act of 1907, and reads: "For any injury to person or persons or property occasioned by the violation of this act, or any willful failure to comply with any of its provisions, a right of action against the operator shall accrue to the party injured, for the direct injury sustained thereby, and in case of loss of life by reason of such violation, a right of action shall accrue first to the widow," etc. It is urged by the appellee that section 8597, Burns, *supra*, must be considered and construed in connection with section 285, Burns 1908, which reads: "When the death of one is caused by the wrongful act or omission of another, the personal representatives of the former may maintain an action therefor against the latter, if the former might have maintained an action, had he or she (as the case may be) lived, against the latter for an injury for the same act or omission. The action shall be commenced within two years. The damages cannot exceed ten thousand dollars, and must inure to the exclusive benefit of the widow or widower (as the case may be) and children, if any, or next of kin, to be distributed in the same manner as personal property of the deceased." We agree with appellee that all statutes of this state on the subject of death by wrongful act are in *pari materia*, and must be construed together. *Elliott v. Brazil Block Coal Co.*, 25 Ind. App. 592, 58 N. E. 736. In this case it was held that the right of action for death by wrongful act abrogates the common-law rule, and cannot exist in the absence of an express statute. And, where a statute confers such right, the same will admit of no exceptions not contained therein.

In the case of *Pittsburg, etc., R. Co. v. Hosea*, 152 Ind. 412, 53 N. E. 419, it is held that the right of action given by section 285 creates a new and independent right, and does not constitute to the personal representatives of the deceased any right or cause of action vested in the deceased; that while the right provided by section 285, *supra*, must rest upon the same wrongful act or omission, if the deceased did not or could not avail himself of it, upon his death therefrom, the statute gives an action for the same cause to his representatives for the use of his widow and children. It is also established by the case of *Hecht v. O. & M. Ry. Co.*, 132 Ind. 507, 32 N. E. 302, that where the injured party brought suit and recovered damages

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes

during his lifetime, including the damages for a disease superinduced by reason of his injuries, where the judgment was paid and received by the injured party, who afterwards died from causes growing out of his injuries, no cause of action would arise in favor of his personal representatives after his death. There are some decisions out of harmony with this holding, but we think that great weight of authority is with the principle announced in this case. *Dibble v. N. Y. & E. R. R. Co.*, 25 Barb. (N. Y.) 183; *Whitford v. Panama R. R. Co.*, 23 N. Y. 465; *Littlewood v. Mayor, etc.*, of N. Y., 89 N. Y. 24, 42 Am. Rep. 271; *Read v. Great Eastern Ry. Co.*, L. R. 3 Q. B. 555. None of these cases, however, reaches the point made in the case at bar. Section 285, *supra*, gives a right of action to the personal representatives of the deceased, where the deceased himself might have maintained an action for the same act or omission, had he lived. The right to recover damages for the negligent act or omission of another is a common-law right in the person injured, but there is no common-law right of action for the death of a human being, the right of action abating upon the death of the injured party under the rule *actio personalis moritur cum persona*. Lord Ellenborough, in the case of *Baker v. Bolton*, 1 Camp. 493, decided in 1808, laid down his famous proposition that "in a civil court the death of a human being could not be complained of as an injury." This rule of the common-law was so harsh that it was abrogated in England in 1846 by the enactment of what is commonly known as "Lord Campbell's Act," which in a more or less modified form has been enacted in practically all of the states of the Union. The right of personal representatives to maintain an action for the death of one by the wrongful act or omission of another was in the original act made conditional that the cause of action should be one that the deceased person himself might have maintained had he lived. Our act does not widely differ from the original act, which was early construed in England, and held that the right of action conferred was not the same as that which the deceased person would himself have had at common law, had he survived, but was a new and independent action given by virtue of the statute. *Seward v. Vera Cruz*, 10 App. Cas. 59; *Pym v. Great Northern Ry. Co.*, 4 B. & S. 396. The Indiana cases have followed this construction, and in *Jeffersonville Railroad Co. v. Swayne's Administrator*, 26 Ind. 477, 484, the court said: "The statute does not profess to revive the cause of action for the injury to the deceased in favor of his personal representative, nor is such its legal effect, but it creates a new cause of action, unknown at the common law. The action given by the statute is for causing the death by a wrongful act or omission, in a case where the deceased might have maintained

an action had he lived, for an injury by the same act or omission. The right of compensation for the bodily injury of the deceased, which died with him, remains extinct. The right of action created by the statute is founded on a new grievance, namely, causing the death, and is for the injury sustained thereby, by the widow and children, or next of kin of the deceased, for the damages must inure to their exclusive benefit."

The immediate question, and the only one before us, is: Does the fact shown by the complaint that the husband of the appellant lived more than two years after his injury bar the right of appellant to recover? In passing upon this question we are not directly aided by any of the cases determined in this state, and must look to the adjudicated cases in other jurisdictions, and these cases are not in entire harmony. The general principle, as laid down in the 8 Am. & Eng. Enc. of Law, at page 877, is that, "where the statute follows Lord Campbell's act, the right of action conferred is for the wrongful death, and is based thereon, and the fact that the decedent's right of action for personal injury had become barred will not affect the right of action conferred by the statute upon his survivors, unless there is some provision in the statute, requiring the contrary."

In the case of *Hoover's Administratrix v. C. & O. Ry. Co.*, 46 W. Va. 268, 33 S. E. 224, the court said: "The first clause of the section, 'Whenever the death of a person shall be caused by the wrongful act, neglect or default, and the act, neglect or fault is such as would (if death had not ensued), have entitled the party injured to maintain an action to recover damages in respect thereof,' plainly relates to the character of the injury without regard to the question of the time of suit or death. In other words, if the character of the injury is such that the injured party could have at any time maintained a suit in relation thereto, his administrator could sue after his death. The cause of action is the negligent injury, but the administrator can have no cause of action until such negligent injury results in death. If such were not the case, why not provide merely that the decedent's cause of action survive to his personal representative, without making the death, coupled with the negligence that occasioned it, a new cause of action? And why not give the damages recovered to his estate, instead of exempting them from his debts and liabilities? The second clause of the section, 'Then and in each such case the person who or the corporation which would have been liable if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured,' does not refer to liability after time of the death of the party, but is descriptive of the person made subject to such liability. 'Who would have been liable, if death had not ensued,' means

liable at any time prior to the time of the death, and not just at that period."

In the case of *Western & Atlantic R. R. Co. v. Bass*, 104 Ga. 390, 30 S. E. 874, the appellee sought to recover damages for the negligent killing of her husband, who was an engineer in the employ of appellant company. He was injured in 1891 and died in 1896. In that case, as in this, the right of action by the deceased for his own injury was limited to two years from the date of his injury, and the question of limitation was raised by the defendant on demurrer. After stating the facts, the court said: "It is clear therefore that the statute of limitation which began to run against the husband from the date of his right of action accrued, namely, the time the injuries were inflicted, could not be pleaded against the plaintiff in a suit for his homicide, alleged to have been caused by the same injuries, because she had no right of action until her husband died, and the statute could not run against a right of action before it came into existence. What we now rule is evidently not in conflict with the adjudications of this court to the effect that, where the widow sues for the homicide of her husband, the defendant may set up any defense which might have been pleaded to the merits of the issue, if a suit had been brought by the husband for injuries to his person."

In *Nestelle v. Northern Pac. R. Co.* (C. C.) 56 Fed. 261, the action was by the administrator to recover damages for an injury causing the death of his wife. The injury was suffered more than three years before the action was commenced, and it was insisted by the defendant that the same was barred by the statute of limitations, and upon that ground a demurrer was filed to the complaint. The court said: "Coming directly to the case in hand, it is to be observed that it is a statutory action, differing from an ordinary action *ex delicto*, in this: that the death of a person, resulting from a wrong is a necessary element, and until the death of Mrs. Nestelle this cause of action had not accrued in favor of her legal representative. In my opinion it is not material at this stage of the case whether if a judgment had been rendered during the lifetime of Mrs. Nestelle in an action for the same injury it would or would not bar this action. The statute gives an action to the legal representatives of the deceased to recover damages for her death, if the same was caused by the defendant's negligence without limiting the time for commencing the same, otherwise than as provided in 2 Hill's Code, § 120, which reads as follows: 'An action for relief not hereinbefore provided for shall be commenced within two years after the cause of action shall have accrued.'"

In *Louisville, E. & St. Louis R. R. Co. v. Clark*, 152 U. S. 230, 14 Sup. Ct. 579, 38 L. Ed. 422, the Supreme Court of the United

States construed the identical section of the statute under consideration. In that case the injury was received on November 25, 1896, resulting in the death of plaintiff's decedent on February 23, 1898. The defendant in that case demurred to the complaint upon the ground that the same did not state facts sufficient to constitute a cause of action, contending that, as the death did not occur until after the expiration of a year and a day from the infliction of the injury, such death could not in law be held to have been caused by the act of the defendant. The opinion of the court was delivered by Mr. Justice Harlan, who said: "The statute in express words gives the personal representative two years within which to sue. He cannot sue until the cause of action accrues, and the cause of action given by the statute for the exclusive benefit of the widow and children or next of kin cannot accrue until the person injured dies. Until the death of the person, the 'new grievance' upon which the action is founded does not exist. To say therefore that, where the person injured died one year and two days after being injured, no action can be maintained by the personal representative, is to go in the face of the statute, which makes no distinction between cases where death occurs within less than a year and a day from the injury, and where it does not occur until after the expiration of one year and a day. Although the evidence may show beyond all dispute that the death was caused by the wrongful act or omission of the defendant, and although the action by the personal representative was brought within two years after the death, yet, according to the argument of learned counsel, the action cannot be maintained if the deceased happened to survive his injuries for a year and a day. We cannot assent to this view. Was the death, in fact, caused by the wrongful act or omission of the defendant? That is the vital inquiry in each case. The statute imposes no other condition upon the right to sue. The court has no authority to impose an additional or different one. If death was so caused, then the personal representative may sue at any time within two years from such death." This construction of the act we think is decisive of the question presented by this appeal. If the only condition imposed by the statute upon the right to sue is that death was caused by the wrongful act or omission of the appellee, then the court below erred in holding that the action was barred by the statute of limitation operating against the decedent in his lifetime.

A case frequently cited in opposition to the view herein expressed is that of *Fowlkes, Administrator, v. N. & D. Ry. Co.*, 56 Tenn. 829, in which it is held that the cause of action accrues at the time of the wrongful act or omission, and the statute of limitations begins to run at that time. An examination of this case, however, discloses a section of

the Code of Tennessee, which provides that the right of action in a person injured by the wrongful act or omission of another shall not be extinguished by the death of the injured person, but shall pass to his personal representatives for the benefit of his widow and next of kin. Under this statute, it is clear that no new cause of action arises upon the death of the injured person, and the case is not in point. Another case frequently cited, to the same effect, and directly in point, is the case of *Canadian Pacific R. R. Co. v. Robinson*, 19 Can. S. O. 292, 54 Am. & Eng. R. R. Cas. 40, in which it is held that, where death ensues from the wrongful act or omission of another, the right of action depends, not only on the character of the act from which death ensues, but upon the condition of the decedent's claim at the time of his death. If the claim was in such condition that he could not then enforce it, had death not ensued, the statute gives to the personal representative no right of action, and creates no liability whatever against the person inflicting the injury. By special leave, an appeal was taken to the House of Lords, where the judgment of the Supreme Court of Canada was reversed. *Robinson v. Canadian Pacific R. R. Co.*, 1892 App. Cas. 481. The holding of the Privy Council was that death is the foundation of the right given by the statute, which is governed by the rule of limitation contained therein, and is exempt from the rule of limitation which barred the claim of the deceased.

In view of the authorities herein cited, we are constrained to hold that the trial court erred in sustaining the demurrer to the complaint. The judgment is therefore reversed, with instructions to overrule the demurrer to the complaint, and for further proceedings not inconsistent with this opinion.

LAIRY, C. J., and MYERS, FELT, and IBACH, JJ., concurring. HOTTEL, J., not participating.

(48 Ind. App. 124)

INDEPENDENT TORPEDO CO. v. J. E. CLARK OIL CO. (No. 7,146.)

(Appellate Court of Indiana, Division No. 1. June 21, 1911.)

1. NEW TRIAL (§ 128*)—QUESTIONS REVIEWABLE—ASSIGNMENTS OF ERROR.

An assignment that special findings of fact are not sustained by sufficient evidence is not a proper assignment in a motion for new trial.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 257-262; Dec. Dig. § 128.*]

2. BAILMENT (§ 20*)—COMPENSATION OF BAILOR—CONSIDERATION.

Where a contractor to "shoot" a gas well for the owner caused a charge of nitroglycerine to so explode as to damage the well, and then obtained from the owner drilling tools to repair the damage, on an agreement to pay reasonable compensation for such tools, and the

contractor used the tools therefor, its promise to pay a reasonable compensation was supported by a valid consideration.

[Ed. Note.—For other cases, see Bailment, Dec. Dig. § 20.*]

3. BAILMENT (§ 20*)—CONTRACT—MEANING OF WORDS—"USE."

One contracting to pay a reasonable compensation for the use of another's drilling tools to repair a gas well is liable to pay a reasonable compensation for the time he has possession and use of the tools, and his liability is not limited to days of actual service; the word "use" applying to one's service, employment, or conversion to some purpose (quoting 8 Words and Phrases, pp. 7226, 7227).

[Ed. Note.—For other cases, see Bailment, Dec. Dig. § 20.*]

4. CUSTOMS AND USAGES (§ 10*)—CONTRACTS—CONSTRUCTION.

A custom that a contractor to "shoot" a gas well for the owner shall have the use of the owner's drilling tools free does not control in case the contractor is required to repair damages to the well caused by an explosion.

[Ed. Note.—For other cases, see Customs and Usages, Dec. Dig. § 10.*]

5. CUSTOMS AND USAGES (§ 14*)—CONTRACTS—CONSTRUCTION.

An agreement by a contractor to "shoot" a gas well to pay the owner a reasonable compensation for the use of drilling tools to repair damages to the well caused by the contractor is definite, and cannot be varied by custom.

[Ed. Note.—For other cases, see Customs and Usages, Cent. Dig. § 29; Dec. Dig. § 14.*]

6. TRIAL (§ 75*)—EVIDENCE—OBJECTIONS—WAIVER.

That a party did not object when the adverse party was proving a custom in his favor did not deprive him of the right to object when further evidence was offered which was prejudicial to him.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 171-182; Dec. Dig. § 75.*]

Appeal from Circuit Court, Jay County; John F. La Follette, Judge.

Action by the J. E. Clark Oil Company against the Independent Torpedo Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Orr & Orr, for appellant. Richard H. Hartford, for appellee.

FELT, P. J. Appellee, in a complaint of five paragraphs, sued appellant for damages to personal property and for the rental or use of an engine, boiler, derrick, and drilling tools. The court made a special finding of facts, and stated its conclusions of law thereon. The finding was in favor of appellant on the paragraphs seeking to recover damages and against it on the paragraphs for the use of the property. Judgment was rendered for appellee in the sum of \$1,193.88, from which this appeal is taken. The appellant assigns as error the overruling of its motion for a new trial, which was asked on the ground that the damages assessed are excessive. The decision of the court is not sustained by sufficient evidence, and is contrary to law.

[1] Other reasons are stated in the motion

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

relating to the special finding of facts, but these are not properly a part of the motion for a new trial. *Hamrick v. Hoover*, 41 Ind. App. 411, 415, 84 N. E. 28; *Scott v. Collier*, 166 Ind. 644, 647, 78 N. E. 184. The complaint charges and the evidence tends to show that appellant undertook to "shoot" a gas well for appellee, and that in so doing a charge of nitroglycerine was exploded so near the surface as to blow out about 150 feet of the casing of the well and cause other damage; that appellant obtained from appellee the use of its boiler, engine, derrick, and drilling tools to be used in an effort to repair the damage caused by the explosion; that the same were so used, and appellant agreed to pay reasonable compensation therefor.

[2] The appellant contends that there is no consideration moving from appellee in support of its claim and judgment. One paragraph of the complaint alleges an agreement to pay a reasonable compensation for the use of the property and a refusal to comply with that agreement. The court found, and the evidence tends to support the finding, that the use of the property was worth \$25 per day, and that appellant had the possession and use of the same for 47 days. This is sufficient to show a consideration. *Neiderfer v. Chastain*, 71 Ind. 363, 36 Am. Rep. 198; *Eisel et al. v. Hayes*, 141 Ind. 41, 40 N. E. 119; *Hunt v. Dederick*, 105 Ind. 555, 5 N. E. 710; *Starr v. Earle et al.*, 43 Ind. 478.

[3] The contention that "use" must be limited to days of actual service cannot be sustained. The evidence tends to show that appellee was anxious to obtain possession of its property, and certainly it was the duty of appellant to return the same to it when through using it. While appellant retained the possession with the right to use the property, and deprived appellee of both possession and use, it cannot rightfully complain of the court's finding. One definition of the word "use" given by Webster is applying to one's service, employment, or conversion to some purpose. See, also, 8 Words & Phrases, pp. 7226, 7227.

[4] Some contention is made in regard to a usage or custom in furnishing engine, boiler, derrick, etc., free to those who "shoot" gas and oil wells, but we fail to see its application here. No claim is made for the use of the property before the premature explosion, and, whether by custom or by agreement appellant was to have the use of the property free, to "shoot" the well under ordinary conditions would not control under the extraordinary conditions shown in this case.

[5] Furthermore, there seems to be no ambiguity or uncertainty in the contract alleged and proved. It is a simple agreement to pay a reasonable price for the use of the property. Where the contract is clear and definite in its terms, it will not be varied by a usage or custom. *Leiter v. Emmons*, 20 Ind. App.

22, 25, 50 N. E. 40; *Louisville, Cincinnati, Packet Co. v. Rogers*, 20 Ind. App. 594, 599, 49 N. E. 970; *Lupton v. Nichols*, 28 Ind. App. 539, 63 N. E. 477; *Morningstar v. Cunningham*, 110 Ind. 328, 333, 11 N. E. 593, 59 Am. Rep. 211; *Seavey v. Shurick*, 110 Ind. 494, 497, 11 N. E. 597; *Cole v. Leach*, 94 N. E. 577; *Hitz v. Warner*, 93 N. E. 1005.

[6] Under the issues and facts of this case, the trial court properly excluded the evidence of a custom or usage. The fact that one of the parties did not object when the other was proving a custom in his favor did not deprive him of the right to object when further evidence was offered which was prejudicial to him. The evidence tends to support the judgment. There is no available error shown by the record.

Judgment affirmed.

(48 Ind. A. 172)

MORTON v. GAFFIELD. (No. 7,695.)

(Appellate Court of Indiana, Division No. 1.
June 27, 1911.)

APPEAL AND ERROR (§ 323*)—DISMISSAL—NECESSARY PARTIES.

As under the direct provisions of Burns' Ann. St. 1908, § 675, a term time appeal may be taken by a part only of persons against whom a judgment was had, without naming in the assignment of error those not appealing, the single appeal of one codefendant, taken in term time and under section 679, cannot be dismissed, because not naming the nonappealing defendant in the assignment of error.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 323.*]

Appeal from Circuit Court, Jasper County; C. W. Hauley, Judge.

Action by William P. Gaffield against James T. Morton and another. From a judgment for plaintiff, defendant Morton alone appeals. On motion to dismiss appeal. Motion overruled.

George A. Williams, for appellant. Frank Foltz, for appellee.

HOTTEL, J. Appellee files motion to dismiss this appeal, for the reason that the appellant has failed to make all the parties against whom judgment was rendered parties to this appeal. The judgment herein was rendered against the appellant, James T. Morton, for \$120, and against George A. Williams, a garnishee, codefendant. Appellant has not joined with him, in his appeal, his said garnishee codefendant, and has not named said defendant in his assignment of errors.

This is a term time appeal, perfected as such under section 679, Burns' 1908. "Any part of any number of coparties against whom a judgment has been taken" may appeal from such judgment to the Supreme or Appellate Court, where the appeal is perfected under the above statute, without making such "coparties, not appealing, parties to the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes
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appeal, and it shall not be necessary to name them as appellants or appellees in the assignment of error." Section 675, Burns' 1908; *Kelser v. Mills*, 162 Ind. 386, 369, 69 N. E. 142; *Gunn et al. v. Haworth et al.*, 159 Ind. 419, 64 N. E. 911; *Baltes Land, etc., Co. v. Sutton*, 32 Ind. App. 14, 69 N. E. 179. The cases cited and relied upon by appellee apply to appeals other than term time appeals perfected under said section 679, Burns' 1908, supra.

The motion to dismiss the appeal is therefore overruled.

(48 Ind. A. 147)

BENNETT v. EVANSVILLE & T. H. R. CO.
et al. (No. 7,628.)

(Appellate Court of Indiana, Division No. 2.
June 23, 1911.)

1. COURTS (§ 97*) — DECISIONS OF UNITED STATES COURTS—CONCLUSIVENESS.

The decisions of the United States Supreme Court on questions arising under the United States Constitution are binding on the state courts.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 329-334; Dec. Dig. § 97.*]

2. COURTS (§ 220*) — APPELLATE COURTS — TRANSFER TO SUPREME COURT.

Where the opinion of the Supreme Court of the state on a question arising in a case before the Appellate Court is in conflict with the decision of the United States Supreme Court on a constitutional question, the Supreme Court will be requested to take over and decide the case.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 587; Dec. Dig. § 220.*]

Appeal from Circuit Court, Greene County; Chas. E. Henderson, Judge.

Action by Lulu Bennett, as administratrix of the estate of Emery C. Bennett, deceased, against the Evansville & Terre Haute Railroad Company and another. Judgment for defendants, and plaintiff appeals. Cause transferred to the Supreme Court under the provisions of Burns' Ann. St. 1908, § 1429.

William L. Slinkard, for appellant. John E. Iglehart, Edwin Taylor, E. H. Iglehart, and Jno. T. & W. H. Hays, for appellees.

IBACH, J. Suit by appellant, as administratrix, to recover damages for the death of Emery C. Bennett, which occurred, it is alleged, by reason of the negligence of appellees. Each appellee filed a separate demurrer to the complaint, which demurrers were sustained, and, appellant declining to plead further, judgment was rendered for appellees. The sole question arising on this appeal is the sufficiency of the complaint, as the only error assigned is in sustaining the demurrers.

The complaint is long and verbose. Following is a brief summary of the facts averred and charges made: That Bennett was employed by defendant railway corporations as a member of a bridge gang, whose busi-

ness it was, among other things, to work upon certain bridges; that he was on July 4, 1907, ordered by defendants, through the boss of the gang with whom he was working, to assist in unloading a car load of piling by rolling them off the car with cant hooks and crowbars; that all of the piling had been unloaded but two pieces, one of which remained on top of the other, on the east side of the car, and which were stuck and fast; that Bennett was ordered by the boss to go to the center of the car, a dangerous place, to the east of the piling, and in front of the way the piling was compelled to roll; that when he was thus situated the piling was by the orders of the boss started to roll, and rolled toward the east, and followed Bennett, who was trying to get out of the way, and in so doing jumped from the east side of the car; the piling, following him, rolled off, and struck him, and as a result of the injury he died. It is also averred that he had been long employed by defendants as a servant for hire, and was working in the line of his duty when injured.

Appellees are charged with negligence in failing to supply chocks, stops, or standards to stop the piling from rolling off the car, and in failing to supply skids on which the piling could slide down from the car. It is charged that appellees, by their boss, whose orders and commands Bennett was bound to obey, were negligent in ordering Bennett into a place of danger, in failing to notify him of the danger, in failing to order him therefrom, and in negligently ordering the piling to be pried loose and rolled off the car, in a dangerous manner, while Bennett was thus situated, and that Bennett's death was the result of appellees' negligence. It is averred that Bennett used due care and caution, and was without fault or negligence, and that the boss knew that the piling was stuck and hard to break loose, and, when started, would roll off the car with great force, and, knowing these things, ordered Bennett into the dangerous place in front of the pilings.

The complaint seems to have been drawn under the employer's liability act. Burns 1908, § 8017. This court recently in the case of *Richey v. Cleveland, etc., R. Co.*, 93 N. E. 1022, No. 7,428, at the last term, say: "In order to state a cause of action under the second subdivision of the statute, it is necessary that the complaint should state facts which show: First, that the plaintiff was employed by a corporation engaged in the operation of railroads; second, that the person giving the order or direction was employed by such railroad company, and that the person injured was bound to comply with such order, and did so comply; third, that the order was a special order, not as broad as the general scope of the employment; fourth, either that the order given was a negligent order, or, in the event said order was

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

not negligently given, that while plaintiff was performing his duty in carrying out said order, and while he was in a place where he was required to be in the performance of his duty under said order, he was injured through some negligent act or omission of the party giving the order or direction."

[1, 2] The present complaint would thus seem sufficient. But the Supreme Court of this state has held that section 8017, Burns' 1908, to be constitutional, in so far as it is, applies only to those employes of railroad corporations who are engaged in the operation of trains. Appellant, on the facts averred, was not thus engaged. A late decision of the United States Supreme Court (Louisville, etc., R. Co., v. Melton, 218 U. S. 36, 30 Sup. Ct. 676, 54 L. Ed. 921) holds that such a statute may apply to all employes of a railroad corporation and not violate the equal protection clause of the fourteenth amendment to the United States Constitution. The decisions of the United States Supreme Court are binding on state courts, and the Appellate Court of this state cannot decide constitutional questions, and as the question presented by the case at bar is practically the question presented by Richey v. Cleveland, etc., Co., supra, upon the authority of that case and for the reasons there given, we respectfully request the Supreme Court of this state to take over this case and decide it, and that they overrule the cases of Indianapolis Traction Co. v. Kinney, 171 Ind. 612, 85 N. E. 954, 23 L. R. A. (N. S.) 711, and Cleveland, etc., R. Co. v. Foland, 91 N. E. 594, and follow the ruling of Indianapolis St. Ry. Co. v. Kane, 169 Ind. 25, 80 N. E. 841, 81 N. E. 721.

This case is transferred to the Supreme Court, under the provisions of section 1429, Burns' Statutes 1908.

PENN-AMERICAN PLATE GLASS CO. v. POLING. (No. 7,681.)¹

(Appellate Court of Indiana. June 30, 1911.)

APPEAL AND ERROR (§ 386*)—DISMISSAL— BONDS.

A term time appeal must be dismissed where the surety upon the appeal bond is not approved at the term during which judgment was rendered, as required by Burns' Ann. St. 1908, § 679, providing for such appeals, and that it shall operate as a stay upon the filing of an appeal bond, with such penalty and surety as the court shall approve.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2059-2063; Dec. Dig. § 386.*]

Appeal from Circuit Court, Tipton County; Leroy B. Vash, Judge.

Action by Anna B. Poling, as administratrix, against the Penn-American Plate Glass Company. From a judgment for plaintiff, defendant appeals. Dismissed.

Lovett & Slaymaker, for appellant. Kittinger & Diven, for appellee.

PER CURIAM. Appellee moves to dismiss this appeal on the ground that appellant has not complied with the statute authorizing term time appeals, and has failed to take steps to perfect a vacation appeal.

On January 15, 1910, and at the November term, 1909, of the Tipton circuit court, a judgment was rendered against appellant and in favor of appellee. Appellant prayed an appeal to this court, which the court granted, and fixed the penalty of the appeal bond at \$3,000, with surety to be approved by the court, and 90 days were given within which to file said bond. On April 13, 1910, and during the February term, 1910, of said court, the appellant filed its appeal bond in the sum of \$3,000, with the National Surety Company as surety thereon, which bond on said last date was approved by the court. On May 11, 1910, the transcript on appeal was filed in this court. There is no claim that this is a vacation appeal; but, on the contrary, it is insisted that the proceedings had in the court below were in substantial compliance with the statute governing term time appeals. Section 679, Burns' 1908. This section provides: "When an appeal is taken during the term at which judgment is rendered, it shall operate as a stay of all further proceedings on the judgment, upon an appeal bond being filed by the appellant, with such penalty and surety as the court shall approve, and within such time as it shall direct, payable to the appellee," etc.

It clearly appears that all the provisions of this statute were complied with except one. The sureties were not named and approved during the term at which judgment was rendered. The failure to name and approve sureties on a bond of this character during such term has been held to be an omission of one of the necessary steps in order to effect a term time appeal. Michigan Mutual Life Ins. Co. v. Frankel, 151 Ind. 534, 50 N. E. 304. In that case it was said: "The statute provides the steps which must be taken in order to effect a term time appeal, and thereby relieve the appellant from giving the notice required by law in vacation appeals. The penalty of the appeal bond must be fixed, and the surety named and approved by the court, during the term at which the final judgment is rendered, and the bond, conditioned according to law, must be filed within the time directed by the court." In this case the bond was filed within the time allowed by the court, but the name of the surety was not brought to the attention of the court until the day the bond was presented and approved, which was after the term in which the appeal was prayed and granted. The authorities seem to hold that it is the filing of the bond only that may be done upon order

¹For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes
²Rehearing granted, 100 N. E. 82. Second petition for rehearing denied. Transfer to Supreme Court denied.

after the term, but it shall be with such penalty and surety as has been prescribed and approved by the court during the term at which the judgment appealed from was rendered. Under this theory of the statute, the appeal in this case was not in term. *McKinney v. Hartman*, 143 Ind. 224, 227, 42 N. E. 681; *Elliott's Appellate Procedure*, § 246; *Ewbank's Manual*, § 175.

Appeal dismissed.

(48 Ind. A. 584)

LAKE SHORE & M. S. RY. CO. v. CHICAGO, L. S. & S. B. RY. CO. (No. 7,664).¹
(Appellate Court of Indiana, Division No. 1, June 23, 1911.)

On petition for rehearing. Petition overruled.

For former opinion, see 92 N. E. 989.

MYERS, J. Appellant, in support of its petition for a rehearing, cites the case of *Peoria Waterworks Co. v. Peoria Ry. Co.* (C. C.) 181 Fed. 990, as announcing a rule of law contrary to that expressed by this court at the former hearing of this case. At that time we were not advised as to the ruling in that case, but in the consideration of the petition before us we have carefully examined the facts and opinion of the courts as reported, without in the least being persuaded that there is any conflict in the two opinions.

In the *Peoria Waterworks Co.* Case the relief sought was an injunction against injury to water mains by electrolysis. The case was referred to a special master for his findings of fact and conclusions of law. In that case, at page 996, it is said: "The ultimate facts disclosed by the evidence may be briefly summarized as follows: (1) The injury complained of exists. (2) The injury is permanent and continuing. (3) The injury has been and is being caused by the defendants. (4) The complainant can do nothing to prevent the injury." Under the heading "Conclusions of Law," on page 997, it is said: "(6) The injury which is being done to complainant's water pipes by the defendants' currents of electricity is not a mere incidental injury or inconvenience, but is a permanent, continuing injury to a legal right, which will, in effect, if the injury is permitted to go on, ultimately result in the absolute destruction of complainant's plant and property." It is also said, at page 998: "(1) It is possible for the defendants to so operate their railways by electric motive power as not to injure the complainant's property. (2) It is impossible by any known method for the complainant to protect its property from such injury. (3) * * * (4) The failure on the part of the defendants to observe such duty constitutes negligence, and, when it results in damage to another, such dam-

age is actionable. * * * (10) The injury found to be going on in this case is the direct consequence of the unnecessary and wrongful acts of the defendants in accomplishing a legal result." In the course of the opinion of the court, at page 1003, it is said: "At the outset it may be said that the court has no power to prescribe by injunction the use of any particular system of circuit or negative return. It is doubtful, indeed, whether the judicial power would extend to the making of a decree restraining the defendant from continuing to serve the public, unless it shall cease injuring complainant's water system."

The facts set forth in the complaint before us are wide of the facts found in the case cited. In that case the water company was powerless to prevent the injury of which it complained. In this case, for aught appearing, appellant at a small expense might have remedied the trouble. It was within the power of the railway company to minimize the escape of its electric currents, and thereby prevent a destruction of the water company's property. In this case appellee may be using the most approved construction and apparatus known to science. In that case the findings show that the railway company was guilty of negligence, and that the injury was the direct consequence of the unnecessary and wrongful acts of the defendants. In this case appellant expressly declines to base its asserted right upon the theory of negligence, unskillfulness, or malice in the construction, maintenance, or operation of appellee's line of railway.

Finding no reason for granting appellant's petition for a rehearing, it is therefore overruled.

(48 Ind. A. 675)

CHICAGO & E. R. CO. v. COON.¹
(No. 6,858.)

(Appellate Court of Indiana, Division No. 1, June 27, 1911.)

APPEAL AND ERROR (§ 832*)—REHEARING—QUESTIONS REVIEWABLE.

A rehearing will not be granted on a point not made or referred to in the original briefs.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3215-3228; Dec. Dig. § 832.*]

On petition for rehearing. Overruled.

For former opinion, see 93 N. E. 561.

HOTTEL, J. A petition for rehearing has been filed in this case, supported by a brief more elaborate and covering more points than that presented by appellant in its original brief herein. The earnestness and ability with which the questions involved in this petition have been argued by counsel upon either side has led us to a very careful re-examination of such of these questions as were presented by appellant in its original

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes.

¹ Transfer denied.

brief herein, with the result that we find no ground for changing the original opinion. We should say in this connection, however, that in the presentation of this petition counsel present some points not included in the original statement of points, nor referred to in the argument thereof, and which, under the rules of this court, cannot now be considered.

This is particularly true as to instruction No. 4 tendered by appellee and given by the court. It is now insisted that this instruction is objectionable, because it authorizes the jury, in assessing damages, to include therein elements not within the issues and evidence. The only objection urged to this instruction in the original brief was that by it (we quote from appellant's points and authorities) "the jury were directed to find for appellee, without being required to find that the negligence imputed to the appellant contributed to or was the proximate cause of the injury." The instruction was not open to the objection then urged against it, and was approved only as against that objection. As against said objection, the instruction was a correct expression of the law and supported by authority, as shown in the original opinion herein. A rehearing cannot be granted on a point not made, nor referred to, in the original briefs. *Cleveland R. R. Co. v. Lindsay*, 33 Ind. App. 412, 70 N. E. 283, 998; *Indiana Power Co. v. St. Joseph, etc., Power Co.*, 159 Ind. 51, 63 N. E. 304, 64 N. E. 468; *Armstrong v. Hufty*, 156 Ind. 630, 55 N. E. 443, 60 N. E. 1080; *City of Evansville v. Senhenn*, 151 Ind. 61, 62, 47 N. E. 634, 51 N. E. 88, 41 L. R. A. 728, 68 Am. St. Rep. 218.

Petition overruled.

(48 Ind. A. 263)

HARMON v. FORAN. (No. 7,200.)

(Appellate Court of Indiana, Division No. 2.
June 29, 1911.)

On petition for rehearing. Petition overruled.

For former opinion, see 94 N. E. 1050.

IBACH, J. Appellee, in his brief on petition for rehearing, suggests that the original opinion makes no reference to the cases of *Nicho's v. Baltimore, etc., Co.*, 33 Ind. App. 229, 70 N. E. 183, 71 N. E. 170, *Pittsburg, etc., Co. v. Reed*, 36 Ind. App. 67, 75 N. E. 50, and *Cleveland, etc., Co. v. Schneider*, 40 Ind. App. 88, 80 N. E. 985, upon the authority of which the instruction was given upon which the case was reversed. These cases are clearly in conflict with the Supreme Court decisions cited in the opinion. In the case of *Grand Trunk, etc., Co. v. Reynolds* (Sup., No. 21,767), 92 N. E. 733, at page 737, the Supreme Court has expressly disapproved *Nichols v. Baltimore, etc., Co.* and *Pittsburg, etc., Co. v.*

Reed, and held them erroneous on the proposition involved in instruction 7 in the present case, setting forth fully the reasons for their holding. In *Cleveland, etc., Co. v. Schneider*, the objection made to the instruction in the present case seems not to have been involved; but the opinion in that case, and the opinion in the case of *Wamsley v. Cleveland, etc., Co.*, 41 Ind. App. 147, 82 N. E. 490, 83 N. E. 640, in so far as they are, or may be construed to be, in conflict with the opinion in the present case, are disapproved.

We adhere to our opinion that the giving of the erroneous instruction 7 was not made harmless to appellant by the answers to interrogatories, for the reasons stated in the original opinion. The jury found the answers to interrogatories after the instruction complained of was given, and may have been led to answer them as they did because influenced by the presumption that appellee was not guilty of contributory negligence, which would include the presumption that he looked and listened at proper times and places, although from the evidence, unaided by presumption, different answers might have been returned.

Appellant has furnished us with a brief on petition for rehearing showing much care, and we have for the second time gone into the case very thoroughly, but find no cause to modify our former judgment.

(48 Ind. A. 163)

ANDIS v. SMITH. (No. 7,284.)

(Appellate Court of Indiana, Division No. 2.
June 27, 1911.)

1. APPEAL AND ERROR (§ 272*)—QUESTIONS REVIEWABLE—EXCEPTIONS TO CONCLUSIONS OF LAW—TIME TO PRESENT.

Burns' Ann. St. 1908, § 656, providing that a party must except at the time the decision is made, is mandatory, and to present any question for review on appeal an exception to the conclusions of law must be taken when the decision is made, and exceptions taken to conclusions of law 16 days after the conclusions of fact and law are announced cannot be considered, unless the court recalls and changes the same.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1611-1619; Dec. Dig. § 272;* Trial, Cent. Dig. §§ 254, 680.]

2. TRIAL (§ 400*)—CONCLUSIONS OF FACT AND LAW—RIGHT TO RECALL AND AMEND.

The trial court may recall and amend its findings of fact and conclusions of law thereon on the motion of either party, or on its own motion, at any time while the action remains undetermined.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 949, 950; Dec. Dig. § 400.*]

3. APPEAL AND ERROR (§ 272*)—QUESTIONS REVIEWABLE—CONCLUSIONS OF LAW—EXCEPTIONS—TIME TO MAKE.

Where the trial court recalls its findings of fact and conclusions of law and makes changes therein, the party objecting is entitled to have his exceptions entered at the time of the making of the change, whether he excepted to the conclusions as originally filed or not.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 272.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.

Appeal from Circuit Court, Hancock County; Robert L. Mason, Judge.

Action by Morgan Andis against Emanuel Smith. From a judgment for defendant, plaintiff appeals. Affirmed.

James E. McCullough and William C. Welborn, for appellant. Robert Williamson, Charles H. Cook, and William Ward Cook, for appellee.

ADAMS, J. This action was by the appellant against the appellee to quiet title to certain real estate in Hancock county. By request of the parties, made at the proper time, the court made and filed a special finding of facts; established by the evidence in said cause, and stated conclusions of law thereon.

The record before us shows that the evidence was heard on April 14, 1908, and the cause continued for argument of counsel until April 27, 1908. The next entry appearing is as follows: "And afterwards, to wit, on the 6th day of June, 1908, being the 36th judicial day of the April term, 1908, of said court, before the same hon. judge the following further proceedings were had in the cause of Morgan Andis v. Emanuel Smith, No. 11,071: Come the parties and their attorneys aforesaid, and thereupon the court makes a special finding of facts and conclusions of law herein, in the words and figures following, to wit: (Here follows the finding of facts and conclusions of law)." The next entry appearing in the record is as follows: "And afterwards, to wit, on the 27th day of June, 1908, being the 54th judicial day of the April term, 1908, of said court, before the same hon. judge the following further proceedings were had in the cause of Morgan Andis v. Emanuel Smith, No. 11,071: Come the parties herein by their counsel and thereupon the plaintiff excepts to each of said conclusions of law separately and severally, and also excepts to all said conclusions of law." The error relied upon by the appellant of reversal is that "the court erred in its conclusions of law, numbered 1 and 2, and in each of them, stated on his special finding of facts."

[1] It will be observed that the trial court made and filed his finding of facts and conclusions of law on June 6, 1908, and the appellant did not except to the conclusions of law until June 27, 1908. The appellee therefore insists that the record does not present any question for the determination of this court on appeal.

Section 656, Burns 1908, provides that: "The party objecting to the decision must except at the time the decision is made." This statute has been held to be mandatory. *Johnson v. Bell*, 10 Ind. 363; *Coan v. Grimes*, 63 Ind. 21; *Kolle v. Foltz*, 74 Ind. 54; *Dickson v. Rose*, 87 Ind. 103; *Brown v. Ohio*, etc., Ry. Co., 135 Ind. 587, 35 N. E. 503; *Tecumseh Mills v. Sweet*, etc., Co., 25 Ind. App. 284, 286, 58 N. E. 93.

It is also settled by the decisions of the

Supreme and this court that, in order to present any question for review on appeal, an exception to the conclusions of law must be taken at the time the decision is made. *Ewbank's Manuel*, section 24; *Elliot's App. Procedure*, section 793; *Smith v. McKean*, 99 Ind. 101; *Helms v. Wagner*, 102 Ind. 385, 1 N. E. 730; *Hull v. Louth*, *Guardian*, 109 Ind. 315, 333, 10 N. E. 270, 58 Am. Rep. 405; *Matsinger v. Fort*, 118 Ind. 107, 20 N. E. 653; *Midland*, etc., Ry. Co. v. *Dickason*, 130 Ind. 164, 29 N. E. 775; *Barner v. Bayless*, 134 Ind. 600, 33 N. E. 907, 34 N. E. 502; *Radabaugh v. Silvers*, Adm'r, 135 Ind. 605, 607, 35 N. E. 694; *Medical College of Ind. v. Commingore*, 140 Ind. 296, 297, 39 N. E. 744; *Winsteadley v. Breyfogle*, 148 Ind. 618, 48 N. E. 224; *Chicago*, etc., R. Co. v. *State ex rel.*, 159 Ind. 237, 241, 64 N. E. 860; *Cooney v. Am.*, etc., *Insurance Co.*, 161 Ind. 193, 194, 67 N. E. 989; *Repp v. Leshner*, 27 Ind. App. 360, 366, 61 N. E. 609.

In the last case cited, the conclusions of law were announced 16 days before the exceptions were noted, and this was held to present no question. In the case of *Chicago*, etc., R. Co. v. *State ex rel.*, supra, six days intervened between the filing and finding and conclusions and taking the exception, and this was likewise held to present no question. In *Medical College of Indiana v. Commingore*, supra, five days after the announcement of the conclusions of law the exception was taken, and held to present no question. In *Radabaugh v. Silvers*, supra, the exception was taken four days after the filing of the conclusions of law, and also held to present no question.

[2] The appellant insists that the rule governing the time of taking exceptions to conclusions of law has been modified by the later decisions; that the early holdings established the principle that the filing of the findings of the court was equivalent to the return of a special verdict of a jury; and that after such findings and conclusions thereon had been signed and filed the court had no further control over the same. It is true that the later decisions have changed the rule, and it is now the settled law that the court can recall and amend the findings at the instance of either party, or upon his own motion, at any time while the action remains in fieri. *Thompson v. Connecticut*, etc., *Insurance Co.*, 139 Ind. 325, 355, 356, 38 N. E. 796; *Royse v. Bourne*, 149 Ind. 187, 192, 47 N. E. 827; *Jones v. Mayne*, 154 Ind. 400, 403, 55 N. E. 956; *Marion Mfg. Co. v. Harding*, 155 Ind. 648, 651, 58 N. E. 194; *Apple, Assignee, v. Smith, Trustee*, 26 Ind. App. 659, 660, 60 N. E. 456.

[3] There can be no doubt about the correctness of the rule stated in the foregoing cases, but we fail to see wherein the latter doctrine enlarges the right of a litigant in a case such as that presented by the record before us. Had the trial court in this case recalled its findings and conclusions, and

made any change therein, after the same had been signed and filed, appellant would clearly have been entitled to have his exceptions entered at the time of making such change, whether he had excepted to the conclusions as originally filed or not. But that question is not before us. We are not here dealing with a case where any changes were made in the facts found or in the conclusions of law after the same were signed and filed, but with a case where the court's findings and conclusions were announced, and 21 days later exceptions taken to the conclusions of law. That this was too late is abundantly shown by an unbroken line of decisions, as well as by the plain wording of the statute.

No available error being shown by the record, the judgment is affirmed.

(48 Ind. App. 308)

VERNON, G. & R. R. CO. v. WASHINGTON CIVIL TP. ex rel. DEEM. (No. 7,610.)

(Appellate Court of Indiana, Division No. 2
June 30, 1911.)

1. PARTIES (§ 75*)—DEFECT OF PARTIES—DEMURRER—REQUISITES.

A demurrer for defect of parties must designate the proper parties, and a mere specification in a demurrer that, as appears on the face of the complaint, there is a defect of parties defendant, does not present any question.

[Ed. Note.—For other cases, see Parties, Cent. Dig. § 116; Dec. Dig. § 75.*]

2. PARTIES (§ 75*)—DEFECT—OBJECTION—SUFFICIENCY—DEMURRER FOR WANT OF FACTS.

A demurrer to a complaint for want of facts does not raise the point of defect of parties.

[Ed. Note.—For other cases, see Parties, Cent. Dig. § 116; Dec. Dig. § 75.*]

3. CORPORATIONS (§ 134*)—WRONGFUL TRANSFER OF CORPORATE STOCK—REMEDY OF OWNER.

An owner of stock wrongfully or negligently transferred by the corporation may sue in equity to compel a retransfer on the corporate books and his recognition as a stockholder, or he may sue the corporation at law for a wrongful refusal to transfer the stock to him on the corporate books, and recover the value of the stock as damages.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 521; Dec. Dig. § 134.*]

4. CORPORATIONS (§ 134*)—WRONGFUL TRANSFER OF CORPORATE STOCK—REMEDY OF OWNER.

While a suit in equity does not lie for specific performance of a contract concerning personality unless it has a peculiar value, a suit in equity will lie against a corporation to compel the transfer of stock on its books on the ground that such suit is the most complete and adequate remedy.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 521; Dec. Dig. § 134.*]

5. CORPORATIONS (§ 134*)—WRONGFUL TRANSFER OF CORPORATE STOCK—REMEDY OF OWNER.

One deprived of its corporate stock by a wrongful act of its agent and the corporation may sue in equity to compel the corporation to

transfer on its books the stock to him, and he need not accept money damages for his injury.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 521; Dec. Dig. § 134.*]

6. CORPORATIONS (§ 134*)—WRONGFUL TRANSFER OF CORPORATE STOCK—REMEDY OF OWNER.

A township owned stock of a corporation. Its trustee intended to sell the stock for a nominal sum, and bartered the same for school supplies. The township tendered the money paid for the stock, and demanded a retransfer. The tender was refused, and the corporation declined to retransfer the stock. *Held*, that the township could sue in equity to invalidate the transfer and to compel the corporation to recognize it as owner of the stock, because its remedy at law was not adequate, and it could sue for such relief without demanding alternative relief in damages.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 521; Dec. Dig. § 134.*]

7. CORPORATIONS (§ 134*)—CORPORATE STOCK—ALLEGATION OF VALUE—PLEADING.

A complaint in an action to compel a corporation to retransfer corporate stock on its books, which alleges the par value of the stock, sufficiently avers its value.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 521; Dec. Dig. § 134.*]

Appeal from Circuit Court, Bartholomew County; Marshall Hacker, Judge.

Action by the Washington Civil Township, Decatur County, on the relation of J. Frank Deem, as trustee thereof, against the Vernon, Greensburg & Rushville Railroad Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Baker & Richman, for appellant. J. W. Donaker, R. N. Spaugh, J. F. Goddard, and J. W. Craig, for appellee.

IBACH, J. Appellant was defendant and appellee plaintiff in the court below. The suit was brought in equity to cancel a transfer of 750 shares of stock of appellant corporation, certificates of which numbered 19, 27, 35, 39, 45, and 48 were assigned by Charles H. Reed, former trustee of the township, to John C. Davie, attorney, delivered by Reed to Nathan G. Swalls for said Davie, or for M. E. Ingalls, and afterwards were surrendered to appellant, whereupon new certificates were issued and the shares transferred on the books of the corporation to J. D. Layng. Besides asking that said assignment be declared invalid, appellee also prayed that appellant be ordered to register said shares on its books in the name of appellee and to issue therefor new certificates. The sum of \$150. received by Reed as part consideration for the assignment was paid into court. Appellee on trial offered to pay appellant \$10 alleged to be the balance of said consideration. The original complaint was filed in the Decatur circuit court with Charles H. Reed, Daniel W. Pardee, John C. Davie, and Nathan B. Swalls joined with appellant as parties defendant. Before the cause was put at issue, John C. Davie per-

fect a change of venue to the Bartholomew circuit court, where took place all the proceedings on which error is assigned. The complaint was thrice amended, and as it finally stands in the record appellant is the only defendant.

A demurrer to the amended complaint was filed which assigns the following statutory grounds: (1) That the plaintiff has not legal capacity to sue. (2) That there is a defect of parties plaintiff. (3) That said amended complaint does not state facts sufficient to constitute a cause of action against said defendant. (4) That as appears upon the face of said amended complaint there is a defect of parties defendant. This demurrer was overruled, an answer in denial was filed, and upon trial before the court without intervention of a jury the court found for appellee.

Judgment was rendered that appellee is the owner of said 750 shares of stock as represented by certificates numbered 19, 27, 35, 39, 45, and 48; that appellant by its secretary assign and deliver said certificates to appellee and register the stock in its books in the name of appellee; that appellee recover costs; and that upon compliance by appellant with the judgment as aforesaid appellee pay to appellant \$10 for its school supplies, and that the clerk of the court pay to appellant the sum of \$150, now held as a tender.

The errors assigned are in the overruling of demurrer to the amended complaint, and in overruling appellant's motion for new trial. The second of these has been waived by failure to discuss it. The third and fourth grounds for demurrer have been argued, and, to better consider them, we set forth the complaint in full, omitting the caption: "The plaintiff, Washington civil township, of Decatur county, Ind., ex rel. J. Frank Deem, as trustee thereof, for amended complaint, complains of said defendant, the Vernon, Greensburg & Rushville Railroad Company, and says: That said plaintiff township is a political division of said state for township purposes, and that J. Frank Deem is the duly elected, qualified, and acting trustee thereof. That defendant, the Vernon, Greensburg & Rushville Railroad Company, is a corporation organized and existing under and pursuant to the laws of the state of Indiana for railroad purposes, and domiciled therein, with a line of railroad extending from the town of Vernon, said state, into and through the city of Greensburg, in the county of Decatur and state aforesaid, to the city of Rushville, in said state, with the principal office at Greensburg. That said company held its last annual election of officers in said city. That William W. Hamilton is one of the directors of said company and resides in Decatur county, Ind. That Dwight W. Pardee is the duly acting secretary of said corporation and resides in the city of New York, in the state of New York, and that he has the custody of its books, and its stock

register book. That the stock of said company is transferred on said book of said company. That heretofore, to wit, on the — day of —, 18—, said corporation issued to said plaintiff certain stock, evidenced by its certificates therefor, aggregating seven hundred and fifty (750) shares of the par value of seventy-five thousand dollars (\$75,000), being of the stock of said company. That a more particular description of said stock cannot be given for the reason that said plaintiff does not have said certificates or a copy thereof, and that said defendant railroad company does have the original stock book therefor. That said shares of stock in said company are the property of said township. That thereafter, on the 1st day of September, 1902, Charles H. Reed was the duly elected, qualified, and acting trustee of said township, and on said date, and while so acting as trustee as aforesaid, said Reed pretended to sell said shares of stock and assign the certificates for the same to one John C. Davie, and that he did deliver to Nathan G. Swails said certificates with a written assignment thereon to said Davie, and said township has never since been in possession of the same. That said Swails paid said Reed, as such trustee, the sum of one hundred and fifty dollars (\$150), and bartered some school supplies of the probable value of ten dollars (\$10) for said assignment to said Davie, as aforesaid. That said Reed, as such trustee, never gave notice as required by law or any notice of the sale of said property belonging to said township as aforesaid, and no notice of said sale was ever given. That thereafter, on the — day of —, said stock was transferred on the books of said railroad company in the name of J. D. Layng, whose Christian name is unknown. Said plaintiff further avers that on the 27th day of November, 1906, it made a tender of one hundred and fifty dollars (\$150) to said Davie, and in writing demanded the return of said certificates to said township, and said tender and said demand were by him refused. That said Davie claimed and claims that seven hundred and fifty dollars (\$750) was the amount paid by him through said Swails for said stock. Said plaintiff now brings said \$150 into court and offers it for the benefit of such person as the court may decide it belongs, and offers to pay and restore the value of such school supplies as the court in equity may order and direct. Said plaintiff avers further that on the — day of —, 1906, it made a written demand upon said defendant, the Vernon, Greensburg & Rushville Railroad Company, and before the bringing of this action, for the cancellation of said pretended assignment of said stock, and that the register of stock of said company shows said plaintiff to be the real owner of the same. That said demand was never complied with, and said defendant has failed and refused, and still does, to

comply with the same. That said assignment and said claims of said defendant are clouds upon the title of plaintiff to said property. And wherefore said plaintiff prays the court that it be declared the owner of said stock; that said assignment be found invalid and held for naught and canceled; that said defendant, the Vernon, Greensburg & Rushville Railroad Company, be ordered and directed to register said shares of stock in the name of said township, and issue its certificates therefor; that said court direct said plaintiff to pay said \$150 to whom it belongs, and for all proper relief."

[1, 2] It is well established by the Supreme Court of this state that a demurrer for defect of parties must designate the proper parties in order to present a question. The fourth specification of the demurrer in the case at bar is "that, as appears upon the face of said amended complaint, there is a defect of parties defendant." This specification does not point out or name the person or persons who should be, but who are not, made parties defendant; therefore does not properly present the question. As a demurrer for want of facts does not raise the point of defect of parties, appellant is in the same situation as if it had not demurred for defect of parties, and had waived such objection. *Kelley v. Love*, 35 Ind. 106; *Galnes v. Walker*, 16 Ind. 361; *Vansickle v. Erdelmeyer*, 36 Ind. 262; *Marks v. Indianapolis, etc., R. Co.*, 38 Ind. 440; *Musselman v. Kent*, 33 Ind. 452; *Durham v. Bischof*, 47 Ind. 211; *Leedy v. Nash*, 67 Ind. 311; *State v. McClelland*, 138 Ind. 395, 37 N. E. 799; *Bosker v. Chamberlain*, 160 Ind. 114, 66 N. E. 448. Appellant, in arguing that the complaint does not contain facts sufficient to constitute a cause of action, first announces the elementary propositions that, where relief is sought in a court of equity, the complaint must contain facts showing that equity has jurisdiction, and that equity will not relieve if there is an adequate remedy at law. He then claims that, in cases where shares of stock have been wrongfully or negligently transferred by a corporation, the injured stockholder has an adequate remedy at law. He further urges that from aught that appears in appellee's amended complaint the stock sought to be recovered has no value whatever, and that, if the shares are of no value, appellee ought not to recover, for equity does not concern itself with trifles.

[3] Where shares of stock have been wrongfully or negligently transferred by a corporation, there is without doubt a remedy at law. But in such cases the party whose demand for a transfer on the books of the corporation has been refused has a choice of remedies. *Thompson on Corporations*, §§ 4406, 4420-4423; 26 Am. & Eng. Ency. Law, 888. The complaint in the present case is drafted on the theory that appellee was and is still the owner of the stock in suit; that by a wrongful act of its statutory agent,

for a consideration, the evidence of its ownership of the stock was turned over to another, and that the corporation, which is a trustee for the stockholders, allowed the old certificates evidencing appellee's ownership of the stock to be canceled, and issued new certificates to another, and registered this stock in the name of the other. Appellee does not claim the stock by a merely equitable title, as one asking specific performance of a contract to convey, but claims as the owner of the legal title seeking to keep its own, and asking to be relieved from the consequences of a void sale.

The Indiana case most resembling the present one is that of *Weyer v. Second National Bank of Franklin*, 57 Ind. 193, and appellee's counsel informs the court that on the complaint in that case the complaint in the present case is based. In that case an executor had made a void sale of shares of stock in a bank. After his removal for insolvency, his successor brought suit against the bank and the purchases to have such sale and transfer set aside, and to compel the issuance to him as executor of a certificate of such stock, or to recover the value of the same. The complaint was held sufficient as stating a cause of action against each defendant. There is substantially but one difference in the complaint in the case cited and the one under consideration. The complaint in the *Weyer* case contained a double prayer, asking for the reissuance of a certificate, or, if that could not be done, for a judgment for the value of the stock. The prayer in the present case is for cancellation of the assignment and reissuance of the certificate. *Thompson*, in his work on Corporations, states that: "Shares of stock when the subject of litigation differ in so far as injunctive relief is concerned from ordinary personal property that the equitable remedy is regarded as more beneficial and complete than any the law can give. When the proper officers refuse on demand to issue a certificate of stock to a person entitled thereto, he may enforce the issue and delivery of such certificates by a suit in equity. * * * The owner of stock sold under a void order has his remedy in equity to have the certificates issued under such void sale surrendered and canceled. * * * The transferee whose demand for a transfer upon the books of the corporation has been refused has the choice of either of two remedies. If he prefers to have an interest in the corporation and hold his stock as an investment, he may proceed by a suit in equity to compel a transfer on the books of the corporation and his recognition as a stockholder." But, if he chooses and is willing to accept the market price of the stock as his measure of damages, he may bring an action at law against the corporation for such wrongful refusal and recover the value of the stock as damages. *Thompson on Corporations*, §§ 4405, 4406, and cases cited.

[4] A suit in equity does not lie for specific performance of a contract concerning personal property, unless it has a peculiar value. But in England shares of stock in a private corporation are held to have such a peculiar value that equity will decree specific performance of a contract for the sale. While American courts have not in all cases gone so far, the most of them have held that a suit in equity will lie against a corporation to compel the transfer of stock on its books. Cook on Corporations, § 391, says that a suit in equity is "the surest, most complete, and most just remedy for compelling a corporation to register a transfer of stock." 20 Encyclopedia of Pleading and Practice, p. 813, holds that such a remedy is well established, and the one generally pursued. The reasoning on which these holdings are based is well expressed in the cases of *Cushman v. Thayer Mfg. Co.*, 76 N. Y. 365, 32 Am. Rep. 315, in which the court says: "The right of the plaintiff to maintain this action depends upon the question whether an equitable action will lie to compel a transfer of stock by a corporation to the owner of the same, or the plaintiff must seek a remedy by an action for damages. The latter action is frequently of no avail, and does not always afford complete and full redress. It is easy to see that a party may have become the owner or purchaser of stock in a corporation, which he desires to hold as a permanent investment, which may be at the time of but little value, in fact without any market value whatever, and its real worth may consist in the prospective rise which the owner has reason to anticipate will follow from facts within his knowledge. To say that the holder shall not be entitled to the stock because the corporation without any just reason refuses to transfer it, and that he shall be left to pursue the remedy of an action for damages, in which he can recover only a nominal amount, would establish a rule which must work great injustice in many cases and confer a power on corporate bodies which has no sanction in the law." And in the case of *Westminster Nat. Bank v. New England Electrical Works*, 73 N. H. 465, 62 Atl. 971, 3 L. R. A. (N. S.) 551, 111 Am. St. Rep. 637, the court say in words applicable to the present case: "To deny him relief by specific performance upon the ground that he could recover damages at law would be, in effect, to compel him to sell what he already owns at such a price as a jury might think it was worth." Additional reasons why such circumstances call for equitable relief are that shares of stock in a certain corporation are frequently not so easily obtained on the market that money damages can be said to be an adequate remedy where the possession of the shares is desired, and that shares often have a peculiar value to certain persons who wish them for the power they will give in control of a corporation. These different considerations have influenc-

ed the courts until the weight of authority holds that a suit in equity will lie against a corporation for the transfer of stock on its books.

[5] In the present case there is yet stronger ground for equitable relief than if appellee had purchased stock and the corporation had refused to transfer on its books; for in this case the title to the property has never passed from appellee, but by a wrongful act of its agent it was deprived of the possession of property which it had held for a long time. These circumstances afford the greatest of reasons why appellee, if it desires the possession of its property again, should not be compelled to accept money damages for its injury. The case of *Read v. Telephone Co.*, 93 Tenn. 482, 27 S. W. 660, holds that if a corporation transfers its stockholder's shares upon its book upon the assignment of the owner's agent, without requiring production or proof of the agent's authority, and the transfer proves to have been unauthorized, the company will be compelled, at the suit of the shareholder, to reinstate him to his rights. This case squarely lays down the principle applicable to the present case. *Thompson on Corporations*, § 4416, states the rule thus: "Equity will not only compel a corporation to make the transfer on its books in proper cases, but, where stock has been transferred improperly or wrongfully by the corporation, the original holder of such stock may by suit in equity compel the corporation to set aside such transfer and restore him to his rights as a stockholder."

[6] The present complaint would be good under the authority of *Weyer v. Second Nat. Bank*, supra, without question, if it contained a prayer for alternative relief in damages. Such prayer is not necessary to make the complaint sufficient, for upon the facts stated the appellee is entitled to equitable relief, and need not pray for relief otherwise. In the case of *Tanner v. Gregory*, 71 Wis. 490, 37 N. W. 830, the court held good a complaint against a corporation asking for the transfer of stock on its books, which contained no prayer for alternative relief in damages. We therefore hold the complaint sufficient to show that appellee has no adequate remedy at law, and that his proper relief is in equity.

[7] Appellant further objects to the complaint on the ground that there appears in it no allegation of the value of the stock, or that the stock has any value, since the only allegation of value is that of the par value of the stock. This contention is effectually disposed of by the case of *Walker v. Bement* (1911) No. 7,904, at the last term of this court, 94 N. E. 339. The court say: "The only objection seriously urged against the complaint is that it does not contain any averment that the stock described in the mortgage had any market value, and that the actual value of said stock is not stated.

It is claimed by appellant that under a proper construction of the mortgage only the actual value of such stock could be recovered, and that the complaint is insufficient for want of an averment showing the market value of such stock at the time it should have been returned, or in the event it had no market value, showing its actual value at such time. The par value of a share of stock in a corporation is *prima facie* its actual value. The complaint contains an averment of the par value of the stock, and this, in the absence of any allegation to the contrary, amounts to an averment that the stock was actually worth its face and is sufficient as against a demurrer. The complaint must be held sufficient.* The averment of the par value of the stock in the case at bar is a sufficient averment of value.

The complaint is sufficient, and, no other error having been relied upon for reversal of the cause, the judgment is affirmed.

MYERS, J., does not participate.

(48 Ind. A. 180)

SHUTT et al. v. SMITH. (No. 7,168.)

(Appellate Court of Indiana, Division No. 1. June 27, 1911.)

1. MECHANICS' LIENS (§ 105*)—PERSONS NOT ENTITLED TO—CONTRACTORS.

A subcontractor is not entitled to a mechanic's lien.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. § 137; Dec. Dig. § 105.*]

2. JUDGMENT (§ 253*)—VALIDITY—PLEADINGS TO SUSTAIN.

In an action by a subcontractor for labor upon a building, a judgment allowing a recovery in excess of the amount claimed in the complaint and greater than the amount shown by the evidence cannot be supported.

[Ed. Note.—For other cases, see *Judgment*, Cent. Dig. §§ 443, 444; Dec. Dig. § 253.*]

Appeal from Circuit Court, Huntington, County; Samuel E. Cook, Judge.

Action by Edward Smith against Lewis A. Shutt and others. From a judgment for plaintiff, defendants appeal. Reversed and remanded.

C. W. Watkins, for appellants. Fred. H. Bowers and Milo Feightner, for appellee.

FELT, P. J. Appellee brought suit against appellants to foreclose a mechanic's lien on certain real estate and for a personal judgment against appellant Shutt. The court rendered a personal judgment against appellant Shutt for \$338.48, including \$40 attorney's fees, and gave judgment of foreclosure against all the appellants. From this judgment an appeal was taken, and the errors assigned are the overruling of the separate motion for a new trial by appellant

Shutt, the overruling of the separate demurrer of appellant Edward B. Ayers, trustee, and the overruling of the separate demurrer of appellant Shutt to the first paragraph of the complaint; also, that the complaint does not state facts sufficient to constitute a cause of action. The motion for a new trial alleges that the decision of the court is not sustained by sufficient evidence, is contrary to law, and that the damages assessed are excessive.

[1] Appellant has not complied with the rules of this court by setting out in his brief the substance of the complaint, and the demurrer thereto, but enough appears to show that appellee sued as a subcontractor to foreclose a mechanic's lien on certain real estate. Under the recent decisions of our Supreme Court, a subcontractor was not entitled to a mechanic's lien under the law in force at the time the lien in suit was filed. *Halstead v. Stahl*, 94 N. E. 1056; *Overholser v. Clifton*, 94 N. E. 792; *Indianapolis, etc., Traction Co. v. Brennan*, 174 Ind. —, 87 N. E. 215, 30 L. R. A. (N. S.) 85; *C. C. & St. L. Ry. Co. v. De Frees*, 173 Ind. 717, 87 N. E. 722; *Fleming v. Greener*, 173 Ind. 260, 87 N. E. 719, 90 N. E. 72; *Korbly, Rec., v. Loomis*, 172 Ind. 352, 88 N. E. 698. These decisions are binding upon this court, and, following them, we are compelled to hold that the complaint did not state facts sufficient to constitute a cause of action to foreclose the mechanic's lien, and that the court erred in rendering judgment of foreclosure.

[2] The complaint is for the foreclosure of a lien upon a particular tract of real estate and for personal judgment against appellant Shutt for work performed in constructing buildings thereon. The evidence before us shows that the amount due appellee for the labor described in the complaint is less than the amount of the judgment. It also appears from the evidence that amounts claimed to be due appellee from appellant Shutt on other jobs of work, and for improvements on real estate other than that described in the complaint, are included in the judgment. Appellee's own testimony shows that there was due him on the work described in his complaint \$347.40, and that he had received of this amount about \$140, leaving balance due of \$207.40. After account for \$40 attorney's fees, there still appears an excess in the judgment of \$91.08. The damages assessed are excessive, and the motion for a new trial should have been sustained.

The judgment is therefore, reversed, with instructions to the lower court to sustain the motion for a new trial and to permit the parties to amend their pleadings, if they desire so to do, and for further proceedings in accordance with this opinion.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

(48 Ind. A. 226)

McKEON v. EHRINGER. (No. 7,303.)(Appellate Court of Indiana, Division No. 2.
June 28, 1911.)**1. INSURANCE (§ 815*)—BENEFIT CERTIFICATE—ACTIONS—COMPLAINT—REQUISITES.**

A complaint in an action on a benefit certificate containing conditions must contain a general averment that all the conditions precedent to a right of action have been performed, or it must show the facts constituting performance, or a legal excuse for nonperformance, or it is demurrable.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1906; Dec. Dig. § 815.*]

2. INSURANCE (§ 815*)—BENEFIT CERTIFICATE—ACTIONS—COMPLAINT—REQUISITES.

One asserting rights as a beneficiary under a new certificate issued by a fraternal insurance order cannot question the sufficiency of the complaint in an action by the original beneficiary on the original certificate, on the ground that the complaint does not aver the performance of the conditions prescribed in the certificate; only the insurer being entitled to demur on that ground.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 815.*]

3. INSURANCE (§ 782*)—FRATERNAL INSURANCE—RIGHTS OF BENEFICIARIES.

The constitution of a fraternal insurance order authorized the issuance of a new certificate changing the beneficiary on the request of the member. Prior to the issuance of a certificate to a member, his daughter, in consideration of being named as beneficiary, agreed to pay all assessments, and did so. The member subsequent to the issuance of the certificate, and two days before his death, obtained a new certificate, making his wife the beneficiary. *Held*, that the contract between the member and his daughter, and her performance of the obligations imposed on her thereby, prevented the member from substituting a new beneficiary who was a mere volunteer, so that the daughter on the member's death was entitled to recover on the certificate as against the claims of the wife.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1948; Dec. Dig. § 782.*]

4. INSURANCE (§ 782*)—FRATERNAL INSURANCE—RIGHTS OF BENEFICIARIES—VESTED RIGHTS.

One who is a mere volunteer beneficiary in a certificate issued by a mutual benefit society on the life of a member acquires no vested rights in the proceeds of the certificate until the death of the member, but where a contract exists between the member and the beneficiary, whereby it is agreed that the beneficiary shall be named in the certificate on consideration that he will pay the assessments on the certificate and the contract is performed, the equities of the beneficiary will be protected as against one who has been substituted as a beneficiary, and who has no superior equities.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1948; Dec. Dig. § 782.*]

Appeal from Circuit Court, Floyd County; Wm. C. Utz, Judge.

Action by Martha C. Ehringer against the Supreme Lodge Knights of Honor and Sarah D. McKeon, in which Sarah D. McKeon filed a cross-complaint. From a judgment for plaintiff, defendant Sarah D. McKeon appeals. Affirmed.

James K. Marsh and A. Dowling, for appellant. James W. Fortune and George H. Hester, for appellees.

LAIRY, C. J. The appellant is the widow of Alexander McKeon, and the appellee is his daughter. This action grows out of a controversy over the proceeds of a benefit certificate for \$2,000 issued by the Supreme Lodge Knights of Honor upon the life of said Alexander McKeon. This certificate, as originally issued, provided that it should be payable to Martha C. Ehringer, and was dated on the 25th day of August, 1891. At and prior to the date of the issue of this certificate it was agreed between said Alexander McKeon and his daughter that, in consideration of her being named as beneficiary in such certificate, she would pay all dues and assessments to be made against him as a member of such mutual benefit association. In pursuance of this agreement, the said Mrs. Ehringer paid all of the dues, assessments, and charges against this certificate of membership from the time it was issued in August, 1891, to the date of the death of Alexander McKeon, on the 17th day of April, 1907, amounting to \$1,356. After this certificate was issued, Alexander McKeon married appellant, and after said marriage he took steps to have the beneficiary in said certificate changed so as to make his wife, Sarah D. McKeon, the beneficiary in the place of his daughter as first named. The constitution of the Supreme Lodge Knights of Honor providing for a change of beneficiaries was as follows: "Sec. 5. Lost. If the benefit certificate of a member be lost, or beyond his control, the member may, in writing, surrender all claims thereto, and direct that a new certificate be issued to him payable to the same or other beneficiary, in accordance with the laws of this order, upon making affidavit of the facts and paying a fee of fifty cents to be forwarded by the subordinate lodge, with the affidavit, to the Supreme Reporter. The issuing of such new benefit certificate shall cancel and render null and void any and all previous certificates issued to such member." Section 7: "Change of beneficiaries. A member desiring to change his beneficiary may, at any time, while in good standing, surrender his benefit certificate which, together with a fee of fifty cents, shall be forwarded by his lodge, under seal, to the Supreme Reporter, who shall thereupon cancel the old certificate and issue a new one in lieu thereof to such member, payable as he shall have directed within the limitations as prescribed by the laws of the order. Said surrender and direction shall be made on the back of the benefit certificate surrendered, signed by the member and attested by the Dictator and Reporter under the seal of the lodge." The certificate originally issued was in the possession of ap-

pellee at the time McKeon desired to have the beneficiary therein changed. He therefore made the affidavit provided for in section five of the constitution, and forwarded this to the Supreme Lodge, together with a written surrender of all interest in the certificate, and a request that a new certificate be issued, naming his wife, Sarah D. McKeon, as beneficiary. This was done on the 15th day of April, 1907, and the death of Alexander McKeon occurred two days later. The certificate was reissued in obedience to his request with his wife as beneficiary on the 18th day of April, 1907, one day after his death. Both the appellant and the appellee claim the money due on this certificate. The Supreme Lodge did not contest its liability and paid the money into court.

The questions of law presented arise upon the pleadings. These pleadings are numerous and lengthy, and cannot be set out without unduly extending this opinion. The principal facts admitted by demurrers have been set out, and a brief statement of the pleadings will be sufficient to show how the questions are presented for decision.

The appellee filed a complaint against the Supreme Lodge and appellant, based on the certificate bearing date August 25, 1891, in which she set up the contract between herself and her father, which provided that she should pay all dues and assessments against said benefit certificate in consideration that she should be made the beneficiary thereunder, and alleging that she had fully performed the contract on her part. We need not set out the allegations of the complaint in full, for the reason that its sufficiency was not questioned by the defendant lodge, and was objected to by the defendant, Sarah D. McKeon, upon only one ground which can be determined without further reference to the complaint. She takes the position that her demurrer to the complaint should have been sustained for the reason that it contains no allegation that the deceased and the beneficiary had performed all of the conditions of said benefit certificate on their part to be performed, and contained no specific averment of facts showing the performance of such conditions.

[1] It is true that a complaint based upon an insurance policy or benefit certificate containing conditions must contain the general averment that all the conditions precedent to a right to bring the action have been performed, or it must show by specific averments the facts constituting such performance, or a legal excuse for nonperformance. A complaint which contains no such averments is insufficient as against the company or association issuing such contract. *Home Insurance Co. v. Duke*, 43 Ind. 418; *Grand Lodge, etc., v. Hall*, 31 Ind. App. 107, 67 N. E. 272.

[2] If the defendant lodge had demurred to this complaint, and presented this objection, a different question would be raised,

but the defendant, Sarah D. McKeon, was in no position to raise this objection to the complaint. She was not a party to the contract sued on, and the conditions therein contained were not imposed for her benefit, and her rights, if any, did not depend to any extent upon their performance. Whatever rights she had were created by and dependent upon the benefit certificate dated on the 18th day of April, 1907, in which she was named as beneficiary and upon which she based her affirmative paragraphs of answer and her cross-complaint. The demurrer of this defendant to the complaint was properly overruled. *Carter v. Carter*, 35 Ind. App. 73, 72 N. E. 187; *Munhall v. Daly*, 37 Ill. App. 628.

After the demurrer to the complaint was overruled, appellant filed an answer in two paragraphs, the first of which was a general denial. The appellee demurred to the second paragraph, which demurrer was sustained, and this ruling of the court is assigned as error. The second paragraph of answer admits that a benefit certificate for the sum of \$2,000 was issued by the defendant lodge on the 25th of August, 1891, to Alexander McKeon, and that his daughter, Martha C. Ehringer, was named therein as beneficiary; that he was a member of said lodge in good standing at the time said certificate was issued, and that he continued to be a member in good standing until the date of his death, on the 17th day of April, 1907; and that from the date said certificate was issued until the time of his death he was a contributor to the widow and orphans' fund of said lodge. The answer then alleges that prior to the death of Alexander McKeon he made a request of the Supreme Lodge Knights of Honor, in accordance with the constitution of said lodge, for a change of beneficiaries, and that, in obedience to said request, a new certificate was issued by said lodge, in which Sarah D. McKeon, who was then his wife, was named as beneficiary. and that the certificate issued on the 25th day of August, 1891, was canceled by said lodge. This last certificate is set out as an exhibit to this paragraph of answer, and it is averred that such certificate was in full force and effect at the time of the death of Alexander McKeon. The allegations of the complaint, showing the contract between McKeon and his daughter, whereby it was agreed that she should be made the beneficiary under such certificate in consideration that she should pay all dues and assessments to be made on such certificate, and the performance of such contract by Mrs. Ehringer, are not denied in this paragraph of answer; but the appellant claims that the facts averred in reference to the change of beneficiaries during the lifetime of McKeon in accordance with the provisions of the constitution of said Supreme Lodge are sufficient to avoid those averments of the complaint, and to show that appellee had no interest in the

fund arising from said benefit certificate, even though the contract and its performance on the part of appellee be admitted as averred. Appellant also filed a cross-complaint based on the certificate, dated on the 18th day of April, 1907. Appellee filed an affirmative answer to this cross-complaint in two paragraphs. Appellant filed a demurrer to each of these paragraphs of affirmative answer, which demurrers were overruled by the court. The question presented by this ruling is the same as that presented by the action of the court in sustaining appellee's demurrer to the affirmative paragraph of answer to the complaint, and is presented in the same way. The trial resulted in a judgment for appellee in the sum of \$2,000.

[3] The question thus presented is, Did the contract existing between Alexander McKee and his daughter, as alleged in the complaint, confer upon her such an equitable interest in the proceeds of the certificate as would estop him from substituting in her place a second beneficiary, who was a mere volunteer having no equities in her favor?

[4] The general rule seems to be that a person who is a mere volunteer beneficiary named in the certificate issued by a mutual benefit society upon the life of one of its members acquires no vested right in the proceeds of such certificate until the death of the member occurs. *Mason Mutual, etc., Society v. Burkhardt*, 110 Ind. 189, 10 N. E. 79, 11 N. E. 449; *Presbyterian, etc., Fund v. Allen*, 106 Ind. 593, 7 N. E. 317; *Bunyan v. Reed*, 34 Ind. App. 295, 70 N. E. 1002; *Milner et al. v. Bowman*, 119 Ind. 448, 21 N. E. 1094, 5 L. R. A. 95; *Sabin v. Phinney*, 134 N. Y. 423, 31 N. E. 1087, 30 Am. St. Rep. 681. Where, however, a contract exists between the member of a mutual benefit society, on whose life a benefit certificate has been issued, and the beneficiary named therein, whereby it has been agreed that said beneficiary should be named in such certificate on consideration that he would pay the dues and assessments on such benefit certificate, or that he would render unto such member some other valuable consideration therefor, and where such contract has been fully performed and such consideration rendered on the part of the beneficiary, the courts recognize the equities arising in favor of such a beneficiary and will protect them, as against a person who has been substituted as a beneficiary, and who has no superior equities in his favor. *Carter v. Carter*, 35 Ind. App. 75, 72 N. E. 187; *Maynard v. Vanderwerker*, 30 Abb. N. C. (N. Y.) 134, 24 N. Y. Supp. 932; *McGrew v. McGrew*, 190 Ill. 604, 60 N. E. 861; *Stronge v. Supreme Lodge K. P.*, 189 N. Y. 346, 82 N. E. 433, 12 L. R. A. (N. S.) 1206, 121 Am. St. Rep. 902; *Jory v. Supreme Council, etc.*, 105 Cal. 20, 38 Pac. 524, 26 L. R. A. 733, 45 Am. St. Rep. 17; *Leaf v. Leaf*, 92 Ky. 166, 17 S. W. 354, 854; *Supreme Council, etc., v. Murphy*, 65 N. J. Eq. 60, 55 Atl. 497.

This proposition seems to be abundantly sustained by the authorities. In the case of *Stronge v. Knights of Pythias*, supra, the court in discussing a case of this kind says: "Thus assuming that a contract was made by a member for a valuable consideration to take out a certificate for the benefit of appellant, it seems to us very clear that, after the certificate has been taken out and the consideration fully furnished by the beneficiary, the member will not be allowed to destroy the rights of his creditor by a new certificate naming a new beneficiary. We do not regard the by-laws and provisions of the certificate or the authorities called to our attention providing for and upholding the right of a member to change the designation of his beneficiary as often as desired without the consent of the latter as at all applicable to such a case as this. They relate to a case where voluntarily and gratuitously designation has been made of a beneficiary who in the language of the certificate has acquired 'no interest' whatever in the certificate nor in the indemnity fund. But can there be any doubt that a member of one of these associations might say to a person that, if the latter would loan him \$1,000, he, the member, would take out a certificate designating the creditor as beneficiary as security for such loan, such designation not to be canceled or changed without the consent of the creditor, and that this contract or agreement would estop and prevent the member from changing the designation whatever might be the ordinary privileges and regulation as between him and the association when no rights of a third party had intervened? While the agreement detailed by appellant is not in terms as complete as the one assumed, we think it is just as effective, because what the parties have omitted specifically to say as between themselves the law says for them. Irvine agreed that he would procure the certificate to be issued designating appellant as beneficiary if she and her husband would establish a new home, take him with them, and care for and nurse him in his sickness. The appellant performed her part of the contract, and Irvine performed his so far as procuring the certificate to be issued was concerned, and the law now prohibits him from destroying the rights which appellant has acquired in the certificate for a valuable consideration."

The case of *McGrew v. McGrew*, supra, is very similar to the case at bar. In deciding that case the Supreme Court of Illinois uses the following language: "The law is well settled in this state that a member of a fraternal beneficiary society, where no intervening rights have attached, may, at his pleasure, surrender his benefit certificate, and have a new certificate issued, and designate therein a new beneficiary, and that a beneficiary has no vested rights in the certificate during the life of the member by reason of the fact that he has been named as a beneficiary

in such certificate. *Martin v. Stubbings*, 126 Ill. 387, 18 N. E. 657, 9 Am. St. Rep. 620; *Benton v. Brotherhood of Railroad Brakemen*, 146 Ill. 570, 34 N. E. 939; *Voigt v. Kersten*, 164 Ill. 314, 45 N. E. 543; *Delaney v. Delaney*, 175 Ill. 187, 51 N. E. 961. While at law said certificate is not assignable, in equity a beneficial interest may be transferred therein which will be protected by a court of chancery. *Supreme Council v. Tracy*, 169 Ill. 123, 48 N. E. 401. In this case McGrew caused the appellee, his daughter, to be named in the second certificate as beneficiary, delivered the certificate to her, and agreed with her that upon his death she was to be paid back the amount which she had advanced to him from the moneys received from said society upon said certificate. After this agreement was made, the money paid, and the certificate delivered to appellee, as between McGrew and appellee, he had no right to surrender said certificate, and have a new one issued in lieu thereof, made payable to appellant. In the case of *Supreme Council v. Tracy*, supra, Tracy, who was a member of the Royal Arcanum, in consideration of a cash loan from his wife, caused her to be made the beneficiary in his certificate, which was delivered to and retained by her, she paying all assessments thereon. Afterwards he made a false affidavit that the certificate was lost, and procured from the society a duplicate certificate, naming his daughters as beneficiaries. On page 128 of 169 Ill., and on page 402 of 48 N. E., the court say: 'After this agreement was made, the money paid, and the certificate turned over, as between Tracy and his wife, he had no right whatever to surrender the certificate, and have the organization make out a new one payable to another party; and his attempt to do so based upon a false affidavit was a fraud on the organization and upon his wife, and his daughters who were mere volunteers, having advanced nothing, cannot profit by the fraud of Tracy attempted to be practiced on his wife.'

The Supreme Court of California, in deciding the case of *Jory v. Supreme Council*, etc., supra, used the following language: "The principle here under consideration is the most recent growth of mutual benefit association law, a branch of the law which in itself is young in years; and we know nothing in the law which deprives a person contemplating membership in a mutual benefit association from so contracting with the proposed beneficiary as that when such certificate is issued equities in favor of the beneficiary are born of such merit that the insured member has no power to defeat them. The few authorities shedding light upon this question declare the rights of the beneficiary are such as to create a vested interest in the proceeds of the certificate. *Smith v. Nation Ben.*, etc., 123 N. Y. 85, 25 N. E. 197, 9 L. R. A. 616; *Maynard v. Vanderwerker* (Sup.) 24 N. Y. Supp. 932. Possibly this is

not a correct declaration of the principle of law applicable to the conditions; for a second beneficiary might be substituted, wholly innocent of the contractual relations existing between the insured and the first beneficiary, and his substitution give rise to the creation of equities in his behalf, all controlling upon a judicial disposition of the rights of the parties concerned. If the original beneficiary's interest was vested, no subsequent conditions could possibly arise which would defeat his right, and for this reason we think it can hardly be termed a vested interest. The whole matter seems to be rather a question of equities, and the stronger and better equity must prevail. The illustration we have used does not arise in the present case, for we here have no clash of equities. The second beneficiary possesses no equities. He is a volunteer pure and simple. His status during the life of the insured is well described in *Smith v. Nation Ben.*, etc., 123 N. Y. 85, 25 N. E. 197, 9 L. R. A. 616, where the court said: 'The designation was in the nature of an inchoate or unexecuted gift, revocable at any moment by the donor, and wholly within his control.' We think a court of equity should declare the insured estopped from substituting a second beneficiary of the character here involved, whenever sound equities are extant in favor of the first beneficiary; and, such estoppel being in force against the insured, it is equally in force and may be successfully urged against the volunteer beneficiary. The respondent is a volunteer beneficiary, and it only remains for us to ascertain from the record what the appellant's equities are, as disclosed by the evidence. She claims by her answer that she and her mother entered into a mutual agreement, whereby each should join a mutual benefit society and make the other a beneficiary under the certificates issued, and that said agreement was carried out. Appellant further alleges that she paid all initiation fees, dues, and assessments upon the benefit certificate taken out by her mother. If these moneys were paid out by appellant under and by virtue of a contract between the parties, and in pursuance of this agreement and scheme for mutual insurance, then she had equities which entitle her to recognition in a court of justice, for it would be a gross imposition and fraud upon her to allow the insured to change her beneficiary under these circumstances." This court in a recent opinion adopted the rule announced and applied it to a case very similar to the one under consideration. *Carter v. Carter*, supra.

Appellant cites and relies upon the case of *Bunyan Adm'r v. Reed et al.*, 34 Ind. App. 295, 70 N. E. 1002. In that case a member of a mutual benefit society was indebted to his brother in the sum of \$3,000. He procured a benefit certificate on his life for the sum of \$5,000, in which his brother, to whom he was indebted, was named as a beneficiary

to the extent of \$3,000, and two of his sisters were also named as beneficiaries to the extent of \$1,000 each. The purpose of naming the brother as beneficiary in the amount fixed was to secure to him the payment of the money due him from the member. The by-laws of the society provided that where two or more beneficiaries were named in a certificate and one or more of such beneficiaries died prior to the death of the member, on whose life the certificate was issued, the survivor or survivors of such beneficiaries should receive the entire benefit. The brother named as beneficiary died before the member, and it was held that the surviving beneficiaries were entitled to receive the entire benefit provided for in the certificate, notwithstanding the equities in favor of the estate of the deceased brother. That case differs somewhat from the case under consideration. In that case the member did nothing to defeat the rights of his brother under the contract. The by-law providing that the surviving beneficiaries should receive the entire proceeds of the certificate was in force at the time the contract was entered into. No change took place either in the by-laws of the order, or in the form of the certificate between the time the contract was made and the time the certificate became payable. The interest of the creditor brother in the proceeds of the certificate was lost not by any act of the member or the society issuing the certificate, but by operation of law. The contract entered into between the brothers, when construed in the light of the existing by-law of the society, gave to the one who was named as beneficiary no right in the proceeds of the certificate in the event he died prior to the death of the brother on whose life the certificate was issued. We do not regard the decision in that case as being in conflict with the conclusion reached in the case under consideration.

Judgment affirmed.

(18 Ind. A. 541)

BRADLEY et al. v. HARTER et al.¹
(No. 6,751.)

(Appellate Court of Indiana, Division No. 2,
June 30, 1911.)

VENDOR AND PURCHASER (§ 198*)—ACTION ON
CONTRACT—FINDINGS.

Recovery by a vendor for money paid out in improving a street through the land sold is sustained by findings that the contract required the vendor to advance such cost and charge the same to the purchasers, that he performed his part of the contract, that he paid over to the purchasers the money for the improvement, that the street was improved, and that the amount remains unpaid, etc.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 412; Dec. Dig. § 198.*]

On petition for rehearing. Petition overruled.

For former opinion, see 93 N. E. 1081.

IBACH, J. Appellants have filed an extensive and forceful brief in support of their petition for a rehearing. They are contending that the court committed error "in refusing to review and pass upon the assignment of error as to special finding No. 17 as being wholly outside of the issue." Finding No. 17 is as follows: "That the plaintiff performed all of the parts of said contracts on his part to be performed according to the terms thereof." They also claim that the court erred in failing to determine whether the special findings of facts sustain the first conclusion of law stated.

The first conclusion of law as stated by the trial court is in the following language: "That the law is with the plaintiff, and he is entitled to recover in this action from the defendants in the sum of \$4,500, together with his costs and charges laid out and expended in this action with relief from valuation and appraisal laws." Appellants concede that the vital and controlling question is presented by the facts found and the conclusions of law stated. The questions now raised by this petition for a rehearing were presented in the original briefs and considered by this court. We quote from the opinion: "Such being the case, the facts found by the court fully sustain both the conclusions of law."

We have, however, again carefully examined the briefs presented by appellant, together with the record before us. From such examination we observe that the trial court found that appellee "did perform all the parts of the contract on his part to be performed, that he did provide and pay over to appellants the money for the improvement of Fourteenth street, that the street was improved, and that he charged the same to appellants and that the amount thereof is unpaid." Whether this finding is within the issues is not for us to decide, as the issues have not been presented for the consideration of this court as is stated in the original opinion.

It is further insisted by appellant that the provision in the contract for the improvement of Fourteenth street was not an independent contract, and that the money paid out by appellee was not to be paid until after the land contract had been disposed of. The contract between the parties set out in the court's special findings says practically that the land was sold by appellee to appellants for \$1,000 per acre, about 58 acres, the actual amount to be determined thereafter. It further contains the provision, if the land is not paid for in the manner specified within three years, that at the end of that time the appellants were to execute their note and mortgage to appellee for the unpaid balance of the agreed purchase price, and he was then to convey it to them the lots and land described remaining unsold. We find nothing

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

¹ Transfer denied.

mentioned with regard to any money paid out by appellee for the improvement of Fourteenth street being taken into consideration in the final settlement for the sale and purchase of the land. The only manner in which the improvement of Fourteenth street is referred to in the contract is that appellee was to make such improvement and charge the expense thereof to the buyers of the property. There is no uncertainty in this contract, and it cannot be successfully claimed that the sum of money advanced for such improvement is to be taken as a part of the purchase price of the real estate, or to be considered in closing up the agreement relating to the sale of the same.

It also appears from the findings of the court that, when appellant Cooper became one of the company, he, together with appellants Bradley and Stout, entered into an agreement as follows: "It is further agreed that said Bradley and Stout will assume and pay all bills of every kind for surveying and platting and recording plats and so forth contracted by them up to this time, except the bills for advertising in the newspapers in Anderson, which bills are to be paid by the three parties hereto, each paying one-third of the same; likewise in the future each of the parties hereto is to furnish and pay one-third of all expenses contracted in laying out said lands, grading streets, advertising and selling lots and all other expense connected with the selling of said lands." In addition to this, the findings show that, when Backus bought into the firm, the following agreement was entered into between the appellants: "It is further agreed that said Stout is to pay all his share of the bills due and debts contracted up to this time, except the debt contracted for the improvement of Fourteenth street running through the said land and all bills made in the future are to be paid by Bradley, one-third, Cooper, one-third, and Backus, one-third." Surely it must be conceded that the debt relative to the improvement of Fourteenth street was one to be paid to appellee by appellants independent of the land when the improvement was completed. This is fully found in the court's findings and in the record. And the court finds that the money by means of which the street mentioned was improved was advanced by appellee to appellants Stout and Bradley at a time before appellant Cooper became one of the firm. After Backus and Cooper entered the firm, the same was paid out by Bradley for the improvement of the street. When the street was completed and the cost thereof known and paid, Bradley executed the following instrument to appellee: "Anderson, Ind., August 19, 1892. Received of Jacob H. Harter Three thousand nineteen dollars and ninety-five cents (\$3,019.95), drawing interest at six per cent. from Dec. 7, 1891." In view of all of these agreements set

out in the court's findings, and in view of the further findings of the court that the said sum of money was paid to appellants for their use in the improvement of such street through the land purchased by them in accordance with the terms of the original contract between the parties, and that said sum had never been repaid to appellee, the court was justified and authorized to state the conclusions of law which he did and the same are supported fully by the facts as found and we are content to abide by the opinion formerly expressed on this point, which is the only one presented by the appeal.

Petition for rehearing overruled.

CITY OF GARY v. MUCH. (No. 7,883.)¹
(Appellate Court of Indiana, Division No. 1.
June 29, 1911.)

1. MUNICIPAL CORPORATIONS (§ 657*)—VACATION OF STREET—PERSONS WHO MAY OBJECT.

One whose property lies without a municipality and abuts upon a highway running along the corporate limits, one half lying within and the other half lying without, has sufficient interest in the street to entitle him to enjoin a proceeding whereby the municipality seeks to vacate the highway.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 657.*]

2. EMINENT DOMAIN (§ 66*)—PROCEEDINGS—PUBLIC USES.

As the purpose of condemnation proceedings is the basis of the right, the taking being allowed only for public use, such purpose may be investigated by the courts.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 165-167; Dec. Dig. § 66.*]

3. EMINENT DOMAIN (§ 14*)—VACATION OF STREETS—PUBLIC USE.

The incidental benefit to an individual does not prevent the vacation of a street by condemnation, being for a public use.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. § 54; Dec. Dig. § 14.*]

4. EMINENT DOMAIN (§ 13*)—PUBLIC USE—QUESTION OF FACT.

Whether the taking of property by condemnation be for a public use is a question of fact.

[Ed. Note.—For other cases, see Eminent Domain, Dec. Dig. § 13.*]

On petition for rehearing. Petition overruled.

For former opinion, see 94 N. E. 583.

Bomberger, Sawyer & Curtis, John R. Cochran, and L. L. Bomberger, for appellant. George B. Sheerer and A. F. Knotts, for appellee.

HOTTEL, J. [1] Petition for rehearing is filed in this case, and it is earnestly insisted by appellant that in the original opinion herein this court has failed to consider one of the questions argued and presented by appellant, viz.: It is insisted that "appellee's property is located outside the city limits," and that for this reason "he has no standing

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes
95 N.E.—39 ¹Superseded by opinion in Supreme Court, 101 N. E. 4. Rehearing denied.

to call in question what the city does with its streets in the city limits." In support of this contention, counsel cites the case of *House v. City of Greensburg*, 93 Ind. 533, and insists that the conclusion reached in the original opinion herein is necessarily in conflict with that case.

In that case the Supreme Court say: "The complaint, therefore, fairly presents for decision this question, Can a nonresident landowner, whose land is *outside of, but abuts upon, the corporation line of an incorporated city*, be heard to complain of the action of the common council of such city in the vacation of a street or part of a street, within the city limits, upon the *terminus* of which such land also *abuts*? We are of opinion that this question must be answered in the negative. By the finding of the city commissioners and by his own showing, the appellant is not a '*property owner immediately upon the line of that part of East street proposed to be vacated.*'" (Our italics.)

The facts stated in the original opinion, as to the location of appellee's property with reference to the street attempted to be vacated, makes this case easily distinguishable from the facts above quoted, upon which the decision in the case of *House v. City of Greensburg*, supra, was predicated. We think it clear that under the decisions of the Supreme Court of this and other states that the appellee in this case had such an interest in the street in question as entitled him to bring this action. *Indiana, Bloomington & Western Ry. Co. v. Eberle*, 110 Ind. 542, 11 N. E. 467, 59 Am. Rep. 225; *Town of Rensselaer v. Leopold*, 106 Ind. 29, 5 N. E. 761.

[2] Counsel also insists that the original opinion runs counter to holdings of the Supreme Court of this state and the courts of other jurisdictions in that it holds that the *motives* of the members of the board in the vacation proceeding is a matter for judicial investigation upon which evidence may be introduced. Counsel are mistaken in assuming or asserting that such opinion announces any such doctrine. Counsel make the mistake of confounding purpose and motive. While these words are sometimes used interchangeably and as synonymous terms, yet in its application to condemnation proceedings "purpose" has a very different meaning from "motive." The purpose for which private property is condemned for public use is the very basis of the right to condemn. Such condemnation must be for a public purpose. It would seem, therefore, necessary and fundamental that this purpose should always be open to investigation by the courts; otherwise the sacredness of property rights guaranteed by the Constitution would be an empty guaranty, without the power of enforcement.

[3] Counsel also insists that the conclusion reached in the original opinion, that the vacation of the street in question was not for

a public purpose, is based upon the ground that private interests are to be *incidentally* benefited thereby. In this counsel is also in error. The vacation of a street of a city necessarily, in most, if not in all instances, results in *incidental* benefit to a greater or less degree to individuals along the street; and such benefit, so long as it is an *incident merely* of the vacation, and *not its purpose*, will have no influence upon the validity of such proceedings.

[4] The question whether or not the vacation of the street in question was for a private or a public purpose, we think, was a question of fact, and one upon which it was proper to hear evidence. The lower court, after hearing the evidence, found against appellant. The evidence of Thomas Knotts, the president of said board of trustees of said town, quoted in the original opinion, to say the least, tended to support such decision of the lower court, and it was for this reason that we reached the conclusion announced in that opinion, and, after a careful examination of appellant's brief on its petition for rehearing, we see no reason for changing that conclusion.

Petition overruled.

LAIRY, C. J., FELT, P. J., and IBACH, ADAMS and MYERS, JJ., concur.

(49 Ind. App. 126)

PITTSBURGH, C. & ST. L. RY. CO. v. JOHNSON. (No. 7,660.)¹

(Appellate Court of Indiana, Division No. 1. June 29, 1911.)

1. APPEAL AND ERROR (§ 934*)—REVIEW—PRESUMPTIONS—JUDGMENT.

The court will not presume on appeal that the successor of the trial judge would sign and give validity to a record entry purporting to be that of a judgment rendered by his predecessor, when, in fact, it was only the unauthorized entry of a clerk made in vacation, but will presume that, when he signed the entry as the entry of proceedings had by his predecessor, he was convinced that such proceedings had been so had by his predecessor, and otherwise would not have signed the entry.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 934.*]

2. APPEAL AND ERROR (§ 612*)—RECORD—AUTHENTICATION—TRANSCRIPT.

It is the signature of the judge that gives official character and validity, to the record entry, and fixes the time of its making and of its taking effect, and not the certificate of the clerk to the transcript; since it is the business of the clerk to put into the transcript a copy of the official entries called for by the præcipe in their order as they appear of record in his office and to certify to such as being a true copy, and, when he has done this, he has discharged his full duty.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 612.*]

3. APPEAL AND ERROR (§ 903*)—REVIEW—PRESUMPTIONS—MATTERS SHOWN BY RECORD.

It will be presumed that the successor of the judge who tried the case, before signing the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

¹ Transfer denied.

entry of a proceeding purporting to be that had before the trial judge, gave proper consideration to such entry as well as to all entries bearing upon the entry signed.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 903.*]

4. APPEAL AND ERROR (§ 662*)—RECORD—CONCLUSIVENESS.

When a judge of the lower court has signed an entry of proceedings and has thereby given it his official sanction, the minutes of the clerk, so authenticated, become the official entry, and, for the purposes of appeal, the record entry to be incorporated in the transcript, and such entry is, on appeal, conclusive against collateral attack.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2850-2852; Dec. Dig. § 662.*]

On petition for rehearing. Petition overruled.

For former opinion, see 93 N. E. 683. See, also, 93 N. E. 240.

HOTTEL, J. Petition for rehearing is filed in this case, and the position taken by appellant's counsel in his brief in support of this petition leads us to supplement the original opinion by setting out certain entries upon which the facts stated in that opinion were, in connection with other entries referred to in said opinion, predicated with some additional observations suggested by counsel's brief on this petition. The return of the clerk of the Pulaski circuit court to the writ of certiorari herein shows, among other entries, the following:

"And be it further remembered that the following proceedings were had in the said case of Carl Johnson v. P. C. C. & St. L. Railway Company, being cause No. 7,180, in the Pulaski circuit court, *as the same appears in the court or bench docket* [our italics] of said court for said September term 1908, to wit: 'Oct. 8. Dft. files Bills of exceptions. Nos. 1 & No. 2. Dft. also files written cause & motion for new trial.' And be it further remembered that under the head of the days proceedings of October 8th, 1908, the same being the 28th judicial day of the September term, 1908, of the said Pulaski Circuit Court, as shown on page 402 of Order Book No. 34, appears the following entry in cause No. 7,180 Carl Johnson v. P. C. C. & St. L. Railway Company being the same entry found in the original transcript at page 571, to wit: Carl Johnson vs. P. C. C. & St. L. Railway Company, # 7,180. Comes now the defendant by counsel, and files Bill of Exceptions No. 1 and No. 2 in words following, to wit: [Insert.] Defendant also files written cause and motion for a new trial in words and figures following, to wit: [Insert.] Plaintiff now moves the court for judgment on the verdict which motion is by the court sustained. It is therefore ordered, adjudged and decreed by the court that the plaintiff recover of and from the defendant the sum of Six Thousand dollars as and for his damages, together with his

costs made and taxed in this cause at \$——. Read and signed in open court December 17, 1909. Francis J. Vurpillat, Judge."

The transcript originally filed in this case sets out as the proceedings had in said cause before said Nye, judge, on October 8, 1908, the proceeding above indicated and designated by said clerk in his said return to said writ as, "Proceedings * * * as the same appear from the court or bench docket of said court," and omits from said day's proceedings the record entry of said proceedings of said day showing the rendition of judgment, and signed by said Vurpillat, judge, and transposes this said record entry to, and makes it a part of, proceedings had before the said Vurpillat, judge, on said December 17, 1909, the date of signing said entry. As indicated in the original opinion, the transcript originally filed showed an entry on October 10, 1908, before said Nye, judge, and signed by him, overruling the motion for new trial, the granting of the prayer for appeal, fixing of bond, etc., and the vacation entry of December 31, 1908, showing the filing of the bond, and the conditions of which are set out in said opinion.

Appellant insists that "neither the original transcript nor the return to the writ of certiorari show that the above entry (referring to the entry above showing the rendition of judgment) was made or entered at any time by the direction or authority, order, permission, or sanction of the Honorable John C. Nye, the then judge of the Pulaski circuit court." Literally speaking, and in the sense that John C. Nye's name as judge does not appear to said entry, this is true; but, legally speaking, the reverse is true. As indicated in our original opinion, the statute expressly authorized the Honorable Francis J. Vurpillat, the successor of John C. Nye, as judge of said court, to sign any unsigned record entry of proceedings had and made before the said Nye, judge, and, when so signed, the said signing relates back and gives validity and effect to the entry as of the date on which the entry shows the proceedings to have been had.

[1] Every presumption is by this court indulged in favor of the action of the trial court. This court therefore will not indulge the presumption that such Vurpillat, judge, would sign and give validity to a record entry purporting to be that of a judgment rendered by his predecessor, when, in fact, it was only "the unauthorized entry of a clerk made in vacation," but will indulge the presumption that when the said Vurpillat, judge, on December 17, 1909, signed said entry, showing the rendition of a judgment, as the entry of proceedings had by his predecessor on October 8, 1908, instead of signing the same as proceedings had before himself of said date, December 17, 1909, thereby giv-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

ing to such proceedings the sanction and authenticity of his official signature, as proceedings had before said Nye, judge, on October 8, 1908, such succeeding judge was convinced that such proceedings had been so had by his predecessor, or otherwise he would not have signed the same. Appellant's insistence that such proceedings were in fact proceedings had by said Vurpillat is in no way supported by the record entries themselves, or the law applicable thereto. If the motions shown by said entry of October 8, 1908, including the motion for judgment and the rendition of the same thereon, had in fact been made before Vurpillat, judge, and he had himself rendered such judgment, the entry would have been signed by such judge as proceedings had before himself on said December 17, 1909, and not as proceedings had by his predecessor on October 8, 1908. Because the clerk had improperly incorporated in the record the memoranda or minutes kept by the judge in his bench or court docket, at the place in the record where he should have copied the said official entry of the proceedings had on October 8, 1908, which court docket entry does not contain any motion for, or rendition of, judgment furnishes no sufficient ground for the contention of counsel for appellant that judgment was not in fact rendered on that day.

[2] It is the signature of the judge that gives official character and validity to the record entry and fixes the date of its making and the time its validity takes effect, and not the certificate of the clerk to the transcript or the *præcipe* of counsel calling for the transcript. It is the business of the clerk to put into the transcript a copy of the official entries called for by the *præcipe* in their proper order as they appear of record in his office, and to certify to such as being a true copy, and, when he has done this, he has discharged his full duty. It is no part of his business to undertake to pass upon their validity, the time of their making, or by whom made; and especially is it not his duty but rather an indefensible violation thereof, to transpose an entry of proceedings purporting to have been had on a given date before the then regular judge of such court to an entry of proceedings purporting to have been had more than one year later before another judge, and then substituting for such transposed entry a court or bench docket entry. But appellant insists that such court or bench docket entry is authorized by statute, and seems to think that, therefore, the original opinion is wrong in not giving it weight over that of the official entry. True, such entry has for its existence the sanction of statute, but, as held in the original opinion, is not the official record contemplated to be continued in a transcript on appeal. It is an unsigned memorandum kept by the judge of the proceedings had before him, and furnishes the data from which

the official entry is made by the clerk, and is very necessary and proper for the use and consideration of the trial judge in determining whether or not the official minutes or entry made by the clerk and submitted to him for his signature and official sanction should, in fact, be signed by him.

[3] The presumption of regularity of the proceedings of the trial judge warrants us in the indulgence of the presumption that in this case Judge Vurpillat, before signing the entry of the proceedings purporting to be those had before Judge Nye on October 8, 1908, gave proper consideration to said court or bench docket entry, together with that of the entries of October 10th showing the overruling of the motion for new trial, prayer for appeal, etc., and that of December 31, 1908, showing the filing of the bond as well as all other entries and files throwing light upon said subject. Such court was the proper court, and then the proper time for the presentation and consideration of said entries.

[4] When said Vurpillat so signed said entry and thereby gave the same his official sanction, such minutes of the clerk so authenticated then became the official entry, and for the purposes of appeal became the record entry to be incorporated in the transcript, and such entry on appeal is by this court treated as authentic against any such indirect and collateral attack as that here made. If said Vurpillat, Judge, through error, mistake, or fraud was induced or procured to sign such record entry, purporting to be an entry of proceedings had on said October 8, 1908, before John C. Nye, the then regular judge of said court, there was a way to correct and obtain relief from such error, mistake, or fraud, but such relief cannot be obtained in this court by the method of official record entry transposition and substitution resorted to in this case. Such method of presenting an indirect and collateral attack upon a record, if given the sanction of any consideration by this court, should be for the purpose of criticism and condemnation only.

For the reasons above indicated, we say now, as we said in the original opinion, that the transcript herein, as amended and corrected by the writ of certiorari, shows clearly that judgment herein was rendered on October 8, 1908, before the Honorable John C. Nye, the then regular judge of said court, that the facts as stated in the original opinion are completely justified by the record, and the principles announced and the authorities cited are applicable thereto; and we therefore see no reason for, in any way, changing or modifying that opinion.

Petition overruled.

LAIRY, C. J., FELT, P. J., and MYERS, ADAMS, and IBACH, JJ., concur.

(51 Ind. App. 34)

KRIEG et al. v. PALMER NAT. BANK.
(No. 7,133.)¹(Appellate Court of Indiana, Division No. 1
June 30, 1911.)**1. BILLS AND NOTES (§ 151*)—CERTIFICATES OF DEPOSIT—NEGOTIABILITY.**

A certificate of deposit payable "in current funds" is not negotiable under the law, merchant as an inland bill of exchange, but is negotiable under Burns' Ann. St. 1908, § 9071, making instruments for payment of money negotiable.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. § 380; Dec. Dig. § 151.*]

2. COURTS (§ 91*)—INTERMEDIATE APPELLATE COURTS—OPINIONS OF SUPREME COURT—CONCLUSIVENESS.

The Appellate Court is bound by the decisions of the Supreme Court until they are overruled or modified by that court.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 325, 326; Dec. Dig. § 91.*]

3. BILLS AND NOTES (§ 151*)—CERTIFICATES OF DEPOSIT—PLACE OF PAYMENT.

A certificate issued by a bank, reciting that a stated person has deposited a specified sum payable to the order of himself on return of the certificate properly indorsed, is payable at that bank as affecting the question of its negotiability.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. § 380; Dec. Dig. § 151.*]

4. BILLS AND NOTES (§ 145*)—CERTIFICATES OF DEPOSIT—NEGOTIABILITY—LAWS GOVERNING.

The negotiability of a certificate of deposit executed in Indiana must be determined by the laws of that state, though the certificate was indorsed in another state.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. § 382; Dec. Dig. § 145.*]

5. BILLS AND NOTES (§ 224*)—INDORSEMENTS—LAWS GOVERNING.

Liability on a contract of indorsement is determined by the laws of the state where the indorsement is made.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. § 526; Dec. Dig. § 224.*]

6. BILLS AND NOTES (§ 224*)—CERTIFICATES OF DEPOSIT—LAWS GOVERNING.

Plaintiff, a subsequent indorsee of a certificate of deposit, executed in Indiana, but indorsed to plaintiff in Illinois, having elected to sue the payee and the depository and not plaintiff's immediate indorser, the question of liability under the Illinois law does not arise.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. § 526; Dec. Dig. § 224.*]

7. ESTOPPEL (§ 110*)—ESTOPPEL IN PALS—PLEADING.

Estoppel in pals must be pleaded.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. § 300; Dec. Dig. § 110.*]

Adams, J., dissenting.

Appeal from Circuit Court, Wabash County; A. H. Plummer, Judge.

Action by the Palmer National Bank against George L. Krieg and others. Judgment for plaintiff, and defendants appeal. Reversed, with instructions.

Lesh & Lesh and Shively & Switzer, for appellants. Watkins & Butler and M. Winters, for appellee.

FELT, P. J. This suit was originally brought by the Palmer National Bank of Danville, Ill., against the appellant, Huntington County Bank, of Huntington, Ind., to recover upon a certificate of deposit which reads as follows: "\$4250. Huntington County Bank, Huntington, Indiana, March 14, 1907. George L. Krieg has deposited in this Bank forty two hundred and fifty dollars payable to the order of himself in current funds on the return of this certificate properly endorsed. Roy Gieber, Cashier. Not subject to check. No. 77179." Said instrument was duly indorsed by the payee to one James W. Price, who, in turn, indorsed the same to the appellee. Upon application of the Huntington County Bank and upon his own petition, appellant Krieg was made a party defendant. The Huntington Bank thereafter filed answer showing that by authority of the court it paid to the clerk, for the use and benefit of the party lawfully entitled thereto, the sum of \$4,381, the amount of the certificate and interest to the date of such payment. The venue was changed from the Huntington to the Wabash circuit court, where, after the issues were formed, the case was tried and judgment rendered against appellant Krieg and the Huntington County Bank for \$4,560.50, from which judgment this appeal is taken.

Appellant Krieg has separately assigned as error: (1) The sustaining of the demurrer of appellee to the amended second paragraph of his answer to the complaint; (2) overruling of his demurrer to the third paragraph of the reply of appellee to the third and fourth paragraphs of the separate answer of appellant Krieg; (3) sustaining the demurrer of appellee to the second paragraph of Krieg's reply to the fourth paragraph of appellee's answer to the cross-complaint of appellant Krieg; (4) overruling the motion for a new trial. The appellant Huntington County Bank, by separate assignment of error, presents the same questions, and there is also a joint assignment of the same errors. The amended second paragraph of the answer of appellant Krieg avers, in substance, that the certificate of deposit sued upon was obtained by his assignee, Price, by fraud; that said Price claimed to be the patentee of a "farm derrick," and he and his associates made certain false statements and fraudulent representations to appellant in regard to the utility and value of said patent (the details of which appear in the answer), and also made bogus sales of territory and rights in his presence, all of which he believed to be true and genuine, and, relying thereon and wholly by reason thereof, he purchased an interest in said patent and executed his note therefor to said Price, in the sum of \$4,300; that said Price had not complied with the law by filing with the clerk of the Huntington circuit court

¹For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

²Rehearing denied. Transfer to Supreme Court denied.

a copy of said letters patent; that said sale was made and said note executed in Huntington county, Ind.; that said Price did not show upon said note over appellant's signature that it was given for a patent right; that thereafter and on the same day the note was executed at the solicitation of said Price, and while still in ignorance of the fraud that had been practiced upon him, and believing the false representations made to him to be true and said bogus sales to be genuine, he indorsed to said Price said certificate of deposit for \$4,250 in exchange for his said note; that said patented device had no value whatever and no element of utility, and appellant Krieg received no consideration whatever for said certificate of deposit; that the same was executed and delivered to said Price in Indiana, and is not negotiable under the laws of Indiana; that the indorsement and transfer of said certificate by Price to appellee was made in Illinois, and is governed by the laws of that state; that by the laws of Illinois a person who takes a nonnegotiable instrument by indorsement in blank and delivery, as in this case, does not acquire a legal, but only an equitable, title, subject to the rights and equities of all prior holders thereof.

The third paragraph of appellant's answer to the complaint avers that there was no consideration for the successive transfers of said certificate and appellee accepted same with knowledge thereof. The fourth paragraph of his answer charges that appellant Krieg was induced to purchase an interest in said letters patent by the fraud of Price and his associates, and gave his note therefor in the sum of \$4,300, and, before discovering the fraud, took up said note by giving to said Price the certificate in suit; that appellee took said certificate with knowledge of said fraud; that, after ascertaining said fraud, appellant tendered a return of the instrument conveying to him an interest in said letters patent, and demanded from said Price said certificate of deposit, but Price refused to accept the same or return to him said certificate of deposit. The substance of the third paragraph of the reply of appellee to the third and fourth paragraphs of answer of appellant Krieg is that appellee is a corporation organized as a national bank and doing business under the laws of Illinois; that it trades in and buys notes and commercial paper as any national bank; that it purchased the certificate in question before maturity from James W. Price in the due course of business for \$4,250 in money, without any notice or knowledge that the consideration thereof had failed, or that it was procured by fraud. Appellant's cross-complaint set up the alleged fraud by which Price obtained the certificate of deposit, and alleged a total failure of consideration. The fourth paragraph of appellee's answer to the cross-complaint of appellant alleged sub-

stantially the same facts that are averred in its third paragraph of reply to the third and fourth paragraphs of appellant's answer. The second paragraph of appellant's reply to the fourth paragraph of appellee's answer to the cross-complaint of Krieg alleges, in substance, that the certificate sued upon was executed in Indiana, is payable in said state, and its negotiability is governed by the laws of Indiana; that the indorsement of Price and the delivery by him of said certificate to appellee was in the state of Illinois; that by the laws of that state appellee obtained only an equitable title to said certificate, subject to the rights and equities of all prior holders thereof.

[1] The assignments of error raise the question of the negotiability of the certificate of deposit sued upon. Certificates of deposit in the usual form substantially like the one sued upon have been held in this state to be the promissory notes of the bank issuing them, and, as such, governed by the same rules as to negotiability that apply to promissory notes. *Drake v. Markle*, 21 Ind. 433, 83 Am. Dec. 358; *Gregg et al. v. Union County Nat. Bank*, 87 Ind. 238; *First Nat. Bank v. Stapf*, 165 Ind. 162, 74 N. E. 987, 112 Am. St. Rep. 214; *Long, Ex'x v. Strauss*, 107 Ind. 94, 104, 6 N. E. 123, 7 N. E. 763, 57 Am. Rep. 87.

The further question arises whether the certificate of deposit is negotiable under the law merchant or only negotiable by virtue of our statute. Upon this question; outside our own state, there is a great diversity of opinion; but we think it is settled in Indiana that a certificate of deposit payable "in current funds" is not negotiable under the law merchant as an inland bill of exchange, but is negotiable by virtue of our statute. Section 9071, *Burns' Ann. St.* 1908; *Nat. State Bank of La Fayette v. Ringel*, 51 Ind. 393; *Conwell v. Humphrey*, 9 Ind. 135, 68 Am. Dec. 611; *Drake v. Markle*, supra; *First Nat. Bank v. Stapf*, supra. In 1 Daniel, *Negotiable Inst.* (5th Ed. 1903) §§ 55, 56, numerous decisions are cited upon both sides of the question and the author concludes by saying: "In business paper it is best to adhere to strict rules; and as certainty is of the first moment in commercial dealings, and paper payable in fluctuating values is uncertain and delusive, we think sound judgment approves the doctrine of the text. Money alone is legal tender, and only the note which represents money should be held negotiable. It should be expressed simply as payable in dollars, which have a definite signification fixed by law." See, also, 1 Daniel, *Negotiable Inst.* § 1706; 1 Randolph, *Commercial Paper*, §§ 89, 90; Tiedeman, *Commercial Paper*, §§ 485, 486, 487. However, two comparatively recent cases by the Supreme Court of the United States decided in 1887 and 1896 depart from the doctrine declared in Indiana, and many of the states, and hold that the phrase "in current funds,"

under our present monetary system and business usage, has come to be used to designate any of the forms of legal tender money of our government, and that its use in a check or other instrument does not destroy its negotiability for "It was intended to cover whatever was receivable and current by law as money, whether in the form of notes or coin, * * * all being current and declared, by positive enactment, to be legal tender." *Bull v. Bank of Kasson*, 123 U. S. 105, 112, 8 Sup. Ct. 62, 31 L. Ed. 97; *Woodruff v. Mississippi*, 162 U. S. 291, 302, 16 Sup. Ct. 820, 40 L. Ed. 973. There is a strong tendency in the more recent decisions of the several states to change the former holdings and to favor the rule of negotiability, though some states and some law writers still incline to the old doctrine of nonnegotiability of such instruments.

[2] However, in view of the long established rule in Indiana, and the fact that this court is bound by the decisions of our Supreme Court until overruled or modified by that court, and the further fact of the division of opinion in other states, we adhere to the rule that a certificate of deposit, such as the one before us in this case, is not negotiable under the law merchant, but is negotiable by, and liability attaches according to, the provisions of our statute. Sections 9071, 9074, *Burns' Ann. St.* 1908. Section 9074, *supra*, reads as follows: "Any such assignee, having used due diligence in the premises, shall have his action against his immediate or any remote indorser; and in suit against a remote indorser, he shall have any defense which he might have had in a suit brought by his immediate assignee."

[3] It is also contended that the instrument is not negotiable because not in express terms payable at a bank in this state. In view of our conclusion above stated, this question is not important, but we are not impressed with the correctness of the contention and think a fair and reasonable interpretation of the instrument leads to the conclusion that it is payable at the Huntington County Bank, Huntington, Ind. See *Halstead v. Woods* (decided June 22, 1911) 95 N. E. 429.

[4] The certificate in suit was negotiated by Price by indorsement to the appellee bank, in the state of Illinois, but was originally executed in Indiana and its negotiability must be determined by the laws of Indiana.

[5, 6] It is true, however, that liability on a contract of indorsement is determined by the laws of the state where the indorsement is made; but Price is not a party to this suit, and he is the only person mentioned whose liability could be determined by the laws of that state, and appellee, having elected to sue Krieg and the Huntington County Bank and not to sue Price, its immediate indorser, the question of the liability, under the Illinois law, is not pertinent to any question presented for our decision. 1 *Daniel, Negotiable Inst.* §§ 865, 867, 882, 899, 900, 901; *Hunt v. Standard et al.*, 15 Ind. 33; *Rose v.*

President, etc., Bank, 15 Ind. 292. The Huntington County Bank issued the certificate in Indiana. It is by its terms payable in Indiana. Krieg indorsed it to Price in Indiana, and the suit was brought in this state, so that appellee's rights against the appellants must be determined by the laws of Indiana: 1 *Daniel, Negotiable Inst.* §§ 879, 882, 895.

[7] It is contended by appellee that, independent of the question of the negotiability of the certificate of deposit, the judgment must be affirmed for the reason that appellant Krieg by his indorsement and transfer of the instrument in the ordinary course of business with the usual apparent indicia of title is thereby estopped from setting up against a subsequent assignee for value, without notice of prior equities or defenses that his title so transferred is not good, and the instrument collectible by the appellee. In *Moore v. Moore et al.*, 112 Ind. 149, 13 N. E. 673, 2 Am. St. Rep. 170, Judge Mitchell, in speaking of the rights and equities between indorsers and indorsees of instruments, under our statute, said: "The effect of these provisions is to vest in the indorsees of the instruments named therein, whether such instruments be technically negotiable by the law merchant or not, a complete legal title, as well as a right of recovery by indorsees in their own names, respectively. Whatever right remains in the assignor of an instrument thus assignable, after the holder has transferred it by an unrestricted indorsement, must of necessity be of a purely equitable character. It is not perceived, therefore, why an innocent purchaser, who takes such an instrument by indorsement for value, and without notice of the latent equities of prior indorsers, may not stand upon the rule that, where the equities are equal, he is in the situation of advantage who holds the legal title. If one of two equally innocent parties must suffer, that one who by his indorsement of the instrument has conferred upon another the apparently absolute ownership of the paper must bear the loss. This doctrine ruled the case of *Stoner v. Brown*, 18 Ind. 464, which is not distinguishable in principle from the case before us. It is familiar law that if the owner, although induced thereto by fraud, invests another with the apparent legal title to chattels, in pursuance of a contract, the person so clothed may transfer an unimpeachable title to a good-faith purchaser." 11 *Daniel, Negotiable Inst.* § 1708g; *Kiefer et al. v. Klinsick*, 144 Ind. 46, 57, 42 N. E. 447; *Shirk v. North*, 138 Ind. 210, 214, 37 N. E. 590; *Merrell v. Springer*, 123 Ind. 485, 488, 24 N. E. 258, 8 L. R. A. 61; *Hirsh v. Norton, Adm'r*, 115 Ind. 341, 17 N. E. 612. Appellee's fifth paragraph of reply to the third and fourth paragraphs of Krieg's answer and its third paragraph of answer to Krieg's cross-complaint were by way of estoppel, but a demurrer was sustained to each, and appellee has assigned no cross-errors questioning such rulings. *Feder v. Field*, 117 Ind. 387, 20 N. E. 129. The rulings of the trial court are presumed to be correct.

Therefore there is no plea of estoppel in this case, and by numerous decisions of our Supreme Court it is established that, to obtain the benefit of an estoppel in pais, it must be pleaded. *Webb v. John Hancock, etc., Ins. Co.*, 162 Ind. 616, 69 N. E. 1006, 86 L. R. A. 632; *International, etc., Ass'n v. Watson*, 158 Ind. 508, 64 N. E. 23; *Center School Tp. v. State ex rel.*, 150 Ind. 168, 49 N. E. 961; *Wood v. Ostram*, 29 Ind. 177.

The questions on the instructions are determined by our conclusions already announced, and we do not deem it wise to extend this opinion by further discussion. Following the conclusions announced, we hold that the trial court erred in sustaining the demurrer to the amended second paragraph of answer, in overruling the demurrer to the third paragraph of the reply of the appellee to the third and fourth paragraphs of the separate answer of appellant Krieg, in sustaining the demurrer of appellee to the second paragraph of Krieg's reply to the fourth paragraph of appellee's answer to the cross-complaint, and in overruling the motion for a new trial.

The judgment is therefore reversed, with instructions to the lower court to sustain the motion for a new trial, to change the rulings upon the several demurrers to conform to this opinion, and to permit the parties to amend their pleadings, if they desire so to do, and for further proceedings in accordance with this opinion.

LAIRY, C. J., and MYERS, HOTTEL, and IBACH, JJ., concur. ADAMS, J., dissents.

(48 Ind. App. 844)

PERLEY v. SCHMIDT CUT STONE CO.
(No. 7,135.)

(Appellate Court of Indiana, Division No. 1.
June 30, 1911.)

1. TRIAL (§ 341*)—VERDICTS—OBJECTIONS—VENIRE DE NOVO.

A motion for a venire de novo is the proper procedure to raise objections to a ruling of the court in accepting separate verdicts.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 802-804; Dec. Dig. § 341.*]

2. APPEAL AND ERROR (§ 499*)—RECORD—MOTION FOR VENIRE DE NOVO—GROUNDS.

The denial of a venire de novo will not be reviewed, where the record does not disclose the ground upon which the motion was made.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 2295-2299; Dec. Dig. § 499.*]

3. APPEAL AND ERROR (§ 302*)—PRESENTATION OF GROUNDS OF REVIEW IN COURT BELOW—MOTION FOR NEW TRIAL.

A motion for a new trial, assigning error in receiving separate verdicts and in overruling defendant's motion to require the jury to return one verdict, does not present for review the action of the court in accepting several verdicts.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 1744-1752; Dec. Dig. § 802.*]

4. APPEAL AND ERROR (§ 930*)—REVIEW—VERDICTS—PRESUMPTIONS.

Where one of several paragraphs of a complaint is good, a general verdict germane to such paragraph will be presumed to have been based thereon.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 8755-3761; Dec. Dig. § 930.*]

5. PLEADING (§ 406*)—WAIVER OF OBJECTIONS—PLEADING OVER.

Where the complaint in one paragraph stated a joint cause of action against appellant and his codefendants, and in another paragraph stated a several cause against appellant, appellant, by answering over, waived any objection for misjoinder, under *Burns' Ann. St. 1908*, § 848.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. § 1370; Dec. Dig. § 406.*]

Appeal from Superior Court, St. Joseph County; *Vernon W. Van Fleet, Judge.*

Action by the Schmidt Cut Stone Company against Samuel S. Perley and others. From a judgment for plaintiff, defendant named appeals. Affirmed.

P. J. Houllhan and Anderson, Parker & Crabill, for appellant. Charles A. Davey, for appellee.

HOTTEL, J. Action brought by the Schmidt Cut Stone Company, appellee, against Samuel S. Perley, appellant, V. P. Fancil, Meyer Gilbert, and Abe Barris, partners, and Meyer Gilbert, to recover damages for breaking, mutilating, destroying, and carrying away and unlawfully converting to their own use certain personal property of the appellee.

The amended complaint is in five paragraphs, the first of which charges all the defendants thereto jointly with unlawfully destroying and converting the property mentioned in the complaint. In the second the appellant Samuel S. Perley alone is charged with said unlawful acts; in the third V. P. Fancil is charged with said acts; in the fourth Meyer Gilbert is charged with said acts; and in the fifth paragraph Meyer Gilbert and Abe Barris, doing business under the firm name and style of South Bend Iron & Metal Company, are charged with said unlawful acts. To this complaint the appellant filed his separate demurrer to each paragraph of the complaint, which was by the court sustained as to the third, fourth, and fifth paragraphs of the complaint, and overruled as to the first and second paragraphs. The cause was put at issue by general denial filed by each defendant separately, viz., Meyer Gilbert, Abe Barris, and the South Bend Iron & Metal Company, V. P. Fancil, and the defendant Samuel S. Perley. Upon the issues so formed, the cause was submitted to a jury for trial, which returned three separate verdicts, viz., a verdict for the plaintiff against the defendant Samuel S. Perley, assessing plaintiff's damages against said defendant at \$400, a verdict against the defendant Meyer Gilbert, assessing plaintiff's damages against said defendant at \$25, and a verdict against Victor P. Fancil, assessing

plaintiff's damages against said defendant at \$25. Upon the return of said separate verdicts, the appellant Perley objected to the receipt of the same by the court and moved the court to require the jury to return one general verdict, which motion was overruled and exceptions saved. The appellant Perley also moved the court for a venire de novo, which motion was overruled and exceptions saved by appellant, whereupon the court then rendered judgment upon said several verdicts, and appellant Perley filed a motion for a new trial, which was overruled and exceptions saved.

The assigned errors relied upon for reversal are: "(1) The court erred in overruling appellant's motion for a venire de novo. (2) The court erred in overruling appellant's motion for a new trial." The grounds for the new trial relied upon are: "(a) The court erred upon the trial of said cause in receiving the separate and several verdicts against the defendants Perley, Fanchl, and Gilbert, over the objection then made by the defendant. (b) The court erred upon the trial of this cause in overruling this defendant's motion to require the jury to return one verdict against all of the defendants found liable for the conversion complained of in the complaint, and in discharging the jury without requiring it to return its single verdict against all the defendants found liable."

[1] The only question attempted to be presented by these assigned errors is the ruling of the court in accepting three separate verdicts in this case and the rendition of the judgment thereon. It seems that a motion for a venire de novo is the proper one to raise this question. See Elliott's App. Proc. §§ 761, 327, 343; Everroad v. Gabbert, 83 Ind. 489, 492; Ashcraft v. Knoblock, 146 Ind. 169, 175, 45 N. E. 69; Boor, Adm'r, v. Lowery, 103 Ind. 468, 477, 3 N. E. 151, 53 Am. Rep. 519.

[2] But counsel for appellee insists that in this case the question is not presented by this motion, for the reason that the record does not disclose the ground upon which the motion was made, and that this was necessary to obtain a consideration of the same by this court. This contention is supported by the authorities. *Douglas v. Indianapolis, etc., Trac. Co.*, 37 Ind. App. 332, 336, 76 N. E. 892; *Deatty v. Shirley*, 83 Ind. 218; *Elliott's App. Proc.* § 763. In the case of *Douglas v. Ind., etc., Co.*, supra, this court said: "The record must disclose the ground upon which it (the motion for venire de novo) is based and pointed out to the trial court. This it does not do. The action of the trial court in overruling the motion is here for review. There one reason may have been assigned as a basis for the motion and here another. The presumption is that the trial court correctly ruled upon the question as it was then presented, and the record being silent as to any reason urged in that court as

a cause for granting the motion, the question on appeal will be deemed to have been correctly decided by it." The record in this case does not disclose the ground upon which this motion was made, and, therefore, under the authorities, supra, presents no question for the consideration of this court.

[3] Counsel next attempts to present this question by the error assigned in overruling his motion for new trial, as indicated by reasons (a) and (b) above quoted. We are of the opinion that this question is not properly presented by reasons for new trial; but, if it be conceded that the question is presented by such motion, yet we are of the opinion that appellant in this case is in no position to complain of the ruling.

[4] The line of authorities cited and relied upon by appellant are cases wherein the complaint stated a joint cause of action against all the defendants, and there were separate verdicts against two or more sets of defendants. This line of authorities is not applicable to this case. This is not a case where there is a single paragraph of complaint charging the appellant and his codefendants jointly with the wrongful and unlawful conversion and destruction of the property set out in the complaint, and seeking to recover against such defendants jointly. As indicated above, there were two paragraphs of complaint held good as against appellant's demurrer; one charging him jointly with his codefendants with said unlawful destruction and conversion of said property, and the other charging appellant alone with such unlawful conversion and destruction of said property. To these paragraphs, after submitting a demurrer for want of facts, the appellant filed a general denial, and went to trial with his codefendants without objection, and without motion or request of any kind to have the cases docketed separately or tried as separate causes. In such a case this court will, upon appeal, in the absence of the evidence or some finding of the court to the contrary, indulge the presumption that the verdict returned was upon the paragraph of complaint stating a cause of action against the appellant alone, and that appellant has not been harmed by such verdict. All reasonable presumptions and intendments are indulged in favor of the general verdict. This being true, this court will, where there are two or more paragraphs of complaint and nothing to show to the contrary, indulge the presumption that a verdict for the plaintiff is based upon that paragraph of complaint to which it is germane. *Central Union Tel. Co. v. Fehring*, 146 Ind. 189, 45 N. E. 64; *Shaw v. Barnhart*, 17 Ind. 183.

[5] By joining issue and going to trial without properly and seasonably objecting to such misjoinder of causes and parties, we think it clear that appellant is now in no position to raise the question which he here attempts to raise. Section 348, Burns 1908;

Lane et al. v. State ex rel., 27 Ind. 108, 112; Boonville Nat. Bank v. Blakey, 166 Ind. 427, 445, 449, 76 N. E. 529; Cargar v. Fee, 140 Ind. 572, 576, 39 N. E. 93.

Judgment affirmed.

(250 Ill. 499)

SLENKER v. ENGEL.

(Supreme Court of Illinois. June 20, 1911.)

1. ELECTIONS (§ 305*)—CONTESTS—APPEAL—QUESTIONS REVIEWABLE—CROSS-ERRORS.

Where contestee in an election contest does not assign cross-errors on the appeal of contestant from an adverse judgment, the denial of contestee's motion to dismiss the contest for want of proper parties is not presented for review.

[Ed. Note.—For other cases, see Elections, Cent. Dig. §§ 317-332; Dec. Dig. § 305.*]

2. ELECTIONS (§ 180*)—BALLOTS—MARKS.

A ballot had one heavy line drawn through the center of the Republican circle from the top to the bottom of the Republican ticket. There was nothing in the Republican circle that resembled a cross. In the squares opposite the names of the Democratic candidates for sheriff and county clerks were marks indicating that the voter desired to vote for those candidates. There were no other marks on the ballot. *Held*, that the ballot could not be counted for a Republican candidate, and was properly rejected because not properly marked.

[Ed. Note.—For other cases, see Elections, Cent. Dig. §§ 151-155; Dec. Dig. § 180.*]

3. ELECTIONS (§ 180*)—BALLOTS—MARKS.

A ballot was marked with a cross in the Republican circle and with crosses in the squares on the Republican ticket opposite the names of some candidates, and in the square opposite the name of a Democratic candidate for another office, and in the squares opposite the names of opposing candidates for another office appeared the figures "½," the pencil marking being similar to the other markings on the ballot. *Held*, that the ballot could not be counted for either of the opposing candidates.

[Ed. Note.—For other cases, see Elections, Cent. Dig. §§ 151-155; Dec. Dig. § 180.*]

4. ELECTIONS (§ 180*)—BALLOTS—MARKS—STATUTORY REQUIREMENTS.

Under the statute requiring a voter to indicate his choice by making a cross either in the circle at the head of his party ticket or in the squares opposite the names of the persons for whom he desires to vote, it is not sufficient to make a cross after the name of a candidate and entirely outside the square, and, before the court can give effect to the intention of the voter, there must be an honest effort to comply with the law.

[Ed. Note.—For other cases, see Elections, Cent. Dig. § 154; Dec. Dig. § 180.*]

5. ELECTIONS (§ 194*)—BALLOTS—"DISTINGUISHING MARK."

A distinguishing mark on a ballot, necessitating its rejection, is a mark placed thereon by the voter by which his ballot may be identified, and a mark placed on a ballot by an election officer either before or after the ballot is voted is not such a mark.

[Ed. Note.—For other cases, see Elections, Cent. Dig. §§ 166, 167; Dec. Dig. § 194.*]

6. ELECTIONS (§ 194*)—BALLOTS—DISTINGUISHING MARKS.

A ballot was marked with a cross in the Democratic circle and with a cross in the square for the Republican candidate for a coun-

ty office and with pencil lines through the Democratic opponent. On the side of the square opposite the name of such Democratic candidate were the figures "25," apparently placed there by an election officer. *Held*, that the ballot did not have a distinguishing mark, and must be counted.

[Ed. Note.—For other cases, see Elections, Cent. Dig. §§ 166, 167; Dec. Dig. § 194.*]

7. ELECTIONS (§ 180*)—BALLOTS—MARKS.

A ballot having a distinct cross in a party circle made with a broken pencil or with a hard substance not leaving any color on the paper, but merely making an indentation of the paper, is properly marked as a straight party ticket, and must be counted as such.

[Ed. Note.—For other cases, see Elections, Cent. Dig. § 153; Dec. Dig. § 180.*]

8. ELECTIONS (§ 192*)—BALLOTS—MARKS.

A ballot was fed through the printing press twice, and the two impressions were not precisely in the same place. It was properly indorsed and a voter properly marked it. *Held*, that the ballot was properly counted, though the judges of election might have refused to give it out because a spoiled ballot.

[Ed. Note.—For other cases, see Elections, Dec. Dig. § 192.*]

9. ELECTIONS (§ 192*)—BALLOTS—MARKS.

Where the Democratic ticket on a ballot containing perfect Democratic, Republican, and Prohibition tickets and imperfect tickets for other parties was properly marked, it must be counted.

[Ed. Note.—For other cases, see Elections, Dec. Dig. § 192.*]

10. ELECTIONS (§ 194*)—BALLOTS—DISTINGUISHING MARKS.

A ballot contained on its back the initials "W. M. C." apparently made by the same person. The initials of an election officer were "W. M.," and he did not know how the "C." happened to be on the ballot. There was nothing to indicate that the "C." was made by the voter. *Held*, that the ballot did not have a distinguishing mark, and was properly counted.

[Ed. Note.—For other cases, see Elections, Cent. Dig. §§ 166, 167; Dec. Dig. § 194.*]

11. ELECTIONS (§ 180*)—BALLOTS—MANNER OF VOTING.

Where the marking of a ballot indicated that the voter was unable to make a straight line, but there was a point in a party circle where two pencil marks crossed, the ballot was properly marked, and must be counted.

[Ed. Note.—For other cases, see Elections, Cent. Dig. §§ 151-157; Dec. Dig. § 180.*]

12. ELECTIONS (§ 180*)—BALLOTS—MANNER OF VOTING.

A cross in the form of a capital "T" in the square opposite a candidate's name is sufficient, and the ballot must be counted.

[Ed. Note.—For other cases, see Elections, Cent. Dig. § 152; Dec. Dig. § 180.*]

13. ELECTIONS (§ 180*)—BALLOTS—MANNER OF VOTING.

That one line of a cross in the square opposite a candidate's name is much shorter than the other line does not make the marking insufficient; there being a distinct crossing of the lines near the center of the square, and the ballot must be counted.

[Ed. Note.—For other cases, see Elections, Cent. Dig. § 152; Dec. Dig. § 180.*]

14. ELECTIONS (§ 194*)—BALLOTS—DISTINGUISHING MARK.

A ballot with the figure "3" in the square opposite a candidate's name made by the voter to indicate that he supposed he could cumulate

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

his votes on one candidate does not have a distinguishing mark, and must be counted.

[Ed. Note.—For other cases, see Elections, Cent. Dig. §§ 166, 167; Dec. Dig. § 194.*]

15. ELECTIONS (§ 194*)—BALLOTS—MANNER OF MARKING.

Where a voter marked crosses in the squares opposite all the candidates on a party ticket, undertook to erase the cross in the square opposite a candidate's name, and thereby distributed the pencil color in blue over the square, and marked a cross in the square opposite the name of the opposing candidate, the ballot must be counted for the latter candidate.

[Ed. Note.—For other cases, see Elections, Cent. Dig. §§ 166, 167; Dec. Dig. § 194.*]

16. ELECTIONS (§ 177*) — BALLOTS — SIGNATURES OF ELECTION OFFICERS.

A ballot containing a letter of an election judge's initials must, when properly marked by a voter, be counted.

[Ed. Note.—For other cases, see Elections, Cent. Dig. § 149; Dec. Dig. § 177.*]

17. ELECTIONS (§ 177*) — BALLOTS — SIGNATURES OF ELECTION OFFICERS.

A ballot which does not contain the initials of any of the election judges is not an official ballot, and cannot be counted.

[Ed. Note.—For other cases, see Elections, Cent. Dig. § 149; Dec. Dig. § 177.*]

Dunn, J., dissenting; Carter, C. J., and Cooke and Farmer, JJ., dissenting in part.

Appeal from Woodford County Court; John H. Gillan, Judge.

Election contest by B. F. Slenker against Ed C. Engel. From a judgment for contestee, contestant appeals. Affirmed.

Sigmund Livingston and Orman Ridgely, for appellant. E. J. Riley and J. A. Riely, for appellee.

VICKERS, J. At the election held November 8, 1910, in Woodford county, Ed C. Engel was the Democratic candidate for county treasurer and B. F. Slenker was the Republican candidate for said office. The election returns showed that Engel received 2,126 votes and that Slenker received 2,077 votes for county treasurer, and George Shuman, candidate on the Prohibition ticket for said office, received 42 votes. A certificate of election was issued to Engel, and Slenker filed a petition in the county court of said county to contest the election, making Ed C. Engel the sole defendant. A motion was made and overruled to dismiss the petition because Shuman was not made a party defendant. A recount of the ballots was entered upon before the county judge of Woodford county, but before the count was completed the judge's term of office expired and a change of venue was granted to the Honorable John H. Gillan, judge of the county court of Iroquois county. When the cause was transferred to Judge Gillan, he proceeded to hear it de novo, and all of the proceedings had before the other judge seem to have been disregarded. All of the rulings complained of, including the motion to dismiss for want of proper parties, are in the rec-

ord as made before Judge Gillan. Upon a recount of the ballots, after all objections to disputed ballots had been disposed of, the court found that Engel had received 2,114 votes, Slenker 2,112 votes, and Shuman 46 votes, and that there were 181 votes which should not be counted for either of the contestants. The court entered an order declaring Engel duly elected, to which Slenker preserved exceptions, and by his appeal has brought the record to this court for review.

[1] Appellee has assigned no cross-errors upon the record; hence the ruling of the court upon the motion to dismiss for want of proper parties is not presented for our consideration.

The only errors complained of by appellant are based on rulings of the court upon certain disputed ballots. He contends that certain ballots were excluded which should have been counted for him, and that certain other ballots were erroneously counted for appellee. The original ballots have been properly certified and sent up with the record for our inspection.

[2] Appellant contends that ballot "Exhibit A," in Green township, should have been counted for him, and that the court erred in rejecting the same. The ballot has one heavy line drawn through the center of the Republican circle, made with an indelible blue pencil. There is nothing in the Republican circle that resembles a cross of any character. The one heavily shaded line drawn from the top to the bottom of the Republican circle is the only trace of a mark to be found upon the Republican ballot. In the squares opposite the names of the Democratic candidates for sheriff and county clerk are blue pencil marks, indicating that the voter desired to vote for those candidates on the Democratic ticket. There are no other marks of any kind or character anywhere to be found upon said ballot. Appellant contends that there is a cross in the Republican circle, and that the same can be seen under a magnifying glass, and that therefore the ballot should be counted for him. We are wholly unable to discover the slightest trace of any mark or line in the Republican circle except the one heavy line above described. There is no evidence of any attempt on the part of the voter to comply with the law by making a cross in the circle. This ballot was properly rejected by the court.

[3] Ballot "Exhibit 1-A," voted in Olio precinct No. 1, was rejected by the court, and appellant complains of this ruling. That ballot is marked with a distinct cross in the Republican circle. There are also crosses in the squares on the Republican ballot opposite the names of the candidates for county judge, county clerk, and county superintendent of schools, and a cross in the square opposite the name of one of the Dem-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

ocratic candidates for representative in the General Assembly. In the squares to the left of the names of appellant and appellee, and also in the squares opposite the Republican and Democratic candidates for sheriff, are the figures " $\frac{1}{2}$ " made with a blue indelible pencil similar in appearance to the other markings on the ballot. It cannot be said that the voter attempted to make a cross in these four squares, since the figure " $\frac{1}{2}$ " is very carefully and accurately written. In each instance the slanting line that separates the figures of the fraction is drawn entirely through the square. The only conclusion that we can arrive at from an inspection of this ballot is that the voter desired to divide his vote equally between the two sets of opposing candidates, and he attempted to carry out this intention by writing the fraction " $\frac{1}{2}$ " in the squares opposite the names of the respective candidates. This, of course, he had no legal right to do. We think that these figures sufficiently indicate that the voter did not intend to give appellant his entire vote; and, since he had no right to divide it and give him a part of it, it could not properly be counted as a vote for appellant.

[4] "Exhibit P," being a ballot cast in El Paso precinct No. 3, was not counted for appellant, and this ruling is complained of. That ballot has no marks of any kind or character in any of the circles or squares upon it. It has a cross after the name of appellant and crosses after the names of two other candidates on the Republican ticket. Appellant contends that this indicates an intention on the part of the voter to vote for him. The law requires the voter to indicate his choice by making a cross either in the circle at the head of his party ticket or in the squares opposite the names of the persons for whom he desires to vote. It is not sufficient to make a cross after the name of the candidate and entirely outside the square. It is not true that, because we may be able to guess at what the voter intended, the law requires that his ballot should be counted. While the intention of the voter should be given effect when it is possible to do so without nullifying the statute, still there must be an honest effort on the part of the voter to observe the law and to express his intention in accordance with its requirements. The statute was entirely disregarded by the person who cast this ballot, and it was not error to refuse to count it for any one.

The foregoing are the only ballots rejected by the court of which appellant makes complaint. He complains of a number of ballots that were counted for appellee. These will be considered.

[5] "Exhibit I," being a ballot cast in Clayton precinct, was counted for appellee over appellant's objection. The objection to this ballot is that it has the letter "B" in pencil on the back of the ballot. It is claimed that this ballot should be rejected be-

cause the letter "B" is a distinguishing mark. We do not agree with this contention, for the reason that we are convinced, from a comparison of the letter "B" with the initial of one of the judges, that the letter "B" was written, not by the voter, but by the judge of the election, whose initials are "B. N." It is not unreasonable to suppose that the judge, before handing out the ballot, started to place his initials on it and wrote the "B," and then discovering that he was not placing the letters at the proper place, wrote "B. N." under the official indorsement and opposite the words "Judges' initials." The probability that this accounts for the presence of this letter on the back of the ballot is greatly strengthened by the striking similarity of the letter "B" on the back of the ballot with the same letter on this and other ballots evidently indorsed by the same judge. A distinguishing mark is a mark placed upon the ballot by the voter by which his ballot can be identified. A mark placed upon a ballot by the election officers, either before or after the ballot is voted, is not a distinguishing mark within the rule which requires ballots having such marks upon them to be excluded from the count. The ballots to which objections were sustained in *Winn v. Blackman*, 229 Ill. 198, 82 N. E. 215, 120 Am. St. Rep. 237, are distinguishable from this ballot, in that ballots 164 and 117 in the *Winn* Case had letters upon them which appeared to have been placed there by the voter, and not by the election officials.

[6] "Exhibit 31" is a ballot case in Minonk precinct No. 2, and was counted for appellee over appellant's objection. This ballot is a straight Democratic ballot voted with a cross in the circle, except that the voter voted by a cross in the square for the Republican candidate for county clerk and erased the name of the Democratic candidate for county clerk by drawing pencil lines through it. There are in black pencil the figures "25" to the left of the square opposite the name of the Democratic candidate for county clerk. These figures and the erasure of the name of the Democratic candidate for county clerk are thought to constitute distinguishing marks which ought to cause the rejection of the ballot. We cannot assent to this. In *Parker v. Orr*, 158 Ill. 609, 41 N. E. 1002, 30 L. R. A. 227, it was held that a ballot which was properly marked with a cross and a circle, and on which the voter had erased the names of some of the candidates, was a good ballot, and should be counted for those persons whose names were not erased on the ballot voted. The method employed by the voter was manifestly for the purpose of emphasizing his intention to vote for the opponent of the candidate whose name is erased. This being the reasonable conclusion as to the voter's purpose in erasing the name, it ought not to be held that it was done for the unlawful purpose of distinguishing his ballot.

The presence of the figures "25" on the margin of the ballot, when considered in connection with other ballots upon which figures appear, leads us to the conclusion that these figures were placed there by some person other than the voter—most probably some of the election officers during the counting of the ballots. There are quite a number of ballots on which figures appear, some of them on the face of the ballot and others on the back. They are not consecutive numbers, and appear to have been made in every instance, with one exception, with a black pencil while the markings on the face of the ballots by the voter were done with a blue indelible pencil. We do not think these figures should be held to be distinguishing marks.

Ballots in Minonk precinct No. 3, "Exhibit No. 1," in Minonk precinct No. 2, "Exhibits Nos. 35, 30 and 34," and in Metamora precinct, "Exhibits Nos. 23 and 24," were all objected to because they had figures upon them, either upon the back or face thereof, and are all disposed of by what has been said in reference to Minonk precinct No. 2, "Exhibit 31."

[7] "Exhibit A," Kansas precinct, is a ballot objected to because there is no cross or other mark in the circle or in any of the squares. This is a straight Democratic ballot and has a distinct cross in the Democratic circle, but it appears to have been made with a broken pencil or with some hard substance that did not leave any color on paper. The cross, however, is very clearly to be seen; and, while it is merely made by indentation of the paper, the ballot was properly counted for appellee.

[8] "Exhibit A," in Linn township, is a ballot which is printed double by having been fed through the printing press twice. The two impressions are not precisely in the same place, and it gives the ballot a peculiar, blurred appearance. It is a ballot that the judges of the election might reasonably have refused to give out as being a spoiled ballot, but it was given to a voter properly indorsed and is voted with a cross in the Democratic circle, being a straight Democratic vote, except the voter voted for the Republican candidate for county judge by marking a cross in the square opposite that candidate's name. The voter has observed the law and clearly expressed his intention. It is very apparent how the ballot happened to be in the condition it is, and that the voter was not in any way responsible for it. We think this ballot was properly counted for appellee.

[9] "Exhibit P," Montgomery township, is a ballot that has a portion of the circles above the Socialist and Socialist-Labor tickets not printed in full, caused by the paper not being properly placed in the printing press. There is about one-half of the circle of the Socialist-Labor ticket, which was the last ticket on the ballot, and about two-thirds of the circle on the Socialist ticket, that still

remains on the ballot. The Prohibition, Republican, and Democratic ballots are perfect. This ballot is objected to by appellant. The portion of the ballot cut away does not in any way affect the Republican or Democratic ballots, both of which are perfect. The ballot is a Democratic ballot voted for all of the candidates on the Democratic ticket except the candidate for sheriff, which is left blank, and a cross is placed in the square opposite the name of the Republican candidate for sheriff. This ballot was properly counted for appellee.

[10] Ballot "Exhibit A," in Palestine precinct, is objected to because the initials "W. M. C." are on the back of the ballot, and the proof is that no judge of the election in that precinct had such initials. One of the judges in that precinct who indorsed his initials on many of the ballots used the letters "W. M." He testifies that he does not know how the "C." happened to be on the ballot. The three letters are made with a blue indelible pencil, and appear to have been made by the same person. There is no reason to suspect that the voter placed the "C." after the judge's initials "W. M.," and hence no reason for holding that the ballot has a distinguishing mark on it.

[11] "Exhibit A," Ollo precinct No. 2, is a ballot objected to because there is an insufficient cross in the Democratic circle. There are a number of pencil marks in the Democratic circle but we think that there is a sufficient cross to warrant the court in counting the ballot. The marking of the ballot indicates that the voter was nervous and unable to make a straight line but there is a point in the circle where two pencil marks intersect and cross. The ballot was properly counted for appellee.

[12] "Exhibit G," in Ollo precinct, is a ballot objected to for the reason that there is no cross in the square opposite appellee's name. The cross here is in the form of a capital letter "T," which has been held to be sufficient by this court in *Parker v. Orr*, supra, and *Winn v. Blackman*, supra.

Ballot designated "Exhibit A," in Montgomery township, is objected to because of insufficient marking in the Democratic circle. The cross in the Democratic circle is distinct and complies with the requirements of the law.

[13] "Exhibit P," Cazenovia precinct No. 1, is a ballot objected to for insufficient marking. This is a Democratic ballot voted by marking in the squares opposite the names of the several candidates, except that the voter voted for John A. Sterling for Congress. The cross in the square in front of appellee's name is sufficient. There is a distinct crossing of the lines near the center of the square, although one line is much shorter than the other. The ballot was properly counted for appellee.

[14] "Exhibit 2-A," Ollo precinct No. 1, is a ballot objected to because the voter wrote

the figure "3" in the square opposite the name of Ella S. Stewart, who was a candidate for trustee of the University of Illinois on the Prohibition ticket. There were three trustees to be elected, and evidently the voter supposed he could cumulate his votes on one candidate and took this method of attempting to do so. This affords no reason for rejecting the ballot. The ballot in other respects is free from objection, and was voted for appellee and properly counted for him.

"Exhibit 3-A," Ollo precinct No. 1, is a ballot similar to the one that has just been considered. The figure "3" is in the square before the name of one of the candidates for the Legislature. It is clear that the voter was simply intending to cast three votes for that particular candidate for representative.

There are five other ballots that are objected to because the voter tried to indicate how he desired to distribute his votes among the candidates for the Legislature. The objection made to all of these ballots is that these figures, either placed in the square or in some instances after the name of the candidate, are distinguishing marks. The observations already made sufficiently show that these figures were made by the voter to indicate how he desired to distribute his votes among the candidates for the Legislature.

[15] "Exhibit B," being a ballot in Montgomery township, is objected to because of an attempt to erase a cross in the square opposite appellant's name. It is contended that this constitutes a distinguishing mark. All the candidates on the Republican ticket appear to have been voted for by marking crosses in the squares opposite their respective names. The voter then undertook to erase the cross in the square opposite appellant's name, and in so doing has distributed the blue color in a blur over the square. There is a distinct cross in the square opposite appellee's name. The reasons for the appearance of this ballot are perfectly apparent. It is simply a case of the voter changing his mind after marking his ballot for appellant, and then voting for appellee. The ballot was properly counted for appellee.

Ballot "Exhibit B," in Palestine precinct, is objected to. It is a straight Democratic ballot marked with a cross in the Democratic circle, with the exception that the voter voted for a Republican for member of the Legislature and a Republican for sheriff, and also marked his ballot for the prohibition candidate for county treasurer, and then erased, or attempted to erase, the cross in the square before the name of the Prohibition candidate for treasurer and left his ballot a straight Democratic ballot, with the exception of the member of the Legislature and sheriff. This ballot is substantially like the preceding one in Montgomery township.

[16] Ballot "Exhibit 2," from Clayton precinct, is objected to because it only has one

letter of the judge's initials on it. This has been held to be sufficient.

[17] Ballots "A" from Cazenovia precinct No. 1, "E" from Ollo precinct No. 2, and "D" from Ollo precinct No. 2, were all Republican ballots marked for appellant, and were rejected by the court because there was no indorsement of the initials of any judge on any of them. This question came before this court first in the case of Kelly v. Adams, 183 Ill. 193, 55 N. E. 837, and it was there held that a ballot not officially indorsed by a judge of the election could not be counted. It was said in that case, on page 195 of 183 Ill., on page 838 of 55 N. E.: "The absence of the official indorsement would have been sufficient cause for the rejection of this ballot." The same question again arose in Caldwell v. McElvain, 184 Ill. 552, 56 N. E. 1012, where the ruling of the court below in refusing to count for either party ballots which did not have the initials of a judge indorsed thereon was affirmed. And again in the case of Cholsner v. York, 211 Ill. 56, 71 N. E. 940; the question arose as to the effect of using a rubber stamp, instead of indorsing the initials of the judge on the ballot in his handwriting, and the doctrine of the previous cases was reaffirmed and the statute requiring the indorsement of the initials of one of the election judges was held to be mandatory, and that a ballot not so indorsed should not be counted. The same question was again before this court in Winn v. Blackman, supra, and it was held there that ballots which did not contain the initials of any of the judges on the back of them were properly rejected. These cases must be regarded as establishing the rule in this state that a ballot which does not contain the initials of any of the judges of the election is not an official ballot, and cannot be counted for any one.

Finding no error in this record, the judgment of the county court is affirmed.

Judgment affirmed.

DUNN, J., dissenting.

CARTER, C. J. (dissenting). I do not concur in the foregoing opinion on one point. In my judgment the three ballots that did not contain the indorsement of the initials of the judges should be counted. The court in Cholsner v. York, 211 Ill. 56, 71 N. E. 940, after reviewing the authorities in this state on the question, said that ballots not having the initials of the judges of election indorsed thereon could not be counted, "In the absence of evidence tending to show fraud and mistake on the part of the judges." I am of the opinion from this record that these three ballots were cast by legal voters, and the judges inadvertently omitted their initials on the back. A voter should not be deprived of his vote by a mistake of election officers where he is not at fault, and the ballot it-

self, or other evidence in the record, shows that the ballot is genuine, delivered by the judges to the voter and by him voted and that the lack of the judges' initials was caused by mistake. The initials of a judge in his handwriting are for the purpose of identifying the ballot, but if the ballot can be fully identified, even in the absence of the initials, and it is shown that it was cast by a legal voter, it should be counted. This conclusion, I think, is in harmony with the decisions heretofore rendered by this court.

OOKE and FARMER, JJ. (specially concurring). We concur in the result reached, and in all that is said in the opinion except the holding and discussion in reference to the ballot "Exhibit 1-A," in Olio precinct No. 1. The statute does not permit any splitting or division of a vote between the candidates for sheriff and the candidates for treasurer. The voter is presumed to know the law, and to know, therefore, that he could not legitimately mark his ballot in the way in which this ballot was marked. In our opinion the figures "1/2" in the four squares indicated constitute distinguishing marks, and this ballot should be thrown out, and not counted for any candidate.

(250 Ill. 561.)

POLZIN v. RAND, McNALLY & CO. et al.†
(Supreme Court of Illinois. June 20, 1911.)

1. SCHOOLS AND SCHOOL DISTRICTS (§ 75*)—PUBLIC SCHOOLS—STATUTES—CONSTITUTIONALITY.

Under Const. art. 8, § 1, providing that the General Assembly shall provide a thorough and efficient system of free schools, whereby all children of this state may receive a good common school education, Laws 1909, c. 416, providing that publishers must register their text-books in order that they may be used in the public schools, and fixing the price of such text-books, is not unconstitutional, because publishers may refuse to comply with the statute, which might necessitate temporary closing of the schools.

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. §§ 184, 185; Dec. Dig. § 75.*]

2. CONSTITUTIONAL LAW (§ 70*)—JUDICIARY—ENCROACHMENT OF LEGISLATURE—WISDOM OF STATUTES.

The wisdom of an act is a legislative question, and a statute cannot be held unconstitutional because unwise.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 132, 137; Dec. Dig. § 70.*]

3. SCHOOLS AND SCHOOL DISTRICTS (§ 75*)—SCHOOL BOOKS—POWER TO REGULATE.

The Legislature has the power to compel publishers to license their books as a condition precedent to their sale for use in the public schools.

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. §§ 184, 185; Dec. Dig. § 75.*]

4. CONSTITUTIONAL LAW (§ 242*)—DISCRIMINATION—REGULATION OF SCHOOL BOOKS.

Laws 1909, p. 416, requires all publishers offering their books for sale in the public schools

to license the same, and fixes the maximum price of certain text-books, including geographies. Hurd's Rev. St. 1909, c. 122, requires instruction to be given in the elements of the natural sciences, and such other branches as may be prescribed by the directors or voters of the district at the annual election of directors. Text-books upon the elements of the natural sciences, which are botany, zoölogy, and physics, are required to be licensed under Act 1909, but no maximum price for their sale is fixed. Held, that the act of 1909 is not unconstitutional in discriminating between publishers of various classes of books.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 691; Dec. Dig. § 242.*]

5. CONSTITUTIONAL LAW (§ 225*)—EQUAL PROTECTION OF LAWS—DISCRIMINATION AS TO LOCALITIES—PUBLIC SCHOOLS—CLASSIFICATION OF DISTRICTS.

Laws 1909, p. 416, which provides in section 6 that it shall be the duty of the board of directors of school districts to advertise for bids for school text-books, in newspapers of general circulation published in the district, was not intended to make a classification of districts with reference to the publication of advertisements for bids, merely because no newspaper is published in most of the districts.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 681, 682; Dec. Dig. § 225.*]

6. SCHOOLS AND SCHOOL DISTRICTS (§ 75*)—PUBLIC SCHOOLS—STATUTES—CONSTITUTIONALITY—"GENERAL CIRCULATION"—"PUBLISHED."

Laws 1909, p. 419, § 6, provides that the board of directors of education shall, before adopting text-books for use in public schools, advertise for bids in newspapers of general circulation published in the city or district. A large majority of the school districts have no paper published within their borders. Held, that this provision could not be construed as allowing the publication of an advertisement in a newspaper having a general circulation in, but not published in, the district, for a newspaper of "general circulation" need only circulate among all classes, and may be published in a place far distant from the district, and the provision requires the advertisement in a newspaper of general circulation published in the city or district; the word "published" clearly meaning the place where a newspaper is first issued or printed, and hence the section is invalid, as impossible to be obeyed.

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. §§ 184, 185; Dec. Dig. § 75.*]

For other definitions, see Words and Phrases, vol. 4, p. 3058; vol. 7, p. 5847.]

7. STATUTES (§ 64*)—PARTIAL INVALIDITY—EFFECT.

Laws 1909, p. 416, having reference to the licensing of school books, is rendered wholly invalid by the invalidity of section 6, for its purpose cannot be accomplished without that section.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 58-66; Dec. Dig. § 64.*]

Carter, C. J., dissenting.

Appeal from Circuit Court, Cook County; Charles M. Walker, Judge.

Bill by Paul E. Polzin against Rand, McNally & Co. and others. From a decree for defendants, complainant appeals. Affirmed.

†For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep.'s Indexes.

† Petition for rehearing denied.

Schuyler, Ettelson & Weinfeld (Samuel A. Ettelson, of counsel), for appellant. Lackner, Butz & Miller, for appellee Rand, McNally & Co. Frank Hamlin and Angus Roy Shannon, for appellee Board of Education of the City of Chicago.

FARMER, J. The bill in this case was filed by appellant, Paul E. Polzin, as a taxpayer in the city of Chicago, against the board of education of said city and Rand, McNally & Co., also of the city of Chicago, and other defendants not necessary to be named. The bill alleges that in September, 1909, the board of education adopted for use in the public schools of the city of Chicago, Dodge's Advanced Geography and Dodge's Elementary Geography, published by Rand, McNally & Co., and entered into a contract with said Rand, McNally & Co., whereby said publisher agreed to furnish said school text-books to said board of education and to the pupils of said schools at maximum prices in said contract specified. The bill further alleges that said text-book has never been licensed as required by an act of the Legislature of 1909, entitled "An act in relation to the adoption, use and price of public school text-books in the free public schools of this state." Laws 1909, p. 416. The Governor refused to approve the act, but failed to return it to the General Assembly during its session, with his veto, and failed to file the bill, with his objections thereto, in the office of the Secretary of State within 10 days after the adjournment of the General Assembly. The bill therefore became a law without the Governor's signature, and went into effect July 1, 1909. The contract between the board of education and Rand, McNally & Co. was for furnishing by the latter Dodge's Advanced Geography to the board of education, or to persons designated by it, at the price of 72 cents, or to pupils at the price of 90 cents, and Dodge's Elementary Geography to the board of education, or to persons designated by it, at the price of 35 cents, and to pupils at the price of 45 cents. The bill alleges that under said act of 1909 the said contract between the board of education and Rand, McNally & Co. is unlawful, and prays an injunction against both parties, restraining them from carrying out and performing it.

The answer of the board of education admits failure to comply with the provisions of the act of 1909, and alleges that since the enactment of said law no publisher of any text-book has complied with its provisions by licensing any geography or other school text-book, except an arithmetic; that said law is operative only when the publishers voluntarily place themselves under its provisions, and by the failure of publishers to do this the law became and is inoperative, and said board of education was confronted with the alternative of obeying the strict letter of the law by buying no text-books, thereby closing the public schools, in viola-

tion of its duty under the Constitution to maintain said schools, or arranging for such temporary use of such text-books as in the judgment of said board was deemed best, so as to perform its duty, under the Constitution, to maintain an efficient public school system within its jurisdiction; that at its meeting September 7, 1909, the board of education adopted resolutions setting out this condition; that, among other things, the resolution recited "that during the emergency created by the conditions hereinbefore set forth this board temporarily use such text-books as in its opinion are necessary and best for the operation of the schools, and purchase the same in such quantities as they are needed, at the lowest obtainable prices." The answer of Rand, McNally & Co. relies as a defense upon the unconstitutionality of the act of 1909.

The cause was heard in open court upon bill, answers, and replications, oral testimony, and a stipulation of facts. The chancellor found and decreed that said act is unconstitutional and dismissed the bill at complainant's costs, and complainant has brought the case to this court by appeal.

Section 1 of the act of 1909 requires the publisher of any text-book desiring to offer the same for sale for use in the public schools of this state to file two sample copies of such book in the office of the Superintendent of Public Instruction, together with the list price and the wholesale and retail prices at which said text-book is to be offered for sale. The publisher is also required to file with the Superintendent of Public Instruction a written agreement to furnish said text-book at the wholesale price so filed to the directors of any public school district or any board of education, or to any merchant or dealer, and at the retail price so filed to any patron of the public schools. The agreement is required to guarantee that all books offered for sale and sold in this state shall correspond with and be equal in quality with the copies deposited with the Superintendent of Public Instruction. With such text-book so deposited, the publisher is required to pay into the state treasury \$10. to constitute a fund to be used by the Superintendent of Public Instruction to pay expenses of printing and distributing lists of accredited text-books to county superintendents of schools, school directors, and boards of education, as required by section 5 of the act. Section 1 forbids the Superintendent of Public Instruction from licensing any publisher, and school directors and boards of education from contracting with any publisher, to furnish any public school text-book which shall be sold at retail prices to patrons at a price or prices in excess of the prices fixed for text-books enumerated in said section. Then follows a list of maximum prices for text-books upon the subjects enumerated. The price of "complete geography" is fixed at 75 cents and "elementary geography" at 35 cents.

Section 3 requires the publisher depositing with the Superintendent of Public Instruction any text-book to file with said superintendent a bond in the sum of \$5,000 conditioned for compliance with the agreement filed with said text-book, and the Superintendent of Public Instruction shall thereupon enter said text-book upon the list of public school text-books permitted to be used in the public schools of this state, and shall issue a license to the publisher to sell said text-book for use in said public schools. For a violation of the agreement, the publisher is liable to a penalty in the sum of \$2,000, to be recovered in an action on the bond in the name of the state.

Section 5 requires the Superintendent of Public Instruction, in February of each year, to furnish county superintendents, boards of school directors, and boards of education a list of publishers who have conformed to the requirements of the act, a list and description of accredited school text-books, and the list prices and wholesale and retail prices of said books. Said section 5 also requires the publisher, before entering into any contract with any board of education or board of directors, to furnish the county superintendent of schools and the secretary of the board of education or board of directors a duplicate printed list of school text-books filed by him with the Superintendent of Public Instruction, together with the lowest wholesale and retail prices, and also with samples of the school text-books in said list referred to, which lists and samples are required to be preserved as a part of the records of the board of education or board of directors for inspection and examination by school officers, teachers, and patrons.

Section 6 is as follows: "Before adopting for use in the public schools under their respective jurisdictions any school text-books under the provisions of this act, it shall be the duty of each board of education or board of directors to advertise for bids by publishing a notice once a week for three consecutive weeks in one or more newspapers of general circulation published in the city or district; said notice shall state the time up to which said bids will be received, the time at which they will be opened, which must be at an open meeting of the board of education or board of directors; said notice shall also state the classes and grades for which the text-books are to be bought, and the approximate quantity needed; and the said board shall award the contract for said text-books to any responsible bidder or bidders offering suitable licensed text-books at the lowest prices, taking into consideration the quality of the material used, illustrations, binding, printing, authorship, and all other things that go to make up a desirable text-book: Provided, that the said board may reject any and all bids, or any part thereof, and readvertise therefor, as above provided."

Section 8 provides a penalty of not less

than \$25 nor more than \$500, to which may be added imprisonment not exceeding 60 days in jail, against any publisher, merchant, dealer, or other person or persons for demanding or receiving for any school text-book any sum in excess of the price for such book filed with the Superintendent of Public Instruction. And section 9 provides that text-books shall not be changed oftener than once in five years, and shall not be changed in the middle of the school year, and that all changes shall go into effect at the beginning of the first term of school after the summer vacation. Other sections and provisions not referred to are not involved in the decision of this case.

In the brief filed on behalf of the board of education, the constitutionality of the act in question is not discussed. The position taken by said board is that no publisher has complied with the act by securing a license for books desired and necessary to be used in the public schools under its control; that no means are provided for compelling the licensing of said books; and that the board was obliged to procure them for use in the public schools or close said schools, as they could not be conducted without the use of text-books. Rand, McNally & Co. (hereafter referred to as appellee) contends that as the law prohibits the use in the public schools of text-books not licensed under its provisions, and affords no means for securing the licensing of them, the effect of the law is to close the public schools if publishers do not choose to secure the licensing of books, and the law is therefore invalid, because it defeats the constitutional mandate of section 1 of article 8 of the Constitution.

[1] First. It is the constitutional duty of the General Assembly to provide a thorough and efficient system of free schools, whereby all children of this state may receive a good common school education. Const. art. 8, § 1. Any act of the Legislature which would make inoperative and render ineffectual laws adopted for the establishment and maintenance of an efficient system of free schools would be invalid. But is that the necessary effect of the act under consideration, as contended by the appellee? The state has the undoubted right to regulate the adoption and price of text-books used in the public schools. This has been decided in several states, and we do not understand it is questioned in this case. If the publisher should comply with the law, no difficulty could arise in procuring licensed text-books required for use in the public schools. The possibility that they will not comply with it may go to the wisdom of the law, but we think not to its constitutionality.

[2] The wisdom of an act is a legislative question, and however unwise it may be thought to be, unless it violates some provision of the fundamental law, it cannot be held invalid. We do not think the validity of the act before us depends upon whether

or not publishers will comply with its provisions. The Legislature had the right to assume they would, and requiring the licensing of all public school text-books offered for sale in this state was a provision in aid of the power to regulate the adoption and price of such books. It may be that this power could be exercised by other methods, but the provision referred to was in aid of the power, and not contrary to the Constitution. We would be very loath to hold that in any case the validity of an act of the Legislature should be determined by whether an individual or corporation affected by it would comply with its provisions. The provision requiring text-books offered for sale in this state to be licensed is not different, in principle, from the requirement of section 176 of the school law (Laws 1909, p. 390), that only persons having a license or certificate from the county superintendent of schools or the Superintendent of Public Instruction shall be employed to teach in the public schools. The possibility that no one might apply for and undergo the examination required for a certificate has never been thought to render the law in that regard invalid. We have laws authorizing public work to be let by contract to the lowest bidder, yet the possibility that when bids are advertised for no one will make a bid does not render the law invalid. Other illustrations of similar character might be given. It is true, that up to the time this litigation arose only an arithmetic had been licensed under the provisions of the law; but are we to assume from this that publishers desiring to sell school text-books in this state, protected by and exercising rights under our laws, will persist and continue in refusing to perform the acts required of them to entitle them to lawfully sell their books?

[3] The Legislature could not compel publishers to license their books if they chose not to offer them for sale in this state, but it had the power, as a condition precedent to their right to sell them for use in the public schools of this state, to require them to license them. We are not impressed with the proposition that a publisher may, by defying the power of the Legislature and ignoring the law, render it invalid. It would be much better that the schools should be temporarily interrupted, than that such should be declared to be the effect of the refusal of publishers to comply with the law. The state is not so powerless in the matter of providing school text-books as to be at the mercy of the publishers.

[4] Second. Appellee contends that the act requires only a part of the text-books used in the public schools to be licensed, and does not require the licensing of other text-books required to be used in the public schools, thus imposing heavy burdens upon publishers of certain text-books that are not imposed upon the publishers of other text-books; and that the act is discriminative between publishers and also between patrons of the pub-

lic schools. So far as the contention states that the act requires the licensing of part of the text-books, but not of all, it is erroneous. The act requires the licensing of all text-books offered for sale for use in the public schools of this state. It also requires that the publishers file with the Superintendent of Public Instruction a list price and the wholesale and retail prices at which the text-books are to be sold, together with an agreement in writing to furnish the books at the prices listed. Section 1 provides that the Superintendent of Public Instruction shall not, in any case, license a publisher, and boards of education and boards of directors are prohibited from contracting with any publisher, to furnish any text-book which shall be sold at retail to patrons at prices in excess of those specified in the said section. The statute (Hurd's Stat. c. 122) requires instruction to be given in the public schools in history of Illinois, the elements of the natural sciences, and such other branches, including vocal music and drawing, as may be prescribed by the directors or the voters of the district at the annual election of directors. The elements of the natural sciences embrace botany, zoölogy, and physics. Text-books upon these subjects are required by the act under consideration to be licensed, but said act fixes no maximum price at which they are to be sold. Publishers of text-books on the history of Illinois, botany, zoölogy, and physics may sell such books (provided they are licensed) to any merchant, dealer, patron, or board of education, or board of directors, at any price the publisher may fix, limited only to the price list filed with the superintendent of public instruction when applying for the license. We do not regard this as an unreasonable classification or discrimination, or in violation of any other constitutional provision.

Third. It appears from the stipulations of facts that there are 11,820 school districts in the state, and that in 11,198 of them no newspaper is published. Section 6 requires boards of education and boards of directors, before adopting text-books for use in the schools, to advertise for bids "by publishing a notice once a week for three consecutive weeks in one or more newspapers of general circulation published in the city or district." Said section prescribes what said notice shall contain, and requires the contract to be awarded "to any responsible bidder or bidders offering suitable licensed text-books at the lowest prices, taking into consideration the quality of the material used, illustrations, binding, printing, authorship, and all other things that go to make up a desirable text-book." The provisions of this section are incapable of being complied with, if the act is to be construed as meaning what it says—that bids shall be advertised for "in one or more newspapers of general circulation published in the city or district."

Appellant contends (1) that the fact that

in some districts no newspaper is published should not render the law invalid, because it applies to all districts in which a newspaper is published, and therefore applies alike to all districts under similar circumstances; (2) that the act does not mean the advertisement shall be published in a newspaper printed or issued in the district, but means it shall be in a newspaper circulated in the district, and that the word "published" should be omitted from said section 6.

[5] As to the first proposition, it is unnecessary to say more than that it is evident there was no intention on the part of the Legislature to make any classification of districts with reference to publication of the advertisement for bids, and there is no valid basis for such classification, if any such intention were indicated by the language of the act.

[6] It would have been competent to have made provision similar to that of the act to regulate the practice in courts of chancery for publication notice to nonresident defendants, where no newspaper is printed in the county where the suit is brought; but the language used in the act before us forbids the construction that the Legislature meant by "published" in the district "circulated" in the district. We apprehend no one would contend that it was intended to authorize advertisement in a newspaper circulated, but not published, in a district in which there was a newspaper of general circulation published. Yet, if the act is construed as appellant contends for, we see no reason why the advertisement could not be published in any newspaper published outside the district, but of general circulation in the district, although there might be one or more newspapers published in the district. A newspaper is of general circulation when it circulates among all classes, and is not confined to a particular class or calling in the community. *Ralston v. Laufer*, 126 Ill. 219, 18 N. E. 555. Chicago and St. Louis papers have a general circulation in many cities and school districts throughout this state, and papers published in other cities and states circulate in Chicago; but the Legislature could not have intended that boards of education of Springfield or Cairo could advertise for bids in Chicago or St. Louis newspapers. The language of section 6 is too plain and explicit to admit of the construction contended for by appellant. If it had been intended that publication in a newspaper of "general circulation" in the district should be a compliance with the law, the Legislature would not have required that the publication be made, not only in a newspaper of general circulation in the district, but also in a newspaper "published" in the district. By the word "published" is clearly meant the place where the newspaper is first issued or printed, to be sent out by mail or otherwise. *Le Roy v. Jamison*, 15 Fed. Cas. 878, opinion by Mr. Justice Field; *State v.*

Bass, 97 Me. 484, 54 Atl. 1113; *Village of Tonawanda v. Price*, 171 N. Y. 415, 64 N. E. 191.

[7] Section 6 is an important provision in carrying out the object and purpose of the act, and other provisions are so related to and dependent upon the said section that without it the act would not be complete for the purpose intended. To eliminate section 6 from the act would cause results not contemplated or desired by the Legislature. In such cases the entire act must be held inoperative. *People v. Strassheim*, 240 Ill. 279, 88 N. E. 821, 22 L. R. A. (N. S.) 1135, and authorities there cited.

It is also contended that the act is unduly oppressive and burdensome upon publishers of public school text-books. This is not apparent from an inspection of the act itself, nor was it shown by the proof that in its practical operation it is unduly oppressive and burdensome.

For the reasons stated in division 3 of this opinion, we hold the act of 1909 is unconstitutional and invalid.

The decree of the circuit court is affirmed.
Decree affirmed.

CARTER, C. J. (dissenting). I think the decree in this case should be reversed. I agree with the reasoning of the opinion in all respects, except in its holding that the decree of the circuit court rightly held that the law was unconstitutional because of the provisions of section 6 with reference to advertising for bids. This court has held that, where the literal enforcement of the statute would cause great inconvenience and great injustice and lead to consequences which the Legislature could not have contemplated, the courts are bound to presume that such consequences were not intended, and adopt a construction which will promote the ends of justice and avoid the absurdity. *People v. Harrison*, 191 Ill. 257, 61 N. E. 99. The construction put upon said section 6 in the opinion of the court reaches conclusions that the Legislature certainly never contemplated. The meaning of the section obviously is to require publicity. The word "publish" may be ignored for the purpose of effectuating the legislative intent, and the provision treated as though that word were not contained in the section.

(250 Ill. 554.)

TIJAN v. ILLINOIS STEEL CO.

(Supreme Court of Illinois. June 20, 1911.)

1. MASTER AND SERVANT (§ 302*)—INJURIES TO SERVANT—ACTS DURING REST PERIOD—MASTER'S LIABILITY.

Where defendant employed two boys to operate electric transportation facilities in a steel mill, each working and resting 30 minutes alternately, that one of them negligently threw in an electric switch at an improper time during his rest period, when he was not on duty, which

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

resulted in injury to another servant, did not relieve defendant from liability; the act, whether done accidentally or intentionally, being within the scope of his employment, and performed during the period of his employment.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1217-1229; Dec. Dig. § 302.*]

2. MASTER AND SERVANT (§ 270*)—INJURIES TO SERVANT—EVIDENCE.

Where, in an action for injuries to a servant in a steel mill, plaintiff alleged that defendant was negligent in failing to promulgate and enforce rules warning and prohibiting its servants from starting or interfering with electrical appliances when the machinery was not in motion, and in failing to make, post, and enforce rules preventing the assembling of servants in places where they were not employed, evidence as to the number and character of defendant's mills connected with the plant, other than the one in which the injury occurred, and the entire number of men employed in the whole plant, was not material on such issue.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 913-932; Dec. Dig. § 270.*]

Error to Appellate Court, Second District, on Appeal from Circuit Court, Will County; Charles B. Campbell, Judge.

Action by John Tijan against the Illinois Steel Company. Judgment for plaintiff, affirmed by the Appellate Court (158 Ill. App. 30), and defendant brings error. Affirmed.

Defendant in error was employed by plaintiff in error in its steel mills in Joliet. While engaged in the line of his employment, he was seriously injured, and brought this suit to recover damages, charging in his declaration that said injuries resulted from the negligence of plaintiff in error. He recovered a judgment, which has been affirmed by the Appellate Court for the Second District, and the case is brought here by writ of certiorari. We adopt the following statement of the case made by the Appellate Court:

The appellee was employed by appellant as a member of a gang of men known as the 'sailor gang,' repairing a reheating furnace in the billet mill in the appellant's steel works. A row of furnaces extended east and west. South of the furnaces, and about a foot from them, a narrow-gauge track extended east and west through the entire length of the row of furnaces. Upon this track a small, but heavy, iron car or ingot buggy, about 2 feet high and 4 feet long, was operated for carrying steel ingots. The space between the furnace and the car was from 6 to 10 inches, and there were some gear wheels on the side of the car that approached still nearer to the furnace. The car was moved by means of cables attached to each end that ran over drums at either end of the track. The power was furnished by electricity that moved the drum at the end towards which it was desired to move the car. The power was applied or controlled in a cage or shanty about 7 feet square that was elevated somewhere from 10

to 18 feet above the track. There were two appliances in the cage which controlled the power that moved the drums. The first appliance was an electric switch on the east side of the cage, about 4½ feet from the floor, for the purpose of cutting out the electric current from the controller. The switch was an ordinary fork switch, about 6 or 8 inches long and 3 or 4 inches wide. At the top or above the switch were two prongs or forks. The switch had a wooden crossbar and two copper bars at right angles with it, which entered the forks to close the switch. The wooden handle was on the crossbar, and the lever ends of the bars were pivoted. The switch would be opened by pulling the wooden handle, so as to cause the connecting bars to come away from the prongs. The electrical connection would then be broken, and the car could not be moved, except when the switch was closed. The switch was open when the wooden handle stood out from the wall or hung down, and was only closed when the handle was upright above the forks. The other appliance was the controller, which was a metallic box about 2½ feet long from east to west, with a lever extending out of the top, which moved east or west. When the lever stood upright in the center, it was in a neutral position, and the machinery did not move. If the lever was moved to the east when the switch was closed, the car moved east; and if the lever was moved west from the center, the car would move west. The further east or west the controller was moved the faster the car would move in that direction. There was also a lift, a steam lever, a whistle, a bench seat, and a stove in the cage. The lift was to work another gearing which was upon the buggy, so as to remove the ingot off the buggy. The lever was to start the engine up to run the ingot off the rolls, and the whistle was to call for another ingot. These appliances were all operated by the man in the cage in charge of the controller and switch. The accident happened between 1 and 2 o'clock on the morning of December 10, 1907, while work in the billet mill had been suspended for about 20 minutes previously for want of material. The appellee, under the direction of his foreman, was at work with his gang repairing one of the reheating furnaces, while the billet mill was not running. The ingot buggy had been standing a few feet east of the furnace the gang was repairing. While the appellee was stooping down, lifting an iron rail, between the narrow-gauge track and furnace, the ingot buggy suddenly started west, and caught appellee between the buggy and the furnace, rolling him in the narrow space, and very seriously injuring him.

"The counts on which the trial was had severally allege that the appellant was neg-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

ligent (1) in failing to exercise reasonable care in providing reasonable safety appliances or safeguards for a certain electric switch; (2) in failing to make, promulgate, and enforce reasonable rules in warning and prohibiting its servants and persons on its premises from moving, starting, or interfering with electric switches, controllers, or appliances when the appellant's machinery was not in motion; (3) in failing to make, post, or enforce rules preventing the assembling of servants in places where they were not employed; (4) in neglecting by its servants to move the switch a reasonably safe distance from the fork and to turn the switch in a downward position; (5) in failing to remove or blockade the car and prevent it from running on the track; and (6) in permitting its servants to assemble in the cage. Each count averred that appellee was in the exercise of due care, that the injuries did not result from an assumed risk, and were not caused by the negligence of a servant who was a fellow servant with appellee."

Kemper K. Knapp, R. W. Campbell, and William Beye (Garnsey, Wood & Lennon, of counsel), for plaintiff in error. John W. D'Arcy, for defendant in error.

FARMER, J. (after stating the facts as above). Two grounds are urged for reversal of the judgment: First, that the proof fails to establish any liability on the part of plaintiff in error, and the circuit court should have directed a verdict in its favor; and, second, the circuit court erred in the admission of evidence.

The car which caused the injury was moved east and west by a controller in the shanty, which had the appearance of a metallic box. The power was electricity, and was applied and disconnected by means of a switch in the shanty. When the lever was in the center of the controller, the car would not move, even with the electric current applied. When it was desired to move the car west, the lever in the controller was moved west; and when it was desired to move the car east, the lever was moved east. When the switch was thrown out, the car could not be moved by the controller. The switch was located on the east side of the shanty, about 4½ feet from the floor, and was within reach of any one who might be in the shanty. It extended 6 or 8 inches out from the wall, and there was no protection of any kind around it. When the controller was off the neutral position, opening or closing the switch would stop or start the car. The shanty was a small room about 7 feet square, and in it there were a stove, and a bench about 6 feet in length, on which the operator could rest during the period he was relieved. The evidence shows that this shanty was frequented by other employés for the purpose of lounging. The electrical appliances were operated, on the night the injury occurred, by Leslie

Fewtrell and William Erik, boys of the ages of 17 and 16 years, respectively. They went on duty at 6 o'clock p. m. and worked until 6 o'clock a. m. They worked alternately, 30 minutes at a time. Shortly after 1 o'clock, while Fewtrell was in charge of the appliances, the machinery was closed down, and he moved the controller to the neutral position, and opened the switch by pulling the handle out from the wall a few inches. At 1:30 o'clock, while the mill was still shut down, Erik took charge of the shanty and appliances therein, and Fewtrell remained in the shanty during his rest period. Two other employés of plaintiff in error were also in the shanty at the time, and occupied the bench used for resting upon. One of them moved so as to give Fewtrell room to sit near the stove; but, it becoming too warm for him there, he got up, moved the lever of the controller to the west as far as it would go, and sat on the controller. He had a stick in his hand at the time, and, seeing the switch out of the forks, touched the handle with the stick and closed the switch. The controller having previously been moved to the west, the car shot forward on the track and struck defendant in error, very seriously injuring him.

[1] We are of opinion that under the evidence the plaintiff in error was responsible for the negligent act of Fewtrell. This is stoutly denied, on the ground that said negligent act was performed by Fewtrell during the 30 minutes of his rest period, and while it was the duty of Erik to operate the appliances in the shanty. It is true the lever of the controller was moved and the switch thrown in by Fewtrell during his period of rest, but it was during the hours of his employment. He was employed to work from 6 o'clock p. m. to 6 o'clock a. m., was paid for that time, and during that time he was the employé of plaintiff in error. *Heldmaier v. Cobbs*, 195 Ill. 172, 62 N. E. 853; *Bailey on Personal Injuries*, §§ 3208-3214. The mere fact that every 30 minutes Fewtrell was granted a period of rest did not terminate his employment, nor relieve the company from liability for acts performed by him, if the company would be liable for the acts if they were performed during the 30 minutes he was working. The act itself was within the scope of Fewtrell's duties. In fact, it was one of the duties which he was employed to perform, except that it was performed at the wrong time. Whether the switch was closed accidentally or intentionally, it was done by the servant of the plaintiff in error, and was within the scope of his duties; and, being performed during the period of his employment, the master is liable.

[2] One count in the declaration charged plaintiff in error with negligence in failing to make, promulgate, and enforce rules warning and prohibiting its servants and persons on its premises from moving, starting, or interfering with electrical appliances when the

machinery was not in motion, and another count charged negligence in failing to make, post, and enforce rules preventing the assembling of servants in places where they were not employed. It does not appear that there were any such rules or warnings promulgated or posted, and for the purpose of showing the necessity for them defendant in error was permitted, over the objection of plaintiff in error, to prove the extent of the plant of plaintiff in error and the number of men employed by it. Plaintiff in error's plant is composed of several different departments or mills. The injury to defendant in error occurred in one of its billet mills, and we do not think it was material to prove more than the situation in that mill, the character of the machinery, and the number of men employed therein. We do not think it was competent to prove the number and character of other mills than the one in which the injury occurred, or the entire number of men employed in the whole plant. The objection made to the proof when it was offered was that it was immaterial. While we think the evidence was not strictly competent, we are of opinion it was not so prejudicial as to require a reversal of the judgment.

The judgment of the Appellate Court is therefore affirmed.

Judgment affirmed.

(250 Ill. 551)

GERSCH v. CITY OF CHICAGO et al.

(Supreme Court of Illinois. June 20, 1911.)

MUNICIPAL CORPORATIONS (§ 180*)—POLICE PATROLMAN—EXISTENCE OF OFFICE.

There is no statute, ordinance, or provision of the Chicago city charter creating the office of police patrolman; and hence a patrolman, alleged to have been improperly dropped from the roll, cannot maintain mandamus to compel his reinstatement.

[Ed. Note.—For other cases, see *Municipal Corporations*, Dec. Dig. § 180.*]

Error to Superior Court, Cook County; Charles A. McDonald, Judge.

Mandamus, on petition of Charles H. Gersch, against the City of Chicago and others, to compel the placing of his name on the roster of police patrolmen of the city of Chicago, and on the pay roll, and to certify his name for the payment of salary as such. From a judgment dismissing the petition on demurrer, relator brings error. Affirmed.

On February 15, 1911, the plaintiff in error filed a petition in the superior court of Cook county, praying for a writ of mandamus to place his name upon the roster of police patrolmen of the city of Chicago and upon the pay roll and to certify his name for payment of his salary as such police patrolman. A demurrer was sustained to the petition, and, the petitioner having elected to stand by it, the petition was dismissed,

at his costs. The petitioner has sued out a writ of error from this court to review the judgment, on the ground that by it his right to share in the police pension fund is abridged, in violation of the fourteenth amendment to the Constitution of the United States and of section 2 of article 2 of the Constitution of this state.

The petition sets out very fully the provisions of the charter of the city of Chicago of 1863 in regard to the police department, the amendment thereof, and a number of ordinances of the city upon the subject of the police; the adoption by the city of the cities and villages act (Hurd's Rev. St. 1905, c. 24) on April 23, 1875; the passage on June 28, 1875, of an ordinance for the reorganization of the police department, and on April 13, 1881, of another ordinance on that subject; the adoption on March 25, 1895, of the city civil service act by the voters of the city and its going into effect on July 1, 1895 (Hurd's Rev. St. 1905, c. 24a). All these facts are alleged as they appeared in the case of *Bullis v. City of Chicago*, 235 Ill. 472, 85 N. E. 614. The petition also alleges the appointment of a board of civil service commissioners, and their adoption of rules and classification of the offices and places of employment in the city. It is then alleged that Charles H. Gersch, the plaintiff in error, was appointed to the office of police patrolman on August 17, 1876, by the general superintendent of police, took the oath of office, entered upon the performance of his duties, and continued therein until wrongfully discharged; that he continued in office and was recognized as police patrolman by the mayors, superintendents of police, and city councils, and no successor was appointed for him, but money was appropriated for his salary, and his salary as such police patrolman was paid to him, until July 1, 1893, when he was promoted to police patrol sergeant, the duties of which office he performed until June 1, 1895, when he was promoted to police desk sergeant, which office he held when the civil service act went into effect, July 1, 1895; that thereupon he became a member of the classified civil service of the city of Chicago, and so continued as police desk sergeant until November 23, 1907, when he was wrongfully reduced to the office of police patrolman, in which he served until December 2, 1910, when his name was dropped from the pay roll by order of the superintendent of police, wrongfully and without warrant of law, without any written charges, without trial, and for no alleged misconduct. During all the time from July 1, 1895, to December 2, 1910, all pay rolls of officers and employes of the city of Chicago, including police patrolmen and sergeants in the police force, have been certified by the board of civil service commissioners, and the plaintiff in error has been so certified and paid.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.

A. B. Chilcoat, for plaintiff in error. Edward J. Brundage, Corp. Counsel, and Robert R. Jampolis, for defendant in error.

DUNN, J. (after stating the facts as above). In *Bullis v. City of Chicago*, 235 Ill. 472, 85 N. E. 614, and in numerous other decisions both before and since, many, if not all, of which are cited in *Preston v. City of Chicago*, 246 Ill. 26, 92 N. E. 591, questions decide against the contention of the plaintiff in error have been determined. At the foundation of his case lies the proposition that the office of police patrolman was created by the charter of the city of Chicago in 1863, and was not abolished when the city adopted the cities and villages act. The cases referred to have decided this proposition against him, and have decided that there is now in force no statute creating the office of police patrolman, and that a suit of this character cannot be maintained without an ordinance creating the office. His counsel devotes himself to a vigorous argument that these cases were wrongly decided, and the positions announced in them should be abandoned; but we are not convinced, and it would be useless to repeat the argument. Not only does the petition fail to allege any ordinance creating such office, but counsel states in his brief that there is no such ordinance, and that therefore it follows that, if the court adheres to its former decisions, there are no policemen, either de jure or de facto, in the city of Chicago. This may be true, and it may be true that there is a defect in the law in regard to the method authorized by the cities and villages act of creating offices and filling them, and an inconsistency, because of such defect, between that act and the city civil service act. If so, it is the province of the Legislature, and not the court, to correct such defect or inconsistency.

Under the former decisions of the court, to which we adhere, the demurrer was properly sustained.

Judgment affirmed.

(250 Ill. 543)

WALKER v. LOVITT.

(Supreme Court of Illinois. June 20, 1911.)

1. CONTRACTS (§ 144*)—CONSTRUCTION—WHAT LAW GOVERNS.

The construction and obligation of a contract must be determined by the law of the place where it is made or is to be performed.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 724-727; Dec. Dig. § 144.*]

2. PAYMENT (§ 6*)—PLACE OF PAYMENT—PRESUMPTION.

Where a contract for the payment of money is silent on the subject, the place of payment is the place where the contract is made: the debtor being required to seek the creditor at his domicile or place of business.

[Ed. Note.—For other cases, see *Payment*, Cent. Dig. §§ 9, 10; Dec. Dig. § 6.*]

3. CONTRACTS (§ 145*)—PLACE—DELIVERY.

The place where a contract is made depends not on the place where it is actually written, signed, and dated, but on the place where it is delivered.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. § 728; Dec. Dig. § 145.*]

4. USURY (§ 2*)—STATUTES.

Hurd's Rev. St. 1909, c. 74, § 8, provides that when any written contract, wherever payable, shall be made in Illinois or between citizens or corporations of that state, or a citizen or corporation thereof and a citizen or corporation of any other state, or shall be secured by a mortgage or trust deed on land in the state, such contract may bear any rate of interest allowed by law in Illinois, not exceeding 7 per cent. per annum, and, if any person or corporation shall contract to receive a greater rate of interest than 7 per cent. on any such contract, he shall forfeit the whole of such interest, and only be entitled to recover the principal. *Held*, that such section applies only to cases where the rate of interest that may be charged by the law of the state or country where the contract has been made is less than the rate that may be legally charged in Illinois in order to sustain its constitutionality, and hence did not apply to or render illegal a Missouri contract for the payment of money bearing 8 per cent. interest which was not usurious in Missouri, and this notwithstanding the fact that its performance was secured by a mortgage on Illinois land; the mortgage being a mere incident to the agreement.

[Ed. Note.—For other cases, see *Usury*, Cent. Dig. §§ 2-15; Dec. Dig. § 2.*]

5. USURY (§ 113*)—BURDEN OF PROOF—STATUTES.

Where plaintiff sued on a note made and payable in Missouri, and defendant pleaded that the contract was usurious, the burden was on defendant to show that the contract was unlawful, and plaintiff was not bound to plead the Missouri interest statute in order to authorize its admissibility.

[Ed. Note.—For other cases, see *Usury*, Cent. Dig. §§ 308-323; Dec. Dig. § 113.*]

Appeal from Circuit Court, Pike County; Harry Higbee, Judge.

Action by A. M. Walker against William P. Lovitt. Judgment for plaintiff for less than the relief demanded, and he appeals. Reversed and remanded.

Anderson & Matthews, for appellant. W. E. Williams and A. Clay Williams, for appellee.

DUNN, J. To an action on a promissory note the appellee set up the defense of usury as to all except a certain amount which was tendered to the plaintiff. The note on its face bore 8 per cent. interest, to be compounded annually if not paid annually. The note was dated Louisiana, Mo., and was payable generally. The payee was a citizen and resident of Missouri, and the appellee a citizen and resident of Illinois. The rate of interest was lawful in Missouri. The note was secured by a mortgage on real estate in Illinois, and the appellee contends that, by virtue of section 8 of chapter 74 of Hurd's Statutes of 1909, the interest contracted to be paid was forfeited. The circuit court sus-

tained this contention, and the plaintiff has appealed from the judgment directly to this court on the ground that the constitutionality of the section mentioned is involved. That section is as follows: "When any written contract, wherever payable, shall be made in this state, or between citizens or corporations of this state, or a citizen or corporation of this state and a citizen or corporation of any other state, territory or country (or shall be secured by mortgage or trust deed on lands in this state), such contract may bear any rate of interest allowed by law, to be taken or contracted for by persons or corporations in this state or which is or which may be allowed by law on any contract for money due or owing in this state: Provided, however, that such rate of interest shall not exceed seven per cent. per annum. And if any such person or corporation shall contract to receive a greater rate of interest or discount than seven per cent. upon any such contract, such person or corporation shall forfeit the whole of said interest so contracted to be received, and shall be entitled only to recover the principal sum due to such person or corporation." If the note was an Illinois contract, it was usurious on its face without reference to this section. If it was a Missouri contract it was enforceable in this state according to the stipulated rate, though in excess of the rate allowed by our law, unless the interest was forfeited by the application of this section. *Phinney v. Baldwin*, 16 Ill. 108, 61 Am. Dec. 62; *Smith v. Whitaker*, 23 Ill. 867; *Morris v. Wibaux*, 159 Ill. 627, 43 N. E. 837; *Dearlove v. Edwards*, 166 Ill. 619, 46 N. E. 1081. The question of the application of the section was preserved by propositions of law submitted to the court.

[1] The rule is well settled that the validity, construction, and obligation of a contract must be determined by the law of the place where it is made or is to be performed. The law of the place becomes a part of the contract, and the courts of another jurisdiction will enforce it in accordance with its legal effect where made or to be performed. *Evans v. Anderson*, 78 Ill. 558; *Barnes v. Whitaker*, 22 Ill. 606; *Mumford v. Canty*, 50 Ill. 370, 99 Am. Dec. 525; *Roundtree v. Baker*, 52 Ill. 241, 4 Am. Rep. 597; *Coats v. Chicago, Rock Island & Pacific Railway Co.*, 239 Ill. 154, 87 N. E. 929.

[2] When a contract for the payment of money is silent on the subject, the place of payment is presumed to be the place of making, and the debtor must seek the creditor at his domicile or place of business. *Esmay v. Gorton*, 18 Ill. 483; *De Wolf v. Johnson*, 10 Wheat. 367, 6 L. Ed. 343.

[3] The place where a contract is made depends, not upon the place where it is actually written, signed, or dated, but upon the place where it is delivered, as consummating the bargain. *Gay v. Rainey*, 89 Ill. 221, 31 Am. Rep. 76. The note here was delivered by the agent of the appellee to the payee at

her residence in Louisiana, Mo., and she then delivered to such agent a check for the face of the note. The contract was thus consummated in Missouri, and the note then took effect as the appellee's obligation to repay the money there where he had borrowed it. The disposition the appellee's agent may afterward have made of the money cannot affect the rights of the parties to the note.

[4] The substance of section 8 above mentioned, omitting the clause referring to security on lands in this state, first appeared in our statutes in 1857. The conventional rate of interest in this state was then 10 per cent., which was higher than the rate permissible in other states and countries from whose citizens and corporations the citizens of this state were accustomed to borrow money, secured by mortgages on land in this state. Under the laws of these other states and countries various results followed a usurious contract, ranging from a forfeiture of the excess of interest to the complete avoidance of the contract. Where a contract or loan was made in this state, or between citizens of this state and citizens of such foreign state, and performance or payment was to be made in such foreign state, the contract or loan was governed by the law of such foreign state, and was valid or invalid as and to the extent determined by such foreign law. *McAllister v. Smith*, 17 Ill. 328, 65 Am. Dec. 651; *Adams v. Robertson*, 37 Ill. 45; *Andrews v. Pond*, 13 Pet. 65, 10 L. Ed. 61. Thus a note given in New York by a citizen of this state and payable there bearing interest at a rate in excess of 7 per cent., was void because so declared by the law of New York, though in Illinois it was competent to contract for 10 per cent. To meet this situation and enable citizens of this state to borrow money in other states whose usury laws were more stringent, and to give obligations and security for loans so made that should be legally binding and enforceable here against the borrowers and their property though not enforceable where made, the General Assembly passed two acts. One, which went into effect February 12, 1857, provided that when any contract or loan should be made in this state or between citizens of this state and any other state or country, bearing interest at a rate lawful in this state, it should be lawful to make the principal and interest of such contract or loan payable in any other state or territory of the United States or in the city of London, in England, and in all such cases the contract or loan should be governed by the laws of this state and not affected by the laws of the state or country where the same should be made payable, and that no contract or loan theretofore made bearing interest at a rate lawful in this state when such contract was made, should be invalidated or in any wise impaired or affected by reason of the same having been made payable in any other state or country. Laws 1857, p. 38. At the same session "an act for the encouragement

and security of loans of money" was passed, which went into effect February 16, 1857, and provided that it should be lawful for any person or corporation borrowing money in this state to make notes, bonds, mortgages, and other securities for the payment of principal or interest at the rate authorized by the laws of this state payable at any place where the parties might agree, though the legal rate of interest in such place might be less than in this state, and such securities should not be held to be usurious or invalidated because of the rate of interest at the place where the paper should be made payable being less than in this state or because of any usury or penal law in such place. It was further provided that no plea of usury or defense founded upon an allegation of usury should be sustained in any court of the state nor any security held invalid on an allegation of usury, where the rate of interest did not exceed that allowed by the laws of this state, because of such security being payable at a place where such rate of interest was not allowed. Laws 1857, p. 33.

It was not the object of these acts to restrict the power of the citizen to contract for the payment of interest. They were enabling acts, and were intended to encourage the lending of money in the state by enabling its citizens to make a valid contract to repay the money in the state where it was borrowed, even though it was recognized that the contract would be void in that state. Their effect and intention was not to make void any contract which would be valid under the law of a foreign state, but to make valid against citizens of Illinois, and their property, contracts which under the law of the state where made would be void. They were therefore open to no constitutional objection. In *Fowler v. Equitable Trust Co.*, 141 U. S. 384, 12 Sup. Ct. 1, 35 L. Ed. 786, they were enforced by the Supreme Court of the United States in a case where it was sought to interpose the defense that the contract of loan was a New York contract payable in New York and was void under the usury laws of that state.

In the revision of 1874 these two statutes were repealed and a single section was enacted on the subject, as follows: "When any bond, bill, draft, acceptance, mortgage or other contract, shall have been or shall be made in this state, or between citizens of this state, or a citizen of this state and any other state, territory or country, bearing interest at a rate lawful by the laws of this state, may be made payable in any other state, territory or country, such contracts shall be governed by the laws of this state." Rev. St. 1874, c. 74, § 8. In 1875 this section was amended so as to read precisely as it does now, except for immaterial verbal changes and the rate, which has since been reduced from 10 to 7 per cent. Laws 1875, p. 85. The object of the Legislature has always been the same—to enable citizens to

borrow money outside the state at the highest rate permitted by law within the state, and to give valid obligations therefor, though such obligations may be invalid by the law of the state where made. The Legislature has power thus to make contracts otherwise invalid enforceable in this state, for in so doing it violates no constitutional limitation. If it is undertaken to invalidate legal contracts made in another state, the case is different. Such action would deny to the parties to the contract the equal protection of the laws and abridge their privileges as citizens of the United States, and deprive them, without due process of law, of the liberty of making contracts outside of the state in regard to their property. The Legislature of a state has no power to prohibit its citizens from making, beyond the limits of the state, contracts lawful in the place where they are made, even though such contracts may concern property within the state. *Allgeyer v. State of Louisiana*, 165 U. S. 578, 17 Sup. Ct. 427, 41 L. Ed. 832. The validity of the contract here is in no way affected by the fact that its performance was secured by a mortgage of Illinois land. The mortgage was but an incident of the agreement. "The mere taking of foreign security does not necessarily draw after it the consequence that the contract is to be fulfilled where the security is taken. The legal fulfillment of a contract of loan on the part of the borrower is repayment of the money and the security given is but the means of securing what he has contracted for, which in the eye of the law is to pay where he borrows, unless another place of payment be expressly designated by the contract." *De Wolf v. Johnson*, *supra*; *Coghlan v. South Carolina Railroad Co.*, 142 U. S. 101, 12 Sup. Ct. 150, 35 L. Ed. 951; *Manhattan Life Ins. Co. v. Johnson*, 188 N. Y. 108, 80 N. E. 658, 9 L. R. A. (N. S.) 1142; *Lockwood v. Mitchell*, 7 Ohio St. 387, 70 Am. Dec. 78. The section of the statute under consideration, without violating constitutional rights, can be applied only to cases where the rate of interest that may be charged by the law of the state or country where the contract is made is less than the rate than may lawfully be charged in this state.

A distinction is sought to be drawn by counsel for appellee between statutes which declare a usurious contract void and those which merely provide for a forfeiture of interest, but the difference is only one of degree, and not of kind. No more authority exists for taking from an individual the benefit of a part of his contract than for taking all.

[5] It is also insisted that the appellant did not plead the Missouri statute in regard to interest and therefore it was not properly admitted in evidence. It was not necessary for the appellant to aver or prove the law of Missouri. The burden of proving

usury was on the defendant relying upon it as a defense. The appellant claimed a recovery not because of the law of Missouri but upon the contract, and, if that was unlawful, the burden of showing it was on the appellee. *Dearlove v. Edwards*, supra; *Smith v. Whitaker*, supra.

The judgment will be reversed and the cause remanded.

Reversed and remanded.

(202 N. Y. 588)

KELLER v. HALSEY et al.

(Court of Appeals of New York. June 6, 1911.)

1. TRIAL (§ 140*)—DIRECTION OF VERDICT—WHEN AUTHORIZED.

Where the testimony of plaintiff testifying in his own behalf establishes a prima facie case, a directed verdict for defendant is erroneous, though the evidence of defendant strongly tends to require a verdict for him; the credibility of the witnesses being for the jury.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 334, 335; Dec. Dig. § 140.*]

2. BROKERS (§ 38*)—STOCKS—SALES—CONTRACTS—EVIDENCE.

In an action against stockbrokers for the conversion of plaintiff's stock purchased on margin, evidence held to require submission to the jury of the issue whether the brokers agreed to carry stock for plaintiff without calling on him for further margins, on the deposit made by him becoming exhausted.

[Ed. Note.—For other cases, see Brokers, Dec. Dig. § 38.*]

3. BROKERS (§ 24*)—STOCKS—SALES.

A stockbroker may waive previous notice calling for margins and agree in the future to buy and carry on a nominal margin the stock for a customer, and the mere service of a notice after such a contract can only be considered as evidence in connection with the testimony establishing the agreement.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. § 19; Dec. Dig. § 24.*]

4. BROKERS (§ 24*)—STOCKS—SALES—CONVERSION.

Where brokers purchased stocks for a customer under an agreement binding them to carry the stock for a nominal margin, the stocks purchased became the property of the customer, subject to the lien created by the customer pledging the stock with the brokers, and a sale by the brokers without authority was a conversion.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. § 19; Dec. Dig. § 24.*]

5. BROKERS (§ 38*)—STOCKS—WRONGFUL SALES—RATIFICATION—QUESTION FOR JURY.

Whether a customer of stockbrokers ratified a wrongful sale of stocks by the brokers, held, under the evidence for the jury.

[Ed. Note.—For other cases, see Brokers, Dec. Dig. § 38.*]

6. TRIAL (§ 143*)—MAILING OF LETTERS—QUESTION FOR JURY.

Whether letters from a party reached the adverse party is for the jury under the evidence of the party that the letters were written, copied and mailed in the usual course of business, and of the evidence of the adverse party that he had never received them.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 342, 343; Dec. Dig. § 143.*]

Haight and Werner, JJ., dissenting.

Appeal from Supreme Court, Appellate Division, First Department.

Action by William B. Keller against Charles D. Halsey and others. From a judgment of the Appellate Division (136 App. Div. 940, 121 N. Y. Supp. 1137) affirming a judgment entered on a directed verdict for defendants, plaintiff appeals. Reversed, and new trial granted.

The plaintiff alleged in his complaint that on the 3d and 4th days of October, 1904, the defendants, acting as his brokers and pursuant to his orders, purchased for him 3,000 shares of the preferred stock of the United States Steel Corporation; that he paid them \$2,250 on account, and they agreed to advance such further sums as were needed to complete the purchase and carry said shares for him until he gave directions to sell; that on the 4th, 5th, and 10th days of October, without authority from him and without giving him notice of the time, place, and manner, they wrongfully sold said shares of stock and converted them to their own use to his damage in the sum of \$112,712.50.

The defendants by their answer admitted the purchase, but alleged that they reserved the right to close the transaction when the margin was exhausted without further notice; that the margin of the plaintiff became exhausted, although they duly notified him to make further payments, and thereupon they sold said shares at different dates commencing on the 4th and ending on the 10th of October, 1904, in accordance with the rules and custom of the New York Stock Exchange where the order was executed; that they promptly rendered the plaintiff an account of the transaction, to which he not only made no objection, but, on the other hand, ratified and affirmed the same. They also pleaded a counterclaim for a balance due them on the transaction amounting to \$4.77, and a reply thereto was served by the plaintiff.

On the first trial, the jury rendered a verdict in favor of the plaintiff for the sum of \$26,054, but the judgment entered thereon was reversed on appeal by the Appellate Division upon the ground that the verdict was not warranted by the evidence. 130 App. Div. 598, 115 N. Y. Supp. 564. Upon a retrial at the close of all the evidence, the court directed a verdict in favor of the defendants, although the plaintiff asked to go to the jury on all the issues. Upon appeal to the Appellate Division, the judgment entered on the verdict so directed was unanimously affirmed, and the plaintiff appealed to this court.

Frederick Wiener, for appellant. Everett P. Wheeler, for respondents.

VANN, J. (after stating the facts as above).

[1] The question presented by this appeal is

whether upon any reasonable view of the evidence the jury could have found a verdict in favor of the plaintiff for any amount. The answer to that question depends mainly upon the testimony of the plaintiff himself, who was sworn as a witness in his own behalf, and if his testimony was sufficient to make out a prima facie case the judgment against him should be reversed, even if the evidence produced in behalf of the defendants strongly tended to require a verdict in their favor. The credibility of the witnesses was for the jury, and by the action of the trial court in directing a verdict the plaintiff was prevented from having their judgment upon that subject.

[2] The testimony of the plaintiff was substantially as follows: He began to deal with the defendants as brokers in October, 1903, and during the next six months made repeated purchases and sales through them of stocks upon a margin. During this period, on one occasion they carried for a very short time a purchase on account of the plaintiff amounting to more than \$100,000 on a margin of less than \$1,300. In May, 1904, after sustaining heavy losses, he sold his holdings with them, paid all he owed them, and ceased to operate in stocks until the latter part of the following September, when upon the urgent advice of Mr. Halsey, one of the defendants, he bought in different lots 1,000 shares of Reading at 68 and a fraction; the first purchase having been made on the 26th and the last on the 29th. No margin was asked for and none was paid until the 1st of October, when the plaintiff gave them a check for \$1,000. On the same day Mr. Halsey called him on the telephone, and, stating that he had information of a rise in the value of Steel preferred, urged him to buy some. The plaintiff declined, but a day or two later he was called up again by Mr. Halsey, and upon his advice gave an order to buy 500 shares of that stock. No margin was furnished, except said sum of \$1,000 paid on the 1st, until the morning of the 4th, when the plaintiff had a personal interview with Mr. Halsey at the office of the defendants. After some general conversation about stocks, Mr. Halsey stated that Steel preferred was booming, and he was advising all his friends and customers to buy it. The plaintiff said: "Mr. Halsey, I have already bought 500 shares of Steel preferred on your recommendation and I would like to carry more, but I am not so sure about the information. Now what is this information? Between man and man, is it reliable?" Mr. Halsey replied: "Our sources of information are very good. I believe they can be relied upon, and I think that Steel preferred is a good purchase." In response to the suggestion that he should carry more of that stock, the plaintiff said: "That is all very well, Mr. Halsey; but if I go in for more Steel I want to go in for a long pull. I don't intend to jump in and out

in the usual way, and if your information is correct I can make a good many points of profit; but before I do anything further I want to have an understanding with you as to where I stand and what you are going to do for me. I have lost a bunch of money in this office, as you know—more than I can afford. I don't want to lose any more if I can help it, but here is my check on account," and thereupon he handed Mr. Halsey a check for \$1,000. This made \$2,000 in all that had been paid by the plaintiff on account of both the Reading and the Steel preferred that he had purchased. Continuing the conversation, he said: "Now I don't want to take on any more Steel preferred than I see my way through with, and I want to know where I stand with you." Mr. Halsey said: "Keller, I know that you have lost a bunch of money in this office, and we want to see you win it back. We know how you operate. We know what you are doing. We know how you work. You place your orders, and we will execute them." The plaintiff replied: "That is all well enough, Mr. Halsey, but that is not exactly what I am trying to drive at. You know there are slumps and recessions in the market, and you know it better than I do, and I will be frank enough to say that I am not prepared to put up a margin every time the market sags off a little." Thereupon Mr. Halsey, placing his hand on the shoulder of the plaintiff, said: "All right, Keller, we will carry you through." The plaintiff expressed his thanks, and after shaking hands with Mr. Halsey on his statement said to him: "On this understanding, you may place another order for my account for 1,500 shares Steel preferred, additional, at the market." That purchase was at once made; the order having been given in his presence.

The plaintiff remained in the office about half an hour after this conversation, watching the market, and seeing that he had made a small profit on his Reading he ordered it sold and realized a net gain of \$287.50, which was placed to his credit in his account. While still in the office he observed a recession in Steel preferred, and said to Mr. Halsey: "You notice Steel preferred is off a little." Mr. Halsey replied: "Yes; but that is only a natural reaction. Don't be alarmed." The plaintiff remained in the office, and, observing that Steel preferred had fallen a little more still, he went to Mr. Halsey and said: "I am carrying a pretty good load of Steel. Wouldn't it be a good idea to take on a little more to average up, because of the recession in price?" Mr. Halsey replied, "It wouldn't be a bad idea," and thereupon the plaintiff gave him an additional order for 1,000 shares of Steel preferred at the market price. The order was promptly executed, making in all 3,000 shares of Steel preferred purchased at an average of 76 and a fraction, or for about,

\$228,000, although the entire margin paid by the plaintiff, including the profit on the Reading, was but \$2,287.50.

In a short time the plaintiff left for his office, but on the way he called up the defendants by telephone and Mr. Dailey, a member of the firm, in response to the plaintiff's inquiry, said that the market had receded a little more, and added: "Hold on a minute; Mr. Halsey wants to talk with you." Mr. Halsey then said: "I wanted to ask you if you could not put up a little more margin." The plaintiff said: "No. Our understanding was that I was not to be called upon every time the market sagged off a little." Mr. Halsey said: "Well, how about unloading a little bit? You are carrying a big load." The plaintiff said: "I know it, but I don't want to sell at present." Mr. Halsey replied, "All right, Keller, we will have to sweat it out together," and that ended the conversation, which took place between 12 and 1.

Before 3 o'clock of the same day, and within an hour or two after the purchase of the 2,500 shares, the plaintiff was called on the telephone and he recognized the voice of Mr. Dailey, who said: "Keller, Steel went off still more, and we sold 1,300 shares of your Steel preferred." The plaintiff asked, "What is that?" and Mr. Dailey repeated his statement. The plaintiff said: "Well, you had a hell of a gall. You didn't have any order from me, and you had no right to sell. I won't stand for that sort of business. My understanding with Halsey this morning was that I was to be carried and was not to be asked for additional margin, and now you have sold 1,300 of the Steel preferred without my order. It is a hell of a skin game. You have gone back on your word, and I won't stand for it." Mr. Dailey said: "Don't get excited; don't get so mad." The plaintiff answered: "I have got a right to get mad. You went back on your agreement. You sold out 1,300 of my Steel preferred. You caused me a big loss, and I won't stand for it. I know the stock is going up and you know the stock is going up, and here you have sold me out at a loss."

The plaintiff further testified that nothing more occurred between the parties until the morning of the 6th, when he received notice of the sale of 200 shares more of his Steel preferred, with a letter, dated the 5th, which, among other things, stated: "On the rally this afternoon, we thought it advisable to lighten up a little, which we did to the extent of 200 shares, as per report herewith. While Steel preferred had a setback to-day in conjunction with the rest of the market, from what we hear we really believe there is going to be a further advance in it and a consequent opportunity to make up past losses. We would, therefore, urge you to, if at all possible, arrange matters so as to protect your present holdings and take ad-

vantage of any opportunity that may offer. In the meantime we will do what we can and take such action as we may deem advisable and best for both your interests and our own protection, but with the understanding that the matter is left entirely to us, and that you are to make good any debit or loss that may result."

The plaintiff swore that when these sales were made no more margin had been demanded; that he had given no authority to sell any of his Steel preferred, and that when he received this letter on the morning of October 6th, he called the defendants up on the phone and said that he had received notice of the sale of 200 shares more, and added: "You had no right to sell it. I never gave you an order, and I think your action is arbitrary. I also received your letter in which you told me you were going to take my account in your own hands and do as you please with it. That is not right or it is not fair, according to our agreement and understanding. Of course, at the present time I am helpless, and your arbitrary action in taking my account out of my hands and operating it as you may see fit for yourselves is dead wrong, and I object. I objected to the sale of the 1,300, and I object to the sale of the 200 which you now report to me. It is a damn skin game. It is an outrage."

According to the plaintiff's version, there was no further communication between the parties until about the 10th or 11th, when Mr. Halsey called him on the telephone, and said: "We have sold out your 1,500 shares and the balance of your Steel preferred." The plaintiff replied: "Well, that is just in line with the other work that you have been doing with the 1,300 and the 200. You sold it out without my authority, and I suppose I will have to take my medicine. You have violated your agreement. You have not kept faith with me." The sales resulted in a loss to the plaintiff of his entire margin, left him in debt to the amount of \$4.77, and prevented him from realizing a fine profit from a rise in the market which began soon and continued for a long time. He made no further protest, but the next day, on receipt of a statement of the transaction, he called up the defendants, said that he had received it, and added: "I see I am indebted to you, according to your statement, \$4.77. I suppose you will be sending a man around to collect it"—and in great indignation hung up the receiver without waiting for a reply. No effort, however, was made to collect it, and no further communication passed between the parties until this action was commenced on the 17th of March, 1906.

During the entire time that the plaintiff dealt with the defendants, on the day after each transaction he usually, but not invariably, received a printed blank in which was written the purchases or sales of the day before, and at the bottom, beneath the

first printed signature of the defendants' firm, was the following footnote in very fine print: "It is hereby understood and agreed that on all marginal business the right is reserved to close transactions when margins are becoming exhausted without further notice and to settle contracts in accordance with rules and customs of Exchange where order is executed. C. D. Halsey & Co." The plaintiff testified that he never read this notice until his attention was called to it by his counsel at about the time the action was commenced.

No argument is needed to show that the conversation between the parties, if it took place, authorized the inference that a contract was made and at once acted upon by the plaintiff. We have quoted his testimony at such great length, because we do not read it in several respects as the justices of the Appellate Division did when they heard the first appeal, assuming that the evidence was the same on both trials, as seems to be conceded. They regarded the testimony of the plaintiff as incredible and as wholly without corroboration. We also regard his testimony standing alone as hard to believe, but, as it seems to us, it was corroborated by the conceded fact that the defendants bought stock for him at a cost of over \$228,000 on a margin of about 1 per cent.; although, as Mr. Halsey testified, the usual margin on this stock is 7 per cent. This indicates that in view of the standing of the plaintiff, as the editor of a trade journal, and his previous losses, owing, as they wrote him, "to the danger of stop orders," they wished to help him retrieve his misfortunes, and that they were willing to make an exception in his case and deal with him on terms of unusual liberality. Their large purchases on a nominal margin bear with force on his theory that they made the special agreement to buy and carry stocks for him without requiring the usual margin, or one with any reasonable proportion to the amount expended. He told them when the purchases were made that he could not put up more margin, yet they departed from the custom of the trade and their own custom to the extent of investing a fortune for him with no security to speak of, except the investment itself, which from its nature was precarious. These facts corroborated the plaintiff's story, however improbable it might be in itself, and, making it possible of belief, presented a question of fact for the jury as to whether the agreement as sworn to by him was actually made. The strong conflict in the evidence through the positive denials of the defendants is not now material, for the jury might have believed him.

If such a contract was made, even if it was too indefinite for specific performance, it was not wholly without effect. It was at least a waiver of the usual course of dealing and of all notices given as to the terms upon which stocks would be bought and carried. When reasonably construed, as it

should be, it did not run for all time, but for a reasonable time, nor provide for an unlimited amount of purchases, but for a reasonable amount. The parties are presumed, in the absence of specific language, to have intended a reasonable, and not an unreasonable, result. The purchases in fact made must be deemed reasonable in amount, because they were approved by the defendants when ordered. In case of a heavy fall in the price of the shares, a reasonable construction of the contract would not permit the plaintiff to insist that they should be carried without further margin, but would authorize the defendants to demand more money, and, if the demand was not complied with within a reasonable time, to sell upon reasonable notice. Whether the demand, if made, or the notice, if given, was reasonable or not would depend on all the circumstances and thus present a question of fact, unless so obviously unreasonable as to present simply a question of law.

[3] The defendants insist that the purchases in question were made pursuant to a contract in writing, and they base their claim on the footnote appended to previous notices, and especially on one dated September 26, 1904, relating to the purchase of the shares of Reading. The notice by mail of the purchase of the first 1,500 shares of Steel preferred had no effect, as they were bought and sold on the same day and within a period of about two hours. The defendants could waive all previous notices and agree in the future to buy and carry on a nominal margin, and this is the legal effect of the agreement, if one was made. The plaintiff does not attempt to enforce by specific performance, but sues for the conversion of his property, invoking the agreement as a waiver, and, if made, it was effective as a waiver as to the shares bought after the alleged arrangement and in reliance thereon. The service of a notice after each purchase with the usual footnote did not, under the circumstances, conclusively establish a written contract, and had effect only as evidence to be considered in connection with the testimony of the plaintiff. Such a notice is not like an insurance policy on which the company signing is sued, or a deed which conveys the title, although both, like the footnote, are signed by one party only. While acceptance of a policy or deed completes the contract, the mere receipt of a notice with a footnote may or may not make a contract, depending on the intention as shown by the surrounding facts.

[4] As each purchase was made, the plaintiff became the owner of the shares and the pledgor thereof to the defendants. They were his property, subject to the lien of the pledgees, and a sale thereof without authority would constitute a conversion. *Content v. Banner*, 184 N. Y. 121, 124, 76 N. E. 913. If the agreement was made, the defendant had no right to call for more margin, unless

the price of the shares fell so decidedly as to make it unreasonable to carry them longer without further protection, and whether it did or not involved a question of fact. No demand for more margin, however, was actually made, if the plaintiff is to be believed, for he denied receiving any letter to that effect, and testified that when Mr. Halsey suggested "a little more margin," and spoke of "unloading a little bit," he peremptorily refused on the strength of their understanding, whereupon Mr. Halsey closed the conversation by saying, "All right, Keller, we will have to sweat it out together." The letter of October 5th was neither received nor written until after the 1,500 shares had been sold, so that it had no application, except to the last sale.

Even if the agreement was not made, the defendants had no right to sell the shares without notice, yet within an hour or two after the purchase of the 2,500 shares they sold a majority thereof, according to the evidence of the plaintiff, without notice and without authority. *Content v. Banner*, supra. The defendants did not attempt to prove notice of time and place of sale, but rested on the rules of the Stock Exchange, although Mr. Halsey testified that they applied only to dealings between brokers.

[5] Whether the plaintiff ratified the sales involved a question of fact. He protested vigorously, and, while he used language which is invoked to establish acquiescence, the jury might have found that it was a cry of despair, made because he could not help himself, as the defendants had the power to sell, even if they had no right to sell. The statement sent by the defendants showing a small balance in their favor, when read in connection with the protest of the plaintiff, obviously did not establish an account stated.

[6] Whether certain letters from the defendants calling for more margin reached the plaintiff was likewise a question of fact, for the evidence that they were written, copied, and mailed in the usual course of business was met by his statement that he never received them.

The case turns on the question whether the alleged agreement was actually made, and that was a question of fact, with the plaintiff's version supported by the corroboration mentioned, and contradicted by the testimony of two of the defendants, as well as by the written evidence. It was for the jury to look into the faces of the witnesses, and, in view of the burden of proof and of all the circumstances and probabilities, to decide whether the plaintiff was to be believed. He had the legal right to have the jury pass upon his credibility as a witness, and hence the direction of a verdict was an error of law that calls for a new trial.

The judgment should be reversed and a

new trial granted, with costs to abide the event.

CULLEN, C. J., and CHASE, J., concur. GRAY, J., concurs in result. HAIGHT and WERNER, JJ., dissent. WILLARD BARTLETT, J., absent.

Judgment reversed, etc.

(202 N. Y. 212)

NEW YORK CENT. & H. R. R. CO. v. CITY OF NEW YORK et al.

(Court of Appeals of New York. May 19, 1911.)

1. RAILROADS (§ 78*)—FRANCHISES—USE OF STREETS—CONTINUATION.

Laws 1846, c. 218, created the Hudson River Railroad Company, with power to construct a railroad and to locate the road on streets of the city of New York, provided the consent of the city was first obtained. The act provided that the company should continue for 50 years. By ordinance passed by the council of the city of New York in 1847, the railroad's route along the streets of the city was specified and confirmed. Laws 1869, c. 917, created the New York Central & Hudson River Railroad Company by a consolidation of the Hudson River Railroad Company with other corporations, to continue for 500 years, with the right to succeed to all the franchises of each corporation included therein. *Held*, that the franchise, granted to the Hudson River Railroad Company at a time the authority of the Legislature over the streets of a city was not subject to constitutional restrictions, was not limited to 50 years, but the consolidation operated as a grant to the new corporation and gave it the right to maintain the tracks during the term of its corporate existence, subject to legislative regulation.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. § 194; Dec. Dig. § 78.*]

2. RAILROADS (§ 78*)—STREETS—OCCUPATION BY RAILROADS—POWER TO CONTROL.

That the Legislature made the location of railroad tracks in the streets of a city dependent on the assent of the city did not give the city any authority to withdraw the franchise after it had once been made effective by the city's consent; the Legislature having at the time authority over the streets of the city.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. § 194; Dec. Dig. § 78.*]

3. MUNICIPAL CORPORATIONS (§ 71*)—FRANCHISES—USE OF STREETS—LEGISLATIVE CONTROL.

The Legislature, granting a railroad company the right to locate its tracks on the streets of a city, subject to the assent of the city, may regulate the railroad in the city for the public safety.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 175; Dec. Dig. § 71.*]

Appeal from Supreme Court, Appellate Division, First Department.

Action by the New York Central & Hudson River Railroad Company against the City of New York and others. From a judgment of the Appellate Division (142 App. Div. 578, 127 N. Y. Supp. 513), unanimously affirming a judgment of the Supreme Court on the report of a referee, enjoining defendants from

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

removing or attempting to remove the tracks occupying certain streets along the line of the Hudson River from Spuyten Duyvil creek to near Sixty-Eighth street, which tracks were laid under an ordinance adopted by the city of New York May 6, 1847, pursuant to Laws 1846, chapter 216, granting permission to the Hudson River Railroad Company to construct the tracks therein, defendants appeal. Affirmed.

Archibald R. Watson, Corp. Counsel (William P. Burr, of counsel), for appellants. Charles F. Brown, for respondent.

WILLARD BARTLETT, J This suit is the outcome of a notice served by the municipal authorities of the city of New York upon the New York Central & Hudson River Railroad Company, requiring the removal of its tracks from Tenth, Eleventh, and Twelfth avenues, and West street. The judgment enjoins the city and its officers from removing or attempting to remove these tracks. It is based upon the legal proposition that the right thus to occupy the streets in question is derived by the New York Central & Hudson River Railroad Company from the state, through the Legislature, and not from the city; that such right was conferred upon the plaintiff's predecessor in title in 1846 and has never been taken away, and that it can only be taken away by the power which granted it; that is to say, the Legislature itself.

The New York Central & Hudson River Railroad Company came into existence in 1869, by virtue of a consolidation between two pre-existing railroad corporations, the New York Central Railroad Company and the Hudson River Railroad Company, pursuant to the provisions of chapter 917 of the Laws of 1869, entitled "An act to authorize the consolidation of certain railroad companies." The agreement of consolidation provided that the new corporation should continue for the term of 500 years. This provision appears to have been authorized by the statute cited, which empowered the directors of the companies proposing to consolidate to enter into a joint agreement for the purpose, "prescribing the terms and conditions thereof." The act of 1869 also provided that all the provisions of the general railroad act of 1850 "shall be applicable to the new corporation so to be formed as aforesaid, so far as the same are now applicable to the railroad companies of this state, which may be consolidated with any other company or companies by virtue of this act." Section 8. The general railroad act provided that articles of association thereunder should state the number of years during which a railroad company should continue (Laws 1850, c. 140, § 1), and this provision having thus been made applicable to a consolidated corporation formed under chapter 917 of the Laws of 1869, it authorized the directors of the companies proposing to unite to fix

the period of existence of the corporation born of the consolidation. The pre-existing New York Central Railroad Company was itself the offspring of a consolidation pursuant to chapter 76 of the Laws of 1853, under an agreement which fixed its corporate life at 500 years, while the existence of the Hudson River Railroad Company was originally limited to 50 years from May 12, 1846 (Laws 1846, c. 216), capable, of course, of being extended by the authority of the Legislature.

[1] The right or franchise to occupy the streets in controversy in this action was conferred upon the Hudson River Railroad Company by the act cited, under which it was organized, and it is the contention of the appellants that the duration of the franchise was limited to the term in which that statute authorized it to carry passengers and property, to wit, 50 years. If this 50-year limitation did apply to the franchise, under a correct construction of chapter 216 of the Laws of 1846, the franchise could not be extended by any action taken by the grantee, either alone or in the process of consolidating with the New York Central Railroad Company; and, so far as any of the opinions below intimate a contrary view, we are unable to agree with them. We are satisfied, however, that the duration of the franchise was not thus limited, but that the limitation applied to the corporate existence of the Hudson River Railroad Company only (which might be extended), and not at all to the location of its tracks in the streets of New York.

The act incorporating the Hudson River Railroad Company was passed on May 12, 1846, and is entitled "An act to authorize the construction of a railroad from New York to Albany." The first section reads as follows: "Section 1. All persons who shall become stockholders pursuant to this act, shall be and they are hereby constituted a body politic and corporate, by the name of 'The Hudson River Railroad Company,' with power to construct a single, double or treble railroad or way, between the cities of New York and Albany, commencing in the city of New York, with the consent of the corporation of the city of New York, and passing through the counties of Westchester, Putnam, Dutchess, Columbia, and ending at some point on the Hudson river, in the county of Rensselaer, opposite the city of Albany, to be laid with an iron rail weighing not less than seventy pounds per lineal yard; with power to construct such branch or branches, for depot and station accommodations, as may be required for the business of said railroad; and to transport, take or carry any property and persons upon the same, by the power and force of steam, of animals, or of any mechanical or other power, or of any combination of them, for the term of fifty years from the passage of this act; it being expressly understood that noth-

ing contained in this act shall authorize or allow the construction of a bridge across the Hudson river; but the said company may, with the consent of the corporation of the city of Albany, establish a ferry across the said river at Albany, for the accommodation of the business of the said railroad."

In section 4 of the same statute it is provided that the directors of the corporation "may locate their railroad on any of the streets or avenues of the city of New York, westerly of and including the Eighth avenue, and on or westerly of Hudson street, provided the assent of the corporation of said city be first obtained for such location." The last section (section 36) provides that the Legislature "may at any time alter or repeal this act." The Legislature has not exercised its reserved power to repeal up to the time of the argument before us.

The assent of the corporation of the city of New York to the location of the tracks of the Hudson River Railroad Company on the streets in controversy was duly given by ordinance approved by the mayor on May 6, 1847, and subsequent ordinances. The assent of the city did not assume to prescribe any limit of time during which such occupation of the streets should continue. As has already been intimated, we think no such limitation of the franchise is to be found in the charter of the Hudson River Railroad Company.

A strong reason for regarding the 50-year limitation as applicable only to the life of the corporation is furnished by the forms of legislation in reference to the organization of railroad companies which prevailed before and at the period when this statute was enacted. Railroad companies were then incorporated by special, and not under general laws; and the common practice was at the beginning of the statute to prescribe the duration of the life of the corporation, which was usually 50 years. Such limitations are to be found in the charters of the Saratoga & Schenectady Railroad Company (Laws 1831, c. 43), Rensselaer & Saratoga Railroad Company (Laws 1832, c. 131), Watertown & Rome Railroad Company (Id. c. 173), Lake Champlain & Ogdensburg Railroad Company (Id. c. 205), Long Island Railroad Company (Laws 1834, c. 178), Auburn & Syracuse Railroad Company (Id. c. 228), Hudson & Delaware Railroad Company (Laws 1835, c. 126), and the Rochester & Lockport Railroad Company (Laws 1837, c. 427), and many more examples might be cited.

The street franchise is granted in a different section of the statute, quite dissociated from the time limit. The language leaves the duration of the franchise wholly indefinite and undetermined. It was unquestionably in existence, however, and in the lawful enjoyment of the Hudson River Railroad Company, when that corporation was merged with the New York Central in 1869. The consolidation act of that year provided that upon the con-

summation of the acts necessary to consolidate the constituent companies "all and singular the rights, privileges, exemptions and franchises of each of said corporations, parties to the same, and all the property, real, personal and mixed, and all the debts due on whatever account to either of said corporations, * * * shall be taken and deemed to be transferred to and vested in such new corporation, without further act or deed; and all claims, demands, property, rights of way and every other interest shall be as effectually the property of the new corporation as they were of the former corporations, parties to the said agreement and act; and the title to all real estate, taken by deed or otherwise, under the laws of this state, vested in either of such corporations, parties to said agreement and act, shall not be deemed to revert or be in any way impaired by reason of this act, or anything done by virtue thereof, but shall be vested in the new corporation by virtue of such act of consolidation." Laws 1869, c. 917, § 4. We see no escape from the conclusion that by means of this enactment and the proceedings thereunder the Legislature transferred to the plaintiff the franchise in the New York city streets which it had originally bestowed upon the Hudson River Railroad Company in 1846.

[2] That franchise, it must be borne in mind, proceeded from the state, and not from the city. At that time, the authority of the Legislature over the streets of a municipality was not subject to the constitutional restrictions which now exist. The Legislature chose to make the location of the tracks in the streets of New York dependent upon the assent of the municipal corporation, but it was not under any legal obligation to do so; and the fact that it did so gave the city no authority to withdraw or cancel the franchise after it had once been made effective by the city's consent. Assuming the existence of that power in any one, it belonged and still belongs to the Legislature, and not to the corporation of the city of New York. See *City of New York v. Bryan*, 196 N. Y. 158, 89 N. E. 467.

[3] The learned counsel for the respondent denies that it could or can be exercised even by the Legislature. Relying upon the case of *People v. O'Brien*, 111 N. Y. 1, 18 N. E. 692, 2 L. R. A. 255, 7 Am. St. Rep. 684, he argues that "the grant to the Hudson River Railroad Company was in fee and invested the railroad company with an interest in the streets in perpetuity to the extent necessary for the railroad which it was authorized by the Legislature to construct, maintain, and operate." There is a manifest difference, however, between the franchise which was held to be beyond revocation or recall in the *O'Brien* Case and that under consideration here. That was the entire franchise to construct and operate a railroad. "The only proposition there decided was that the reservation of the power to alter or repeal the charter of a

corporation did not reserve the power to revoke or recall the franchises given to it to construct a railroad." City of New York v. Bryan, supra, 196 N. Y. 165, 89 N. E. 469. The permission given to the directors of the Hudson River Railroad Company by the act of 1846 "to locate their railroad" on the streets in controversy was considered early in the history of this court, as appears from the opinion of Denio, C. J., in *Davis v. Mayor*, etc., of New York, 14 N. Y. 506, 520, 67 Am. Dec. 186, where he said: "The special subject of railroads passing through or terminating in cities early engaged the attention of the Legislature, and in particular cases, where such roads terminated in the city of New York, express power was given to the municipal government to license their location in the streets. (Charter of the N. Y. & Harlem R. R. Co. [L. 1832, c. 93] § 1; Charter of the Hudson River R. R. Co. [L. 1846, c. 216] § 1.) It will be remembered that the cases provided for in these statutes were railroads running from one part of the state to another, and to be located for the most part in the country, and upon land to be purchased or acquired by the companies, and where the intersection of a highway, or the running upon the streets of a city, was merely an incident of the general design, and where the whole enterprise would be greatly embarrassed or entirely frustrated, unless some power to run upon highways or streets were vested in some public body or magistrate." This permission, however, as I have endeavored to show, sprang originally from the state. Even if it conferred an irrevocable property right, under the doctrine of *People v. O'Brien*, it would not follow that it was incapable of modification or regulation by the Legislature as to the manner in which it might continue to be enjoyed. These questions, however, it is not necessary now to decide; and so far as I have discussed them I express my own impressions only. The right of the respondent to resist the attempt of the city to compel the removal of its tracks, in the absence of any action to that end on the part of the state, is clear, whatever may be the power of the Legislature in the premises.

In granting a franchise of this character, indefinite as to its duration, the Legislature evidently contemplated that it should be enjoyed by the successor or successors of the immediate grantee, if that grantee should cease to operate the railroad between Albany and New York, either in consequence of ceasing to be a corporation or for any other reason. But, as Judge Earl said, in *Miner v. N. Y. C. & H. R. R. Co.*, 123 N. Y. 242, 249, 25 N. E. 339, 340: "While the life of the corporation was limited to 50 years, it could not have been expected that it should really cease to exist at the end of that period. While the Legislature reserved the right to cut its life short, it also had the power to extend it. It is the experience of mankind that such quasi public corporations never

come to and end by mere effluxion of time. A railroad corporation which had, during 50 years, rendered a valuable public service and properly discharged its corporate functions would, with the passage of years, become more and more useful, and more and more a necessity." In the case at bar the Legislature did not in express terms extend the life of the corporation upon which the franchise in question was bestowed, but it provided for the continuance of that life by means of its merger into a corporation which should live 500 years. At the same time the interests of the public in the other direction were protected by the reserved right of amendment and repeal. There is much evidence in the record before us indicating that these interests demand a radical change in the manner in which the franchise of the plaintiff shall be enjoyed. Indeed it is said in the brief for the respondent: "The conditions existing in the streets through which the cars pass are conceded to be bad, and the plaintiff is willing to make them better." These are matters, however, over which the courts have no control. The question upon which this litigation turns is whether the plaintiff can lawfully be put off the streets by the city of New York. The act of the Legislature which permitted the Hudson River Railroad Company to go there 65 years ago, and which the Legislature has seen fit to leave in full force and effect ever since, compels us to answer that question in the negative.

It follows that the judgment appealed from must be affirmed, with costs.

CULLEN, C. J. I concur in the opinion of Judge WILLARD BARTLETT and also in the expression of his personal view as to the power of the Legislature to modify or regulate the franchise given by the state for the location of the plaintiff's railroad in the city of New York. There is this marked distinction between the present case and that of *People v. O'Brien*, 111 N. Y. 1, 18 N. E. 692, 2 L. R. A. 255, 7 Am. St. Rep. 684: There the franchise granted was that of a street surface railroad, and the repeal of the right to maintain a road in the street was destructive of the franchise. There is no franchise in this case to do the business of a street railroad, and the permission to occupy the street was solely as a means for running from one terminus of the road to the other; nor did the franchise to maintain the road include an unqualified right to maintain it on the surface. The "power reserved to the Legislature to alter, amend, or repeal a charter authorizes it to make any alteration or amendment of a charter granted subject to it, which will not defeat or substantially impair the object of the grant, or any rights vested under it, and which the Legislature may deem necessary to secure either that object or any public right." *Close v. Glenwood Cemetery*, 107 U. S. 466, 476, 2 Sup. Ct. 267, 27 L. Ed. 408. Under this doctrine the

Supreme Court of the United States upheld the validity of an act of the Legislature of the state of Connecticut, compelling a railroad company to abolish, at its own expense, all grade crossings, as a valid exercise of the police power. *N. Y. & New England R. R. Co. v. Bristol*, 151 U. S. 556, 14 Sup. Ct. 437, 38 L. Ed. 269. So, in the case before us, I think it clear that the Legislature may so regulate the plaintiff's railroad in the city of New York as to remove the constant menace and danger to life occasioned by its present operation.

CULLEN, C. J., and GRAY, HAIGHT, VANN, WERNER, and CHASE, JJ., concur with WILLARD BARTLETT, J. GRAY, HAIGHT, VANN, WERNER, WILLARD BARTLETT, and CHASE, JJ., concur with CULLEN, C. J.

Judgment affirmed.

(202 N. Y. 181)

McKANE v. HOWARD.

(Court of Appeals of New York. May 16, 1911.)

**1. BREACH OF MARRIAGE PROMISE (§ 13*)—
DEFENSE—PRIOR UNCHASTITY.**

Unchastity of plaintiff prior to the marriage promise and then unknown to defendant is a complete defense to an action for breach of the promise.

[Ed. Note.—For other cases, see *Breach of Marriage Promise*, Cent. Dig. §§ 4-10; Dec. Dig. § 13.*]

**2. BREACH OF MARRIAGE PROMISE (§ 22*)—
DEFENSE OF PRIOR UNCHASTITY—REBUTTING
EVIDENCE.**

In rebutting or repelling the defense, in an action for breach of a marriage promise, of acts of unchastity of plaintiff prior to the promise, then unknown to defendant, evidence that plaintiff's reputation for chastity was good has no place and for such purpose is immaterial, irrelevant, and inadmissible.

[Ed. Note.—For other cases, see *Breach of Marriage Promise*, Cent. Dig. §§ 31-36; Dec. Dig. § 22.*]

**3. BREACH OF MARRIAGE PROMISE (§ 22*)—
CHARACTER—EVIDENCE.**

Defendant's evidence in an action for breach of marriage promise of specific acts of fornication of plaintiff prior to the promise, which he had pleaded as a defense, because unknown to him at the time of the promise, being directed to proving that defense, and not that her general character for chastity was bad, because of which damages should be diminished, though reaching to the fact of character, was not an attack on general character for chastity, so as to permit plaintiff to introduce evidence of her good reputation for chastity.

[Ed. Note.—For other cases, see *Breach of Marriage Promise*, Cent. Dig. §§ 31-36; Dec. Dig. § 22.*]

**4. BREACH OF MARRIAGE PROMISE (§ 22*)—
CHARACTER—EVIDENCE.**

Evidence of the leaving by plaintiff under compulsion of defendant of her babe at a certain place is impertinent to the issues, and inadmissible in an action for breach of a marriage promise under which plaintiff had relations with defendant resulting in birth of a child, the answer pleading a general denial, and

that prior to the alleged promise plaintiff had had intercourse with other men of which he did not then know.

[Ed. Note.—For other cases, see *Breach of Marriage Promise*, Cent. Dig. §§ 31-36; Dec. Dig. § 22.*]

Appeal from Supreme Court, Appellate Division, Third Department.

Action by Elizabeth McKane, an infant, by Marie McKane, her guardian ad litem, against Leslie Howard. From a judgment of the Appellate Division (138 App. Div. 680, 123 N. Y. Supp. 632) affirming a judgment for plaintiff, defendant appeals. Reversed, and new trial ordered.

The action is to recover the damages sustained by plaintiff through the alleged breach by defendant of a contract between the parties to intermarry.

The complaint alleged the contract, its breach by defendant, and that plaintiff subsequent to the making of it and confiding in it entered into illicit relations with defendant, by reason of which she gave birth to a child. The answer denied those allegations, and averred as a defense that the plaintiff prior to the alleged contract had sexual intercourse with divers men other than defendant of which the defendant was ignorant at the time of the alleged promise to marry the plaintiff. At the trial the plaintiff offered, as a part of her case, testimony that her reputation for chastity in the community in which she lived was good, to which the defendant objected as immaterial and inadmissible. The court refused the testimony and said: "Presumptively it is good until the contrary is shown, and, when they attack it, it seems to me that that is the time to establish her character." The defendant introduced testimony tending to support his denials and also his defense. The plaintiff, in rebuttal, offered testimony that the reputation of plaintiff for chastity was good, and it was admitted under the objection of the defendant that it was immaterial, irrelevant, and inadmissible under the pleadings; the court stating as the ground for the ruling that the plaintiff's character was in issue and the testimony of defendant's witnesses tending to show as a defense several instances of unchastity on the part of the plaintiff was the introduction of proof of her bad character, and consequently she could respond with proof of her virtuous character. The court charged the jury that, if the plaintiff prior to the alleged contract was an unchaste woman, that was an absolute defense to this action.

G. H. Main, for appellant. R. M. Moore, for respondent.

COLLIN, J. (after stating the facts as above). The trial justice declined to admit, as a part of the plaintiff's case, testimony that her reputation for chastity was good, and that ruling became the law for that trial.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

The prominent question presented for our determination by the record is: Does the introduction by the defendant in an action for a breach of a promise of marriage of testimony supporting the pleaded defense that the plaintiff had committed fornication with a person or persons other than the defendant invest the plaintiff with the right to introduce testimony that the reputation of the plaintiff for chastity was good? Neither the briefs of counsel nor our investigation enable us to cite a decision of any court of this state (other than those rendered by the courts below in this action) treating the question, and the conflict of the authorities of other jurisdictions indicates that it is perplexing as well as interesting.

[1] The proposition that illicit intercourse of the plaintiff prior to the promise and then unknown to the defendant or subsequent to the promise with another than the defendant is a defense to the action is fundamental and established beyond the reach of discussion. The law, through implication, reads into the promise of either party to the engagement the representation of chastity and physical qualification for the relation, which, if false or a misrepresentation, constitutes a fraud vitiating the whole contract. *Boynton v. Kellogg*, 8 Mass. 189, 3 Am. Dec. 122; *Palmer v. Andrews*, 7 Wend. 142; *Kniffen v. McConnell*, 30 N. Y. 285; *Goddard v. Westcott*, 82 Mich. 180, 46 N. W. 242; *Budd v. Crea*, 6 N. J. Law, 370. It is in this respect impartial between the sexes. In *Baddely v. Mortlock*, 1 Holt, 151, an action for breach of promise of marriage, the woman was the defendant and it was held: "If a woman impropiously promise to marry a man, who turns out upon inquiry to be of bad character, she is not bound to perform her promise. But she must show that the plaintiff is a man of bad character. The accusation is not enough."

The defendant in the action at bar was clearly within his legal rights when he pleaded as a defense the particular acts of fornication on the part of the plaintiff with others prior to his alleged promise. His promise of marriage, if made, was simply entering into a contract with the plaintiff, and he was not bound to fulfill it in case it was nullified by the condition or acts of the plaintiff. His defense that plaintiff was unchaste when she received his promise, given in ignorance of that fact, was legitimate even as would have been the defense, if alleged, that she obtained the promise through express fraud or was insane or diseased, or malformed or impotent. It attacked her cause of action at its core, and, if found proven by the jury, defeated it precisely as would have the establishing of either of those defenses. It tendered an issue of fact to be met by plaintiff in the ordinary way of producing evidence refuting or avoiding it.

[2] The testimony of her witnesses that her

reputation was good was not such evidence. It did not meet or respond to the issue. It did not prove or tend to prove that she was not guilty of each illicit act testified to by the defendant's witnesses. In rebutting or repelling the defense it had no place, and for such purpose was immaterial, irrelevant, and inadmissible. While it may reasonably be argued that testimony as to the reputation of plaintiff might be a ground for an inference as to whether or not she did the acts charged, the law has been from the earliest period that such testimony was inadmissible for that purpose. *Fowler v. Aetna Fire Ins. Co.*, 6 Cow. 673, 16 Am. Dec. 460; *Gough v. St. John*, 16 Wend. 646; *Humphrey v. Humphrey*, 7 Conn. 116; *Insurance Co. v. Hazen*, 110 Pa. 530, 1 Atl. 605. In 1 Greenleaf on Evidence (16th Ed.) p. 40, it is said: "Because of the slight probative value of a party's character, and of its confusion of issues to little purpose, and for other reasons variously stated by different judges and not easy to disentangle or define, it has come to be generally accepted that the character of a party in a civil cause cannot be looked to as evidence that he did or did not do an act charged." In criminal cases evidence may be given by the accused to show such traits of character as tend to afford a presumption that he would not have committed the crime charged. *Cancemi v. People*, 16 N. Y. 501; *People v. Sweeney*, 133 N. Y. 609, 30 N. E. 1005; *Stover v. People*, 56 N. Y. 315.

[3] The testimony was received, however, by the trial court upon the ground that the character of the plaintiff was in issue, and the defendant, in the testimony that she had been guilty of several instances of unchastity, introduced proof of her bad character, and consequently she could respond with proof of her virtuous character; that she was seeking to recover as a part of the damages to be awarded her those suffered through the loss of character resulting from the breach of promise, seduction, and consequent pregnancy.

While the action is for a breach of contract, the plaintiff is entitled to damages upon principles more commonly applicable in actions of tort. The jury in awarding them must look beyond the contract, which does not fix or measure them. The law authorizes indemnity to the plaintiff for all the injuries the bad faith of the defendant has worked, and deems a just part thereof the injury to her reputation or character and to her feelings. As to the measure of damages, the action has always been classed with actions of tort, as libel, slander, seduction, criminal conversation, etc. *Thorn v. Knapp*, 42 N. Y. 474, 1 Am. Rep. 561; *Johnson v. Caulkins*, 1 Johns. Cas. 116, 1 Am. Dec. 102. The general character of a plaintiff must be taken into consideration in estimating her damages. The jury might justly and with good sense find that the mental suffering or loss of char-

acter of a licentious or bad woman was less than that of a virtuous and good woman. The general character of the plaintiff was therefore a subject of proof on the part of the parties and of consideration on the part of the jury, and, if the defendant did in and through the testimony adverted to give evidence in proof that the general character of the plaintiff for chastity was bad, the court ruled correctly in admitting the testimony of the witnesses of the plaintiff that it was good. But the evidence introduced by defendant was not of that nature or effect. He did present testimony tending to show specific instances of fornication on the part of the plaintiff, which instances he had pleaded as facts constituting a fraud in the inception of and vitiating and nullifying the contract and destroying the cause of action. By that testimony he was seeking to prove, and it was directed to proving, that defense, and not that the general character of the plaintiff for chastity was bad and not that the damages recoverable by her should be diminished because thereof. If the jury believed it, their verdict would in favor of the defendant. If they did not believe it, it could not either mitigate or enhance the damages. The defense which the defendant was attempting to establish was as free and legitimate to his hand as any other and its use subjected him to no burden or risk dissociated with any other. The fact that his proof did reach to the fact of character did not expose him to the burden of meeting the direct and affirmative testimony of plaintiff's witness that the plaintiff's reputation for chastity was good and the hazard of his inability to answer such testimony. *Johnson v. People*, 55 N. Y. 512; *Matthews v. Huntley*, 9 N. H. 146. To hold that it did would not make for justice. Our conclusion is that the ruling of the court admitting the evidence in proof that the character of plaintiff for chastity was good was error. It may be that this conclusion is not in harmony with certain decisions of other courts (*Sprague v. Craig*, 51 Ill. 288; *Haymond v. Saucer*, 84 Ind. 3), and that it is in accord with certain other decisions (*Leckey v. Blosser*, 24 Pa. 401; *Colburn v. Marble*, 196 Mass. 376, 82 N. E. 28, 124 Am. St. Rep. 561). It is based, however, upon the reasoning of this opinion.

[4] There was error, also, in the ruling of the court admitting, under the objection of the defendant, the proof on the part of the plaintiff that the plaintiff left, under compulsion in which the defendant participated, the babe in the hospital at Montreal, at which she underwent her confinement. It permitted the plaintiff to thrust into the trial an issue foreign and impertinent to those framed by the pleadings and without the scope of the cause of action.

The judgment should be reversed and a

new trial ordered, with costs to abide the event.

CULLEN, C. J., and GRAY, VANN, WERNER, and HISCOCK, JJ., concur. HAIGHT, J., absent.

Judgment reversed, etc.

(203 N. Y. 201)

HALLOCK v. NEW YORK CENT. & H. R. R. CO.

(Court of Appeals of New York. May 16, 1911.)

FORCIBLE ENTRY AND DETAINER (§ 5*)—ELEMENTS OF FORCIBLE DETAINER.

Where, while defendant's workmen were tearing down the building after a peaceable entry by defendant, plaintiff and his attorney entered it, and the foreman merely warned them that the wall was coming down, and that they had better get out or they would get hurt, and immediately after they and he got out it fell, there was not a forcible detainer, for which Code Civ. Proc. § 1669, authorizes recovery of treble damages, no force having been resorted to and no threats having been made of personal violence against plaintiff.

[Ed. Note.—For other cases, see *Forcible Entry and Detainer*, Cent. Dig. §§ 23-28; Dec. Dig. § 5.*]

Appeal from Supreme Court, Appellate Division, Fourth Department.

Action by John J. Hallock against the New York Central & Hudson River Railroad Company. From a judgment for plaintiff, affirmed by the Appellate Division (136 App. Div. 912, 120 N. Y. Supp. 1127), defendant appeals. Reversed, and new trial ordered.

A. H. Cowie, for appellant. Frank E. Young, for respondent.

GRAY, J. The action was brought to recover the treble damages allowed by section 1669 of the Code of Civil Procedure in cases of the forcible entry upon, or detainer of, real property. Upon the trial, the case was submitted to the jury upon the evidence and the plaintiff obtained a verdict, the amount of which was trebled by the judgment pursuant to the statute. There was an affirmation at the Appellate Division (136 App. Div. 912, 120 N. Y. Supp. 1127) by a divided court, and the defendant now appeals to this court.

I think that the case should not have been submitted to the jury, and that the motion for a nonsuit, made upon the plaintiff's case and renewed upon the whole case, was erroneously denied. The question, which the exception to the denial of the motion raises, is whether the plaintiff had made out a case under a complaint, which was based expressly upon the statute. The action is at law and the plaintiff's right to any recovery must depend upon proof of facts, which will bring the case within statutory provisions, that are penal in their nature. Section 1669 provides that "if a person is dis-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

seized, ejected, or put out of real property, in a forcible manner; or, after he has been put out, is held and kept out, by force, or by putting him in fear of personal violence, he is entitled to recover treble damages, in an action therefor against the wrongdoer." There was no proof of a forcible entry upon the premises and the trial court so charged; but it was left to the jury to say if there had been a forcible detainer. The evidence shows that the piece of land in question formerly was part of a tract which one Clark conveyed to the defendant in June, 1888, and that Clark had a good title to the land. Some years prior to that conveyance, a man named Cholet had a small hut, or shanty, upon the premises, in which he sold refreshments. The property so occupied was a small parcel of land in an angle formed by the crossing of a street over the defendant's railroad, in the vicinity of Onondaga Lake and more or less in the open country. In 1887 Cholet moved away and the plaintiff bought out his interest, whatever it was. He put up a small building, and from time to time leased it to tenants. In 1906 the attention of the defendant's officers seems to have been particularly drawn to the place by reason of an action against the company, brought to recover damages for a collision occurring at this crossing, in which action it was claimed that the building was an obstruction to the view of persons approaching the tracks. Learning that this plaintiff had some interest in the premises, it was sought to have him remove the building. Negotiations failing to cause him to do so, the defendant instituted a summary proceeding under subdivision 4 of section 2232 of the Code of Civil Procedure to remove the plaintiff's tenant as a squatter upon the property. The proceeding was not defended by the tenant nor by the plaintiff, although the latter was given an opportunity to defend, and the defendant obtained a judgment by default. The tenant in occupancy of the building had given up the keys to the plaintiff some time before and, after the recovery by defendant of its judgment, when its attorney, in company with a court officer, went to the building, they found it vacant and entered it without trouble, or opposition. After that, the plaintiff sought to have the company itself remove the building for him to some adjoining land; but efforts to adjust the matter were without result. Subsequently the defendant sent a gang of men to tear the building down. They had removed the roof, the doors, windows, and a wall, and had piled outside what personal property was in the building. At that stage the plaintiff with Young, a lawyer, arrived on the ground, and the question turns upon their testimony with respect to the existence of any facts showing forcible detainer. Their testimony agrees; but I will use only Young's, as it puts the matter the more strongly. Young spoke for the plaintiff and

told the foreman of the gang that the person with him was the owner of the property, and that they must leave the property at once. To this the foreman replied that "he was sent there by the defendant to tear down the building and he was going to do it; that, if we didn't look out, the building would be down on our heads. They were then working on the wall to the north of where we were standing inside the building and some of the men yelled out, 'This wall is coming down,' and Mr. Zeigler (the foreman) said, 'You better get out from here. You will get hurt. This wall is coming down,' and we started and he started, and we got very comfortably out in the street, when down came the whole side of the building. They had cut away the building at the floor, and it came right over the whole length of the building, and we came away. Nobody laid hands on me. We didn't give them an opportunity. We just stepped out so that we could be out of it when the building fell. He (Mr. Zeigler) said we were in danger of being hurt, and I believed him." The evidence fell far short of proving a forcible detainer. There was no force used to keep the plaintiff out of the premises, and he was not in fear of any personal violence. The theory upon which the action for a forcible entry or detainer, which are distinct offenses, is allowed for either, is that the complainant shall have redress for a forcible violation of his rights by the trebling of the damages sustained; while the offender is punished for the disturbance of the public peace by his violent conduct. Because of the breach of the peace in a disorderly trespass upon the land, damages are given punitively. *Wood v. Phillips*, 43 N. Y. 152, 157. Whether the complaint be of a forcible entry, or of a forcible detainer, the circumstances of force, or violence, to be shown, in each case, are the same. This was held in *People ex rel. Kline v. Rickert*, 8 Cow. 226, 232, where, also, it was pointed out what would amount to a forcible detainer. It was said: "The law is that the same circumstances of violence or terror which will make an entry forcible will make a detainer forcible also; and whoever keeps in the house an unusual number of people, or unusual weapons, or threatens to do some bodily hurt to the former possessor if he dare return, shall be adjudged guilty of a forcible detainer."

This question has been passed upon, quite recently, and quite fully, by this court in *Fults v. Munro*, 202 N. Y. 34, 42, 43, 95 N. E. 23, 26, an action of the same nature as the present one. In that case, Judge Vann, speaking for the court, defined what force was necessary to be shown to constitute a forcible entry and the definition is applicable to a case of forcible detainer. He said: "The force used must be unusual and tend to bring about a breach of the peace, such as an entry with a strong hand, or a multitude of people, or in a riotous manner, or with per-

sonal violence, or with threat and menace to life or limb, or under circumstances which would naturally inspire fear and lead one to apprehend danger of personal injury if he stood up in defense of his possession." In that case as in this, the entry was shown to have been peaceable, and the question was, as here, whether the plaintiff was kept out by force. It was held that, "although the entry was peaceable, still, if the plaintiff was kept out through fear of personal violence, she was entitled to recover treble damages for a forcible detainer," and then the opinion proceeded to consider whether the acts of the defendant were such as would, under the rule in *People v. Rickert*, supra, amount to a forcible detainer. The facts in that case were that an officer marched with a loaded gun in front of the plaintiff, as she sat by her effects on the roadside, and demeaned himself in such ways as naturally to inspire fear of personal injuries, if she should attempt to regain possession of her land. The opinion in *Fults v. Munro* carefully reviews the statutes and the cases from an early date, and is in point as an authority.

I think it clear that this plaintiff has utterly failed to make out a case of forcible detainer. The evidence simply shows a warning given by the foreman to him and to Young, after these persons had entered the building, that they were exposed to the danger of personal injuries from its fall. No force was resorted to, and there were no threats made of personal violence, against the plaintiff. All that he had to apprehend was from the consequences of remaining in a building in course of demolition. If the defendant had been guilty of a mere trespass, the law afforded the plaintiff an adequate remedy for the injury by an ordinary action.

The complaint should have been dismissed, and I advise a reversal of the judgment, and that a new trial be ordered, with costs to abide the event.

CULLEN C. J., and HAIGHT, VANN, WERNER, HISCOCK, and COLLIN, JJ., concur.

Judgment reversed, etc.

(202 N. Y. 156.)

WALLACE et al. v. DIEHL et al.

(Court of Appeals of New York. May 9, 1911.)

1. WILLS (§ 506*)—DESIGNATION OF DEVICES — "HEIRS."

A devise to "heirs" on the death of a life tenant, especially in the case of a gift over upon death without heirs, may be confined to heirs of the body.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1090-1099; Dec. Dig. § 506.*]

For other definitions, see Words and Phrases, vol. 4, pp. 3241-3265; vol. 8, pp. 7677, 7678.]

2. WILLS (§ 506*)—DESIGNATION OF DEVICES — "HEIRS."

Testatrix devised to her daughter, if living, a part of her residuary estate during her natural life, with power to devise and bequeath by will "to such of my heirs as she may prefer." Held, that the power of appointment could be executed only for the benefit of such of the issue or descendants of testatrix as were heirs of her body.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1090-1099; Dec. Dig. § 506.*]

3. WILLS (§ 524*)—DESIGNATION OF DEVICES — CLASSES—TIME OF ASCERTAINMENT.

Though as a general rule, a gift to a testator's heirs, after the death of a life tenant, is a gift to those who were the testator's heirs at law at the time of his decease, and the indications to overcome the effect of such rule must be clear, a devise to testatrix's daughter of a life estate, with power to devise by will "to such of my heirs as she may prefer" empowers the daughter to dispose of the property to such of testatrix's issue or descendants as were her heirs at the death of the life tenant.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1116-1127; Dec. Dig. § 524.*]

4. WILLS (§ 552*) — RIGHTS OF LEGATEES — LAPSED LEGACY.

Testatrix by a codicil gave \$5,000 to her executors in trust to purchase an annuity for a granddaughter, and by a later codicil provided that, "whereas circumstances may arise which may make the purchase of an annuity undesirable, it is my will that said sum of \$5,000 be paid to my said granddaughter * * * if she survive me, and I hereby give and bequeath said sum of \$5,000 to her," and by another provision the will gave to a daughter, if living, a part of the residuary estate during the term of her natural life, with power to give and devise upon her death by last will to such of the heirs of the testatrix as the donee might prefer. The granddaughter died before the testatrix leaving a daughter, her only heir at law and next of kin. Held, that the legacy to the granddaughter did not pass to her child by right of representation under 2 Rev. St. (2d Ed.) pt. 2, c. 6, tit. 1, § 52, but lapsed, and passed to the residuary estate of the donee of the power.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1191-1197; Dec. Dig. § 552.*]

Collin and Gray, JJ., dissenting in part.

Appeal from Supreme Court, Appellate Division, Second Department.

Action by Margaretta Wetherill Wallace and another, as executors of the last will of Margaretta M. Diehl, deceased, against Charles W. Diehl, Susan D. Edson, and others, to procure a judgment establishing the meaning of certain provisions of the will of Margaretta M. Diehl and settling the accounts of the plaintiffs. Appeal by the plaintiffs and the defendant Susan D. Edson, under Code Civ. Proc. § 1336, from certain parts of the final judgment of the Supreme Court, entered May 3, 1910, in the county of Richmond, upon the decision of the court on trial at Special Term, after the affirmance of an interlocutory judgment by the Appellate Division of the Second Department (134 App. Div. 942, 118 N. Y. Supp. 1149), with notices of appeal stating an intention to bring up for review the interlocutory judgment. Modified and affirmed.

See, also, 122 N. Y. Supp. 1149.

W. B. Chamberlain, for appellants Wallace and others. John Ewen, for appellant Edson. George M. Pinney, Jr., for respondent Lillian Purcell. Frederick A. Drake, guardian ad litem, for infant respondents.

CULLEN, C. J. I concur in the opinion of my Brother COLLIN, save in one respect. The courts below have held that the power of appointment given in the eleventh clause of the testatrix's will to Mrs. Wallace, "to give, devise and bequeath upon her death by Last Will and Testament duly executed, to such of my heirs as she may prefer," may be exercised in favor of any issue or descendant of the testator. I can find no authority in the decided cases for the extension of the term "heir" to include issue or descendants who are not heirs. Not one of the propositions cited in support of that contention in my opinion sustains it.

[1] Before entering on a review of the cases, the distinction must be borne in mind between two radically different propositions: First, that in the case of a devise to "heirs" upon the death of a life tenant, and especially in the case of a gift over upon death without heirs, the term "heirs" may be confined to such heirs as are issue or descendants; in other words, to heirs of the body; second, the proposition which it is necessary to maintain to support the decisions below, that the term "heirs" may include all descendants, however remote, though not heirs because their parents or ancestors are still living. This second proposition, as I have said, I can find no authority to sustain. Now, to refer to the cases cited by my Brother. *Matter of Cramer*, 170 N. Y. 271, 63 N. E. 279, is authority for the first proposition, not the second. In that case the word "heirs" was limited to heirs of the body and death without heirs construed as a gift over without heirs who were descendants or heirs of the body. *Snider v. Snider*, 160 N. Y. 151, 54 N. E. 676, decides exactly the same proposition. *Johnson v. Brasington*, 156 N. Y. 181, 50 N. E. 859, the same. So with *Kiah v. Grenier*, 56 N. Y. 220. In *Heath v. Hewitt*, 127 N. Y. 166, 27 N. E. 959, 13 L. R. A. 46, 24 Am. St. Rep. 438, which was the case of a gift to the heirs of a living person, Judge Parker, writing for the court, said the devise was to the children, but this was not because the word "heirs" could be construed as meaning children, but because it was the children which happened in that case to be the persons who would have been the heirs of the living person had he died at that time. This plainly appears, because the case was decided on the authority of *Heard v. Horton*, 1 Denio, 165, 43 Am. Dec. 659, where the general rule is stated that "a devise to the heirs of one who is stated in the will to be living is a valid disposition in favor of those who would be his heirs if he should then die." *Livingston v. Greene*, 52 N. Y. 118, seems to have no application to

the case before us. In *Thurber v. Chambers*, 66 N. Y. 42, 47, the term "heirs" was construed in its legal meaning so as to include all persons entitled to succeed in case of intestacy. So the decision has no bearing on the question before us. But Judge Church does remark in his opinion: "The word 'heirs' will, however, be construed to mean 'children' when, from the whole will, such appears to have been the intention of the testator [*Taggart v. Murray*] 53 N. Y. 233, 238 [*Bundy v. Bundy*] 38 Id. 410." A reference to the two cases Judge Church cites plainly indicates his meaning that the term "heirs" will be limited to children or other issue and not extended to heirs generally. *Scott v. Guernsey*, 48 N. Y. 106, is precisely to the same effect, and in the opinion it is said: "The testator has used the word 'heirs' in the sense of children." Now, such a statement was correct, though possibly misleading, because in that case children were the heirs.

[2] Without discussing the provisions of the will at length, I can simply say I cannot find any indication of a desire of the testatrix to pass over the nearest in line of her descendants or heirs in favor of more remote issue who might not be born till a generation after she was in her grave. Certainly there is no such clear indication as would warrant us in departing from the proper meaning of the word "heirs."

But I am of opinion that the heirs of the testatrix were to be ascertained not at her death, but at the death of the life tenant, to whom she gave the power of appointment.

[3] It should be conceded that the general rule is that a gift to a testator's heirs, though after the death of a life tenant, is a gift to those who were the testator's heirs at law at the time of his decease. But the will may disclose an intention that they are to be ascertained at a different period. In some of the cases cited as requiring a class to be ascertained at the death of the testator, the language is too plain to admit of discussion. In *Delaney v. McCormack*, 88 N. Y. 174, the provision was "to distribute the proceeds thereof amongst my next of kin as personal estate, according to the laws of the state of New York for the distribution of intestate personal estate." There also the language of the will was imperative. There appears to have been no claim that the next of kin would have been ascertained at a later period. In *Wadsworth v. Murray*, 161 N. Y. 274, 282, 55 N. E. 910, 911, 76 Am. St. Rep. 265, the provision was that the property should "descend to and vest in my heirs at law in the same manner that it would have descended to and vested in them if this will had not been made." Of course, if the will had not been made, the property would have passed as in case of intestacy. The general rule is stated in 2 *Jarman on Wills* (6th Ed.) p. 981: "Prima facie the next of kin at the death of the testator are meant;

and the indication should be clear to overcome the presumption." But in several cases indications have been held sufficiently clear to show that the testator meant the class to be ascertained at the death of a life tenant or of a primary devisee. Such cases are *Wood v. Bullard*, 151 Mass. 324, 25 N. E. 67, 7 L. R. A. 304; *Welch v. Brimmer*, 169 Mass. 204, 47 N. E. 699; and *Matter of Bowers*, 109 App. Div. 568, 96 N. Y. Supp. 562; affirmed on op. below, 184 N. Y. 574, 77 N. E. 1182.

It must be borne in mind that in the case before us there is no present gift of the property, the subject of the eleventh clause, to the heirs of the testatrix. They take solely by the exercise of the power of appointment dependent entirely on the favor of the life tenant, who might give all to one and exclude the rest. It was not a gift to a class, but the designation of a class among which the life tenant was to exercise her favor. It is in this respect that I think the case before us is to be distinguished from an ordinary gift by the testatrix herself. There the class to be benefited would be known to the testator and take under the will as a recipient of the testator's bounty. Here, though it was not the life tenant's bounty, it was the life tenant's favor to which any appointee would be indebted for what he might get. That favor was to be exercised by the life tenant at her decease, and it seems to me that the class was to be ascertained at the same time. But there is one further consideration which is to my mind controlling. It is true that the life tenant has no children, but she might have had children after the testatrix's death, and, for aught we know, even after the present time. A construction of the will which would require the heirs of the testatrix to be ascertained at her death would preclude the life tenant from exercising the power of appointment over what may be not improperly termed her own share of her mother's estate in favor of her own children. Certainly this testatrix never intended this.

I think the judgment of the Appellate Division and of the Special Term should be further modified so as to hold that the power of appointment given in the eleventh clause of the will must be exercised in favor of the heirs of the testator, such heirs, however, to be ascertained at the death of the life tenant and donee of the power.

COLLIN, J. (dissenting in part). The action is to procure a judgment establishing the meaning of certain provisions of the will of Margaretta M. Diehl and settling the accounts of the plaintiffs. Upon the trial at Special Term, by an interlocutory judgment unanimously affirmed, the disputed parts of the will were given construction and the plaintiffs directed to account. The action thereupon proceeded to the final judgment appealed from.

The testatrix died in January, 1908, leaving surviving as her sole heirs at law and next of kin three sons, Charles W., Thomas, and William, and three daughters, Margaretta Wetherill Wallace, Mary E. Smith, and Susan D. Edson. The original will and the three codicils were probated April 13, 1908. They are without unusual or involved features, and a brief general statement of their contents will suffice. The original will by its second paragraph gave to Charles, in case he survived the testatrix, certain shares of corporate stock, and to the executors the sum of \$10,000 in trust to purchase him an annuity. By its third paragraph it gave to Thomas, in case he survived her, all promissory notes belonging to the estate of her deceased husband under process of collection by him; also his indebtedness to her and to the executors \$10,000 in trust to purchase an annuity for him. Each paragraph provided that, if the son named therein did not survive the testatrix, the bequests should form a part of the residue of the estate. The fourth paragraph devised to William certain lands in St. Paul, Minn. It was, however, revoked by a codicil which devised to him all properties in the state of Minnesota owned by the testatrix. By the fifth paragraph testatrix gave to her daughter Mary E. Smith all of her diamonds and the sum of \$500; and to her grandson, Edward I. Smith, certain paintings and engravings. The sixth and seventh paragraphs were revoked by the codicils. The eighth paragraph gave to the daughter Margaretta Wetherill Wallace a real estate mortgage of \$5,000, and to the daughter Susan Douglas Edson real property known as No. 12 Clinton avenue, in the borough of Richmond, New York City. The ninth paragraph directed the executors to divide the rest and residue into two equal parts, with power to convert it into cash, one of which parts the tenth paragraph gave to her daughter, the appellant Susan D. Edson, and the other was disposed of in the following language: "Eleventh. I give, devise and bequeath unto my daughter, Margaretta Wetherill Wallace, if living, the other part of my residuary estate during the term of her natural life, with power to collect and apply the income therefrom for her own use to invest and reinvest the principal according to her judgment, in real estate or in any other investment except railroad securities and with further power to give, devise and bequeath upon her death by Last Will and Testament duly executed, to such of my heirs as she may prefer." A question presented to us is, Does the word "heirs" therein mean those who were the testatrix's legal or actual heirs, or those who are her descendants at the time the legatee exercises the power of appointment. The courts below have held that the legatee may effectively exercise the power of appointment for the benefit of any descendants of the testatrix.

The sixth paragraph of the will, revoked

by a codicil, gave to the executors \$5,000 in trust to establish a comfortable home for Marguerite Wetherill Buckwell, a granddaughter of testatrix. The first codicil revoked the sixth paragraph and gave the \$5,000 to the executors in trust, to purchase an annuity for the said granddaughter. The second codicil contained the provision: "Whereas circumstances may arise which may make the purchase of an annuity undesirable, it is my will that said sum of Five Thousand Dollars be paid to my said granddaughter Marguerite Wetherill Buckwell if she survive me, and I hereby give and bequeath such sum of Five Thousand Dollars to her, giving, however, my said executors power to apply said sum of Five Thousand Dollars to the purchase of an annuity in their discretion, for the benefit of my said granddaughter Marguerite in like manner as declared with respect to the proceeds of my property in Manhattan, Kansas, given my granddaughter Lillian." The granddaughter died April, 1907, leaving her surviving her daughter, Isabel Bingham Buckwell, her only heir at law and next of kin. The testatrix died, as stated, January 20, 1908. A question presented to us is, Did this legacy lapse because of the death of the legatee prior to that of the testatrix. The courts below have held that it did not lapse and become a part of the residuary estate, but vested in Isabel Bingham Buckwell.

First. May Margaretta Wetherill Wallace exercise the power of appointment, given by the eleventh paragraph, for the benefit of any descendants of the testatrix? The answer is dictated by the intention of the testatrix. If she intended to confine Mrs. Wallace, in the exercise of the power, to a selection from those of her sons and daughters, her actual heirs, who were living when Mrs. Wallace made her last will and testament, the answer must be in the negative. A testamentary intention declared in a lawful manner and having a legal purpose cannot be thwarted or nullified. When it is declared in plain and unambiguous language, the meaning of which is not made questionable by the context, it must be given effect. A doubt as to the intention must spring from the will itself. When the doubt exists, the intention must be sought through a scrutiny and study of the provisions of the will and a consideration of the relevant and competent facts and circumstances; and, while judicial rules of construction may be called in aid, they may not frustrate the intention. Neither rules of construction nor the technical sense of words can prevail against the superior force of intention, the ascertainment and declaration of which is the whole province and duty of the court.

At the outset, therefore, the inquiry arises as to whether there arises from the language within the entire will a legitimate doubt as to the intention of the testatrix when she used the word "heirs." The word has various meanings. It has the primary and cor-

rect meaning of designating those on whom the law, immediately on the death of an owner of real estate, casts the estate therein. Under that meaning it relates only to real estate, and describes the persons appointed by law to succeed to it in cases of intestacy. That meaning the courts will give it without question, unless there is in the will itself language or disposition which suggests that the purpose in the mind of the testator is not thereby fulfilled. It has, however, popular or colloquial meanings and with sensitive flexibility yields easily and quickly from its primary, legal meaning in favor of an inconsistent or opposing intention. Applied to the succession of personal estate, it means next of kin. *Tillman v. Davis*, 95 N. Y. 17, 47 Am. Rep. 1. It not infrequently designates children. *Heath v. Hewitt*, 127 N. Y. 166, 27 N. E. 959, 13 L. R. A. 46, 24 Am. St. Rep. 438; *Livingston v. Greene*, 52 N. Y. 118; *Scott v. Guernsey*, 48 N. Y. 106; *Thurber v. Chambers*, 66 N. Y. 42. Legatees and devisees have been designated by it. *Roland v. Miller*, 100 Pa. 47; *Matter of Hull*, 30 Misc. Rep. 281, 63 N. Y. Supp. 725; *Plummer v. Shepherd*, 94 Md. 466, 51 Atl. 173; *Clark v. Scott*, 67 Pa. 446; *Shapleigh v. Shapleigh*, 69 N. H. 577, 44 Atl. 107; *Greenwood v. Murray*, 28 Minn. 120, 9 N. W. 629. We have, as the intention expressed by the instruments required, given it the meaning of issue or descendants. *Matter of Cramer*, 170 N. Y. 271, 63 N. E. 279; *Snider v. Snider*, 160 N. Y. 151, 54 N. E. 676; *Johnson v. Brasington*, 156 N. Y. 181, 50 N. E. 859; *Taggart v. Murray*, 53 N. Y. 233; *Kiah v. Grenier*, 56 N. Y. 220.

Whenever it reasonably appears that words within a will were not used in their technical sense, but according to a vocabulary of the testator, they are to have the significance he designed for them if the nature of the estate which he meant to create is not prohibited by law. The provisions of the will under consideration indicate that the testatrix did not intend that the operative exercise of the power of appointment given Mrs. Wallace depended upon the survival beyond her life of one or more of her brothers or sisters. The disposition by the testatrix of the estate is inconsistent with that intention. She gave sparingly and cautiously to her children. While the value of the estate is not made known by the findings, a very substantial part of it at least passed into the rest, residue, and remainder, of which only one-half is given to a child, Mrs. Edson, who had a son, to whom she could give that which she had received. We may with reason and just cause believe that the testatrix did not intend to compel Mrs. Wallace to hand over or distribute her estate to those from whom she herself had withheld it. A careful reading of the provisions in favor of all the sons and daughters, except Mrs. Edson, is persuasive to the conclusion that she anxiously intended that an important part of her estate should not pass under the own-

ership, with its power to lose, spend, and squander, of her children, but should be preserved for the next generation at least. This conclusion is aided by the fact that she gave by the will to three of her grandchildren, viz., the son of Mrs. Smith and two married daughters of Charles. The findings of the referee establish the fact that Mrs. Wallace had no children, and that there are three other grandchildren, one of whom is the son of Mrs. Edson and two, Madelaine Diehl and Theodore Diehl, are the children of Charles. The will shows the testatrix desired that her property should be deemed a general provision for the family, and that as such the one-half should be dispensed within the family by Mrs. Wallace. Another fact points to the conclusion that the testatrix did not in the eleventh paragraph use the word "heirs" in its technical significance. Paragraph twelfth is: "Twelfth: Any real or personal property remaining undisposed of by this my Will, or to which my sons Thomas and Charles or either of them for any reason might otherwise as heir at law or next of kin become entitled, whether under the laws of the State of New York or any other State, shall vest in my said Executors in place of my said sons, and shall be converted by my said Executors into cash, and my Executors are instructed to use the same for the purchase of annuities for each of my said sons Thomas and Charles." The third and only additional use in the will of the word is in the thirteenth paragraph which forfeits the benefit or share of any of her "heirs" who shall legally dispute or contest any of the provisions of the will. The manifest purpose of the testatrix in the twelfth paragraph required that the status of Thomas and Charles against which she was providing should be accurately expressed. If she were in the eleventh or thirteenth paragraph designating only those of that identical status of heir at law or next of kin, she would have used the identical expressions. *Bundy v. Bundy*, 38 N. Y. 410, 422. It is probable rather than improbable from the thirteenth paragraph, considered by itself, that the testatrix intended the forfeiture therein prescribed to apply to all persons benefited by the will who might legally contest it. Inasmuch as the will raises a doubt as to the intention of the testatrix, and, for the reasons stated, fair grounds for holding that she intended that Mrs. Wallace should be free to select from the family the beneficiaries under her will, aid in reaching the correct conclusion may be sought in the established rules of construction. Such a rule is the courts will with alacrity and satisfaction lay hold of slight expressions as a ground for avoiding a construction or decision which excludes the issue of a deceased child from participation in a general family provision. *Matter of Paton*, 111 N. Y. 480, 18 N. E. 625. It is apparent from the will that the general purpose of the testatrix was

to include her grandchildren in the distributees of her estate, and, the will permitting, we reach the conclusion, in accord with that purpose, that Mrs. Wallace may, in fulfillment of the intention of the testatrix, exercise the power of appointment for the benefit of any descendants of the testatrix.

[4] Second. Did the legacy to Marguerite Wetherill Buckwell lapse by reason of her death prior to that of the testatrix? It is argued in the negative that the words "and I hereby give and bequeath such sum of Five Thousand Dollars to her" effect a gift or legacy, absolute, and unaffected by the preceding words of the paragraph, upon the principle that when two clauses in a will are irreconcilable, so that they cannot possibly stand together, the one which is posterior in position shall be considered as indicating a subsequent intention, and prevail, unless the general scope of the will leads to a contrary conclusion; and, as a second step in the argument, the statute (2 R. S. [2d Ed.] pt. 2, c. 6, tit. 1, § 52) providing that whenever a testator gives a legacy to a child who dies during the lifetime of the testator leaving a child who survives the testator, the legacy shall not lapse, but shall vest in the surviving child, is invoked. This position cannot be maintained. The language of the codicil clearly and plainly expresses the intention that the bequest should become effective only in case the legatee survived the testatrix. The words above quoted are not a clause or a bequest independent of the words immediately preceding them.

There are not within the principle invoked two disposing clauses. The paragraph is free from contradictory or inconsistent parts and constitutes one disposition. So clear is this that it is enunciation rather than construction to say that the testatrix fearing that the direction to the executors to pay, in case Mrs. Buckwell survived, was not a complete testamentary giving, added the words quoted which were inoperative unless the payment, depending upon the survivorship, was made. The five thousand dollars was not bequeathed to Mrs. Buckwell within the meaning of the statute (2 R. S., § 52) which, therefore, has no application. The courts below erred in holding that the legacy did not lapse.

As to the other questions presented, we concur in the conclusions of the Appellate Division.

That part of the interlocutory and final judgments adjudging that the legacy of \$5,000 bequeathed to Marguerite Wetherill Buckwell does not lapse and form a part of the residuary estate of Margaretta M. Diehl, but that said legacy vested in the surviving child of Marguerite Wetherill Buckwell, the defendant Isabel Bingham Buckwell, and that additional part of the final judgment adjudging that the plaintiffs pay to the

guardian of the person and property of the defendant Isabel Bingham Buckwell, after security given, the sum of \$4,500, together with the interest or income on the sum of \$5,000 from the 13th day of April, 1909, and that the plaintiffs pay to Frederick A. Drake, Esq., guardian ad litem for the infant defendant Isabel Bingham Buckwell, the sum of \$500 heretofore allowed to him as guardian ad litem out of the said Isabel Bingham Buckwell's share or portion of the estate should be reversed. In all other respects said judgments should be affirmed, with costs to the plaintiffs and to the respondent Lillian Purcell, to be paid out of the estate.

HAIGHT, VANN, WERNER, and HIS-
COCK, JJ., concur with CULLEN, C. J.
GRAY, J., concurs with COLLIN, J.

Judgment of Appellate Division and that of Special Term modified, first, so that, instead of declaring that the power of appointment given by the eleventh paragraph of the testator's will may be effectually exercised for the benefit of any issue or descendants of Margaretta M. Diehl, it be adjudged and declared that it may be exercised for the benefit of any of the heirs of said Margaretta M. Diehl, such heirs to be ascertained at the death of the donee of the power, Margaretta Wetherill Wallace; second, that, instead of adjudging that the legacy of \$5,000 bequeathed to Marguerite Wetherill Buckwell did not lapse, it be adjudged and declared that said legacy did lapse and fall into and become part of the residuary estate of Margaretta M. Diehl; and the direction that the legacy be paid to the guardian of the person and property of defendant Isabel Bingham Buckwell and Frederick A. Drake, guardian ad litem, is reversed; and, as modified, the said judgments are affirmed, with costs to all parties who have appeared and filed briefs in this court payable out of the estate.

(309 Mass. 9)

WELD v. CLARKE.

(Supreme Judicial Court of Massachusetts.
Middlesex. May 19, 1911.)

1. TAXATION (§ 788*)—SALE — TAX DEED—REGULARITY—PRESUMPTIONS—BURDEN OF PROOF.

A tax deed, with its recitals, affords no presumption of regularity; and the burden rests on the grantee to show affirmatively by extrinsic evidence that the statutory requirements have been followed.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 1555-1557, 1559-1569; Dec. Dig. § 788.*]

2. JUDGMENT (§ 685*) — CONCLUSIVENESS — PARTIES CONCLUDED — PERSONS NOT PARTIES.

Where a mortgagee brought an action to set aside tax deeds on the mortgaged land is-

sued subsequently to the execution of the mortgage, the fact that, if plaintiff obtained relief, it must have inured to the benefit of the owner of the legal title to the land was insufficient in itself to estop such owner by the judgment.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1208; Dec. Dig. § 685.*]

3. JUDGMENT (§ 685*) — CONCLUSIVENESS — PERSONS CONCLUDED — PERSONS NOT PARTIES.

Where a mortgagee brought an action to set aside tax deeds on the mortgaged land issued subsequently to the execution of the mortgage, that the facts and issues involved in such action were the same as those involved in a subsequent writ of entry brought by the owner to recover possession of the land was not determinative of the question whether such owner was bound by the judgment in the mortgagee's action.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1208; Dec. Dig. § 685.*]

4. JUDGMENT (§ 675*) — CONCLUSIVENESS — PERSONS CONCLUDED.

Where an owner of the legal title to land, while not joined as a party to proceedings by a mortgagee to test tax titles, acted in conjunction with the mortgagee as the real party in interest and as manager of the suits, he was bound by the decrees, and estopped from contesting the validity of the tax deeds therein sustained.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1190, 1191, 1194; Dec. Dig. § 675.*]

5. QUIETING TITLE (§ 38*) — DISCLAIMER — PERSONS CONCLUDED.

Where, in a writ of entry, it appeared that a former owner of the property brought a petition, under Rev. Laws, c. 182, §§ 1-5, authorizing actions to try adverse claims, against one W., who had previously conveyed to demandant, a disclaimer by W. did not estop demandant from claiming that a tax title involved was paramount to the tenant's estate.

[Ed. Note.—For other cases, see Quieting Title, Dec. Dig. § 38.*]

Exceptions from Land Court, Middlesex County.

Writ of entry by Ethel C. Weld against Nathan D. A. Clarke. Judgment for demandant, and defendant excepta. Exceptions overruled.

The opinion of Louis M. Clark, Associate Judge, in the land court, is as follows:

"This is a writ of entry filed February 11, 1909, to recover possession of a parcel of land in Medford. In 1897 the tenant was the owner of the record title to the demanded land, and for the purpose of raising money thereon, conveyed the same to one Scaplen, who conveyed the same in mortgage to the Massachusetts Title Company, and then reconveyed to the tenant. In 1902 and again in 1903 the land was sold for nonpayment of taxes for the years 1900 and 1901 respectively, and in each case the collector of taxes gave a deed of the land to the purchaser. Whatever title passed by said two tax deeds was conveyed to one Welsh prior to 1904, and by him released to the demandant as below set forth. In Feb-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

ruary, 1904, the tenant conveyed his equity of redemption to one Batchelder. In May and June of that year one Roberts, to whom said mortgage had been assigned, brought two bills in equity to remove the clouds on the title to the demanded land, caused by said two tax deeds, and on the 19th of June, 1906, these two deeds were held to be valid in the cases of *Roberts v. Welsh*, 192 Mass. 278, 78 N. E. 408. Meanwhile, in January, 1905, said Batchelder had conveyed the land to one Young, who, in January, 1907, conveyed the same to one Holt, who brought in the land court a petition against said Welsh, the then holder of the record title under said two tax deeds, to require said Welsh to try his title. Said petition was entered in said court on the 4th of February, 1907, and was dated the 21st of January, 1907, and said Holt on the 22d day of January, 1907, caused to be recorded at the registry of deeds a notice of the pendency of said action. Said Welsh, having by deed dated and acknowledged October 29, 1906, released the premises to this demandant, then a resident of Texas, filed a disclaimer in said action of Holt v. Welsh, and on the 11th of March, 1907, judgment was entered for him, said Welsh, with costs. Said release from Welsh to the demandant was recorded on the 31st of January, 1907, nine days after the aforesaid notice of his pendens. Since then conveyances have been made by Holt to Batchelder, by Batchelder to Holt, by Holt back to Batchelder, and again by Batchelder to the tenant, all prior to the bringing of this writ of entry.

"The tenant maintains, first, that as the demandant claims under said Welsh the disclaimer of said Welsh on the petition of Holt v. Welsh aforesaid is conclusive as to her, and that she cannot now have any interest in said land as against those claiming under said Holt. I find that the release from Welsh to this demandant was made for a valuable consideration, and that she was a bona fide purchaser for value without notice of any adverse claim, and I rule that the demandant is not bound by said disclaimer of Welsh.

"The tenant maintains, second, that the two tax deeds under which the demandant claims are invalid, and that the decisions in the two cases of *Roberts v. Welsh* above referred to are not conclusive as against him. As to this contention the tenant testified, and I find, that in all the proceedings in said actions of *Roberts v. Welsh* he, the tenant, acted as the attorney of said Roberts and as such attorney managed and controlled all the proceedings; that he paid the fees; that he never charged Roberts anything, because Roberts would charge over to him when he came to redeem; that the deed from Batchelder to Young in 1905 was made at the request and for the benefit of the

tenant; that there never was a time when a foreclosure of the mortgage or a sale for taxes would not have been an injury to him, except during the time that the title stood in Batchelder; that he had collected all the rents, controlled the property and made repairs thereon, and had never made any charge therefor; that he never paid over any of the rents to anybody, but that he accounted to Batchelder for some of them, and once had an adjustment with Batchelder, the nature of which was not described, probably in 1907.

"I also find that for a large part of the time, if not all of the time, that said two actions were pending, the tenant had an interest to be affected in the land which was the subject of said actions, and that he had a personal interest in the prosecution thereof.

"I rule that the two cases of *Roberts v. Welsh* which determined said two tax deeds to be valid are conclusive as to this tenant, and that he cannot now set up any title as against those claiming under said Welsh. *Elliott v. Hayden*, 104 Mass. 182; *Nash v. D'Arcy*, 183 Mass. 30, 66 N. E. 606; *Valentine v. Farnsworth*, 21 Pick. 176; *Lightcap v. Bradley*, 186 Ill. 510, 58 N. E. 221; *Freeman on Judgments*, § 174.

"Judgment for the demandant."

Joseph Bennett, for demandant. James C. Batchelder, for tenant.

BRALEY, J. The tenant, when the owner, conveyed the demanded premises in fee for the purpose of having the grantee mortgage the land, and after this had been effected, received back a conveyance of the equity of redemption. The taxes having fallen into arrears for two consecutive years, the collector made separate sales of the estate, which was purchased by one Welsh, who received and recorded the deeds. The mortgage having been assigned to one Roberts, he brought bills in equity to have the sales declared invalid for errors, and informalities in the assessments, and the collector's deeds. But the sales being held valid, the bills were dismissed, and Welsh then deeded the land to the demandant, whose title having been put in issue by the tenant's plea, depended upon the validity of the tax deeds. *Roberts v. Welsh*, 192 Mass. 278, 78 N. E. 408; *Green v. Kemp*, 13 Mass. 520, 7 Am. Dec. 169. [1] It was early decided that a tax deed, with its recitals, of itself affords no presumption of regularity, and the burden rested on her to show affirmatively by extrinsic evidence, that the requirements of the statute had been followed. *Alvord v. Collin*, 20 Pick. 418, 421; *Harrington v. Worcester*, 6 Allen, 576; *Burke v. Burke*, 170 Mass. 499, 49 N. E. 753. See St. 1911, c. 870. But no proof was offer-

ed, as the court ruled, that the tenant was estopped by the decrees. [2] It is insufficient, to create an estoppel, that if the plaintiff obtained relief, it must have inured to the tenant's benefit, or that in the present action the parties are interested in proving or disproving the same facts as were there involved. *Sturbridge v. Franklin*, 160 Mass. 149, 151, 35 N. E. 609. If the tenant, however, to establish or protect his own title, caused the suits in equity to be instituted in the name of Roberts, for their joint benefit, and directed and controlled the prosecution, he was the real party in interest, even if a stranger to the litigation upon the face of the record. *Valentine v. Farnsworth*, 21 Pick. 176; *Elliott v. Hayden*, 104 Mass. 180, 182; *Brigham v. Fayerweather*, 140 Mass. 411, 416, 5 N. E. 265. The judge found that he acted as counsel for the plaintiff, paid the costs, and gave his professional services, while retaining his beneficial interest in the equity of redemption, even if the legal title was in numerous persons to whom at various times he caused it to be conveyed. The judge also was satisfied that the tenant's title would be affected by the result. It is certain that if the tax titles were set aside, although the mortgage still would be an outstanding incumbrance, the equity of redemption also would be preserved. [3] The tenant under these findings is shown to have been substantially interested in the subject-matter of these suits, with full opportunity to control the proceedings, to examine witnesses, and to take and prosecute an appeal from the decrees of the trial court to this court. While not having been joined as a party to the proceedings, yet he acted in conjunction with Roberts, or as the real party in interest and as manager of the suits. The tenant therefore, having been bound by the decrees, is estopped from contesting the validity of the tax deeds. *Elliott v. Hayden*, 104 Mass.

180; *Nash v. D'Arcy*, 183 Mass. 80, 66 N. E. 606; *Cecil v. Cecil*, 19 Md. 72, 81 Am. Dec. 626; *Peterson v. Lothrop*, 84 Pa. 223; *American Bell Telephone Co. v. National Improved Telephone Co. (C. C.)* 27 Fed. 663.

[4, 5] It appeared, in the itinerary of the equity of redemption, that one Holt while the owner brought a petition under Rev. Laws, c. 182, §§ 1-5, against Welsh to require him to try his title, and caused notice of the pendency of the petition to be entered in the registry of deeds. But Welsh having previously conveyed to the demandant, who did not record the deed until after the notice had been filed, appeared and disclaimed the alleged ownership. It is contended by the tenant that the judgment on the disclaimer, in favor of Holt, vested the absolute title to the land in him, or, in other words, that Holt by the disclaimer became an innocent purchaser for value without notice of the prior conveyance. The tenant misconceives the purpose of the statute. It was not intended as a substitute for the remedies which may be used for the recovery of land. In *Orthodox Congregational Society v. Greenwich*, 145 Mass. 112, 113, 13 N. E. 380, 381, it was said by Chief Justice Morton of Pub. St. 1882, c. 176, where a similar provision is found: "The object of the proceedings is not to try the title to the real property; the court cannot make any decree unless the respondent makes default, which will operate as a conclusive adjudication of the title of either party." The disclaimer is to be treated as a pleading which did not operate to convey any new source of title to the petitioner, or estop the demandant from claiming that the tax title was paramount to the tenant's estate.

The third and fourth requests were properly refused, and the first, fifth, sixth and seventh were rendered inapplicable by the findings of the judge.

Exceptions overruled.

(309 Mass. 292)

RYAN v. BOSTON ELEVATED RY. CO.(Supreme Judicial Court of Massachusetts.
Suffolk. June 19, 1911.)**1. MASTER AND SERVANT (§§ 286, 289*)—ACTION FOR INJURIES—QUESTION FOR JURY.**

In an action for personal injuries, the defendant's negligence and the plaintiff's due care held, on the evidence, questions for the jury.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. §§ 286, 289.*]

2. MASTER AND SERVANT (§ 274*)—ACTION FOR INJURIES—ADMISSION OF EVIDENCE—CONTRIBUTORY NEGLIGENCE.

A question to the plaintiff, in an action against his employer for personal injuries, as to why he did not look before stepping upon the track, where he was injured, is competent.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 939-949; Dec. Dig. § 274.*]

3. APPEAL AND ERROR (§ 1056*)—HARMLESS ERROR—EXCLUSION OF EVIDENCE.

Where the probable answer of plaintiff to a question is such as may be inferred by the jury without an express statement from him, its exclusion is harmless.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4187-4193; Dec. Dig. § 1056.*]

Exceptions from Superior Court, Suffolk County; John F. Brown, Judge.

Action by John F. Ryan against the Boston Elevated Railway Company. To a directed verdict for defendant, plaintiff excepted. Exceptions sustained.

C. W. Bond and W. U. Friend, for plaintiff. R. A. Stewart and L. R. Chamberlin, for defendant.

KNOWLTON, C. J. The plaintiff was employed by the defendant as a conductor on its electric railway. Early in the morning of June 25, 1907, before the time for starting on his first trip, he had occasion to see one of his superior officers at the defendant's car barn near the Chestnut Hill reservoir. For that purpose, he was riding on an electric car on the outbound track towards Chestnut Hill, and as it approached the terminus of the railway near the car barn he stepped off the car while it was moving slowly, and started, by a well-worn path, which was used by the defendant's employes, across the inbound track, towards the car barn. While crossing this track he was struck by another of the defendant's cars and injured.

[1] There was evidence proper for the consideration of the jury tending to show negligence on the part of the defendant's servants in charge of this car.

The only difficult question in the case is whether there was evidence that the plaintiff was in the exercise of due care. It is not suggested that there was any lack of care in stepping from the car on which he was riding before it came to a stop. He saw the car that struck him as it was approaching at a speed of about two miles an hour not very far

away, and the contention is that he was negligent in not continuing to observe it or in not looking for it a second time before it struck him. On this part of the case the evidence was uncontradicted that between him and the place where he saw the car approaching there was what is called a "dead stop." It was also an undisputed fact that all passenger cars were accustomed to stop at this place, whether there were passengers to get on or off there or not. The plaintiff testified that, when he was receiving instructions as to his duties as conductor, he was told by his instructor that all cars stopped at this place called the "dead stop." He testified that in this respect he knew no difference between different kinds of cars. It appeared that the car that struck him was not a passenger car, but was used for collecting receipts or other similar purposes. The plaintiff testified that when he saw it he did not know what kind of a car it was, although he had an idea that it was not a passenger car. If this car had stopped at the "dead stop" and started again, it would not have reached the place where the plaintiff crossed until a considerable time after he had passed by. There was evidence that from 80 to 100 conductors and motormen were employed on this part of the railway, and from this and other testimony in the case the jury might have inferred that, even if the plaintiff had known that money cars did not stop at this point, the chances were not 1 in 100 that an approaching car was one of this kind. The jury might have found from the evidence that the plaintiff thought it certain when he saw the car approaching that it would stop before reaching the place where he crossed, and that there was no danger in crossing.

We are of opinion that it was a question of fact for the jury whether the plaintiff exercised such care as persons of ordinary prudence would be expected to exercise in relying upon his supposed knowledge that all cars approaching from the place where he saw the car that afterwards struck him would stop before reaching the place where he crossed.

[2, 3] The question put to the plaintiff as to why he did not look before stepping upon the track was competent, and the proposed testimony should have been admitted. *McCrohan v. Davison*, 187 Mass. 466, 73 N. E. 553; *Whitman v. Boston Elevated Railway*, 181 Mass. 138, 63 N. E. 334. Presumably he would have answered, stating his supposed knowledge that this car like all other cars would stop before reaching the place where he was about to cross. But the jury might infer this without an express statement from him. A majority of the court is of the opinion that the exceptions should be sustained.

So ordered.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

(208 Mass. 600)

BROWN v. HARRINGTON.(Supreme Judicial Court of Massachusetts.
Middlesex. May 18, 1911.)**1. LIBEL AND SLANDER (§ 16*)—WORDS ACTIONABLE AS CAUSING SPECIAL DAMAGE—EXPOSING A PERSON TO RIDICULE AND CONTEMPT.**

A newspaper publication, covering a whole page, which consisted of a cartoon labeled "City Farm," showing the emaciated inmates in attitudes of despair as a woman brought a tray containing a little food and teapot, with the words "Poor Food," "Rancid Butter," and "Shadow Tea" on the tray, together with a statement that Mayor B., the plaintiff, forced a humane board of charity out of office because it would not do his bidding, and that in the name of humanity he should be repudiated in to-morrow's election, is defamatory, tending to hold up the plaintiff to ridicule and contempt and seriously injure his reputation.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 1-9; Dec. Dig. § 16.*]

2. TRIAL (§ 253*)—INSTRUCTIONS—APPLICABILITY TO EVIDENCE.

The trial court need not give instructions on detached portions of the evidence.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 613-623; Dec. Dig. § 253.*]

Exceptions from Superior Court, Middlesex County; Jabez Fox, Judge.

Action by George H. Brown against John H. Harrington. From an order overruling a demurrer to the declaration, defendant appealed. There was a verdict for plaintiff, and defendant excepted. Order affirmed. Exceptions overruled.

J. Gilbert Hill, for plaintiff. F. W. & S. E. Qua, for defendant.

KNOWLTON, C. J. This is an action of tort for a libel published in a newspaper in Lowell. The questions before us arise on the defendant's appeal from an order overruling a demurrer to the declaration, and on exceptions to the refusal to order a verdict for the defendant at the close of the evidence, and a refusal to give certain instructions requested. The questions upon the appeal and the refusal to order a verdict for the defendant are substantially the same, and the questions upon the other requests are kindred in character.

[1] The publication was plainly defamatory. It covered an entire page of the newspaper and consisted of a cartoon or caricature labeled "City Farm" and showing inmates emaciated, in various attitudes of dejection and despair, some sitting at a dining table and others rising in disgust or protest as a woman approached bearing a tray containing a small amount of food and a teapot. Towards the tray hands point from the words, "Poor Food," "Rancid Butter," "Shadow Tea;" while just beside and behind the woman is depicted a large receptacle labeled, "Forty Gallons of Water to a Pound of Fifteen-Cent Tea." At the top of

the page above the picture were the words in very large type, "Saving on the city's poor is the meanest kind of economy;" while underneath, in a little smaller type, were the words, "It is no crime to be poor, but it is wrong to stint the poor and the unfortunate." Then followed this language in large print: "Mayor Brown forced a competent and humane board of charity out of office because it would not do his bidding, and he put in the present charity board, which has been cognizant of this outrage upon the poor and unfortunate inmates of our city farm. In the name of humanity and public decency, let us go to the polls to-morrow, like men, and repudiate the mayor who has been solely responsible for this blot upon the fair name of our city." The plaintiff was then the mayor of the city and was a candidate for re-election.

It needs no argument to show that this publication would have a tendency to hold the plaintiff up to ridicule and contempt, and to inflict a serious injury upon his reputation. It represented the mayor as officially and personally responsible for a great wrong upon the dependent poor of the city of Lowell, and for bringing the city into disrepute for a failure to support its paupers properly. The declaration contains sufficient averments of the publication of the libel, and it is plain that the demurrer was rightly overruled. The evidence tended to prove all the allegations of the declaration, and a verdict for the defendant could not have been directed without doing violence to the law.

[2] The defendant set up the truth as a justification, and relied upon his qualified privilege, founded on the fact that the plaintiff was a public officer and a candidate for re-election. The jury were given full and proper instructions covering both of these defenses. See *Com. v. Pratt*, 95 N. E. 105. The special requests for instructions relied upon need not be considered in detail. They selected different parts of the language of the publication from the rest of it and asked for an instruction as to each part, that if it was given a certain interpretation by the jury, a certain result would follow, which would leave the defendant without liability on account of it. Most, if not all, of these suggested interpretations were such as could not properly be given by the jury. Moreover, the judge was not called upon to select certain portions of the evidence bearing upon a certain charge, and to give instructions as to the effect of each portion taken by itself alone. *Hicks v. New York, New Haven & Hartford Railroad Company*, 164 Mass. 424, 41 N. E. 721, 49 Am. St. Rep. 471.

Order affirmed.

Exceptions overruled.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

(34 Oh. St. 32)

LAMPRECHT v. STATE.

(Supreme Court of Ohio. March 28, 1911.)

*(Syllabus by the Court.)***1. BROKERS (§§ 21, 26, 35, 77*)—PURCHASES OF STOCK—TITLE—DELIVERY—CONVERSION.**

Where a broker buys stock on the exchange upon the order of a customer, the latter is the owner of the stock from the time of the purchase, whether purchased in his name or not, and he has the right to the possession thereof on demand, subject to payment to the broker for advances, if any, and commissions, as to which the customer is the debtor of the broker; in other words, the legal relation of the customer and broker is that of pledgor and pledgee. Upon such demand, the broker need not deliver the identical stock purchased for the customer, but it is sufficient to deliver the same number of shares of the same kind and value, and a failure to do so on demand may amount to a conversion of the stock and under some circumstances to a fraudulent conversion.

[Ed. Note.—For other cases, see *Brokers*, Cent. Dig. §§ 20, 27, 98; Dec. Dig. §§ 21, 26, 35, 77.*]

2. BROKERS (§§ 35, 38*)—PURCHASE OF STOCKS—“SHORT SALE”—CONVERSION.

A sale of stock “short” by a broker on his own account does not per se imply a conversion or use by the broker of stock previously purchased for a customer, or held in trust for the latter, because a sale short means a sale of that which the vendor does not possess at the time, but which he expects to acquire subsequently for delivery at a lower price.

[Ed. Note.—For other cases, see *Brokers*, Dec. Dig. §§ 35, 38.*]

For other definitions, see *Words and Phrases*, vol. 7, p. 6497.]

3. BROKERS (§§ 35, 38*)—SHORT SALES.

When a memorandum kept by a broker for the purpose of showing the transactions in a particular stock and the balance long or short on a given date shows a sale short by the broker of a number of shares less than the balance long on that date, and more than the number of shares bought for a customer, which have not been delivered to him, it is not a proper inference from such memorandum, when not supported by other evidence, that such shares of the customer were converted or sold; but from the nature of a sale short the presumption would be that such sale did not include a sale of the customer's stock, and therefore such memorandum does not in itself prove or imply a fraudulent conversion.

[Ed. Note.—For other cases, see *Brokers*, Dec. Dig. §§ 35, 38.*]

4. EMBEZZLEMENT (§ 14*)—CHECK—WHAT CONSTITUTES.

When a customer orders his broker to buy for him certain stock, to be actually delivered to him and to be paid for at a future date, and the broker complies with the order and notice thereof, together with the amount advanced, and commission is given to the customer, and the cost thereof is charged to the account of the broker, leaving a large balance in the broker's favor, the customer is the owner of the stock so purchased and is the debtor of the broker for the amount advanced and the commission; and when the customer subsequently pays such demand against him by a check on his banker, which is accepted by the broker, deposited in a bank where the account of the broker was overdrawn, and the check was afterwards paid, and the broker promises to deliver the stock later, which was never done, and the broker failed and made an assignment for the

benefit of creditors, such facts do not constitute an embezzlement of the check.

[Ed. Note.—For other cases, see *Embezzlement*, Dec. Dig. § 14.*]

5. INSTRUCTIONS—DEFENSES.

In this case it was error for the court of common pleas to charge the jury, as it did, as follows: “It is immaterial in this case what Ellsworth's redress or rights may be as against Laidlaw & Co., the correspondents of George O. Lamprecht in New York—it is a question here as to the guilt or innocence of this defendant—whether or not this evidence proves to your satisfaction beyond a reasonable doubt that he is guilty, that is the question.”

Error to Circuit Court, Cuyahoga County.

George O. Lamprecht was convicted of embezzlement, and he brings error. Reversed.

Westenhaver, Boyd, Rudolph & Brooks, Blandin, Rice & Ginn, and Harrison B. McGraw, for plaintiff in error. John A. Cline, Pros. Atty., and W. D. Meals, Asst. Pros. Atty., for the State.

DAVIS, J. The plaintiff in error was indicted upon five counts, viz., the first count charged him with larceny of a certain check for \$2,932.50, the second count charged him with embezzlement of a certain certificate of stock for 60 shares of the stock of the Toledo, St. Louis & Western Railroad Company, the third count charged him with embezzlement of the check described in the first count, the fourth count charged him with embezzlement of money, the proceeds of the check mentioned and described in the first and third counts, and the fifth count charges him with obtaining the check aforesaid by false pretenses. The jury found him guilty under the third count and not guilty as charged in the first, second, fourth, and fifth counts.

The following are undisputed facts which led to this indictment and trial: The plaintiff in error was the junior partner of the firm of Lamprecht Bros. & Co., who were brokers in Cleveland, dealing in bonds and stocks and having a branch office in Youngstown. In this case, at least, they transacted business on the stock exchange in New York through Laidlaw & Co., a firm of brokers. On the 9th day of January, 1909, one Ralph H. Ellsworth left an order at the Youngstown office of Lamprecht Bros. & Co. to buy for him 60 shares of Toledo, St. Louis & Western Railroad Company's common stock, at a stipulated price, the certificate to be made out in name of Ellsworth and be delivered to him. Ellsworth paid no money on the stock at that time, but stated, which he afterwards confirmed by letter, that he would be at the office of Lamprecht Bros. & Co. in Cleveland on Saturday, the 16th of January, and pay for the same. Ellsworth's order to buy was telegraphed to Laidlaw & Co. in New York on same day it was given, January 9th, and it was executed in New York by Laidlaw & Co. on Monday, January 11th,

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

and notice given to Lamprecht Bros. & Co. in Cleveland by telegraph. On the following day, January 12th, Lamprecht Bros. & Co. received a letter from Laidlaw & Co., stating that the stock had been purchased as ordered and that the amount of the purchase, together with commission, in the aggregate \$2,982.50, they (Laidlaw & Co.) had charged to the account of Lamprecht Bros. & Co. On that date the books of both Laidlaw & Co. and Lamprecht Bros. & Co. agreed in showing a credit balance in favor of Lamprecht Bros. & Co. of \$23,491.04 after the said purchase and commission had been charged to the account of Lamprecht Bros. & Co. Following all this, on January 16th, Ellsworth appeared at the office of Lamprecht Bros. & Co. and presented to the cashier the bill for purchase of the stock and commission, \$2,982.50, together with his check therefor. This is the check which the plaintiff in error is charged with embezzling. The cashier stamped the bill "Paid," and, having written upon it the words "Stock to follow," gave it back to Ellsworth, retaining the check. The check was on the same day deposited with others, in the usual course of business, in the Union National Bank of Cleveland, by employes of Lamprecht Bros. & Co. and in the name of that firm. The check was afterwards paid at the bank on which it was drawn. The certificate for the 60 shares of stock so ordered by Ellsworth and so purchased for him by Lamprecht Bros. & Co. was never forwarded by Laidlaw & Co., and it was never in the state of Ohio, so far as appears. Lamprecht Bros. & Co. made an assignment for the benefit of their creditors, February 9, 1909.

Upon the trial of the case, after all the evidence offered and given by either party had been submitted to the jury, and before argument, the defendant, plaintiff in error here, asked the court to charge the jury in writing, before argument, the following separate propositions, with others, viz.: "There is no evidence in this case showing or tending to show the defendant guilty of the charge of embezzlement, as charged in the third count of the indictment, and I therefore direct you to return a verdict of not guilty as to said count." The court refused to so instruct the jury before argument, and afterwards, although again requested to do so, the court again refused to so instruct the jury in the general charge. Thereby the question is brought upon the record whether there is sufficient evidence to warrant a conviction for crime as charged.

[1] It is manifest that at the time when Ellsworth tendered his check to the cashier of Lamprecht Bros. & Co. the order for the purchase of the stock, which he had given just one week before, had been fully carried out, except as to the delivery of the stock, and in that particular it remains unexecuted to this day. What were the legal relations

and rights of the parties at that time? Ellsworth had paid nothing, not even a margin, on the purchase. Nevertheless he had such a property right in the stock, whether it had been bought in his name or not, that he could claim it as his own, subject to the lien of the brokers for advances and commissions; for, as it is said upon good authority in 26 Am. & Eng. Ency. of Law (2d Ed.) 1057: "The client is the owner of the stock purchased on margin from the time of the purchase, and is entitled to its possession at any time upon demand and payment of the broker's commissions and the balance due thereon." Now if this is the law when the broker advances only 90 per cent. of the purchase price when he fills a customer's order, no valid reason appears to us why it should not be the law when, upon the request of a customer, the broker buys the stock for the latter and advances all of the purchase money. "The ordinary margin paid on opening an account with a broker—that is, in ordering him to buy or sell securities—is 10 per cent. The margin may be less than this, or frequently none is advanced, according to the confidence which the broker has in the ability of the client to respond to ultimate loss. But whether the broker advance all or only the principal portion of the sum invested in the securities, the relation of the parties is unchanged. The fact exists that the broker looks to the principal for an indemnity upon the entire transaction. * * *

Upon the whole, while it must be conceded that there are apparently some incongruous features in the relation, there seems to be neither difficulty nor hardship in holding that a stock broker is a pledgee; for, although it is true that he may advance all or the greater part of the money embraced in the speculation, if he acts honestly, faithfully, and prudently, the entire risk is upon the client, and may be enforced against him as a personal liability, irrespective of the value of the securities which are the subject of transaction. To introduce a different rule would give opportunities for sharp practices and frauds, which the law should not invite." 1 Dos Passos on Stock Brokers & Stock Exchanges (2d Ed.) 182, 196.

"The broker acts in a threefold relation: First, in purchasing the stock he is an agent; then, in advancing money for the purchase, he becomes a creditor; and, finally, in holding the stock to secure the advances made, he becomes a pledgee of it. It does not matter that the actual possession of the stock was never in the customer. The form of a delivery of the stock to the customer, and a redelivery by him to the broker, would have constituted a strict, formal pledge. But this delivery and redelivery would leave the parties in precisely the same situation they are in when, waiving this formality, the broker retains the certificates as security for the advance. The contract is in spirit and effect,

if not technically and in form, a contract of pledge, and is governed by the law of pledges." Jones on Pledges (2d Ed.) § 496.

[4] It is expressly decided by the New York Court of Appeals, in *Content v. Banner*, 184 N. Y. 121, 76 N. E. 913, that when a stockbroker buys securities for a customer, although he advances the whole amount necessary for the purchase, instead of requiring a margin, the relation of pledgee and pledgor exists between the parties. So that, when Ellsworth presented Lamprecht's bill, or statement of account, to their cashier together with his check for a corresponding amount, he was not putting up a margin for a future deal, nor putting money into their hands upon a specific trust. Lamprecht Bros. & Co. had paid the whole amount of the purchase and the commission, and held the right to the stock in the hands of Laidlaw & Co., subject to the payment of their lien for the amount advanced. From the moment that Ellsworth's check was accepted and the bill receipted, the stock became absolutely his very own, and subject to his right to possess and control whether it should be found in the possession of Lamprecht Bros. & Co. or Laidlaw & Co. He had received a full and valuable consideration for the check and the same had become the lawful property of Lamprecht Bros. & Co. and was not, and could not be, the subject of embezzlement. This view of the legal relations of the parties to this transaction seems to us to be satisfactorily sustained by *Richardson v. Shaw*, 209 U. S. 365, 28 Sup. Ct. 512, 52 L. Ed. 835, and note thereon; 14 Am. & Eng. Ann. Cas. 986; *Markham v. Jaudon*, 41 N. Y. 235; *Le Marchant v. Moore*, 150 N. Y. 209, 44 N. E. 770; and *Schaefer v. Dickinson*, 141 Ill. App. 234.

By a parity of reasoning from the same facts, the plaintiff in error could not have been properly convicted on any of the counts in this indictment, unless it should be on the second count which charges the embezzlement of the stock itself, and as to this two answers are sufficient for our present purpose. First, it does not appear that the stock purchased for Ellsworth was ever in the possession of Lamprecht Bros. & Co., or that it was ever in this state. Second, assuming that it appears, or can be made to appear, that the plaintiff in error unlawfully converted the stock to his own use, that does not necessarily mean that he *fraudulently* so converted it, within the meaning of the statute. *State v. Cunningham*, 154 Mo. 162, 55 S. W. 282. Further on we shall discuss the evidence upon this subject somewhat.

It seems, therefore, that there is, and can be, no sufficient answer to the conclusions above, unless the contention is sound, on part of the state, that after the shares of stock were bought and paid for by Lamprecht Bros. & Co. the same shares were subsequent-

and prior to January 16th, when Ells-

worth gave his check, sold by Lamprecht Bros. & Co. Of course, and we say "of course" because the law is well settled on that point, the identical 60 shares of stock purchased for Ellsworth need not be kept on hand to be delivered to him. It is sufficient if 60 shares of stock of the same kind and value be delivered on demand, and a failure to so deliver on demand may amount to an unlawful, and under some circumstances to a fraudulent, conversion of the stock. But it must not be overlooked that the plaintiff in error was found not guilty of embezzling the stock, and it does not yet appear that the failure of Laidlaw & Co. or Lamprecht Bros. & Co. to deliver the stock on demand by Ellsworth would constitute embezzlement of the check given by Ellsworth to pay, in legal effect, what he owed for the stock. It may have been that the fault of nondelivery was not in Lamprecht Bros. & Co., but in Laidlaw & Co.; or it may have been that Laidlaw & Co., if Ellsworth had pursued his remedies against them, may have made delivery or responded in damages.

[5] And just here, it may be remarked, the court erred in refusing, both before and after argument, to charge the jury as requested upon this subject, and in charging the jury as follows: "It is immaterial in this case what Ellsworth's redress or rights may be as against Laidlaw & Co., the correspondents of George O. Lamprecht in New York—it is a question here as to the guilt or innocence of this defendant—whether or not this evidence proves to your satisfaction beyond a reasonable doubt that he is guilty, that is the question."

But let us see what there is in the contention by the prosecution that Lamprecht had sold the stock without Ellsworth's knowledge or consent after it was bought and paid for by Lamprecht, and before Ellsworth gave his check. This is the substance of the argument of the attorneys for the state: "Suppose that, without Ellsworth's knowledge, and while the stock was in the hands of Laidlaw & Co., Lamprecht ordered Laidlaw & Co. to sell the same, which Laidlaw & Co. did; and then suppose that on the 16th day of January, after Ellsworth's stock had been sold, without his consent, Lamprecht accepted his check, and appropriated it to his own use, what then was the legal relation existing between Lamprecht and Ellsworth? If Lamprecht, on the 14th of January, sold Ellsworth's stock, he could not under the circumstances thereafter maintain an action against Ellsworth for the purchase price, for he had not only violated his trust, but had sold the stock without lawful justification, and besides had reimbursed himself; nor could Ellsworth have maintained an action against Laidlaw & Co., for under the circumstances they were justified in selling the stock on Lamprecht's order; an agent having apparent authority. The title to the

stock, upon being sold by Laidlaw & Co., became vested in the purchaser thereof, and Ellsworth lost the title thereto, notwithstanding he had had it at one time, so that on January 16th the title to the stock was not vested in Ellsworth, nor was Ellsworth indebted to Lamprecht for the purchase price thereof. We fail to perceive in these circumstances the relation of debtor and creditor. Notwithstanding he had sold Ellsworth's stock and concealed that fact from him, and that Ellsworth was not indebted to him, Lamprecht accepted Ellsworth's check and deposited it to his own account in the Union National Bank of Cleveland, on the 16th of January, 1909. On the day preceding its deposit, January 15th, Lamprecht was overdrawn in this bank in the sum of \$5,177.51. On the next business day, January 18th, this overdraft had been reduced to \$2,889.38. Lamprecht had used Ellsworth's check in reducing it. This, we think, was the embezzlement of the check."

[3] Without discussing the soundness of this argument, let us see what the record shows about this hypothesis that Lamprecht had the stock sold on January 14th without Ellsworth's knowledge or consent. If that is not true, then the whole case of the state fails. The only evidence upon this subject is what appears in the record as "State's Exhibit D." This is a card memorandum showing the transactions of Lamprecht Bros. & Co. in that particular stock. Similar and separate memoranda were kept of transactions in other stocks. It was kept and made out by one of the witnesses for the state, and it showed from day to day the balances of that stock "long" or "short." It does not purport to contain any account with Ellsworth or any other customer. All that it does of itself show is that the firm bought, January 11, 1909, 60 shares of Toledo, St. Louis & Western, balance "long" 60 shares. January 13th, bought 100 shares same, balance "long" 160 shares. January 14th, sold 150 shares, balance "long" 10 shares. January 16th, sold 100 shares, balance "short" 90 shares. January 18th, bought 100 shares, balance "long" 10 shares. February 9th, sold 10 shares, balance 0.

Now does this exhibit show beyond a reasonable doubt—and it must be with that degree of certainty to convict—that Lamprecht sold Ellsworth's 60 shares of stock? Surely not. An examination of the record discloses the fact that, for some unexplained reason, Laidlaw & Co. had not, at any date named on that card, delivered to Lamprecht Bros. & Co. the 60 shares bought for Ellsworth, and that in fact it has never been delivered by Laidlaw & Co. Therefore it could not be presumed from this card, without other evidence to that effect, that the 60 shares of Ellsworth stock, which was not bought on margin, but was purchased outright for ac-

tual delivery, was included in any subsequent sale.

[2] Moreover it clearly appears from the testimony that the sale of 150 shares of this stock, on January 14th, was what is technically known as a "short" sale for account of Lamprecht Bros. & Co. Now "a sale short means a sale of that which the seller has not, but which he expects to buy in at a lower price than that for which he sells." 25 Am. & Eng. Ency. Law (2d Ed.) 1061, citing *Appleman v. Fisher*, 34 Md. 549; *Baldwin v. Flagg*, 38 N. J. Eq. 57; *White v. Smith*, 54 N. Y. 522; *Knowlton v. Fitch*, 52 N. Y. 288; *Hess v. Rau*, 95 N. Y. 359; *Maxton v. Gheen*, 75 Pa. 168. "A sale of stock 'short' means a sale of stock which the seller does not at the time possess, but which, by the future date or time agreed upon for delivery to the customer under the terms of the contract, the seller must in some way acquire for the purpose of such delivery." 26 Am. & Eng. Ency. Law (2d Ed.) 1060.

So far, therefore, from proving or even justifying an inference that Ellsworth's stock was ordered sold by Lamprecht, as assumed by the prosecution, this memorandum card, when considered along with the other testimony in the case, not only fails to show that the stock was sold by Lamprecht and appropriated to his own use, but it does conclusively show that the sale, on January 14th, was an independent and lawful transaction on account of Lamprecht Bros. & Co.; and, since this was a sale of stock "short," the presumption would be that the sale did not include Ellsworth's stock, nor the stock of any other person held in trust by Lamprecht Bros. & Co., because a short sale means a sale of stock which the vendor has not in his possession or under his control, as shown above—a presumption the exact opposite of that indulged on the trial. Therefore the evidential value of the card was totally misconceived by the courts below and by the jury.

Proceeding upon the assumption that Lamprecht had ordered to be sold the stock bought for Ellsworth, counsel for the state insist that Lamprecht knew that Ellsworth was not indebted to him, and was not paying a debt, yet he took his check and used it to meet his own obligations. We have not discovered in the record any evidence that Lamprecht had any actual or personal knowledge of this transaction before January 16th, when the check was delivered. There is a conflict in the evidence as to his knowledge on that date and several later dates. Ellsworth testifies that he asked Lamprecht on January 16th whether he required the check to be certified, and he replied that it was not necessary, etc., and further that he talked with Lamprecht about the delivery of the stock at several times thereafter. Lamprecht testifies in the most positive manner that no conversation between him and Ellsworth oc-

curring on January 16th, except perhaps to pass the time of day; that he did not know then that Ellsworth had bought or ordered any stock; that he never saw the check until it was produced on the trial; that he never sold the stock which had been bought for Ellsworth, nor directed any other person to sell it; that he never knew that it was sold, and never had an intention of selling it. So far as Lamprecht's testimony relates to the alleged sale of the Ellsworth stock, it is not contradicted by anything in the record, save the inference which has been drawn from the memorandum card, Exhibit D, and which, for the reasons already stated, appears to us to be altogether unwarranted.

It has been intimated in the brief for the state that such a view of this case as we entertain is purely technical and tends to defeat justice. The soundness or the justice of our conclusions must be determined by calm and enlightened judgment; but we nevertheless adhere to the humane precept of the law that a person who is accused of crime is presumed to be innocent until proven to be guilty. It must be conceded that there is cause for irritation here. Ellsworth paid his money and has never got that which he bought, but that is not sufficient to convict of the crime of embezzlement. Probably in all time there has not been an extensive bank failure without an accompaniment of wrong and hardship, disappointment and bitterness, and a clamor for vengeance. The charge of embezzlement is easily and frequently made under such circumstances, and, although the charge is sometimes difficult of proof, it is still necessary that the scales of justice be held to an even balance, not forgetting the ancient and merciful rule of the common law that it is better that ninety and nine guilty ones should go unpunished, than that one innocent person should suffer.

The conclusion at which we have arrived renders it unnecessary for us to consider any of the other assignments of error. Upon the whole record we are of the opinion that there is not sufficient evidence to sustain a conviction upon the charge that George O. Lamprecht unlawfully and fraudulently embezzled and converted to his own use the check aforesaid, and that the court of common pleas erred in refusing to so direct the jury. I am authorized to say that, in the opinion of the CHIEF JUSTICE and of Judge SHAUCK and myself, the foregoing considerations would lead to a final judgment and a discharge of the prisoner. The other concurring Judges, however, are of the opinion that the case should be remanded to the court of common pleas for further proceedings, and therefore the judgment of the circuit court and that of the court of common pleas are reversed, and the cause remanded.

Reversed.

SPEAR, C. J., and SHAUCK, PRICE, and JOHNSON, JJ., concur. DONAHUE, J., not participating, having sat in the circuit court.

(84 Oh. St. 165)

POWELL v. STATE ex rel. FOWLER.

(Supreme Court of Ohio. May 9, 1911.)

(Syllabus by the Court.)

1. BASTARDS (§ 3*)—EVIDENCE—PRESUMPTION OF LEGITIMACY.

Every child begotten in lawful wedlock is presumed in law to be legitimate.

[Ed. Note.—For other cases, see Bastards, Cent. Dig. §§ 4, 5; Dec. Dig. § 3.*]

2. BASTARDS (§ 6*)—EVIDENCE—SUFFICIENCY.

Before such child can be adjudged a bastard, the proof must be clear, certain, and conclusive, either that the husband had no powers of procreation, or the circumstances were such as to render it impossible that he could be the father of the child.

[Ed. Note.—For other cases, see Bastards, Cent. Dig. §§ 9, 10; Dec. Dig. § 6.*]

(Additional Syllabus by Editorial Staff.)

3. BASTARDS (§ 20*)—WHO ARE LEGITIMATE—CONSTRUCTION OF STATUTE.

In Rev. St. § 5614 (Gen. Code, § 12110), providing that, when an unmarried woman who has been delivered or is pregnant with a bastard child makes complaint thereof in writing under oath before any justice of the peace charging a person with being the father of the child, the justice shall issue his warrant for the arrest of the person so charged, the common-law definition of the word "bastard," namely, one that is begotten and born out of lawful matrimony, must be given the word in the statute.

[Ed. Note.—For other cases, see Bastards, Cent. Dig. §§ 36-38; Dec. Dig. § 20.*]

For other definitions, see Words and Phrases, vol. 1, pp. 717, 718; vol. 3, p. 7538.]

Error to Circuit Court, Franklin County.

Action by the State, on relation of Mollie Fowler, against John V. Powell. Judgment for relator before the common pleas was affirmed in the circuit court, and defendant brings error. Reversed.

Mollie Fowler was married to Karl Koch on the 8th day of March, 1898, and was divorced from him on the 15th day of September, 1904. No entry of the decree of divorce was put upon the records of the court until some two years later, when a decree nunc pro tunc was entered. Some time later she married a man named Jaycox, but the evidence does not disclose the date of this marriage. On the 7th day of January, 1907, she filed with a justice of the peace an affidavit in which she stated that she was then an unmarried woman, a resident of Montgomery township, Franklin county, Ohio, that on the 12th day of January, 1905, she was delivered of a bastard child, and that John V. Powell was the father of such child. In her examination before the magistrate on the hearing of said charge she testified that she was an unmarried woman. On cross-examination she tes-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

tified that she was married to Karl W. Koch on the 7th day of March, 1898; that she was divorced from him, but did not give the date of the divorce; that she had separated from him on the 22d day of February, 1904; that she saw him last on the 21st day of July, 1904, and that her child was born on the 12th of January, 1905. On the trial of the case in the common pleas court she testified that she had separated from her husband several times before this final separation, and during each of these separations she sustained illicit relations with the defendant Powell, and then would return to her husband for short intervals and again leave him and renew her adulterous relations with Powell; that the final separation occurred on the 22d of February, 1904, after which time she continued to live with Powell pending her proceedings for divorce from her husband; that she became pregnant on the 3d day of April, 1904; and that the defendant, John V. Powell, was the father of her child, and she denies that she ever had any sexual relation with her husband after the final separation. It appears from the evidence that Karl Koch resided in Columbus at least up until July 21, 1904. There is some evidence tending to show that he did leave Columbus shortly after that date, but that is not clear. Her evidence is corroborated as to the fact that Powell called upon her at the different places where she was living after her separation from her husband, but she is wholly uncorroborated as to whether or not she had sexual relation with her husband after February 22, 1904. It was admitted that two witnesses who were offered by the defense would testify that she had told them that her husband was the father of this child. Another witness did testify that she asked her if she did not think the child resembled its father, Karl Koch. This affidavit in bastardy was not filed until about two years after the birth of the child and about the time she received information that the defendant Powell was to be married to another woman.

The jury returned a verdict finding the defendant guilty, a motion for new trial was overruled, and the defendant was adjudged the putative father of the relator's child, and adjudged to stand charged with the maintenance of the child in a sum fixed by the court, payable at certain intervals. The circuit court affirmed this judgment of the common pleas court, and this proceeding in error is prosecuted to reverse the judgment of both courts.

Claude L. Brewer, for plaintiff in error.
Fred S. Hatch and James A. Miles, for defendant in error.

DONAHUE, J. (after stating the facts as above). [§] Section 5614, Revised Statutes (section 12110, General Code), provides that, when an unmarried woman who has

been delivered or is pregnant with a bastard child makes complaint thereof in writing under oath before any justice of the peace charging a person with being the father of such child, the justice shall issue his warrant for the arrest of the person so charged. The statute uses the word "bastard," but does not define it. Therefore the common-law definition of bastard is the proper meaning to be given to that word as used in this statute. The common-law definition of bastard is one that is begotten and born out of lawful matrimony. 1 Blackstone Commentaries, 454; 2 Kent, 208.

[1] This definition is now subject to some modification, but a strong presumption always obtains that a child either born in lawful wedlock, or within the competent time after its termination, is legitimate, and before it can be found to be a bastard the proof must be clear and convincing.

[2] In England unless the husband was shown to be beyond seas during all the period in which it was possible for the wife to become pregnant and be delivered of a child, or unless it could be shown beyond question that the husband had no power of procreation, this presumption was so absolute that the doctrine of *filiatio non potest probari* applied, and no proofs would be received to dispute the legitimacy of the child. This doctrine has practically been adopted in the United States with the modification that if the child is born under such circumstances that render it impossible that the husband of its mother can be its father, then the child may be adjudged a bastard. *Van Aernam v. Van Aernam*, 1 Barb. Ch. (N. Y.) 375; *Dennison v. Page*, 29 Pa. 420, 72 Am. Dec. 644; *Watts et al. v. Owens*, 62 Wis. 512, 22 N. W. 720. But such impossibility must be proven beyond a reasonable doubt. *Stegall v. Stegall's Adm'r*, 2 Brock. 256, Fed. Cas. No. 13351; *Cross v. Cross*, 3 Paige Ch. (N. Y.) 139, 23 Am. Dec. 778; *Wright v. Hicks*, 15 Ga. 160, 60 Am. Dec. 687; *State v. Herman*, 35 N. C. 502.

The question, therefore, to be presented to the jury in a case of this character is not whether the mother of the child and her husband did or did not have sexual intercourse at or about the time the wife became pregnant, but whether under the circumstances proven such acts of intercourse were possible. In other words, such circumstances must be shown by the evidence as would render it impossible that the husband of this woman could be the father of her child.

The evidence offered in this case as shown by the record falls far short of proof of all the requisite facts to authorize a jury or court to find therefrom that a child begotten in lawful wedlock is a bastard. The only evidence tending in that direction is the testimony of the mother that she had no sexual intercourse with her husband from and after the 22d of February, 1904, a pe-

riod of 324 days before the birth of the child, and she is not corroborated except perhaps as to her illicit relations with Powell, but proof of the adultery of the wife is not sufficient to show the child is a bastard. She is contradicted in two or three important particulars. True, some of these witnesses were not called to testify, but she admitted in open court that, if they were called, they would testify that she had said to them that her husband was the father of the child, and that its blindness resulted from the fact that its father, her former husband, was suffering with a venereal disease. Aside from this, it is clearly in evidence that this woman falsely testified in her divorce case, or at least deceived the court and obtained a divorce by fraud, for, according to her evidence now, she was then, and for many months prior to the time of the granting of the divorce, cohabiting in a state of adultery. She now seems willing to add to her own infamy, and further wrong her child, either for the purpose of securing a few dollars from the defendant, or reeking her revenge upon him for failure to marry her. But if her evidence should be taken as proving beyond a reasonable doubt all the matters and things to which she testifies, even then her evidence fails to meet the measure of the law. Public policy requires that the status of a child born or begotten in lawful wedlock should be fixed and certain, and the immediate exigencies or even the apparent justice of any particular case will not justify a departure from the rule so necessary and salutary to the best interests of society. The law is not willing that a child shall be declared a bastard to suit the whims or purposes of either parent, nor upon evidence merely that no actual act of intercourse occurred between husband and wife at or about the time the wife became pregnant. The proof must be such as to show the impossibility of access, and this evidence not only fails to prove that, but, on the contrary, it does show that access was a physical possibility at all the time from the date that she claims there was a final separation up until the time the divorce was granted, or at least up until the 21st day of July, after which time there is some proof, very vague and uncertain, however, that he was in distant parts. The common pleas court charged the jury, among other things, that there is a strong presumption that the husband is the father of a child begotten during the marriage; that the presumption is not conclusive, and may be overcome by evidence where it is shown to the jury that the husband could not possibly have had any intercourse with his wife. The charge of the court in this respect was right. The only criticism is that from the whole paragraph the jury might have understood that the presumption could be overcome by her testimony that she

had not had sexual intercourse with her husband from the 22d of February of that year. However that may be, it is evident that the jury either did not understand the charge as given, or did not apply it to the proofs offered, for there is practically no evidence in this record rebutting the presumption of law that her then husband is the father of this child.

Judgment of the common pleas court and of the circuit court is reversed and cause remanded for further proceedings according to law.

Reversed.

SPEAR, C. J., and DAVIS, SHAUCK, and JOHNSON, JJ., concur.

(84 Oh. St. 177)

STATE v. VAN GUNTEN.

(Supreme Court of Ohio. May 9, 1911.)

(Syllabus by the Court.)

FALSE PRETENSES (§ 37*)—INDICTMENT.

An indictment under section 7075, Revised Statutes, charging the presentation to a county auditor of a false and fraudulent expense bill for the purpose of procuring a warrant for the payment of the same out of the treasury of the county, which in describing the bill avers it to have been a false and fraudulent bill, and sets out the bill itself showing items of expense incurred as sheriff of the county and then alleges that certain particular items pointed out were not incurred by defendant, and that the bill was presented with intent to defraud, he knowing it to be false, sufficiently charges an offense under above section. *Du Brul v. State*, 80 Ohio St. 52, 87 N. E. 837, approved and followed.

[Ed. Note.—For other cases, see *False Pretenses*, Cent. Dig. § 49; Dec. Dig. § 37.*]

Exceptions to Court of Common Pleas, Allen County.

Henry Van Gunten was indicted for presenting false and fraudulent bills to a county auditor. Plea in abatement was sustained, and the State excepts. Exceptions sustained in part, and overruled in part.

At the January term, 1910, of the court of common pleas of Allen county, the grand jury returned an indictment against the defendant, Henry Van Gunten, for presenting false and fraudulent bills. A plea in abatement was heard and dismissed by the court, and the cause coming on for trial, a jury, having been impaneled, defendant objected to the introduction of any evidence for the reason that no one of the five counts in the indictment stated facts sufficient to constitute an offense against the laws of Ohio. The court sustained this objection, directed the jury to return a verdict of not guilty, and discharged the defendant. Exceptions to this ruling of the court are now prosecuted here.

The material parts of the first count in the indictment are as follows: "That Henry Van Gunten, whose real and true name is to

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.

the jurors of the grand jury unknown, late of said county, on the 29th day of December, A. D. 1909, with force and arms, in said county of Allen and state of Ohio, unlawfully and falsely pretending that Allen county was indebted to him the said Henry Van Gunten in the sum of one hundred and twenty-seven and fifteen hundredths (\$127.15) dollars for expenses incurred as sheriff of Allen county, Ohio, unlawfully did make out a certain false and fraudulent bill against Allen county, Ohio, which said false and fraudulent bill was in words and figures following, to wit: [The indictment here sets forth in full the alleged false and fraudulent bill relied upon in this count.]

The indictment then alleges: "That said bill was false and fraudulent in this, to wit: August 30th, James O'Connor, to State Hospital at Gallipolis, railroad fare to Gallipolis and return, eight and ten hundredths (\$.810) dollars; railroad fare for patient, four and five hundredths (\$.405) dollars; hotel and meals, three and no one-hundredths (\$.300) dollars; hack at Gallipolis, one and no one-hundredths (\$.100) dollars; hack at Lima, fifty hundredths (\$.50) dollars, which items of expense were not incurred by said Henry Van Gunten, and unlawfully did present said false and fraudulent bill to E. C. Akerman, then and there the auditor of Allen county, Ohio, for the purpose of procuring the allowance of said bill by the commissioners of Allen county, Ohio, and for the purpose of procuring from the said E. C. Akerman, the said auditor of said county, a warrant for the payment of said bill out of the treasury of said county, with intent to defraud, he the said Henry Van Gunten then and there well knowing the said bill to be false and fraudulent, contrary to the form of the statutes in such case made and provided and against the peace and dignity of the State of Ohio."

The particulars in which any of the other counts are essentially different from the first count are noticed in the opinion.

B. F. Welty, Pros. Atty., and James W. Halfhill, for the exceptions. W. H. Leete, against the exceptions.

JOHNSON, J. (after stating the facts as above). The indictment is founded on section 7075, Revised Statutes, parts of which pertinent to this case are as follows: "Whoever, knowing the same to be false or fraudulent, makes out or presents to * * * the auditor or commissioners, or other officers of any county * * * any claim, bill, * * * or other evidence of indebtedness, false or fraudulent in whole or in part, for the purpose of procuring the allowance of the same, or an order for the payment thereof out of the treasury of said * * * county; and whoever, knowing the same to be false and fraudulent, receives payment of any such claim, bill * * *

from the treasurer * * * of any county * * * shall, if such evidence of indebtedness so made out and presented * * * or of which payment is received, is false or fraudulent to the amount of thirty-five dollars or more, be imprisoned in the penitentiary," etc.

The contention of the defendant is that the indictment simply alleges a conclusion of law, and fails to allege the facts on which the conclusion is based. The section of the statute above referred to was under consideration in this court in the cases of *State v. Voute et al.*, 68 Ohio St. 274, 87 N. E. 484, and *Du Brul v. State*, 80 Ohio St. 52, 87 N. E. 837, in each of which the sufficiency of an indictment founded on that section was the subject of inquiry, and those cases are invoked by the contending parties here in support of their respective views. The holdings in the two cases referred to are in perfect harmony.

In the *Du Brul* Case it is held that an indictment brought under section 7075, Revised Statutes, charging the presentation of a false and fraudulent claim and obtaining payment of same by the county treasurer, which in describing the claim avers it to have been a "certain false and fraudulent claim," but in no way avers wherein it was false and fraudulent, and states no facts showing that it was so, is bad on demurrer, and will not support a conviction. The indictment alleged generally that the claim was false and fraudulent, and set out the claim itself in detail, but did not state in what respect it was false or fraudulent. The court, Spear, Judge, in the opinion cites and discusses a number of Ohio cases which support the conclusion that: "A criminal charge should be preferred with such certainty and precision as will reasonably apprise the party charged with that which he is required to answer and may be expected to meet, and so that the court and jury may know what they are to try and the court may determine without difficulty what evidence is admissible, also that the record to be made will be sufficiently definite to make it clear of what the party has been put in jeopardy."

In the *Voute* Case a different question was made. The indictment charged that defendant presented a false and fraudulent pay roll against the city of Toledo, to the auditor of the city. It was claimed, and the lower court held, that the auditor was not authorized by law to allow or pay the claim, and that, therefore, no offense was charged, and that the indictment was bad. This court held that the common pleas court erred because the authority of the officer referred to does not enter into the statutory definition of the crime, and this court held the indictment in that case to be sufficient. But that indictment specifically set forth the respects in which the pay roll was false and

fraudulent in full compliance with the rule stated in the *Du Brul* Case.

Does the indictment in this case meet the requirements of the wise and well-settled rules above stated and enforced? The first count after the formal parts sets out the bill in detail, and then alleges that said bill was false and fraudulent in this, to wit: Then follows certain items of expense which are included in the bill presented, and then the allegation, "which items of expense were not incurred by said Henry Van Gunten and unlawfully did present said false and fraudulent bill to E. C. Akerman then and there the auditor of Allen county, Ohio," etc. So that in this count of the indictment the defendant is advised of the exact particulars and items of the bill (alleged to have been presented) which are claimed to have been false and fraudulent; and the respect in which they are false and fraudulent. Defendant is fully apprised of what he may expect to meet. The court of common pleas therefore erred in holding the first count to be insufficient.

The fourth and fifth counts are similar to the first except the amount and details of the bill are different, and there is a distinct allegation in each that the items of expense set out, and which is part of the bill presented, was not incurred by defendant. Thus fully meeting the requirements of a sufficient presentment informing defendant of the exact charge which he must meet.

The second and third counts are each similar to the first except also as to amounts and particular items. Each contains the averment that "said bill was false and fraudulent in this, to wit," and then follows a list of items which are a part of the bill so presented, followed by the allegation "and unlawfully did present said false and fraudulent bill to E. C. Akerman, Auditor," etc., "for the purpose of procuring the allowance of said bill by the commissioners of Allen county," etc., "with intent to defraud, he then and there well knowing said bill to be false and fraudulent." But there is not contained in either of said second or third counts any averment showing where the claim was false and fraudulent, nor is there set out any facts from which it would necessarily follow that it was so. Under the authorities referred to, the simple averment that the claim is false and fraudulent does not fill the requirements of the rules of pleading in criminal cases. That averment is a legal conclusion, and is not aided by the allegation that the defendant well knew the claim to be false and had been presented with intent to defraud. The wrongful and unlawful act itself must be described, not simply the intent with which it is done. It has been settled by many state and federal decisions that such a pleading does not secure to the accused the full information con-

cerning the charge against him to which under the Constitution he is entitled. The court below did not err, therefore, in sustaining the objection as to the second and third counts. As to the first, fourth, and fifth counts, the exceptions are sustained. Judgment accordingly.

SPEAR, C. J., and DAVIS, SHAUCK, PRICE, and DONAHUE, JJ., concur.

(84 Oh. St. 172)

STATE v. VAN GUNTEN.

(Supreme Court of Ohio. May 9, 1911.)

(Syllabus by the Court.)

COUNTIES (§ 80*)—COUNTY OFFICERS—SALARIES—FEES—PAYMENT INTO COUNTY TREASURY—"YEAR."

The year referred to in the act passed March 22, 1906, to fix the salaries of certain county officers (98 O. L., 89), is the calendar year beginning January 1st, and the end of each quarter, referred to in section 6 of that act, requiring the payment into the county treasury of all fees, etc., collected during said quarter, means the end of each quarter of three months, after January 1st of each year.

[Ed. Note.—For other cases, see Counties, Dec. Dig. § 80.*]

For other definitions, see Words and Phrases, vol. 8, pp. 7551-7554, 7839.]

Exceptions from Court of Common Pleas, Allen County.

Henry Van Gunten was indicted for misconduct in office of sheriff. A demurrer to the indictment was sustained, and the State excepts. Exceptions sustained.

At the January term, 1910, of the common pleas court of Allen county, an indictment was returned by the grand jury against the defendant Henry Van Gunten for misconduct in office; he being the sheriff of the county. Omitting formal parts the first count of the indictment is as follows: "That Henry Van Gunten, late of said county, on the 1st day of April, in the year of our Lord one thousand nine hundred and eight, with force and arms, in said county of Allen and state of Ohio, was then and there an officer of said county, to wit: The duly elected and qualified sheriff of Allen county, Ohio, and did then and there unlawfully and willfully fail and neglect to pay into the county treasury of said county on the warrant of the county auditor of said county, the sum of eighteen dollars and eighty-eight (\$18.88) cents, which said sum, the said Henry Van Gunten as said sheriff and by virtue of his said office, collected and received as fees and costs for the use of said county, as follows, to wit: February 12th, 1908, for serving ventres, eighteen dollars and eighty-eight (\$18.88) cents and so the jurors aforesaid upon their oath aforesaid do say the said Henry Van Gunten is guilty in manner aforesaid of misconduct in said office as sheriff of Allen

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep't Indexes

county, Ohio, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the state of Ohio." There are five other counts in the indictment which are substantially the same as the first, differing in dates and amounts. A plea in abatement filed by the defendant was heard and dismissed by the court. Defendant then filed a demurrer to the indictment, and the court sustained the demurrer as to each count. Exceptions to the ruling of the court in sustaining the demurrer are now prosecuted here.

Benjamin F. Welty, Pros. Atty., and James W. Halfhill, for the exceptions. W. H. Leete, against the exceptions.

JOHNSON, J. (after stating the facts as above). The indictment under examination is based on sections 6 and 22 of the act passed March 22, 1906 (98 Ohio Laws, p. 89), to fix the salaries of certain county officers. Section 6 provides: "Each of the officers named herein shall at the end of each quarter, pay into the county treasury on the warrant of the county auditor, all fees, costs, penalties, percentages, allowances and perquisites of whatever kind collected by his office during said quarter, for his official services, which moneys shall be kept in separate funds by the county treasurer, and credited to the office from which the same has been returned." The pertinent portion of section 22 is as follows: "Whoever, being an officer required, as aforesaid, to file a report and to pay in money to the county treasury, neglects to make such reports or to pay said money, as above directed, or willfully violates any of the provisions of this act, upon indictment, in the court of common pleas in the county, shall be adjudged guilty of misconduct in office, and fined for the use of the county, not more than two thousand dollars; and such conviction shall work an immediate forfeiture of his office." The state contends that the words in section 6, "at the end of each quarter," mean the end of each quarter of three calendar months, while defendant insists that this expression refers to the term of office of the particular official, the beginning of which in this case, of the sheriff, is on the first Monday in January and not the 1st day of January. Thus, the ends of the official quarters would be the first Monday in April, July, October, and January.

The defendant also insists that section 6 is uncertain, and that section 22 is unreasonable, in so far as it prescribes penalties for neglect to perform the requirements of this uncertain section 6. The two sections, 6 and 22, which are under consideration here, must be viewed in connection with the whole act of the General Assembly of which they are part. The rule is familiar, but a restatement of it as made in *State v. Rouch*, 47 Ohio St. 478-485, 25 N. E. 59, 62, may be of assistance here, viz.: In giving "construction

to a statute, all its provisions must be construed together. We must endeavor to get at the legislative intent by a consideration of all that has been said in the law and not content ourselves with partial views, by selecting isolated passages, and holding them alone up to criticism. What is the whole scheme of the law? What object did the Legislature intend to accomplish?" The purpose of this law was to fix the salaries of certain county officers. It was passed March 22, 1906. Section 24 provides that the act shall take effect January 1, 1907. Section 3 provides that on November 20, 1906, each of the officers named shall prepare and file with the county commissioners a detailed statement of the probable amount necessary for employes "for the year 1907." And further provides that on each November 20th thereafter he shall file a like statement showing the requirements of his office "for the year beginning January 1st, thereafter." It is manifest from these provisions that the year referred to in the law is the calendar year "beginning January first." Section 1 of the law provides that all fees, costs, etc., collected or received by any such officer shall be received and collected for the sole use of the treasury of the county in which they are collected and shall be held as public moneys. Section 6, above quoted, requires each officer at the end of each quarter to pay into the county treasury all fees, costs, etc., of whatever kind collected by his office during said quarter.

As the language of the act clearly indicates that the Legislature intended that the year referred to in the different sections is the calendar year, it necessarily follows under the rule of construction above given that the "end of each quarter" referred to in section 6 means the end of each quarter of three months after January 1st of each year. Therefore any such officer who neglects to pay such money to the county treasury at the end of any such calendar quarter is liable to the penalties provided in section 22 of the act. The indictment in this case was sufficient, and the demurrer should have been overruled.

After the demurrer to the indictment in the above case had been sustained, another indictment was returned, which was in the same words as the former, except that in the body of the instrument the words "on the first Monday of April" were inserted. So that the new indictment read: "That Henry Van Gunten late of said county on the first day of April, 1908, etc., * * * did fail and neglect to pay into the county treasury of said county, etc., on the first Monday of April, 1908," etc.

The common pleas court also sustained a demurrer to this indictment and exceptions to that ruling are now prosecuted here.

As to the last indictment it is contended that the averments are inconsistent because

of the difference in the days referred to. For the reasons already given, this indictment was sufficient without the words "first Monday in April, 1908," and in accordance with section 13,581, General Code, their presence does not invalidate that instrument.

The court should have overruled the demurrer to that indictment.

Exceptions sustained.

SPEAR, C. J., and DAVIS, SHAUCK, PRICE, and DONAHUE, JJ., concur.

(84 Oh. St. 143)

STATE ex rel. HOGAN, Atty. Gen., et al. v. HUNT, Judge.

(Supreme Court of Ohio. April 18, 1911.)

(Syllabus by the Court.)

1. QUO WARRANTO (§ 1*)—AUTHORITY FOR ACTION.

The authority, and the only authority for bringing an action in quo warranto in this state, is given by section 12,303 of the General Code. That section provides that quo warranto may be brought in the name of the state against a person who usurps, intrudes upon, or unlawfully holds or exercises a public office, or a franchise, within this state.

[Ed. Note.—For other cases, see Quo Warranto, Cent. Dig. §§ 1, 3, 23, 28; Dec. Dig. § 1.*]

2. QUO WARRANTO (§ 13*) — WHEN LIES — EXERCISE OF FUNCTION.

The legality of the exercise of a mere function alleged to be erroneously exercised by one who, it is claimed, is a public officer cannot be inquired into by a proceeding in quo warranto.

[Ed. Note.—For other cases, see Quo Warranto, Cent. Dig. § 15; Dec. Dig. § 13.*]

3. COURTS (§ 48*)—QUO WARRANTO (§ 12*)—ORGANIZATION — SUPERVISING JUDGE — INTRUSION INTO OFFICE.

Neither section 1539, 1540, nor 1687, of the General Code, nor all taken together, constitute the judge therein designated as supervising judge an officer holding an office separate and distinct from his office as judge of the court of common pleas. Such designation is mere descriptio personæ. And there being no such public office as supervising judge, there can be no intrusion by anyone into such alleged office. Hence quo warranto will not lie to oust such alleged intruder. This court, therefore, has no jurisdiction of the action sought to be brought.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 173; Dec. Dig. § 48; Quo Warranto, Cent. Dig. § 14; Dec. Dig. § 12.*]

Johnson and Donahue, JJ., dissenting.

Quo Warranto by the State, on the relation of Timothy S. Hogan, Attorney General, and Henry T. Hunt, Prosecuting Attorney of Hamilton County, for leave to file petition in quo warranto against one Hunt, Supervising Judge of the Common Pleas Court of Hamilton County. Leave refused.

Timothy S. Hogan, Atty. Gen., and Henry T. Hunt, Pros. Atty., in pro. per. Lawrence Maxwell (Charles W. Baker and Darby & Benedict, on the brief), for defendant.

SPEAR, C. J. The petition presented, and to file which leave in this court is asked, represents in substance that the defendant, who is a judge of the court of common pleas of Hamilton county, is and has been for several days last past, usurping and intruding into the following alleged office and following function, to wit, the office known and designated as, and the functions of, supervising judge of the common pleas court of Hamilton county, Ohio—that is, the office and function of designating, appointing, and assigning to, a judge of such court, to try and hear and dispose of criminal cases pending in such court before a judge or judges thereof who have, or are alleged by affidavits to have, bias or prejudice for or against parties to such cases; that he usurps such office and functions under a claim that the statutes of Ohio provide for such office and functions in Hamilton county; and that he has been duly elected thereto, and that he has been lawfully vested with said office and functions. Judgment of ouster is therefore prayed.

[1, 2] Quo warranto may be brought in the name of the state against a person who usurps, intrudes into, or unlawfully holds or exercises a public office, or a franchise, within this state. General Code, § 12,303. The alleged office must be not only of a public nature, but must be a substantive office; not merely the function or employment of a deputy holding at the will of others. Shortt on Ex. Rems. *121.

[3] It must appear, then, that there is, within the meaning of the statute, an office into which one may intrude. Whether or not this "alleged office" is a real office depends upon what construction is to be given to sections 1539, 1540, and 1687 of the General Code, which sections make provision for the selection and prescribe the duties of the judge designated as supervising judge. We are of opinion that neither of these sections, nor all taken together, create a new office, or constitute the judge designated as supervising judge an officer separate and distinct from his office as judge of the court of common pleas. It is to be borne in mind that the question is not whether it would have been possible for the General Assembly to create an office and devolve upon the holder the duties which it is by statute made the duty of the supervising judge to perform. That may readily be admitted. But the question is, Do these sections under review create any such office?

It is usual for the judges of the district, pursuant to section 1533, to meet on the third Tuesday of October of each year, and issue an order to the clerk of the court of common pleas of each county fixing the day of the commencement of each term for the next judicial year. At the same time, by section 1539, they are to apportion the la-

bor on the part of the judges, which order shall specify what terms, or parts, shall be held by each judge. The following section directs that the order shall designate one of their number to supervise the execution of the order, which judge is there termed supervising judge. This order, it is to be noted, is in effect only one year. Upon information that a judge who has been assigned to certain work is unable to do it, or when an unusual amount of business occurs in one or more counties, he shall assign a judge or judges, not otherwise engaged, to discharge the duties of such disabled judge, or to help dispose of the unusual work. Section 1687 makes provision for a situation where a judge in any cause or matter pending in his court is disqualified to sit (the same being shown by affidavit of party or counsel), the supervising judge, if himself not disqualified, shall assign some other judge to try such matter or cause. This is the manner of constituting and filling the alleged office, and these are the duties to be performed by such alleged officer enjoined by these sections, and all of them. We look in vain for any language which even purports to create a new office, or purports to constitute the judge designated as supervising judge an officer; there is nothing which tends to disclose such an intent, and surely such intent is not to be implied, where the language used by the General Assembly does not warrant such implication.

The statute does not direct the taking of an oath of office, which the Constitution, § 7, art. 15, requires of all officers, nor is it customary for any oath to be administered to such judge as such; it does not require any bond; it does not provide any emolument; it does not provide for the issuing of any commission; nor does it provide any quarters where the appointee may discharge his duties. It may be that neither of these provisions is essential in an act creating an office, and we suppose that neither is essential, but the absence of all of them is of significance in arriving at the intent of the General Assembly in enacting these sections. Rather is it the authorizing by all the judges of the district of one of their number to perform additional duties, as such; duties devolved upon him by his superiors under authority of the statute, and not independent duties, thus making of the place but an adjunct to that judge's general duties as judge; duties which terminate at the time fixed in the order, and terminate at all events at the conclusion of such judge's term of office. It cannot be supposed that such judge would hold over in case of failure by the judges of the district to make a new appointment at the end of his term as judge, which holding over would necessarily follow by force of section 8 of the General Code, if such supervising judge be an officer independent of his office as

judge. True such judge is designated as supervising judge. But, as held by this court in *State ex rel. v. Jennings et al.*, 57 Ohio St. 415, 49 N. E. 404, 63 Am. St. Rep. 723: "The character of an office cannot be attached to a position by a name merely. Whether it be an office or not will depend upon the nature and character of the duties attached to it by law."

But for the provision of the statute directing the appointment of a supervising judge, the work of the supervision of the order might properly, though perhaps with some inconvenience, be performed by the judges jointly. If so, it is difficult to see a reason why the one appointed to attend to that duty or assist in its performance should not be classed as a mere auxiliary, helping to make up the judicial machinery, as in the case of a jury commissioner, who was held, in *State v. Kendle*, 52 Ohio St. 346, 39 N. E. 947, not to be an officer of the state, but merely an assistant to the court. The same act which authorizes the appointment by the judges of one of their number to perform the duties imposed on the supervising judge devolves additional duties of a ministerial character upon all the judges. Suppose, now, that the legislative draftsman who drew the act referred to had happened to designate those judges as "appointing judges," would any one suppose that new offices had been created? And yet why not, if the judge called "supervising judge" holds an independent office? It seems clear that the term "supervising judge" used in the statute is merely descriptio personæ.

In giving construction to the statute it must be borne in mind that the policy of this state, as shown by its general legislation under the present Constitution, while it has in a few instances imposed additional ministerial duties on judges of the court of common pleas, has been not to impose the burden of making appointments to office upon such judges. They are not even authorized to appoint the clerk who is to record their mandates, nor the sheriff who is to execute their writs and care for and keep order in their courtroom; both of those officers being chosen by the people. The court may and does sometimes appoint deputies and other auxiliaries, such as interpreters, stenographers, and criminal bailiffs, but deputies have been held not to be officers, and it can hardly be claimed that the other even more subordinate positions are offices.

We have not undertaken to enter the field of definition of the term "office" or "officer." As given in the books, they are multitudinous, not to say multifarious. Indeed so varied are they, scattered through the books, that the ingenious barrister may find support for almost any proposition relating to the general subject which the necessities of his case may seem to demand. But, like maxims of the law, when used indiscrimi-

nately and without judgment, they are apt to mislead. One which seems to have met with most favor, perhaps, is that an "office" is a public position to which a portion of the sovereignty of the country attaches, and which is exercised for the benefit of the public. And yet, without a satisfactory definition of what is and what is not the "sovereignty of the country," this definition seems to fail to adequately define. Manifestly, however, each case should be decided on its peculiar facts, and involves necessarily a consideration of the legislative intent in framing the particular statute by which the position, whatever it may be, is created. Returning again to the statute, when its intent and purpose is ascertained, we are nearing a proper answer to the question of office or no office, and if that purpose is not inconsistent with the language used in the act we may confidently assume that our answer is correct. Now upon the very face of the sections cited appears the purpose to fix the date of the commencement of the terms in the several counties, and provide for a fair apportionment and equalization of the work of the district, incident to which is provision for meeting a situation where an unusual amount of business occurs in one or more counties, and of supplying a qualified judge to take the place of one temporarily disqualified. This main purpose, which is indeed the only expressed purpose, is not at all inconsistent with the language of the entire sections, but is in full harmony with it. It seems clear that the lawmakers, when enacting these sections, did not dream that they were installing a new officer or creating a new office.

A number of the later decisions of this court in quo warranto proceedings have been called to our attention by counsel for the relators. We do not find that any of them bear close resemblance to the case at bar as to the facts. Indeed none of them, save *State ex rel. v. Anderson*, 45 Ohio St. 190, 12 N. E. 656, seems to bear any resemblance whatever. All others are cases where the question related to the status of a person holding, or claiming to hold, an office wholly apart from any relation with or to any other office. *State v. Jennings et al.*, supra, presented the question whether the defendants (certain firemen in the fire department of Newark), who had been appointed by the city council to those places, were officers. The court held they were not officers and dismissed the petition. *Palmer v. Zeigler*, 78 Ohio St. 210, 81 N. E. 234, presented the question whether the superintendent of a county infirmary is or not the holder of a public office. The holding is that he is not such officer. *State v. Anderson*, supra, involved the question whether or not the presidency of a city council is a public office. The court, basing its judgment on the language of the statute creating the office (section

1676, *Williams' Revised Statutes*), held that it is. *State ex rel. v. O'Brien et al.*, 47 Ohio St. 464, 25 N. E. 121, was against persons who assumed to exercise the functions of a member of city council (membership in which is clearly an office), and the defendants were ousted because they had not been elected as councilmen from any territory entitled to be represented in the council; that is, they were not councilmen because they had not been duly elected as such. The fact is to be emphasized that the attack was made on the defendants because they were intruding into, and assuming to exercise the powers of councilmen. The ground on which they sought to defend did not in the least detract from the fact of their actual intrusion into an office. *State ex rel. v. Brennan*, 49 Ohio St. 33, 29 N. E. 593, was against one who was exercising the duties of a place relating to the purchase and custody of office supplies for Hamilton county under and by virtue of an appointment by the clerk of the court of common pleas, and of a statute which created a county office, but provided for filling it by appointment, rather than election. This was the part that was held void. The act on its face purported to create an office. That it failed in that regard was not seriously contended. But *Brennan* was occupying it by virtue only of an appointment. Hence the ouster. *State ex rel. v. Wilson*, 29 Ohio St. 347, holds that the place of medical superintendent of a hospital for the insane, under the act of March 27, 1876 (73 O. L. 80), is an office; this because, and because only, of the provisions of that statute which clearly indicates an intent to create a public office.

We now come to two cases which, we think, have a direct bearing on the case at bar. *State ex rel. v. Judges*, 21 Ohio St. 1, challenged by quo warranto the authority of the judges of the court of common pleas of the county of Hamilton to fix the compensation of certain deputies, clerks, etc., employed by the treasurer, auditor, recorder, sheriff, probate judge, and the clerk of that county. The judges justified because of a recent statute directly conferring authority to do and perform the acts complained of. The statute was assailed as attempting to give the judges power to usurp or intrude into an office of trust distinct from that of judges, the question being whether the authority thus given by the statute constitutes a distinct office or is merely additional authority conferred on them as judges. The court held that: "The act does not create or invest them with a new office. What they are authorized to do, they can only do by virtue of their office as judges. It does not follow from the fact that the new duties or powers might have constituted a new office that therefore they do constitute such office. New duties may as well be attached to an existing office as that part of the du-

ties of an existing office may be assigned to a new one." *Walker v. Cincinnati*, 21 Ohio St. 15, 8 Am. Rep. 24, relates to the power of the judges of the superior court of Cincinnati to appoint trustees of the Southern Railway. The court held that: "The act is not the creation of a new office, but the annexing of a new duty to an existing office," and the complaining party failed.

The petition seems to assume that a mere function, being exercised by a person occupying a place or office, may be the subject of a quo warranto inquiry. We have not so understood the law. A function, in this connection, is said to be a course of action by any one in a public office, but it is not the office itself; nor is it within the purview of the quo warranto statute.

Finally, if the position of supervising judge be an office, how, under the Constitution (section 14, art. 4), which provides that judges of the court of common pleas shall not "hold any other office of profit or trust under the authority of this state or of the United States," could a judge of the court of common pleas be eligible to it? Surely, if an office at all, it is an office of trust. We are not at liberty to assume that the lawmakers were ignorant of this constitutional inhibition, nor that they intended to disregard it. Nor can we assume that the General Assembly intentionally committed the folly of creating an office, by the same act limiting its occupancy to certain persons, no one of whom would be eligible to fill it, but in fact all such persons distinctly, and by constitutional provision, prohibited from filling it. And yet this is exactly what the General Assembly did do, if the position of supervising judge is an office.

It follows that if there be no public office there can be no intrusion into such alleged office. Hence quo warranto will not lie, and this court is without jurisdiction to entertain the case sought to be brought. With this conclusion reached, the filing of the petition in this court would be only an idle ceremony. The application, therefore, is refused. Nor is the refusal to allow the filing of the petition in any way a denial of, or prejudicial to, any substantial right of relators. The hearing on the application was ample, not only orally, but by means of elaborate briefs, and abundant time was taken for consideration. Had the petition been filed, it would have been open to a general demurrer, and the disposition of the matter following that would have been precisely the same as it now is. The court has in the matter but followed a rule of practice of long standing as to applications for leave to file petitions in this court in causes of which the Constitution gives the court original jurisdiction.

Leave refused.

DAVIS, SHAUCK, and PRICE, JJ., concur.

JOHNSON and DONAHUE, JJ., (dissenting). We are unable to concur in the conclusion reached by the majority of the court in refusing leave to file this petition. We do not, however, dissent from the first proposition announced by the majority of this court at the time leave to file was refused, as appears on page 139 of the Ohio Law Bulletin, under date of April 24, 1911, that: "Where the action of a court is challenged as erroneous and question of error only is presented, quo warranto will not lie." That is a self-evident proposition, but we do not understand that that question is involved in this application. The petition presented here by the Attorney General of Ohio and the prosecuting attorney of Hamilton county does not seek to review any alleged error of any court, but rather to inquire by what authority defendant assumes to exercise the duty and function of appointing and assigning a judge to try and dispose of certain causes in the district in which he is a judge. That is the only question presented by the petition, and the only one in our opinion proper to be considered in disposing of the motion for leave to file it. So that, while this proposition of law announced by the majority of this court is undoubtedly correct, and no lawyer in this state would likely question the same, yet we cannot understand why it should be declared now as pertinent to this case.

Neither do we dissent from the first and second paragraph of the syllabus as it now appears, for undoubtedly the only authority for bringing an action in quo warranto is found in section 12,303 of the General Code, and the provisions of that section are as stated in the first paragraph of the syllabus. The second paragraph of the syllabus as now written is but a different statement of the same proposition as found in the first paragraph of the original announcement. But as we have already said that, although a proper statement of the law, in our opinion, it has no application here. The petition does not assign error of a lower court in the application of law or rules of procedure in a cause which was properly before the court; but it presents a case in which it is claimed that this particular judge was assuming to exercise certain functions and powers which he had no authority whatever to exercise, and which amounts to usurpation of an office, and wholly without warrant in law.

We think that this petition raises that question and asks for an authoritative disposition of the same, and that is reason enough why the Attorney General of this state should be permitted to file it. It is a question that ought to be fully heard and determined upon the final hearing of the petition in quo warranto sought to be filed herein. We think that upon this motion the question to be considered is whether or not the petition raises a substantial question of in-

portance to the people of the state, and, if such a question is raised, the court should not dispose of it upon the motion itself, but rather permit the filing of the petition, to the end that such full hearing and consideration may be had. Especially is this true when the question is one as to which the bench and bar of the state have had a feeling of uncertainty and is one which so largely and vitally affects the administration of justice.

The petition presented avers that the defendant is usurping and intruding into the office and functions of supervising judge of the common pleas court of Hamilton county; that is, the office and functions of appointing and assigning a judge of such court, to try and hear and dispose of criminal cases and proceedings pending in such court before a judge thereof who is alleged to have bias or prejudice for or against the parties to such cases, or proceedings; and that he claims to be invested with such office and functions.

Against the petition it is contended, and the majority of the court conclude, that the provisions of the statute on the subject found in sections 1539, 1540, and 1687, of the General Code, do not constitute an office, and therefore there can be no intrusion into such office. We do not think that the cases cited and relied on apply to the question made here.

In *State ex rel. v. Judges*, 21 Ohio St. 1, the statute which was attacked provided that the judges should fix the number and compensation of clerks of certain county officials. Under that act all of the judges participated in the performance of the duty defined, and this court held that it was simply a new duty added to the existing office of judge, and not the creation of a new office. The duty attached to, and was to be performed by, all of the judges in the district, acting together and equally.

The court did not hold that it was not the exercise of a public function. On the contrary, the court recognized that it was a public function, and was proper to be imposed on the office of judge in addition to its other functions. It would have presented an entirely different case, and the reasoning of the court would have led it to an entirely different conclusion, if the statute had provided that the judges of the district should elect one of their number, who should be invested with the power and duty of fixing the number and compensation of the clerks. The judge chosen would then be invested with a function separate and distinct from the others. He would be clothed with the power and duty of a public office. In such a case we do not think it would be claimed that quo warranto would not lie to test the right of a judge, exercising such power, to do so.

For the same reasons we think it is clear that *Walker v. Cincinnati*, 21 Ohio St. 15,

8 Am. Rep. 24, does not apply here. The law provided that the judges of the superior court of Cincinnati should appoint trustees of Cincinnati Southern Railroad. The decision is placed directly upon the ground that the duty imposed on the judges did not create an additional office, but simply annexed another duty to the office of judge, which all of the judges in that court should perform.

In *State ex rel. v. Jennings*, 57 Ohio St. 415, 49 N. E. 404, 63 Am. St. Rep. 723, this court held that a fireman is not an officer, but an employé, and that quo warranto would not lie to oust him from his employment. However, in the syllabus in that case it is held that: "To constitute a public office against the incumbent of which quo warranto will lie, it is essential that certain independent public duties, a part of the sovereignty of the state, should be appointed to it by law, to be exercised by the incumbent, in virtue of his election or appointment to the office, thus created and defined, and not as a mere employé, subject to the direction and control of some one else."

In the opinion the following from High on Extraordinary Legal Remedies, § 625, is quoted with approval: "An office, such as to properly come within the legitimate scope of an information in the nature of a quo warranto, may be defined as a public position, to which a portion of the sovereignty of the country, either legislative, executive, or judicial, attaches for the time being, and which is exercised for the benefit of the public."

It would seem to be clear that the duties and functions defined and referred to in the sections of the General Code, touching the subject of supervising judge, are clearly included in the definitions of an "office" above given. These sections specifically define these duties and provide that they shall be performed by a certain and particular judge, designated in the act as supervising judge, and chosen in the manner provided, for a fixed and definite term. And these duties and functions are such as can be performed *only* by the *particular* judge chosen in the manner provided.

In the *State ex rel. v. Anderson*, 45 Ohio St. 196, 12 N. E. 656, it is held in the syllabus that: "The presidency of a city council is a public office, within the purview of section 6760 of the Revised Statutes, authorizing an action in quo warranto to be brought against a person who usurps, intrudes into, or unlawfully holds, or exercises, a public office."

In the opinion it is pointed out that the duties of the president of the council are different from those of the members, and although he still remains a member of the council, with all of the powers and duties incident thereto, and although such president must be chosen from the membership, and that the place is without emolument, still its

functions are of a public nature and for public purposes, and it is a public office. It is difficult to see how the duties of a president of a council chosen in the manner referred to should constitute a separate public office, and the distinct, additional, and important duties which are imposed by the statutes upon a supervising judge, who is designated as such by the statutes, should not constitute an office, to which a portion of the judicial sovereignty of the state attaches, within the terms of the definition above given.

Section 1540 provides that the judges of each judicial district shall select or designate one of their number to supervise the execution of the order, with authority to make changes and assign judges of the district to other counties, and requires: "Upon receiving notice thereof from the *supervising judge*, the judge so assigned shall proceed to hold such courts." Section 1687 provides that when a judge of the common pleas court is interested in a cause or matter pending before the court in a county of his district, or is related to, or has a bias or prejudice, etc., that it shall be the duty of the clerk of that court to forthwith notify the supervising judge, who is then required to proceed in the manner required by law in the case of illness or other disability of the judge to designate or assign some other judge of the subdivision or district in which such matter or cause is pending. It is clearly evident from these statutes that, if the judge so selected as supervising judge acquires no additional powers or authority differing from the other judges of that district, the Legislature failed in its purpose, for it evidently intended that such judge should have such additional powers and authority in excess of all other judges of the district during the time that he was entitled by such election to exercise the rights, duties, and powers of supervising judge.

Where one has assumed to exercise public duties, which are a part of the sovereignty of the state, quo warranto may be maintained against him, although the particular territory for which he assumes to act and perform such functions has not been brought within the terms of any statutes defining such duties.

In *State ex rel. v. O'Brien*, 47 Ohio St. 464, 25 N. E. 121, this court held: "Quo warranto may be maintained against a person who assumes the exercise of the office of member of council from a ward which has no legal existence, or under an election held without lawful authority."

And on this point we wish especially to notice the case of *State ex rel. v. Newark*, 57 Ohio St. 430, 49 N. E. 407, which is cited in the brief of counsel opposing this application. The first sentence in the first proposition of the syllabus in that case is quoted in the brief of counsel in support of the proposi-

tion that quo warranto will not lie against a city for the simple purpose of testing its powers. But the second sentence in the same proposition of the syllabus is as follows: "The remedy, in such case, is to enjoin any steps that may be taken to enforce the ordinance, or to proceed in quo warranto against any person or persons who may claim to hold an office, under and by virtue of the provisions of the ordinance claimed to be invalid."

The court (Minshall, J.) in the opinion uses the following language: "Or where, as in this case, it creates what is *claimed to be* an office, and provides a mode of filling it, *not authorized by law*, and proceeds to fill it, the incumbent may be proceeded against in quo warranto, as was done in the preceding cases."

It seems to be conceded by counsel on both sides on the hearing of this application that sections 1687, 1539, and 1540 of the General Code, do not apply to Hamilton county.

While the petition, which is here sought to be filed, simply contains averments of intruding into the office and functions referred to, the record and brief filed by counsel opposing the application shows that they, in a proceeding in mandamus, sought to compel the defendant in this proceeding to perform the duties of the office which they now claim has no legal existence.

We think the authorities relied on by the majority of the court do not justify the conclusion arrived at, but, on the contrary, those authorities and the reasoning on which they are based would indicate a different view of the question presented here than the majority of the court have taken.

We think it is a matter of very serious doubt whether this court has a right to deny to the law officers of this state the right to file a petition in quo warranto. The Constitution itself does not suggest any right of the court to grant or refuse leave to file the petition. Section 12,305 of the General Code requires the Attorney General or prosecuting attorney to commence an action in quo warranto whenever directed by the Governor, Supreme Court, or General Assembly so to do, and section 12,306 authorizes the Attorney General or prosecuting attorney to bring such action upon his own relation, or he may bring the action upon the relation of another person, by leave of court or a judge in vacation. If this court has the right to refuse the Attorney General or prosecuting attorney leave to file a petition in quo warranto, when either of these officers brings such action upon his own relation, then serious complications must necessarily follow, for by the express terms of the statute it is made the duty of the Attorney General, or the prosecuting attorney, to commence an action in quo warranto whenever directed by the Governor, Supreme Court, or General Assembly so to do, and if the Governor or

General Assembly were to direct either of these officers to bring such an action and the Supreme Court were to refuse him leave to file his petition in this court there would arise a serious conflict of authority, and a serious complication of the public business that certainly was not within the contemplation of the General Assembly when this law was enacted. In other words, it would appear from a reading of the Constitution, and of these statutes in reference to the action of quo warranto, that jurisdiction in quo warranto was conferred upon the Supreme Court, not for its benefit, but for the equal benefit of the co-ordinate branches of government and for the benefit of the public directly interested in the controversy; the only difference being that when the Attorney General or prosecuting attorney brings such action here upon request or direction of the Governor or General Assembly, or upon his own relation, it would appear that no leave is required; but, when he brings such action upon the relation of a private individual, then it is provided that leave of court, or a judge in vacation, must first be obtained.

We are of the opinion that when the prosecuting attorney of any county in this state, or the Attorney General of this state, either upon the direction of the Governor or General Assembly of the state of Ohio, or upon his

own relation, presents a petition in quo warranto to this court, he does so as of right, and not as a privilege to be granted by the court; but, even though it be said that permission must first be obtained before such petition in quo warranto can be filed in this court, then certainly, when the court finds there is one or more questions in the case calling for its determination, as has been found and announced by the majority of the court in this case, the court should permit the filing of such petition, and permit the joining of issue thereon and determine the question in the regular and ordinary way. It is true there has been printed and handed to this court a record of other proceedings in Hamilton county that may or may not have logical connection with the case sought to be filed by the Attorney General, but how is this court to take cognizance of these matters, except in the regular way; that is, by an answer setting up any fact that may be pertinent to the issue so joined. The Constitution invests the Supreme Court with original jurisdiction in quo warranto, and surely this court can have no more imperative duty than to exercise that jurisdiction when called on to lend its aid and authority in preventing the machinery of the courts and judiciary itself from being involved in unseemly and regrettable confusion.

(176 Ind. 423)

WABASH R. CO. v. RAILROAD COMMISSION OF INDIANA. (No. 21,652.)¹

(Supreme Court of Indiana. June 30, 1911.)

1. RAILROADS (§ 95*)—HIGHWAY CROSSINGS—RESTORATION AND MAINTENANCE.

The right of a railroad company to cross a highway carries with it the duty to restore the highway to and keep it in its former condition of usefulness and safety; and, if this cannot be done by a grade crossing, the company must do it by constructing its tracks over or under the highway or the highway over or under its tracks.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 274-283; Dec. Dig. § 95.*]

2. MANDAMUS (§ 132*)—MINISTERIAL DISCRETION—RAILROADS—HIGHWAY CROSSINGS.

A railroad's discretion as to the manner of discharging its duty to provide safe and useful highway crossings is ministerial, and mandamus lies to compel proper performance of such duty.

[Ed. Note.—For other cases, see *Mandamus*, Cent. Dig. §§ 206, 267; Dec. Dig. § 132.*]

3. RAILROADS (§ 9*)—RAILROAD COMMISSIONS—POWER—SOURCE.

A railroad commission's powers are limited by statute.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 12-19; Dec. Dig. § 9.*]

**4. PLEADING (§ 214*)—ADMISSION BY DEMUR-
REER.**

The truth of the averments of a complaint are admitted by demurrer thereto.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. §§ 525-534; Dec. Dig. § 214.*]

5. RAILROADS (§ 9*)—HIGHWAY CROSSINGS—RAILROAD COMMISSION ORDERS—ENFORCEMENT.

Regardless of whether the Railroad Commission could order defendant railroad company to put a particular highway crossing in safe condition for public travel on the highway, the commission being bound under Burns' Ann. St. 1903, §§ 5550, 5553b, to require the company to make such reasonable changes in the crossing as were in the commission's opinion necessary to make the crossing safe for passengers, compliance with a proper order requiring the company to construct the highway under the railroad grade is enforceable in a suit by the commission.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. § 17; Dec. Dig. § 9.*]

6. RAILROADS (§ 99*)—HIGHWAY CROSSINGS—RAILROAD COMMISSION ORDER—REASONABLENESS.

An order requiring a railroad company to construct a highway crossing in a village under the railroad grade is reasonable where it appears that trains are operated daily, that the highway is a main thoroughfare, and traveled by many persons, etc.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 293-298; Dec. Dig. § 90.*]

Appeal from Circuit Court, La Grange County; James S. Dodge, Judge.

Action by the Railroad Commission of Indiana against the Wabash Railroad Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Edwin P. Hammond, William V. Stuart, Dan W. Simms, and Allison E. Stuart, for appellant. John W. Hanan, Louis B. Ewbank, and J. Frank Hanan, for appellee.

MONKS, J. It appears from the record that appellee in 1909 investigated the grade crossing of appellant over the highway running north and south through the town of Topeka, La Grange County, Ind., and made an order recommending that said appellant railroad company within 90 days commence and complete the necessary work to separate the grade of the railroad and the grade of said highway at said crossing, and that this separation be made by constructing said highway under the grade of said railroad, so that "an overhead clearance of at least fourteen feet shall be provided, and so that the roadway so constructed shall be fifteen feet on each side of the center thereof." A copy of this order was served upon appellant September 3, 1909. Appellant failed and refused to construct said crossing in the town of Topeka and to obey said order of appellee. Afterwards, on December 22, 1909, appellee commenced this action to compel appellant to construct said highway crossing as requested in said order. It appears from the complaint that appellant owns and controls a line of railroad extending from the city of Detroit, Mich., to the city of Chicago, Ill., that said line of railroad runs across the townships of Eden and Clear Spring, in La Grange county, Ind., and through the town of Topeka, which lies partly in Eden township and partly in Clear Spring township in said county. It is alleged in the complaint, among other things, that "plaintiff shows the court that defendant is now operating said line of railway, and is, and for a long time has been, engaged in running upon and over said railway through the said village of Topeka a large number of trains every day; that it now runs, and for a long time past has run, over its said railway, through said village of Topeka, 20 trains within every 24 hours; that under defendant's present schedule it operates over said road through said village 5 passenger trains every day at a speed of from 40 miles to 60 miles per hour without stopping any of said trains at said village, and 10 freight trains at the rate of 30 miles per hour, without stopping any of said trains at said village. Plaintiff shows the court that upon and along the section line extending north and south between the said section 31, township 36 N., range 9 E., and section 36, township 36 N., range 8 E., extending north and south through the said village of Topeka, and across defendant's said railroad and right of way is a public highway, which highway is the main thoroughfare for travel between the cities of La Grange and Ligonier, and for all of the surrounding country in passing north of said railroad track to the village of Topeka, and the town of Ligonier, and for all of the surrounding country south of said railroad track to the village of Topeka and the town of La Grange; that such high-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

way is much traveled, and is used by many hundreds of teams and vehicles and by travelers driving such teams every day; that said highway constitutes the sole means of communication between the north part and the south part of the village of Topeka, and is the only street in said village which crossed defendant's railroad track; that said village of Topeka has a population of about 700 inhabitants, of whom more than three-fourths in number, to wit, 550, live north of said defendant's railroad track, and the remainder, to wit, 150, live south of said railroad track; that in said village on the south side of said railroad track are located a gristmill which buys a large amount of grain every year, to wit, of the value of \$5,000, and * * * elevators which buy and ship from said point a large amount of grain every year, to wit, of the value of \$200,000; that said grain is hauled in from the surrounding country, and, in order to reach said gristmill and elevators, the owners thereof are compelled to haul it upon said highway across defendant's said railroad tracks; that in said village of Topeka there is located a stockyard which ships therefrom each year animals of the value of \$125,000, which animals are brought in from the surrounding country by the producers thereof, and, to reach the stockyards, must be and are hauled or driven upon and along said highway across said railroad; that at said village there is located a creamery which buys cream and butter fat from the producers in the surrounding country of the value of \$40,000 each year, all of which the producers are compelled to and do haul upon said highway across said railroad; that there is a coal and lumber yard at said village which sells coal and lumber each year of the value of \$30,000 to consumers in the surrounding country, all of which the owners are compelled to and do haul upon said highway across said railroad track; that there is in said village a schoolhouse at which there is a daily attendance of 200 children during eight months in each year, and that of these children more than one-third in number, to wit, 75, are compelled to and do pass along said highway across said railroad track to reach said schoolhouse from their homes, and many of them, to wit, 35, live in the country at a distance from the schoolhouse, and are compelled to and do each day drive over said railroad crossing upon said highway in covered vehicles twice each day; that in said village of Topeka there is a library building containing a lecture parlor in which are conducted respectively, a lyceum and a lecture course to which a large number of persons, to wit, 100 persons, resort 25 times during each year, and are compelled to and do cross said railroad track in the night upon said highway in passing to and from their respective homes; that said village contains a theater and 15 stores and mercantile business which supply entertain-

ment and merchandise for all the surrounding country, and are visited by a large number of persons, to wit, 200 persons, every day, who are compelled to, and do, cross said railroad track on said highway in passing to and from their respective homes; and plaintiff avers that said crossing is used for travel upon said highway across said defendant's railroad more than 500 times every day by persons who necessarily pass over said railroad in going from one part of the village of Topeka to another part thereof. Plaintiff shows the court that from said crossing to the next highway crossing over said railroad on the east is a distance of one mile, to the next highway crossing over said railroad on the west is a distance of one mile, and that in that entire distance of two miles between said crossings there is no other highway or means whatever by which persons north of defendant's railroad can pass to the south side thereof, or by which persons south of said railroad track can pass to the north thereof, except along said highway and over said crossing in said village of Topeka, on the aforesaid highway. Plaintiff alleges that defendant's depot stands on the north side of said railroad track, 124 feet west of the center of the said highway, and that the depot platform extends to, and for a distance of 17 feet into, said highway; that defendant's switchyards are near said highway, to wit, at a distance of 500 feet west of said crossing, and that all of defendant's trains running in a western direction which stop at said town of Topeka, to wit, 5 trains every day, are stopped on said railroad in such a manner that they extend across said highway and obstruct and prevent travel thereon, and that defendant repeatedly had, and continuously at least once every day does, stop a local freight train upon said crossing and obstruct the same for a long time, to wit, 15 to 30 minutes; and defendant thereby often has and continuously does obstruct so many as a dozen teams and wagons, and travelers driving the same and seeking to travel on said highway over said crossing for such a period of time. Plaintiff alleges that defendant has neglected and refused, and now neglects and refuses, to restore said highway intersected by its road to its former state, or in a sufficient manner not to unnecessarily impair its usefulness, and to construct its road upon and across said highway so as not to interfere with the free use of the same in such manner as to afford security for life and property; but plaintiff alleges that defendant has constructed and now maintains its said railroad and tracks in, upon, and across said highway and on an embankment of great height, to wit, the height of 10 feet above the level of said highway on either side; that it had constructed and now maintains a steep grade leading up from said highway on either side to the top of said embankment and to the crossing over its said track; that said highway is 60 feet

wide, and that defendant has built and now maintains a crossing over its said railroad, and an embankment and grade leading up thereto from either side, of the width of only 20 feet wide; that the top of said embankment is higher than the eyes of a person riding in a wagon or buggy upon and along said highway, and so high that a person driving along said highway toward said crossing cannot see a traveler driving toward said crossing upon the highway from the opposite direction until he has reached the top of said embankment, and by reason of such fact, and the existence of the narrow crossing as above stated, travelers frequently meet each other at the top of said embankment upon defendant's track in such a way that it is very difficult for their vehicles to pass each other, and they are compelled to, and do, stop and turn out and delay for a long time upon said railroad track; that the approaches and grades on said highway which lead to said crossing on either side of defendant's railroad track are so steep that a team of horses drawing a loaded wagon is liable to, and such teams drawing loaded wagons frequently do, become stalled and unable to pull their loaded wagons across said track, and are thereby compelled to stop for a long time upon said track, by reason of their inability to get over it with such loads; that the view of said crossing by persons approaching the same upon and along said highway is obstructed by many buildings on each side of the railroad track near said highway; and that defendant has constructed and has for many years, and is now using, a large number of side tracks which extend from a point 20 rods west of said crossing, and on both sides of the main track for a long distance west and these side tracks are used by said defendant company to store freight cars, and said company does store freight cars on said side tracks, and suffer said cars to stand upon said side tracks for months at a time; and that said freight cars standing thereon entirely obstruct the view of defendant's railroad by travelers riding and driving upon and along said highway and of trains approaching from the west on said railroad when they look from the said highway. Plaintiff alleges that there is an amount of travel upon and along said highway over said railroad at said crossing, which needs and will, if provided therewith, use a traveled track thereon of the width of 30 feet and that said highway is frequently used by travelers with vehicles which extend to a great height, to wit, the height of 12 feet; that all of the travel in and along said highway could be fully accommodated and provided for by an undergrade crossing beneath said railroad at a level of not more than four feet below the level of said highway as it now exists on either side of the said crossing, and that defendant's railroad could be so constructed as to pass over said highway at a height above the same sufficient

to permit travelers and vehicles to drive beneath it; that an opening in said embankment of the full width of 30 feet and of the full height of 14 feet would amply accommodate all of the travel on said highway, and permit all persons using said highway to pass from one side of the said railroad track to the other side thereof without difficulty or danger; that all of the travel on said highway does now pass over a crossing 30 feet in width, as aforesaid, and that there is such an amount of travel on said highway as will make continuous use of a 30-foot roadway; that an opening beneath the railroad track 14 feet in height is necessary to permit loaded wagons and covered vehicles, traction engines, and separators to pass through. Plaintiff shows the court that from a long distance east of said crossing, to wit, a point of one mile distant, defendant's railroad track runs at a heavy downgrade to a point near said highway crossing, and that from said point near the said crossing said defendant's railroad track runs westward at a very slight grade, and is nearly level, and that defendant's track at said highway crossing is a great deal, to wit, two feet, lower than a direct line drawn from the top of defendant's present grade of its track, as said track is now located, one mile east of said crossing, to a point at the height of defendant's present grade as its track is now located one mile west of said crossing, so as to make a uniform grade for said track through and across said sections 31 and 36, and that by making said track of a uniform grade through and past the said village of Topeka, and said sections 31 and 36, defendant's track would and might be raised two feet above its present grade without any injury thereto. Plaintiff shows the court that a public ditch is located and extends from a point near said crossing at a depth below said highway sufficient to afford drainage for said highway, and such an undergrade crossing beneath said railroad track; and that the bottom of said ditch is a long distance, to wit, 10 feet, below the level of said highway."

Appellant demurred to said complaint for the following reasons: (1) It does not state facts sufficient to constitute a cause of action; (2) the court has no jurisdiction of the subject-matter of the action; (3) the plaintiff has no legal capacity to sue. The demurrer was overruled and exceptions saved as to each specification. Appellant refused to plead over, electing to stand on its demurrer. Thereupon the court rendered judgment in favor of appellee and ordering appellant to "immediately construct a sufficient undergrade crossing" as prayed for by appellee. Appellant filed a motion to modify said judgment for the reasons (1) that the complaint does not state facts sufficient to constitute a cause of action; (2) that plaintiff (appellee) has no authority under the law to maintain this cause of action nor is

it entitled to such judgment; (3) that said judgment is not authorized under the facts stated in the complaint, which said motion was overruled and exceptions saved.

[1] It is well settled in this state that the right of a railroad company to cross a highway with its tracks carries with it the duty upon the part of the railroad company to restore the highway to, and keep it in, its former condition of usefulness and safety, and, if this cannot be done by a grade crossing, the company must do it either by constructing its tracks over or under the highway or the highway over or under its tracks. *Elliott on Railroads* (2d Ed.) §§ 1102, 1105, 1107, 1111, 1112; *Chicago, etc., R. Co. v. State*, 158 Ind. 189, 63 N. E. 224, and authorities cited; *Chicago, etc., R. Co. v. Luddington*, 91 N. E. 939, 940; *New York, etc., R. Co. v. Rhodes*, 171 Ind. 521, 524, 86 N. E. 840, 24 L. R. A. (N. S.) 1225; *Chicago, etc., R. Co. v. State*, 159 Ind. 237, 64 N. E. 860; *Cincinnati, etc., R. Co. v. City of Connersville*, 170 Ind. 318, 324, 83 N. E. 503; *State v. St. Paul, etc., R. Co.*, 98 Minn. 380, 28 L. R. A. (N. S.) 298, 120 Am. St. Rep. 581; *Greenup County v. Maysville, etc., R. Co.*, 88 Ky. 659, 661, 11 S. W. 774, 11 Ky. Law Rep. 169; *City of Moundsville v. Ohio R. Co.*, 37 W. Va. 92, 16 S. E. 514, 20 L. R. A. 161; *Baltimore, etc., R. Co. v. State*, 159 Ind. 510, 517-521, 65 N. E. 508.

[2] While under the law of this state the railroad may have a discretion as to the manner of performing this duty of providing a safe and useful crossing, it is a ministerial discretion. "The act must be done, and there is no discretion as to whether it will or will not do it. If the mode chosen fails to execute the duty, though the company claims it is adequate, the law by mandamus will compel a proper performance, pointing out in the writ the point of failure and what must be done that there may be no further failure." *City of Moundsville v. Ohio R. Co.*, 37 W. Va. 92, 98, 16 S. E. 514, 20 L. R. A. 161; *Elliott on Railroads* (2d Ed.) §§ 1107, 1111; 1 *Rorer on Railroads*, p. 551; 8 Am. & Eng. Ency. of L. (2d Ed.) 365, 370, 374; 19 Am. & Eng. Ency. of L. (2d Ed.) 873, 874; *Chicago, etc., R. Co. v. State*, 158 Ind. 189, 191, 193, 194, 63 N. E. 224, and authorities cited; *Evansville, etc., R. Co. v. State*, 149 Ind. 276, 49 N. E. 2; *Cummins v. Evansville, etc., R. Co.*, 115 Ind. 417, 18 N. E. 6; *Greenup County v. Maysville, etc., R. Co.*, 88 Ky. 659, 664, 11 S. W. 774, 11 Ky. Law Rep. 169; *People v. Dutchess, etc., R. Co.*, 58 N. Y. 152; *City of Minn. v. St. Paul, etc., R. Co.*, 35 Minn. 131, 28 N. W. 3, 59 Am. Rep. 313; *State v. Minn., etc., R. Co.*, 39 Minn. 219, 39 N. W. 153; *Commonwealth v. Proprietors, etc.*, 2 Gray (Mass.) 339, 352, 353. It is therefore clear that it was the duty of appellant to place and keep the highway crossing in question in such a condition as not to interfere with the use of the same by the public. It is equally clear from the au-

thorities above cited that, if said railroad company has restored said highway in an improper manner but contends that it has done its duty in this respect, it is for the court to determine whether appellant has done its duty or not, and, if not, to direct it how the same shall be done so it may not fail again. *Chicago, etc., R. Co. v. State*, 158 Ind. 189, 63 N. E. 224; *Baltimore, etc., R. Co. v. State*, 159 Ind. 510, 65 N. E. 508; *Chicago, etc., R. Co. v. State*, 159 Ind. 237, 64 N. E. 860; *Vandalia R. Co. v. State*, 166 Ind. 219, 76 N. E. 980, 117 Am. St. Rep. 370; *Evansville, etc., R. Co. v. State*, 149 Ind. 276, 49 N. E. 2.

Appellant contends, however, that the action must be brought by the township trustee when the crossing is in a township without the limits of a city or incorporated town, and by the city or town when the crossing is within the limits of such city or town. We agree that the action may be so brought, and appellee, as we understand, so concedes, but appellee contends that the action may also be brought by the Railroad Commission of the state and in support of such contention cites section 5550 and 5553b, Burns 1908.

[3] A railroad commission is a tribunal unknown to the common law, and possessed only such powers as are conferred upon it by statute. *Elliott on Railroads* (2d Ed.) §§ 675, 682-985; 23 Am. & Eng. Ency. of L. (2d Ed.) 653, 661; 33 Cyc. 47, 48; *Board of R. R. Com. v. Oregon, etc., Ry. Co.*, 17 Or. 65, 75-77, 19 Pac. 702; *State v. Yazoo, etc., R. Co.*, 87 Miss. 679, 40 South. 263; *State v. Fremont, etc., Co.*, 23 Neb. 117, 126, 36 N. W. 305; *Merrill v. Boston, etc., R. R.*, 63 N. H. 259, 264; *Eastern R., etc., v. Concord, etc., R. R.*, 47 N. H. 108, 111-112; *R. R. Com. v. Railroad Co.*, 26 S. C. 353, 357, 2 S. E. 127; *Trustees, etc., v. State Board of Com.*, 55 N. J. Law, 436, 27 Atl. 809; *Neal v. Mortland*, 85 Me. 62, 26 Atl. 994; *Pittsburg, etc., Ry. Co. v. R. R. Com.*, 171 Ind. 189, 208, 86 N. E. 328; *State v. Indianapolis Ry. Co.*, 160 Ind. 45, 66 N. E. 103, 60 L. R. A. 831. It is evident, therefore, that, unless the Legislature has conferred upon the Railroad Commission authority to do so, it cannot maintain this action. It is clear under the Railroad Commission act that whenever a defective crossing endangers the security of persons on its trains it becomes the duty of the Railroad Commission to cause an investigation to be made and make a report to the manager or superintendent of the railroad company "recommending such reasonable changes as are in the opinion of the commission necessary to remedy the defects and set out specifically a reasonable time within which the improvements shall be made by the railroad company. And if they are not so made within the time specified the commission, if it deem it best to do so, may file a bill in equity in some circuit or superior court of the state having jurisdiction of the carrier to require compliance with its order." Section 5553b, Burns 1908.

[4] The averments of the complaint, the truth of which is admitted by appellant's demurrer, show a condition at said highway crossing which was a constant menace to the security of persons riding on appellant's train, as well as to persons traveling on the highway at said crossing. These facts show a danger of collisions between appellant's trains and the users of said highway. Every such collision is fraught with danger to the persons carried on appellant's trains, as well as to the travelers on said highway. Even if, as appellant contends, the Railroad Commission act does not inure to the benefit of the general public, but simply to the public using its railroad, it is clear that the condition set out in appellee's complaint was a menace to the security of the employees and the public traveling on appellant's trains which it was the duty of appellee to investigate and recommend such reasonable changes at said crossing as would afford security for life and property, and not interfere with the free use of said highway. Not only does section 5553b, Burns 1908, supra, provide that, if the railroad company refuses to make said changes, the commission "may file a bill in equity * * * to require compliance with its order," but section 5550, Burns 1908, supra, provides: "And the commission is hereby authorized and required to enforce * * * such other laws of this state as shall prescribe the duties and obligations and regulate the conduct of the carriers subject hereto in their dealings with the public and each other as common carriers of passengers and property in this state, and to enable the commission to do so it is hereby given full power and authority to institute and prosecute in its name any appropriate action at law, or suit in equity, in any circuit or superior court of this state, against any such carrier to compel it to observe the requirements of this act, and all other laws of this state, and the orders of the commission duly made pursuant to this act, or any other law of this state," etc. We are not required to decide whether the "duties and obligations" mentioned in the above section relate to the general public or to the public using the railroad of appellant, as the result of this case would be the same in either event.

It has been held that the law making a railroad company liable for the value of animals killed or injured, without regard to the negligence of the owner thereof, where the railroad company had failed to properly fence its right of way is a proper police regulation, not because of the abstract right of the owner of the animal to recover therefor, but because it is an effectual mode of securing the safety of the persons riding on the railroad company's trains by preventing "cars from coming in collision with animate objects, involving not only the destruction of such object, but most likely a great loss of human life." *New Albany, etc., R. Co. v.*

Maiden, 12 Ind. 10; New Albany, etc., R. Co. v. Tilton, 12 Ind. 3, 5, 6, 74 Am. Dec. 195; Indianapolis, etc., R. Co. v. Guard, 24 Ind. 222, 223, 224, 87 Am. Dec. 327; McKinney v. Ohio, etc., R. Co., 22 Ind. 99, 100; Indpls., etc., R. Co. v. McKinney, 24 Ind. 283, 284, 285; Indpls., etc., R. Co. v. Marshall, 27 Ind. 300; Jeffersonville, etc., R. Co. v. Dunlap, 29 Ind. 426, 428; Indpls., etc., R. Co. v. Parker, 29 Ind. 471; Bellefontaine Ry. Co. v. Reed, 33 Ind. 476, 479; Toledo, etc., Ry. Co. v. Cary, 37 Ind. 172; Baltimore, etc., Ry. Co. v. Johnson, 59 Ind. 188, 190; Cincinnati, etc., R. Co. v. Hildreth, 77 Ind. 504, 506; Indianapolis, etc., R. Co. v. Townsend, 10 Ind. 38; Clark, Adm'r, v. Hannibal, etc., R. Co., 36 Mo. 202, 219; 3 Elliott on Railroads, §§ 1182, 1190, 1191, 1192; Thornton on Railroad Fences, §§ 14, 15, p. 25; 33 Cyc. 312; 12 Am. & Eng. Ency. of L. 1066. The rule declared in the above cases is equally applicable to the present one, as it can scarcely be contended that collisions with the users of said highway crossing will be less dangerous to persons riding on appellant's trains than collisions with animals which are on its track by reason of a defective fence. In both cases the danger to the persons aboard its trains arises from appellant's failure to do its legal duty.

[5] It is clear that, whether the Railroad Commission has authority to order appellant to put this crossing in a safe condition for the use of the public traveling on said wagon roadway or not, it became its duty under sections 5550, 5553b, Burns 1908, to require appellant to make such reasonable changes in said crossing as were in its opinion necessary to make it safe for persons riding on appellant's trains, and, when appellant refused to comply with said order, to file its bill in equity to compel compliance with it.

[6] Appellant also contends that the order made by the Railroad Commission was not a reasonable and practicable one under the facts alleged in the complaint. The facts alleged clearly show that it was.

It follows that the court did not err in overruling the demurrer to the complaint or the motion to modify the judgment.

Finding no available error, the judgment is affirmed.

(48 Ind. App. 339)

REEVES & CO. v. MILLER et al. (No. 7,001.)
(Appellate Court of Indiana, Division No. 2
June 30, 1911.)

1. PRINCIPAL AND AGENT (§ 189*)—ACTIONS—ANSWERS—CONTRACTS WITH AGENTS.

In an action on notes given for the price of machinery, defendants' answer alleged that the duly authorized agent of the seller agreed with defendants to take the machinery in satisfaction of the debt, and that defendants delivered the machinery to him. Held that, as the answer failed to allege that the contract was made with the plaintiff through its agent,

it set up no defense, as the contract might have been with the agent individually.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 713-717; Dec. Dig. § 189.*]

2. PRINCIPAL AND AGENT (§ 171*)—AUTHORITY OF AGENT—RATIFICATION.

Where a seller, retaining title until the payment of the price with the right to take possession on default, received possession from an agent who took the property from the buyer under an unauthorized agreement to accept it in satisfaction of the debt, and held the property without knowledge of the contract, the agent's act was not ratified.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 644-655; Dec. Dig. § 171.*]

3. PLEADING (§ 93*)—ANSWER—THEORY OF DEFENSE.

An answer setting up an agreement with plaintiff's agent as a defense cannot rely both on actual authority of the agent and ratification by the principal, for a pleading must proceed upon some single theory.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 189; Dec. Dig. § 93.*]

On petition for rehearing. Judgment reversed.

For former opinion, see 91 N. E. 812.

Walter Olds, W. R. Baxter, and Elliott & Houston, for appellant. Hottel, Cauble & Hottel, for appellees.

LAIRY, C. J. The appellant entered into a written contract with appellees on the 27th day of August, 1906, whereby it sold to appellees a sawmill for the price of \$2,625. The contract specifically described the property sold, and provided that the appellees should give six notes for the purchase price of \$437.50 each. It was also stipulated in the contract that the title to the machinery sold should not pass to the appellees, but should remain in the seller until the purchase price was fully paid. It further provided that the seller should have a right to retake possession of the property in the event it was not paid for in accordance with the terms of the contract. The contract also contained a warranty of the machinery sold.

On the 1st day of September, 1906, appellees executed the notes provided for in the contract, and also executed a chattel mortgage on the machinery purchased, to secure the payment of these notes, which mortgage was duly recorded. The notes were not paid at maturity, and this suit was begun by appellant to collect the notes and foreclose the mortgage. The complaint was based on the notes and mortgage, and no question as to its sufficiency is raised.

The defendants filed an answer in four paragraphs, and as no objection is urged against the sufficiency of any of the paragraphs of answer, except the fourth, we omit further reference to the first three. A demurrer for want of facts sufficient to constitute a cause of defense was filed to the

fourth paragraph of answer and overruled. This ruling of the court is the first cause relied on for reversal.

[1] The fourth paragraph of answer sets up a contract between appellees and one Holbrook, who was alleged to be the duly authorized agent of appellant, by the terms of which the machinery, described in the mortgage, was surrendered and turned over to said agent upon his agreement to release the mortgage and surrender the notes given for the purchase price of said machinery. Appellant insists that the answer is insufficient, for the reason that it does not aver that said Holbrook was acting for and in behalf of the appellant in the making of the contract alleged, and that the answer nowhere alleges that the appellee made such contract. The averments of the answer, so far as they relate to the question presented, are as follows: "That on the — day of —, 190—, and long before the bringing of this suit, J. H. Holbrook, the duly authorized agent of said plaintiff, came to the defendants, and, by the express agreement and contract entered into by and between said plaintiff's agent and the defendants herein, agreed and contracted to take the machinery set out in plaintiff's mortgage and his complaint herein, in full payment and satisfaction of the debt herein sued on, and would surrender the defendants' said notes and release the mortgage securing the same: that in compliance with said contract the said defendants surrendered to the plaintiff's said agent the ownership, possession, and control of said machinery, and that plaintiff's said agent took complete possession and control of the same and asserted ownership and advertised the same for sale, and that on the day advertised for said sale to be made neither the said plaintiff nor its said agent came and made sale thereof."

It will be seen that the portion of this paragraph, above set out, describes Holbrook as the duly authorized agent of appellant, and alleges that the contract therein set out was made with him and the property turned over to him. These facts may be all true as averred, and still the appellant may not be bound by the contract. Holbrook may have been the duly authorized agent of Reeves & Co. at the time he made the contract, but he may not have been acting in their behalf in making it. The answer should have averred that the contract was made with the appellant, or that it was made with appellant by and through its agent, Holbrook, who was by them duly authorized in that behalf. Some other form of averment might be held sufficient, but whatever form is adopted should show that the agent had authority from the principal to make the contract, and that he acted in its behalf in making it. Enc. of Pl. & Prac. vol. 16, § 900; Coddington

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

v. Mansfield, 7 Gray (Mass.) 272; First National Bank v. Turner (Sup.) 24 N. Y. Supp. 793; May v. Kelley, 27 Ala. 497.

[2] Appellee contends that this defect in the answer is cured by the following averment contained therein: "Defendants further say that they, nor neither of them, have ever been in possession or control of the said property since the same was surrendered and turned over to the plaintiff's said agent in full payment of said notes and mortgage, but that the plaintiff has been in full and complete possession and control of the same ever since the same was turned over and surrendered to them, as above set out." The latter part of this quotation from the answer, when considered in connection with the part first quoted, amounts to an averment that the appellees turned the property over to Holbrook under the contract entered into with him, and that ever since that time said property has been in the possession of appellant, Reeves & Co. It cannot be doubted that if Holbrook, assuming to act for Reeves & Co., entered into the contract with appellees, as set out in this paragraph of answer, and took possession of the machinery by virtue of such contract, and thereafter turned it over to the appellant, and appellant, knowing the material facts, accepted and retained possession of said property, then said appellant would be bound by said contract, upon the ground that it had ratified the act of Holbrook. *Meiners v. Munson*, 53 Ind. 138; *Story, Agency*, § 251; *Id.*, § 244; *Wilson v. Dame*, 58 N. E. 392; *Crowder et al. v. Reed*, 80 Ind. 1. Under such circumstances, it would not be necessary to aver or prove that Holbrook had authority from appellant to make the contract at the time it was entered into.

Even though it were proper to consider this paragraph of answer upon the theory of ratification, it fails to state facts sufficient to make it good upon such theory. It fails to aver that the possession and control of said property ever since it was turned over to the agent Holbrook, as averred, was taken and held by appellant with knowledge on its part that the contract or arrangement by which its possession had been obtained from appellees. Even though it be true, as alleged, that appellant has been in possession and control of said property ever since it was turned over to their agent, Holbrook, this fact would not bind them to the terms of a contract of which they had no knowledge. If appellant knew that Holbrook had gained the possession of said property by means of some contract, it would probably be incumbent upon it to ascertain the terms of such contract; but if it believed that the possession of said Holbrook had been taken by virtue of the terms of the chattel mortgage which it held, then the mere fact that it received and held full and complete control of the property could not be construed as a ratification of any contract made by Hol-

brook of which appellant had no knowledge. *Willison v. McKain*, 12 Ind. App. 78, 39 N. E. 886; *Davis v. Talbot*, 137 Ind. 235, 36 N. E. 1098; *Kelley v. Newburyport Horse R. Co.*, 141 Mass. 496, 6 N. E. 745; *Mechem on Agency*, § 148.

In the case of *Willison v. McKain*, supra, the court in its opinion states the rule as follows: "If the principal knowingly appropriates to himself the fruits of his agent's unauthorized act, he cannot be heard to declare that it was done without his authority. Neither can he take the benefits and reject the burdens; he must as a rule accept or reject the whole contract. But here, as in other cases, it is indispensable that the principal should have had full knowledge of the material facts, or that he should have intentionally accepted the benefits without inquiry. Otherwise the receipt and retention of the benefits of the unauthorized act cannot be deemed a ratification of it." The Supreme Court of this state, in the case of *Davis v. Talbot*, supra, says: "No other act of ratification appears, unless it can be said that the acceptance and retention of the money of the solvent debtors could be properly so considered, but before such acts can be held a ratification it must appear that the acceptance or retention was with knowledge of the agreement so in excess of the agent's authority."

[3] This paragraph of answer is clearly insufficient upon either theory upon which it may be considered. It is quite apparent, however, from the general scope of this answer that it proceeds upon the theory that the agent, Holbrook, had authority from Reeves & Co. to make the contract set out therein at the time it was made, and that he made it in their behalf, and that it does not proceed upon the theory of a subsequent ratification of an unauthorized act of their agent. The proceedings at the trial, as disclosed by the record and the finding of the trial court, show that it was so construed by that court. If it were held good upon the latter theory, the evidence would not sustain it upon such theory. A pleading must proceed upon some single definite theory, which must be determined by its general scope and character, and upon this theory it must stand or fall. *First National Bank, etc., v. Root*, 107 Ind. 224, 8 N. E. 105; *Aetna Powder Co. v. Hilderbrand*, 137 Ind. 462, 37 N. E. 136, 45 Am. St. Rep. 194; *Oolitic Stone Co. v. Ridge*, 169 Ind. 639, 83 N. E. 246; *Dyer v. Woods*, 166 Ind. 44, 76 N. E. 624; *Carmel Nat. Gas, etc., Co. v. Small*, 150 Ind. 427, 431, 47 N. E. 11, 50 N. E. 476. As the fourth paragraph of answer was clearly insufficient upon any theory, the demurrer thereto should have been sustained.

The judgment is reversed, with directions to sustain the demurrer to the fourth paragraph of defendants' answer, with leave to amend.

(48 Ind. App. 319)

PERU HEATING CO. v. LENHART et al.
(No. 6,967.)(Appellate Court of Indiana, Division No. 1.
June 30, 1911.)**1. NEGLIGENCE (§ 15*)—TORTS (§ 22*)—JOINT TORT-FEASORS—LIABILITY.**

Persons jointly bound to perform a duty are jointly and severally liable for omitting to perform it, or for negligently performing it.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 18; Dec. Dig. § 15;* Torts, Cent. Dig. § 29; Dec. Dig. § 22.*]

2. TORTS (§ 22*)—JOINT TORT-FEASORS—LIABILITY.

Persons who co-operate in an act directly causing injury are jointly liable for the consequence thereof, where they acted in concert, or united in causing a single injury, though acting independently of each other.

[Ed. Note.—For other cases, see Torts, Cent. Dig. § 29; Dec. Dig. § 22.*]

3. TORTS (§ 3*)—ACTION IN "TORT"—FOUNDATION.

An action in tort is not necessarily dependent on the existence of a contractual relation between the wrongdoer and the person injured; a "tort" being an injury inflicted otherwise than by breach of contract, and being a disturbance of another's legal rights for which the law gives redress.

[Ed. Note.—For other cases, see Torts, Cent. Dig. § 3; Dec. Dig. § 3.*]

For other definitions, see Words and Phrases, vol. 8, pp. 7007-7009; vol. 8, p. 7817.]

4. NEGLIGENCE (§ 2*)—DUTY TO USE CARE.

Where one is placed in such a position with reference to another that it is obvious that injury to the person or property of the latter will arise if the former does not use ordinary care, a duty arises to use ordinary care to avoid injury.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 3, 4; Dec. Dig. § 2.*]

5. NEGLIGENCE (§ 22*)—DUTY TO USE CARE.

Where a corporation owning and operating a hot water heating plant and supplying heat to its customers by means of its pipes was permitted by an owner of a building to furnish hot water heat to tenants through the water pipes and fixtures in the building, pursuant to a contract between the corporation and the tenants, the corporation owed, not only to its patrons in the building, but to all rightfully therein the duty of care commensurate with the danger to which it exposed them, and was liable for damages to an occupant by the freezing of the pipes in the building through its negligence.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 31, 32; Dec. Dig. § 22.*]

6. NEGLIGENCE (§ 62*)—"PROXIMATE CAUSE"—INTERVENING CAUSE.

The "proximate cause" is ascertained by determining the responsible cause, without regard to its time or place, in the succession of events resulting in an injury, and it is not material whether such cause is the first or last in the succession of events, provided it is the responsible cause; and where an original wrongful act supplies the condition by which a subsequent act is rendered injurious the one committing the wrongful act is responsible.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 76-79; Dec. Dig. 62.*]

For other definitions, see Words and Phrases, vol. 6, pp. 5758-5769; vol. 8, p. 7771.]

7. NEGLIGENCE (§ 59*)—PROXIMATE CAUSE—ACTS CONSTITUTING.

Where a corporation operating a hot water heating plant contracted with tenants of a building to furnish them heat by means of the heating appliances in the building, the corporation was chargeable with the injurious results from creating a dead end in pipes filled with water during winter; and its act in permitting pipes to remain filled with water during winter, after it had ceased to furnish heat, was the proximate cause of an injury to an occupant of the building by the bursting of the pipes.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 72; Dec. Dig. § 59.*]

8. NEGLIGENCE (§ 25*)—ACTS CONSTITUTING.

Where a corporation supplying hot water heat from its plant to customers contracted with tenants of a building to furnish them with heat, and undertook to shut off the heat pursuant to the request of a tenant, it was required to use reasonable care in so doing as to the rights of others lawfully occupying the building, and where it failed to do so it was liable for resulting injury.

[Ed. Note.—For other cases, see Negligence, Dec. Dig. § 25.*]

9. NEGLIGENCE (§ 142*)—ACTS CONSTITUTING—SPECIAL VERDICT—GENERAL VERDICT.

In an action by a tenant of a part of a building against a corporation supplying hot water heat to other tenants of the building, for damages caused by the bursting of pipes in the building, a special verdict that another tenant, supplied with heat by the corporation, notified the landlord to discontinue the heat in designated rooms, that the landlord's agent saw the agent of the corporation, who directed the manner of turning off the water, that the landlord's agent turned off the water in an improper manner, but not contrary to the instructions of the agent of the corporation, did not show that it was not the duty of the corporation to shut off the water, or that its agent had no authority to employ the landlord's agent to perform the work, or that the agent of the corporation directed the landlord's agent how to turn off the water, and did not overcome a general verdict for plaintiff.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 401; Dec. Dig. § 142.*]

10. APPEAL AND ERROR (§ 930*)—TRIAL (§ 359*)—SPECIAL AND GENERAL VERDICTS—PRESUMPTIONS.

The court on appeal must assume, as proved in favor of the general verdict, every material fact provable under the issues not expressly negatived in the special verdict, and a judgment cannot be rendered on the special verdict, unless it is in irreconcilable conflict with the general verdict.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3759; Dec. Dig. § 930;* Trial, Dec. Dig. § 359.*]

11. APPEAL AND ERROR (§ 1050*)—HARMLESS ERROR—ERRONEOUS ADMISSION OF EVIDENCE.

The error in overruling an objection to an improper question is harmless, where the answer of the witness is not responsive, and is practically a repetition of what he had previously stated in his examination in chief and on cross-examination.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4166; Dec. Dig. § 1050.*]

12. NEGLIGENCE (§ 184*)—DANGEROUS APPLIANCES—FAILURE TO EXERCISE CARE COMMENSURATE WITH DANGER—EVIDENCE.

Evidence held to support a finding that a corporation supplying hot water heat to customers from its heating plant by means of

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

pipes was negligent in shutting off the supply of heat in a building, and liable for injuries resulting therefrom.

[Ed. Note.—For other cases, see Negligence, Dec. Dig. § 134.*]

13. APPEAL AND ERROR (§ 1001*)—VERDICT—INSUFFICIENCY OF EVIDENCE.

Where there is some evidence tending to support the verdict the court on appeal will not grant a new trial on the ground of insufficiency of the evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3928; Dec. Dig. § 1001.*]

14. TORTS (§ 22*)—JOINT TORT-FEASORS—LIABILITY.

When either or both of two joint tort-feasors are liable, they are liable for the entire damages sustained.

[Ed. Note.—For other cases, see Torts, Cent. Dig. § 29; Dec. Dig. § 22.*]

15. JUDGMENT (§ 198*)—GENERAL VERDICT—SPECIAL VERDICT—MOTION FOR JUDGMENT ON SPECIAL VERDICT.

The court on motion for judgment on a special verdict must consider in connection therewith the general verdict and the pleadings.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 362, 368; Dec. Dig. § 198.*]

16. TORTS (§ 28*)—TRIAL—VERDICT.

Where, in an action against two joint tort-feasors, the jury returned a general verdict against one defendant and fixed the damages, there was a sufficient verdict to authorize the court to assess the damages against codefendant on rendering judgment against it on the special verdict returned with the general verdict.

[Ed. Note.—For other cases, see Torts, Cent. Dig. § 37; Dec. Dig. § 28.*]

17. APPEAL AND ERROR (§ 747*)—RECORD—BILL OF EXCEPTIONS.

Where a defendant, against whom a judgment for plaintiff was rendered, appealed and filed a general bill of exceptions containing the evidence, and permitted plaintiff to assign cross-error on the transcript against codefendant recovering judgment, the court on plaintiff's appeal could consider the bill of exceptions.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3053-3057; Dec. Dig. § 747.*]

18. APPEAL AND ERROR (§ 1001*)—VERDICT—CONCLUSIVENESS.

The court on appeal, in determining the question of sufficiency of the evidence to support the verdict, will only look to the evidence which tends to support the verdict, and will indulge all legitimate inferences that may be drawn therefrom in favor of the verdict.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3928-3934; Dec. Dig. § 1001.*]

19. PRINCIPAL AND AGENT (§ 23*)—AGENCY—EVIDENCE—FAILURE TO EXERCISE ORDINARY CARE.

Evidence held to justify a finding that a corporation supplying hot water heat from its central plant to tenants in a building accepted the landlord's agent as its agent in shutting off the water from the building, and thereby relieved the landlord from liability for injuries caused by negligence in shutting off the water.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. § 41; Dec. Dig. § 23.*]

Appeal from Circuit Court, Miami County; J. N. Tillett, Judge.

Action by William F. Lenhart and another against the Peru Heating Company and

Charles H. Brownell. From a judgment for plaintiffs against defendant the Peru Heating Company, it appeals, and from a judgment for defendant Charles H. Brownell, plaintiffs appeal. Affirmed.

Antrim & McClintic and Robert J. Loveland, for appellants. Cox & Andrews, Shively & Switzer, and Cole & Cole, for appellees.

HOTTEL, J. This is an action begun in the Miami circuit court by the appellees Lenhart and Simpson against the appellant and appellee Charles H. Brownell to recover damages for injuries to a stock of undertaking goods, alleged to have been caused by the negligence of said appellant and Brownell.

The amended complaint was in one paragraph, to which a demurrer filed by each defendant was overruled and exception taken. The cause was put at issue by a general denial filed by each defendant, and was tried by a jury, which returned a general verdict in favor of the defendant Brownell and against the Peru Heating Company, assessing damages in favor of Lenhart and Simpson in the sum of \$1,094.40, with answers to interrogatories. The appellant heating company moved for judgment on the answers to interrogatories and then for new trial, each of which motions were overruled and exceptions saved. Appellees Lenhart and Simpson also filed their separate motion for judgment in their favor on the answers to interrogatories, as against defendant Brownell, and motion for judgment on the general verdict against the defendant heating company, and then filed a motion for new trial against the defendant Brownell, who also filed a motion for judgment in his favor on the general verdict. The motions of Lenhart and Simpson for judgment on the answers to interrogatories and for new trial, as against Brownell, were by the court overruled, with exceptions in their favor, and the court then sustained the motions of Lenhart and Simpson and of Brownell for judgment on the general verdict, and rendered judgment for appellees Lenhart and Simpson in the sum of \$1,094.40 against the appellant heating company, and in favor of the appellee Brownell, from which judgment appellant heating company and appellees Lenhart and Simpson each prayed an appeal.

The errors relied upon in this court by appellant heating company are: (1) "The overruling of its demurrer to the amended complaint. (2) The overruling of its motion for judgment in its favor on the answers to interrogatories. * * * (3) The overruling of the motion for a new trial."

That part of the complaint necessary to a full understanding of the case and the questions presented for decision is substan-

dally as follows: The appellee Brownell was the owner of a three-story brick building in Peru, Ind. Plaintiffs, on and prior to February 8, 1905, were partners in the retail furniture and undertaking business in Peru, and occupied ground floor rooms in said three-story brick building which they held "under a lease from said Brownell," the owner. The defendant heating company owned and operated a central hot water heating plant in the city of Peru, and furnished "heat to consumers in said city by its system of pipes extending from its said central plant to the various business houses and dwellings." One of the rooms so occupied by the plaintiffs was at the time filled with undertaking goods. Immediately above this room was a suite of office rooms not at any time occupied, leased, used, or controlled by plaintiffs. In 1903, the defendant heating company, under a contract with Brownell, and for him, installed in all of his said building, "except in the rooms so used * * * by plaintiffs," a system of pipes and radiators by which the various rooms, except those of plaintiffs, were heated. The current was brought into the basement by an inflowing pipe, and the return circuit was by an outflowing main, also in basement. The radiators in said office rooms, above the room of plaintiffs, were connected with the pipes and mains in the basement; the manner of the connection being particularly set out. During the fall of 1903, "the defendants caused the hot water to be turned into the building, including said office rooms so located immediately above plaintiffs' said undertaking establishment, and excepting the rooms so occupied by plaintiffs. And thereafter the said heating company furnished to the various tenants of said business block such heat for hire." "A short time prior to" February 8, 1905, "the defendants" were notified by the new occupants of said office rooms "to turn the heat out of the same." And at or about the time of such change, "and some time prior to the 8th day of February, 1905, in pursuance of such notice, the defendants undertook to cut off the hot water from said office rooms and remove the heat therefrom."

"Plaintiffs further aver that in so attempting to shut off the heat from said office rooms and the flow of water through the pipes and radiators therein the defendants carelessly and negligently shut off the entire circulation of water in said rooms through said pipe, and negligently and carelessly neglected to drain the water from said pipes in said rooms, thereby creating a 'dead end' in said pipe, at which water collected, stood, and could not circulate or pass out, and the water which so collected and stood in said pipe aforesaid was negligently and carelessly left by said defendants so to remain at the time and season of the year when, as the defendants well knew, the water therein was liable to freeze and burst

the said pipes, and without providing other means to prevent the freezing and bursting thereof. That about the 8th day of February, 1905, the water so standing in said pipe froze, and burst and separated the same at or near the valve where same was so negligently and carelessly cut off, as aforesaid; and by reason of freezing and bursting of said pipe large quantities of hot water were forced therefrom * * * and precipitated into the room so used by plaintiffs for their undertaking business, as aforesaid. * * *

[1, 2] The defendants are sued as joint tortfeasors, and the law applicable thereto is stated in Consolidated Ice Machine Co. v. Keifer, 134 Ill. 481 at page 492, 25 N. E. 799 at page 801 (10 L. R. A. 696), 23 Am. St. Rep. 688 at page 692, in the following language: "And so if several persons are jointly bound to perform a duty they are jointly and severally liable for omitting to perform, or for performing it negligently. All persons who co-operate in an act directly causing injury are jointly liable for its consequences, if they acted in concert, or united in causing a single injury, even though acting independently of each other." See, also, Chicago, etc., R. R. Co. v. Marshall, 38 Ind. App. 217, 75 N. E. 973; Baltes et al. v. Bass Foundry & Machine Works, 129 Ind. 185, 188, 28 N. E. 319; Ashcraft v. Knoblock, 146 Ind. 169, 45 N. E. 69; Doherty v. Holliday, 137 Ind. 282, 32 N. E. 315, 36 N. E. 907; Hilliard on Remedies for Torts, 178; Deering on Negligence, § 395; Wharton on Negligence, § 788.

Appellant bases its objection to the complaint practically upon the same grounds which it urges in support of its motion for judgment on the answers to interrogatories, and against the sufficiency of the evidence, and we will therefore, in this connection, consider these objections more in detail than we otherwise would. The objection to the complaint is that it "does not disclose such a relation between the appellees Lenhart and Simpson and appellant that the latter will be answerable in damages to the former for the injuries complained of." As reasons for this contention, appellant urges that the complaint shows that appellee Brownell owned the building in which the goods of Lenhart and Simpson were injured, and the water pipes and fixtures therein; that appellant's service pipes extended to said building and there stopped; that Brownell had exclusive ownership and control of the water pipes in the building; that the service of appellant never extended to the rooms occupied by appellees Lenhart and Simpson; that no contractual relation existed between them and appellant; that the appellant's "relations to the tenants of Brownell never went beyond those of the merest licensee, extending only to such portions of the building and pipes therein as were at the time of the injury complained of being used by the renters of

such building for heating purposes; that appellant's license and right to use or have anything to do with said pipes in the rooms where the bursting complained of occurred terminated some time prior to the 8th day of February, 1906, when such bursting occurred, viz., such right terminated when "the defendants shut off the entire circulation of water in said rooms through said pipe," and that, therefore, appellant, at the time of the injury to appellees' property, owed them no duty in connection therewith for the violation of which it could be held accountable for damages for injury resulting therefrom.

[3] Appellant's contention as to the facts disclosed by the complaint is practically correct, as far as it undertakes to state such facts; but it is in error in the conclusion deduced therefrom that appellant, at the time of the injury, owed appellee no duty for the violation of which it could be held accountable in damages. It is not necessary that a contractual relation exist between the wrongdoer and the party injured by the wrong, in order that such party may have redress for the injury and damage resulting from the wrong done. In other words, an action for tort is not necessarily dependent upon the existence of a contractual relation between the person guilty of the tort and the person suffering injury therefrom. *Stock v. City of Boston*, 149 Mass. 410, 21 N. E. 871, 14 Am. St. Rep. 430; *Reagan v. Boston Electric L. Co.*, 167 Mass. 406, 45 N. E. 743; *Ennis v. Gray*, 87 Hun (N. Y.) 355, 34 N. Y. Supp. 379; *Murphy v. City of Indianapolis*, 158 Ind. 238, 240, 63 N. E. 469; *Heaven v. Pender*, 11 Q. B. D. 503.

In 28 Am. & Eng. Ency. of Law (2d Ed.) 253, "tort" is defined as follows: "The word 'tort' means nearly the same thing as the expression 'civil wrong.' It denotes an injury inflicted otherwise than by a mere breach of contract; or, to be more nicely accurate, a tort is one's disturbance of another in rights which the law has created, either in the absence of contract or in consequence of a relation which a contract had established between the parties." To this definition, Bishop, in his work on Noncontract Law, adds the following qualification: "Of course, the wrong must be a sort which the law redresses, not a mere infraction of good morals."

[4] The oft-quoted legal maxim, "*Sic utere tuo, ut alienum non lœdas*," is here applicable. In 21 Am. & Eng. Ency. Law (2d Ed.) 470, this maxim finds expression in language taken from one of the leading cases on this subject (*Heaven v. Pender*, supra), which we think particularly applicable to this case. We quote: "Whenever one person is placed in such a position with regard to another that it is obvious that if the former does not use ordinary care and skill in his own conduct he will cause danger of injury to the person or property of the latter, a duty

arises to use ordinary care and skill to avoid such danger."

[5] Even if it be conceded that appellant was, under the allegations of the complaint, a mere licensee in the building of Brownell, the license or privilege which it enjoyed with reference to said building was that of being permitted by Brownell to furnish hot water heat through his (Brownell's) water pipes and fixtures in said building, under a contract for hire, made between appellant and the occupants of said building. Under these allegations, appellant owned and controlled the hot water supply, and through it, and not through Brownell, the occupants of Brownell's building obtained such heat, if they desired the same. Brownell's renters, who used the heat, contracted with appellant, and not Brownell, and Brownell had nothing to do with the same, except to permit the pipes and radiators in his building to be used as the medium through which the heat was furnished, and whether or not the heat was furnished by the heating company and accepted by the renter depended wholly on their own arrangement. Under such conditions, it became the duty of appellant, when arrangement was made therefor by the renter, to turn the heat into the particular room or rooms for which the arrangement was made; and likewise, when the renter desired the heat turned off, it became appellant's duty to turn the same off, and it was not only its duty, but, when the payment for the heat stopped, it was to its interest to have the heat turned off.

It would seem unreasonable to hold that the wrongdoer, under such circumstances, might shield himself by his license from liability for the wrong done. We know that there is a line of cases holding that the mere licensee does not, in the absence of contract to that effect, assume the duties of the licensor in looking after and keeping up the repairs of the property in connection with which the license is granted, and therefore is not liable for injury for a violation of such duties. It is the above line of cases which is cited and relied upon by appellant, and they are easily distinguishable from cases like the one presented by the facts pleaded in this complaint. We have been unable to find any case where the wrongdoer, even though a licensee, so circumstanced and situated with reference to the party injured by his wrong, as was appellant under the facts here pleaded, has been able, by his license, to shield himself from liability to the injured party resulting from his (the licensee's) negligent acts in connection with his own business in the use of the property covered by his license.

We think, under such circumstances, that it would hardly be contended that, if appellant, in turning on the heat to supply the renter, should, by its carelessness and negligence in such act, permit the escape of the water to the injury and damage of oth-

er rightful and legal occupants of the building, it would not be liable therefor.

For the same reason the appellant would be liable in damage for any injury resulting to such occupants from its carelessness and negligence in shutting off the heat. That this is true we think is supported by numerous cases of other states, as well as by those of our own state. *Citizens' Gas, etc., Co. v. Whipple et al.*, 32 Ind. App. 203, 69 N. E. 557; *Huntington Light, etc., Co. v. Beaver*, 37 Ind. App. 4, 73 N. E. 1002; *Schmeer v. Gaslight Co.*, 147 N. Y. 529, 42 N. E. 202, 30 L. R. A. 653; *McGahan v. Indianapolis Natural Gas Co.*, 140 Ind. 335, 37 N. E. 601, 29 L. R. A. 355, 49 Am. St. Rep. 199. Appellant had in its possession and control, and was selling to the public, an agency dangerous, unless properly and carefully regulated and controlled, and in such case it owed, not only to its patrons in the buildings where it supplied and stored the same, but we think to all legal and rightful occupants of such buildings, the duty of using care commensurate with the danger to which it exposed the person or property of the occupants of such building so supplied with such agency. *Ennis v. Gray*, 87 Hun (N. Y.) 855, 34 N. Y. Supp. 379; *Clements v. Louisiana Electric Light Co.*, 44 La. Ann. 692, 11 South. 51, 16 L. R. A. 43, 32 Am. St. Rep. 348; *Giraudi v. Electric Improvement Co.*, 107 Cal. 120, 40 Pac. 108, 28 L. R. A. 596, 48 Am. St. Rep. 114; *Griffin v. United Electric Light Co.*, 164 Mass. 492, 41 N. E. 675, 32 L. R. A. 400, 49 Am. St. Rep. 477; *Hebert v. Lake Charles Ice, Light, etc., Co.*, 111 La. 522, 35 South. 731, 64 L. R. A. 101, 100 Am. St. Rep. 605.

But counsel for appellant insist that the complaint affirmatively shows that the cutting off of the heat was not the proximate cause of the injury. We cannot agree with this contention. Under the authorities, supra, it became appellant's duty, when it, in connection with Brownell, as the complaint charges, undertook to shut off the heat, to take all reasonable and proper precautions to provide against not only the then present and known consequences of injury that might result from such act, but also to provide against such consequences as might reasonably be anticipated to happen or follow therefrom.

In *Derry v. Flitner*, 118 Mass. 131, it is said: "One who commits a tortious act is liable for any injury which is the natural and probable consequence of his misconduct. He is liable, not only for those injuries which are caused directly and immediately by his act, but also for such consequential injuries as, according to the common experience of men, are likely to result from his act. And he is not exonerated from liability by the fact that intervening events or agencies contribute to the injury. The true inquiry is whether the injury sustained was such as, according to common ex-

perience and the usual course of events, might reasonably be anticipated."

[6] The proximate cause is ascertained and fixed by determining the responsible cause, without regard to its time or place in the succession of events that resulted in the injury. That is to say, it is not material whether such cause be first or last in the succession of events that caused the injury; if it be the responsible cause, it will be the proximate cause. *Lake Erie, etc., R. Co. v. Charman*, 161 Ind. 95 at page 103, 67 N. E. 923; See authorities there cited: *White Sewing Machine Co. v. Richter*, 2 Ind. App. 331, 28 N. E. 446; *Harriman v. Pittsburgh, etc., Ry. Co.*, 45 Ohio St. 11, 12 N. E. 451, 4 Am. St. Rep. 507. If the original wrongful act or omission supplied the condition by which the subsequent act or cause was rendered hurtful, he who committed that act is responsible. *Walters v. Electric Light Co.*, 12 Colo. App. 145, 54 Pac. 960; *Skinn v. Reutter*, 135 Mich. 57, 97 N. W. 152, 63 L. R. A. 743, 106 Am. St. Rep. 384.

[7] In turning off said hot water heat, appellant was chargeable with knowledge of the character of the climate in which it was operating said business, and of the injurious results that might flow from the creating of a dead end in said pipes filled with water; that on account thereof the pipes so filled with said water were liable to freeze and burst, when freezing weather came; and that in such case injury would, in all probability, result to the occupants of said building. We think it clear that under the authorities, supra, the allegations of the complaint show that appellant was so situated with respect to appellees Lenhart and Simpson; that it owed them the duty of exercising care in the turning off of said hot water heat to see that no injury might result to them from such act; that they violated this duty; and that injury and damage resulted to appellees Lenhart and Simpson as the proximate cause thereof. In such case appellant is liable under the law. *Pittsburgh, etc., R. Co. v. Lighthelser*, 163 Ind. 247, 252, 71 N. E. 218, 660; *Indianapolis, etc., Transit Co. v. Foreman*, 162 Ind. 85, 69 N. E. 669, 102 Am. St. Rep. 185; *American Rolling Mill Co. v. Hullinger*, 161 Ind. 673, 67 N. E. 986, 69 N. E. 460.

[8] The complaint alleges in positive terms that appellant and Brownell undertook to shut the hot water heat off pursuant to the request of the renters, and that they did it in the negligent manner above set out. Having undertaken to shut the heat off, under the circumstances and conditions set out in the complaint, it became their duty to use reasonable care and caution in doing the same, with reference to the rights of others legally and rightfully occupying the building. *Huntington Light, etc., Co. v. Beaver*, supra; *Conner v. Winton*, 8 Ind. 315, 65 Am. Dec. 761.

[8] Appellant next urges that the court erred in overruling its motion for judgment on the answers to interrogatories, and urges practically the same reasons urged against the sufficiency of the complaint, and claim also that the answers to the interrogatories show that the man, Miller, who turned the hot water heat off in the negligent manner charged, was the agent of Brownell, and not of appellant. What we have said in discussing the complaint on questions here involved need not be repeated. The interrogatories important and controlling on the subject of Miller's agency affirmatively find the following facts, viz.: That some member, or members, of the firm of Endicott, Murphy & Redmon, in the summer or fall of 1904, notified the appellee Brownell that they wanted to discontinue the heat in rooms 12 and 13, and requested him to have the water shut off from said rooms; that Charles H. Miller was in the employ of said Brownell during the summer and fall of 1904, and said Brownell, during said summer or fall, directed said Miller to see Homer Thrush, and if he (Thrush) would tell him (Miller) how to turn the water off from rooms 12 and 13 and drain the pipes he (Miller) should go ahead and do it. And Miller, pursuant to said order from Brownell, saw Thrush and told him that he (Miller) would turn the water off from said rooms 12 and 13 and drain the necessary pipes, if he (Thrush) would tell him (Miller) how to do it. Miller thereupon shut off the circulation of water in said rooms by closing said gate valves, and drained the water from the radiators and pipes in said rooms, and permitted said gate valves to remain closed. If said gate valves in said rooms had been reopened after said radiators had been drained and the radiator valves closed, there would have been a circulation through said by-pass which would have prevented the water in said belt from freezing. "(24) Did not said Thrush tell said Miller to first close the main valves, then close the gate valves in said rooms, then disconnect the belt from the main pipes and plug the openings in the main pipes, then reopen said gate valves, and open the air valves in said radiators, and drain the water from said belt? Answer: No."

It will be observed from the answers to these interrogatories, especially No. 24, supra, that the jury made no finding, or rather a negative finding, upon the subject of what directions Thrush gave Miller. There is nothing in these answers that negatives the fact that it was the duty of appellant to shut off the water; nothing that negatives Thrush's authority to appoint Miller the agent for the appellant, or that negatives the fact that he did so appoint him in fact or by inference, and give him full direction how to turn the water off for appellant; and nothing that negatives the fact that Thrush may have given Miller wrong

instructions as to the way in which to shut off the water, all of which facts were provable under the issues.

[10] In view of the well-established rules that this court will assume, as proven in favor of the general verdict, every material fact provable under the issues, not expressly negated by the answers to the interrogatories, and that a judgment will be rendered on such answers against such verdict only when such answers are in irreconcilable conflict with such verdict, we are of the opinion that no error was committed by overruling this motion. *Shoner v. Pennsylvania Co.*, 130 Ind. 170, 28 N. E. 616, 29 N. E. 775; *Chicago, etc., R. Co. v. Leachman*, 161 Ind. 512, 69 N. E. 253; *Louisville, etc., R. Co. v. Summers, Adm'r*, 131 Ind. 241, 30 N. E. 873; *McCoy v. Kokomo R. Co.*, 158 Ind. 662, 64 N. E. 92; *Consolidated Stone Co. v. Summit*, 152 Ind. 297, 53 N. E. 235.

[11] The third error relied upon and urged by appellant is the overruling of the motion for new trial and the first ground of the motion insisted upon is an alleged error of the court in overruling the objection of appellant to the following question put by his codefendant Brownell to plaintiff's witness Miller on cross-examination, "What did you understand to be Mr. Brownell's purpose in referring you to Mr. Thrush to have the heat turned off, instead of turning it off yourself?" Counsel followed up the objection to this question by a motion to strike out the answer thereto, which was also overruled, and exception saved, and this alleged error is assigned as a ground of the motion for new trial. The question was objectionable and the objection thereto should have been sustained, but the answer was not responsive and was practically a repetition of what the witness had before stated, both in his examination in chief and on a cross-examination, as to what his own understanding was of what Mr. Brownell had said to him, and was therefore harmless.

A number of instructions were given by the court, at the request of each of the appellees, and many of them are objected to by appellant, but a discussion of them would require a repetition of matters already discussed in considering the sufficiency of the complaint, and we deem it unnecessary to incur this opinion by taking up the several objections urged to each instruction. We have examined all the instructions given in the case with care and are of the opinion that they correctly state the law applicable to the case, and with fairness to appellant. Finally appellant urges that the verdict is not sustained by sufficient evidence, and in this connection earnestly insists that the evidence shows that Mr. Miller, who turned off the hot water heat, was the agent of Brownell, and not of appellant, and that therefore appellant had nothing to do with the same.

[12] As will later develop in this opinion, there is a double appeal in this case, and we will therefore set out at this point enough of the evidence on the disputed points to present the question of its sufficiency to sustain the verdict in favor of both appellees to the original appeal.

The witness Miller testified, in substance, as follows: Mr. Brownell "informed me * * * that his tenants, Murphy, Redmon, & Hammond, didn't want the hot water in the rooms * * * vacated by Mr. Kling, and told me to go to Mr. Thrush and tell him they didn't want this heat any longer, and further to state to him that if he would instruct me how to turn this water off and drain the necessary pipes that I should go ahead and do it." The witness then went to see Mr. Thrush, and said to him "that Mr. Brownell had instructed me to tell him that his tenants, Murphy, Redmon, & Hammond, didn't want this heat in the rooms that they had recently rented, and further that he instructed me to tell him that I would turn the water off and drain the necessary pipes if he would instruct me how to do it. * * * He (Thrush) said, 'Turn the valves off in the basement on this branch, to turn the water off. * * *' I replied that I didn't think there were such valves there. * * * He says, 'There isn't? Well, there ought to be,' and then I told him that there (were) valves on the second (floor) in these rooms, near where the risers came through the floor. * * * I roughly drew a sketch, indicating the location of these particular valves and every union in these two rooms. * * * He said to close these two valves and disconnect the union and drain the pipes and radiators. * * * I suggested he had better step over to the building and show me there. He said he didn't think it was necessary; that I could have (no) trouble there, and then I left him."

The witness George Redmon testified that he was in the rooms where the pipes burst just after the accident and saw Miller and Thrush there, and heard the following conversation between them: "Mr. Thrush accused Mr. Miller of shutting off the wrong valve, and Mr. Miller said that he went according to the instructions that he had given him. * * * Mr. Thrush said the shutting off of that valve caused it to freeze and burst the pipe."

Appellee Lenhart testified: "Mr. Thrush told Mr. Miller he had shut off the wrong valve and created a dead end, and it froze, and Mr. Miller said, 'I done just exactly as you told me.'"

Mr. Murphy testified that Thrush said to Mr. Miller that, if the water had been shut off where he told him to, it would not have frozen, and that Mr. Miller replied, "The substance was that he shut it off where he was told to shut it off."

Mr. Brownell testified, in substance, as

follows: "A. I sent for W. H. Miller. * * * In (the) substance of what I said to him was that Murphy, Redmon & Hammond didn't want the hot water heat in this office any longer and wanted it cut off; and I instructed him to go to the hot water heating company and arrange to have it done. Q. What, if any, instructions did you give Mr. Miller himself to cut off the hot water? A. None. I understand * * * that I had given the hot water people license to go into the building and sell heat to my tenants. * * * They (the heating company) tried to make a contract with me, but I refused to make one. * * * I did not have any contract with the hot water company. * * * The heating company had been given the right to sell heat in there. "A. I made the contract with them for putting in the plant, and had an understanding with Mr. Richard Edwards that they would go in there and sell heat to my tenants. Mr. Edwards tried to get me to make a contract by which I would assume the heating of the building for all my tenants, but I refused to do that, and told him they could go in there and sell heat to my tenants and collect for it." (Mr. Edwards was the president of the heating company.)

Mr. Thrush testified, as to his position as superintendent of the heating company, that the former occupant of rooms 12 and 13 of the Brownell building had paid him heat rent, and that on the 18th day of January, 1904, he collected the heat rent of the then occupants, Murphy, Redmon & Hammond, up to the close of the heating season of 1903 and 1904, for said rooms, and that when he collected said rent said renters then notified him that they would not want the heat after the close of that season; that he understood that he was under obligation to turn off the heat when ordered by the tenant or customer to do so; that, if a tenant or customer ordered or informed him that they didn't want the heat, it was his duty to have it turned off and see that it was done properly.

[13] There were over 700 pages of the evidence, but we think we have indicated enough of the same upon the disputed matters to show that there was some evidence tending to support the verdict against appellant, which, under the rules of this court, is enough to prevent the granting of a new trial on account of the insufficiency thereof. We find no error in the record against the appellant heating company.

There is, however, another side to this appeal. After the appellant heating company filed its transcript and perfected its appeal herein, the appellees Lenhart and Simpson filed petition for leave, and notice to and consent of appellant, to assign errors on appellant's transcript, which leave was granted by this court, and errors so assigned. The errors assigned and relied upon by appellees Lenhart and Simpson call in question the

rulings of the court on their motion for judgment against Brownell on the answers to interrogatories, and their motion for new trial as against Brownell. As to the first motion, counsel for Brownell insist that there could have been no judgment against Brownell on the answers to the interrogatories, for the reason that there was no finding by these answers as to any amount of damage sustained by appellee as against Brownell, and as supporting this contention cite the case of *Selvers v. Peter's Box & Lumber Co.*, 151 Ind. 655, 50 N. E. 877, 52 N. E. 399. The case cited is entirely different from the one at bar, and not in point on the question here presented. In the case cited there was but one defendant, and a general verdict against the plaintiff, with answers to interrogatories, none of which found any amount of damages, and the court in that case properly held that there were no "facts found from which the court could, as a matter of law, make such assessment."

[14] In the case at bar, the theory of the complaint is that both defendants are joint tort-feasors. Under this theory of the complaint, and the proof as well, if either or both defendants were liable at all, they were liable for the entire damages suffered by the plaintiff. *Baltes et al. v. Bass Foundry, etc.*, Works, supra, 129 Ind. at page 188, 28 N. E. at page 319; *Ashcraft v. Knoblock*, supra; *Doherty v. Holliday*, 137 Ind. 282, 32 N. E. 315, 36 N. E. 907; *Boor v. Lowrey*, 103 Ind. 468, 476, 3 N. E. 151, 53 Am. Rep. 519; *Everroad v. Gabbert*, 83 Ind. 489. There was in this case a general verdict against one of the defendants, which fixed the amount of the recovery.

[15, 16] In determining a motion for judgment on the answers to interrogatories, it is not only proper, but it is the duty of the court, to consider, in connection therewith, the general verdict and the pleadings. In this case the jury have by their general verdict found facts from which "the court can, as a matter of law, make such assessment."

[17] We have found a more difficult question in the disposition of this motion upon its merits; but a careful consideration of the same leads us to the conclusion that, under the general denial to the complaint, the appellee Brownell might have made proof of other facts, not negatived by these answers, which would have relieved him from liability, and that the motion was therefore properly overruled.

[18] Lastly it is urged by Lenhart and Simpson that the verdict in favor of Brownell was not sustained by sufficient evidence. Brownell insists that for the purposes of the appeal of Lenhart and Simpson the evidence is not in the record, that the bill of exceptions filed in the court below and made part of the record of this appeal was not filed by Lenhart and Simpson, and was not filed within the time given them to file such bill of exceptions, and therefore should not be

considered in determining any question on the evidence raised by their appeal. The facts with reference to the filing of the bill of exceptions are as Brownell claims, but there is a general bill of exceptions containing the evidence in the record of this appeal which was filed by the appellant heating company within the time given it to file such bill, and this bill we think may be considered in determining any question in relation thereto properly presented by either the original appellant or these appellants. After notice to, and with the consent of, the appellant heating company, these appellants were by this court permitted to assign error on the transcript of the original appellants. This obviated the necessity for filing a separate transcript by them, and we think also the necessity for a second bill of exceptions. To hold that in such cases a second bill of exceptions should be filed would add unnecessarily to the record and augment the costs of appeal, with no resulting benefit to any one. This view of this question can do no injustice to any of the parties to an appeal, and enables the court to finally adjudicate the whole controversy without a multiplicity of transcripts and bills of exceptions, with the additional costs thereby occasioned. We have been cited to and have found no decision of this or the Supreme Court decisive of this exact question, but we think we are strongly supported in our holding by the cases of *Feder et al. v. Field*, 117 Ind. 386, 20 N. E. 129, and *Merritt v. Richey*, 127 Ind. 400, 402, 27 N. E. 131.

[19] The sufficiency of the evidence to sustain the verdict in favor of Brownell to our minds presents the most difficult question raised by this appeal. In support of their respective contentions as to the sufficiency of the evidence, Brownell and the heating company are each insisting on the application of the same rule of law, and each hopes thereby to shift the liability or be relieved therefrom; the heating company contending that the proof shows that their superintendent, Thrush, in giving instructions and directions to Miller as to how to shut off the water, "was acting in the service of Brownell; and Brownell, on the other hand, insisting that his employé, Miller, was loaned to the heating company to shut off the water, under the instructions and directions of its general superintendent, Thrush." In determining this question, the law requires this court to look to that evidence only which tend to support the verdict, and to indulge all legitimate inferences that may be drawn therefrom in favor of such verdict. This being the rule by which this court is bound, we are led to inquire what facts and legitimate inferences can be drawn from the evidence in this case most favorable to Brownell.

From the evidence above quoted, we think the jury may have properly found that the duty of shutting off the water from rooms

12 and 13 rested upon the heating company, and not Brownell; that the heating company accepted Miller as their agent, and authorized him to shut off said water, and gave him instructions and directions how to do the same, which instructions and directions were wrong and resulted in the water being shut off in the negligent manner charged in the complaint. There being some evidence which, as we view it, tended to prove such facts and inferences, we are, under the rules governing this court, constrained to hold that as to Brownell the verdict of the jury was sustained by sufficient evidence. We find no error in the record.

Judgment affirmed.

(202 N. Y. 328)

WEIBERT v. HANAN.

(Court of Appeals of New York. June 6, 1911.)

1. EVIDENCE (§ 555*)—OPINION EVIDENCE—ADMISSIBILITY.

It is error to allow an expert in heating apparatus for buildings to testify to the radiating surface required to heat the rooms in question without stating their dimensions, and to testify to the capacity of a boiler which he has not seen, basing his opinion on the test of another boiler not shown to have been of the same type, and without giving the facts on which he based his conclusion.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2376; Dec. Dig. § 555.*]

2. EVIDENCE (§ 555*)—OPINION EVIDENCE—MEDICAL EXPERT.

A medical expert, testifying to the mental condition of a party, need not disclose in the first instance the particular facts on which his opinion is based.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2376; Dec. Dig. § 555.*]

3. APPEAL AND ERROR (§ 1031*)—HARMLESS ERROR—ERRONEOUS ADMISSION OF EVIDENCE.

The court on appeal, in reviewing the error of a referee, in admitting incompetent testimony of an expert over clearly stated objections, cannot presume that his judgment was unaffected by the testimony, but must reverse the judgment entered on his report, where a perusal of the evidence indicates that in all probability he assigned considerable weight to the testimony.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4038-4046; Dec. Dig. § 1031.*]

Appeal from Supreme Court, Appellate Division, Second Department.

Action by Charles J. Weibert against Herbert W. Hanan. From a judgment of the Appellate Division (136 App. Div. 388, 121 N. Y. Supp. 35), affirming a judgment for plaintiff on the report of a referee, defendant appeals. Reversed, and new trial granted.

James M. Gray, for appellant. James O. Tryon, for respondent.

WILLARD BARTLETT, J. This is an action on a quantum meruit for work done and materials furnished in the installation of a

heating plant on the premises of the defendant. The answer put in issue the value of the work done and materials furnished, and also pleaded an express contract under which the plaintiff agreed to install in the defendant's house, for a sum not to exceed \$1,500, such a heating plant as would heat the house in cold weather to the reasonable satisfaction of the defendant, which agreement the plaintiff had totally failed to perform. The evidence on the trial indicated that the defendant's house was not properly heated when the plaintiff's work was finished, and the principal question litigated between the parties was who was responsible for this condition of things.

The defendant contended that it was due to the inadequate size of the boiler, while the plaintiff insisted that the boiler was large enough, but that the defendant's radiators were too small. The referee did not pass upon these issues specifically, but made findings in favor of the plaintiff in substantial accordance with the allegations of the complaint and directed judgment accordingly. This judgment has been affirmed in the Appellate Division by a divided court. All the members of the Appellate Division agreed that two errors were committed by the learned referee in the admission of evidence. Three of the justices, however, thought that these errors might properly be disregarded, because, as was said in the opinion below, the action "was tried without a jury and before an experienced and learned referee." Their dissenting brethren insisted that the errors to which we have referred were grave enough to require a reversal of the judgment.

[1, 2] Among the witnesses called for the plaintiff was an expert in reference to heating apparatus for buildings. He gave opinion evidence in regard to the capacity of the boiler and radiators, over the objection of counsel for defendant that the facts upon which his opinion was based had not been stated. This witness was allowed to testify as to the radiating surface required to heat the defendant's rooms without having stated what were the dimensions of the rooms; and he was also permitted to testify as to the capacity of the boiler (which he had never seen), basing his opinion upon the test of another boiler not clearly shown to have been of the same type and without giving the facts upon which he based his conclusion. It is a general rule in regard to the opinion evidence of experts that the facts upon which the opinion of the witness is founded must be laid before the trial court either by assuming them in a hypothetical question or by the testimony of the expert himself if he has observed them. *Dougherty v. Milliken*, 163 N. Y. 527, 57 N. E. 757, 79 Am. St. Rep. 608. There is an exception in the case of medical experts testifying as to the mental condition of a party, where the particular facts upon which the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

opinion is based need not be disclosed in the first instance. *People v. Faber*, 199 N. Y. 256, 92 N. E. 674. There may also be other exceptions, but in the case at bar the general rule applied, and even the learned counsel for the respondent, in his brief on the argument of the appeal in this court, concedes that the general objection made to the admissibility of this line of testimony is probably technically correct.

[3] There being entire unanimity of opinion in the court of intermediate appeal to the effect that the referee erred in the rulings which have been mentioned, the proper disposition of the case here depends upon the gravity of the error. We are unable to concur with the prevailing opinion in the Appellate Division that it was not substantial enough to raise a presumption of prejudice. The fact that the referee is a lawyer of recognized ability, who has rendered most capable service to the public in a judicial capacity, in no wise tends to justify the inference that his judgment was not influenced or affected by evidence which he admitted into the record against the clearly and carefully stated objection of counsel. On the contrary, it seems to us the presumption is just the other way. The ruling was equivalent to an express declaration on the part of the referee that he regarded the evidence which he thus admitted as entitled to probative force; and a perusal of all the testimony indicates that in all probability he did assign considerable weight to the evidence in question in reaching the conclusion that the plaintiff was entitled to prevail in the action. The case would be very different if the referee had stricken out the objectionable testimony, and had stated in his report that he had decided the issues wholly on the other and proper evidence in the record, without regard to that thus eliminated from consideration. An appellate court might well have confidence that an experienced referee or trial judge would be able to disregard testimony which he had originally admitted under the mistaken impression that it was properly receivable. Nothing of the kind was done here, however; and we cannot resist the conclusion that the issues in this action were determined against the defendant upon objectionable evidence which affected the decision.

In behalf of the defendant it is contended that, inasmuch as the plaintiff contracted to do a completed job which would effect a specific result, the proper measure of his recovery should have been the value of the completed work, and not the value of the specific items. This question would be presented for consideration, if there had been a finding or request to find that the plaintiff's work was done under a contract whereby he undertook to heat the premises to the reasonable satisfaction of the defendant as alleged in the answer; but there is no such finding, nor any

request so to find, and therefore we cannot pass upon this question.

By reason, however, of the erroneous rulings which have been considered, the judgment should be reversed, and a new trial granted, costs to abide the event.

CULLEN, C. J., and HAIGHT, WERNER, HISCOCK, CHASE, and COLLIN, JJ., concur.

Judgment reversed, etc.

(203 N. Y. 275)

MULLIN v. GENESEE COUNTY ELECTRIC LIGHT, POWER & GAS CO.

(Court of Appeals of New York. May 30, 1911.)

1. MASTER AND SERVANT (§ 107*)—SAFE PLACE TO WORK—PLACE INHERENTLY DANGEROUS.

The rule requiring a master to furnish a safe place to work does not apply, where the prosecution of the work itself makes the place and creates the danger.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 199-202, 212, 254, 255; Dec. Dig. § 107.*]

2. MASTER AND SERVANT (§ 196*)—FELLOW SERVANT—WAYS AND PLACES FOR WORK—LINEMEN.

Where a lineman was engaged in the construction of a line of wires, working with other gangs, each of which did separate parts of the work, but all of whom were controlled by one superintendent and one foreman, and was injured by the falling of a pole on which he was working, and which had been set by a gang of pole setters, the negligence of the pole setters was the negligence of his fellow servants in a detail of their common work, for which the master is not liable at common law.

[Ed. Note.—For other cases, see *Master and Servant*, Dec. Dig. § 196.*]

Appeal from Supreme Court, Appellate Division, Fourth Department.

Action by John Mullin against the Genesee County Electric Light, Power & Gas Company. From a judgment of the Appellate Division in the Fourth Department (136 App. Div. 913, 120 N. Y. Supp. 1136), affirming a judgment entered upon a verdict for plaintiff, defendant appeals. Reversed, and new trial granted.

Safford E. North, for appellant. John J. McInerney, for respondent.

WERNER, J. The plaintiff, a lineman employed by the defendant on the 18th day of July, 1907, was injured by the falling of a pole which was part of a line of wires then in course of construction in Genesee county for the transmission of electric power. The action was commenced under the employer's liability act (Consol. Laws 1909, c. 31), and the notice required by that statute seems to have been served. That theory was abandoned at the trial, however, and the case went to the jury as one at common law, involving the question whether the defend-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes 95 N.E.—44

ant, as employer, had discharged its duty to the plaintiff to furnish him a reasonably safe place in which to work. Had there been an adherence at the trial to the theory of the complaint that this is an action properly brought under the employer's liability act, it is quite probable that the plaintiff would have succeeded in getting a verdict which he could have sustained on appeal; but his determination to present his cause of action as one at common law has brought into the case a common-law rule which is fatal to his judgment.

The record discloses that at the time of the accident to the plaintiff the defendant was engaged in constructing through Genesee county a line of poles and wires for the conveyance of electric power. The plaintiff, an experienced lineman, had worked for the defendant about nine days previous to the accident. The force of men engaged in the construction of this line was divided into "gangs," each of which performed different parts of the work, but all were subject to the control of a superintendent and a foreman, both of whom gave orders and hired and discharged men. Broadly stated, the force was divided into the "ground men," who dug the holes; the "framers," who trimmed and prepared the poles; the "pole setters," who placed the poles; and the "linemen," who strung the wires. That this division of labor was not strictly observed is evident from the fact that the plaintiff, although a lineman, had assisted in trimming poles. He had nothing to do, however, with the digging of the holes or the setting of the poles. On the day of the accident he was engaged with others in stringing wires. The ends of the wires, three in number, were fastened into holes drilled into a triangular piece of iron, called a "running board," at the opposite end of which there was another hole, into which was fastened a heavy rope. This rope was thrown over the crossarm on the first pole, a team was attached to the further end of the rope, and the line was thus drawn forward until the running board reached the cross-arm, where a lineman was stationed, who gave the signal for the team to stop until he could lift the running board so that it would clear the cross-arm, and when this had been done the teamster was signaled to go forward. This process was repeated from pole to pole. When the line reached a pole at which the plaintiff had been stationed, he ascended. The running board had nearly reached the pole when he gave the teamster the usual signal to stop. Having lifted the running board so that it would clear the cross-arm, he gave the signal to go on. At that juncture the strain of the line caused the pole to fall, and the plaintiff was thrown to the ground with such violence as to sustain personal injuries. It appears that this pole was one of a number which had been set in low, soft, marshy earth. There was evidence which would have justified

the jury in finding that this particular pole had not been properly set, and that this circumstance had been brought to the attention of defendant's foreman before the happening of the accident to the plaintiff. There was other testimony from which the jury were also authorized to find that the plaintiff had nothing to do with the setting of this pole, that he had no actual knowledge of its unsafe condition, and was not chargeable with notice thereof.

At the close of the plaintiff's case the counsel for the defendant moved for a nonsuit upon the usual ground that the plaintiff had failed to establish negligence on the part of the defendant, and on the further ground "that the negligence, if any, was that of the fellow servant of the plaintiff, for which the defendant is not responsible." To this the trial court replied, "I think there is a question of fact here for the jury as to whether or not the defendant exercised reasonable care in providing a reasonably safe place for Mullin to do his work," and thereupon the motion for a nonsuit was denied. To this ruling the defendant's counsel excepted, and in doing so he further moved for a nonsuit upon the specific ground that the rule requiring a master to furnish his servants with a reasonably safe place in which to work has no application to this case. That motion was also denied, and the defendant's counsel again excepted. The same question was raised by exception to the refusal of the trial court to nonsuit the plaintiff at the close of the evidence, and by exception to the charge to the jury.

[1] From what we have already said it is evident that the case turns upon the question whether it was the defendant's duty to furnish the plaintiff with a safe place in which to work. To state it differently, the question is whether the general rule that it is the duty of the master to exercise reasonable care to provide a fairly safe working place for his servants applies to a case like the one at bar. That rule does not apply "where the prosecution of the work itself makes the place and creates the danger." *O'Connell v. Clark*, 22 App. Div. 466, 48 N. Y. Supp. 74; *Stourbridge v. Brooklyn City R. R. Co.*, 9 App. Div. 129, 41 N. Y. Supp. 128; *Citrone v. O'Rourke Engineering Construction Co.*, 188 N. Y. 339, 80 N. E. 1092, 19 L. R. A. (N. S.) 340; *Capasso v. Woolfolk*, 163 N. Y. 472, 476, 57 N. E. 760; *Perry v. Rogers*, 157 N. Y. 251, 51 N. E. 1021. The reason for this exception to the general rule is that it would be manifestly absurd to hold a master to the duty of providing a safe place, when the very work in which the servant is engaged makes it unsafe. If a man is engaged in tearing down a house, he is constantly exposed to dangers of his own creation; and in such a case all those who are engaged in the same common purpose are fellow servants for whose negligence in executing the details of the work

the master is not liable, even though "the work is done in successive stages, different parts thereof being devolved upon different persons, and the labor performed by one set of employes being prior in time to that performed by another set." *Citrone v. O'Rourke Engineering Constr. Co.*, 188 N. Y. 343, 80 N. E. 1093, 19 L. R. A. (N. S.) 340, *supra*, and cases there cited.

[2] In the case at bar the evidence tended to establish that the pole which fell with the plaintiff had not been properly set. If the work of setting poles was a part of the construction of this electric line, it follows that it was part of the very work which created the place in which the plaintiff was called upon to work, and that the negligence of the pole setters was the negligence of the plaintiff's fellow servants in a detail of the work in pursuit of the common purpose in which all were engaged. We do not see how the case can be open to any other view. If this had been a completed line, upon which the plaintiff had been employed to string additional wires, he would find support in the cases of *McGuire v. Bell Telephone Co.*, 167 N. Y. 208, 210, 60 N. E. 433, 52 L. R. A. 437, *Kranz v. L. I. Ry. Co.*, 123 N. Y. 1, 25 N. E. 206, 20 Am. St. Rep. 716, *Finn v. Cassidy*, 165 N. Y. 584, 59 N. E. 311, 53 L. R. A. 877, and other similar cases upon which he relies. But this was not a completed line. The work of setting the poles and the work of stringing wires were details of the common employment, performed at different times and by different men, but all in the process of creating the very place in which the plaintiff met with his injury. We cannot distinguish the case at bar from the *Citrone Case*, and that is enough to render further discussion unprofitable.

The judgment must be reversed, and a new trial granted; costs to abide the event.

CULLEN, C. J., and HAIGHT, WILLARD BARTLETT, HISCOCK, CHASE, and COLLIN, JJ., concur.

Judgment reversed, etc.

(202 N. Y. 301)

BARNES et al. v. SOUTHFIELD BEACH R. CO. et al.

(Court of Appeals of New York. May 30, 1911.)

RAILROADS (§ 72*)—RIGHT OF WAY—CONDITION SUBSEQUENT.

After a railroad had acquired title to a right of way through certain mortgaged premises, it obtained from the mortgagee release of so much of the mortgaged land as was included in its right of way. The release provided that the property was released for railroad purposes only, and that if a railroad was not constructed and in operation over the released land by June 15, 1901, or the premises were used for other than railroad purposes, they should be again subject to the lien of the mortgage.

Held, that such provision was a condition subsequent, and not a covenant to build the railroad, so that, on the railroad's default, the release terminated, and the land again became subject to the mortgage without re-entry or any action on the part of the mortgagee.

[Ed. Note.—For other cases, see *Railroads*, Dec. Dig. § 72.*]

Appeal from Supreme Court, Appellate Division, Second Department.

Action by Sarah H. Barnes and another against the Southfield Beach Railroad Company and others. From a judgment (136 App. Div. 896, 120 N. Y. Supp. 616) for plaintiffs, defendant Southfield Beach Railroad Company appeals. Affirmed.

See, also, 199 N. Y. 520, 92 N. E. 1077.

Lewis H. Freedman, for appellant. John Brooks Leavitt, for respondents.

GRAY, J. The action was brought to foreclose a mortgage and the appellant railroad company was made defendant, as claiming some interest in the mortgaged premises adverse to the plaintiffs. These premises consisted in a tract of land on the southeasterly shore of Staten Island, and, after the execution of the mortgage to the plaintiffs, the owner and mortgagor conveyed a strip to the company through the tract, upon which to build its railroad. A proposed terminal of this road would be near to a beach, which the plaintiffs owned and had improved for use as a summer resort. Desiring to lift the lien of the mortgage from its land, the company applied to the plaintiffs for, and obtained, an instrument of release, to the granting of which the plaintiffs were moved by the expectation of profit from bringing visitors to their beach. The instrument was executed in August, 1900. It recited the facts of the plaintiffs' mortgage and of the company's ownership, and, after proceeding to grant, release and quitclaim, by description, so much of the mortgaged land to the company, then, continued as follows: "This property is released to the said party of the second part (the railroad company), its successors and assigns, for railroad purposes only, and in case a railroad is not constructed and in operation on the same by June 15, 1901, and in case said premises are used for other than railroad purposes, the said premises hereby released are to become a part of the mortgaged premises and be subject to the lien of said mortgage, as if this release had not been made." The rest of this unnecessarily long instrument dealt with the subject-matter, as though it had been some grant of an estate, or interest, in land, including a habendum clause. The preparation of such an instrument displayed great ignorance of the law and of what was necessary to express the agreement of the parties. That agreement was simply a release of the mortgage lien conditioned upon the railroad being in opera-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

tion by the date fixed. The plaintiffs, as mortgagees, had no title to the lands, and, of course, they could grant no estate in them. The company had all the estate that could be conveyed and held it, subject only to the lien of the prior mortgage. The mortgagees were not in possession and all they could do was either to release absolutely their lien, or to agree to do so upon some condition. So that, however extraordinary this instrument, the question is, Was it operative for any purpose?

What, stripped of its irrelevant and imperinent clauses and verbiage, did the parties intend and accomplish by it? I think that the plaintiffs, who alone executed the instrument, intended to release the lien of their mortgage upon the condition, subsequently to be performed, that the railroad should be in operation by June 15, 1901, and that, thereafter, the land should not be used for other than railroad purposes. The company owned the land; but could not free it from the plaintiffs' lien, unless with their consent and upon any lawful condition they might see fit to impose. The company could go on with the building and operation of its railroad, notwithstanding the mortgage lien, or it could earn, or acquire, a release of the lien by performance of the condition imposed. It is argued by the appellant that this clause in the instrument, if doubtful, should be construed as a covenant and not as a condition. However artificially drawn, I think that it must be treated as a condition, upon the breach of which the obligation of the plaintiffs ceased and the company lost its right to a release of the lien. There was no promise by the company to do anything, and hence no covenant with the plaintiffs; but there was a condition which, if and as performed, would entitle it to hold the land freed from the lien. It is true that the clause is not declared to be a condition and does not contain words usually employed in connection with a condition; but that is not always the test and this is a case where the question of whether a clause is a covenant, or a condition, is to be determined by the apparent intention of the parties, rather than by any fixed rules of construction, or upon the precise form of words. Technical rules must generally yield to the application to the contracts of parties of good sense and reason. *Post v. Well*, 115 N. Y. 361, 370, 22 N. E. 145, 5 L. R. A. 422, 12 Am. St. Rep. 809. The situation of the parties and the purpose of this release plainly show a condition subsequent to have been intended. The clause goes to the whole of the consideration; which was, as found by the trial court, that there should be a railroad in operation at a time when the ensuing summer season began and such a continuing use thereafter of the land.

The company being in default as to the completion of its railroad on June 15th, the

default operated to terminate the conditional agreement to release, and to defeat any claim of the company thereunder. There could be, of course, no re-entry by the plaintiffs; for no estate had been created, and the plaintiffs had no right to the possession of the land. Nor was any action necessary to be instituted by them to enforce any forfeiture. The land was not released from the lien, and the instrument simply had failed to be operative in the company's favor. The equitable action, which the plaintiffs did institute, shortly after June 15th, to set aside the release, was absolutely futile; for the court could give them nothing they did not already possess. It could add nothing to their rights under the mortgage in its fullest scope. It may have served the purpose, somewhat cumbrously, of notifying the company of the attitude of the plaintiffs, as intending no waiver of their rights and no indulgence, and that is all. When, in 1908, upon the maturity and nonpayment of the debt secured by the mortgage, these plaintiffs commenced this action of foreclosure, the appellant's interest in the mortgaged premises was subject to the mortgage lien, and therefore the judgment appealed from should be affirmed.

CULLEN, C. J., and VANN, WILLARD BARTLETT, HISCOCK, CHASE, and COLLIN, JJ., concur.

Judgment affirmed, with costs.

(202 N. Y. 264.)

STIEBEL et al. v. GROSBERG.

(Court of Appeals of New York. May 30, 1911.)

1. RELEASE (§ 12*)—PAROL EVIDENCE—NATURE OF INSTRUMENTS—"EXECUTORY INSTRUMENT."

Releases, being merely declarations or admissions in writing, are not executory instruments, within Code Civ. Proc. § 840, providing that a seal upon an executory instrument is only presumptive evidence of sufficient consideration, and hence the consideration for a release under seal cannot be disproved.

[Ed. Note.—For other cases, see *Release*, Cent. Dig. § 19; Dec. Dig. § 12.*]

2. RELEASE (§ 10*)—VALIDITY—DELIVERY.

To be valid, a release must be delivered.

[Ed. Note.—For other cases, see *Release*, Cent. Dig. § 17; Dec. Dig. § 10.*]

3. EVIDENCE (§ 444*)—PAROL EVIDENCE—RELEASE—DELIVERY ON CONTINGENCY.

A general release signed, sealed, and delivered may be shown by parol to have been delivered to take effect on a contingency which has never happened.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 1929-1944; Dec. Dig. § 444.*]

4. RELEASE (§ 53*)—PLEADING—REPLY—EVIDENCE.

In an action on a note in which defendant pleaded a release, plaintiff's reply alleging that the release was intrusted to the defendant, with the understanding that it was not to have effect as a release and was to be returned on

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

demand, did not plead a conditional delivery of the release, and hence evidence of that fact was improperly received.

[Ed. Note.—For other cases, see Release, Cent. Dig. § 93; Dec. Dig. § 53.*]

Appeal from Supreme Court, Appellate Division, First Department.

Action by Samuel J. Stiebel and others against John Grosberg. From a judgment of the Appellate Division (137 App. Div. 275, 121 N. Y. Supp. 923) affirming a judgment for plaintiffs, defendant appeals. Reversed and remanded.

Solomon Hanford, for appellant. Barnett L. Hollander, for respondents.

HAIGHT, J. This action was brought to recover the amount of a promissory note executed by the defendant on the 31st day of December, 1906, in which he promised to pay to the plaintiffs on demand the sum of \$37,372.87, with interest. The defense interposed by the defendant was a written release, signed, sealed, and delivered by the plaintiffs to him on the 31st day of December, 1907. A reply was served by the direction of the court, in which the plaintiffs alleged that the release was given or intrusted to the defendant with the understanding that it was not to have a legal inception or effect as a release, or as a delivery, and was to be returned upon demand. There was no allegation in the reply to the effect that the release was delivered conditionally to become operative in case the defendant should be forced into bankruptcy; and, in case he was not adjudged a bankrupt, that the release should be returned to the plaintiffs.

Upon the trial of the case after the jury had been impaneled, the counsel for the defendant moved the court for judgment on the pleadings, thus bringing up for the determination of the court the question as to whether the reply contained any allegations that would nullify the release. The court denied the defendant's motion, and an exception was taken. Thereupon the plaintiffs' counsel opened his case to the jury, stating what he proposed to prove relating to the release, and then the defendant's counsel again moved for judgment upon the opening, which motion was also denied and exception taken. Thereupon one of the plaintiffs was sworn as a witness, and gave testimony under the objection and exception of the defendant, to the effect that the defendant had applied to him for a release, stating, in substance, that he had been sick and had lost all that he had; that one of his creditors had commenced action against him; that he could not pay and would be compelled to go into bankruptcy unless he could stave it off; that he considered the plaintiffs' claim a debt of honor which he would pay when he was able to do so; that he wanted a release which he would only use provided he was forced into bankruptcy; if he did not have to go

through bankruptcy, he would return it. The plaintiffs then called the defendant as a witness, and showed from him that he had not been forced into bankruptcy, and then rested. The defendant offered no testimony in his own behalf, but moved for a direction of a verdict in his favor, "on the ground that the release is conclusive upon the parties, being a deed executed by the plaintiffs and now shown to have been duly delivered. It was turned over as a valid instrument at the time it was delivered and could not be accompanied by any condition resting in parol, and it was not pleaded in the reply that there was any parol condition in regard to the delivery." The motion of the defendant was denied and exception taken, and a verdict was directed in favor of the plaintiffs for the amount of the note, with interest, to which an exception was also taken.

The questions thus presented are:

First. Can a written release under seal be shown to have been delivered conditionally upon the happening of an event in the future upon an oral agreement that it should be returned in case the event did not happen?

Second. Was the conditional delivery properly pleaded in plaintiffs' reply?

[1] At common law the seal to a written instrument was conclusive evidence of a sufficient consideration, and its conclusive character could not be changed by parol testimony. This rule of the common law, however, was modified by the statute (2 R. S. 406, § 77), which is now embraced in our Code of Civil Procedure, § 840, which provides that a seal upon an executory instrument, hereafter executed, is only presumptive evidence of a sufficient consideration, which may be rebutted, as if the instrument was not sealed. Neither a receipt nor a release is a contract or an executory instrument. They are merely declarations or admissions in writing, and consequently it was held that the modification of the statute with reference to seals upon executory instruments does not extend to releases, which, when under seal, continue to be conclusive evidence of a sufficient consideration. *Gray v. Barton*, 55 N. Y. 68-71, 14 Am. Rep. 181; *Ryan v. Ward*, 48 N. Y. 204-208, 8 Am. Rep. 539.

For upwards of a century, or from the case of *Fitch v. Sutton*, 5 East, Rep. 230, down to the cases above cited, it has been repeatedly held that the giving of a receipt in full payment by a creditor of an undisputed account or claim does not conclude him from recovering the balance, although the receipt was given with knowledge and there was no error or fraud. The reason for so holding was that the receipt, not being under seal, was not conclusive upon the question of consideration; and, upon it appearing that there was no consideration for the receipt, it became of no binding force. Of course, this rule has no application to claims

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

or accounts, which are in dispute, in which the parties agree upon a compromise, or where a receipt is given for unliquidated demands. *Coon v. Knap*, 8 N. Y. 402, 59 Am. Dec. 502; *Kellogg v. Richards*, 14 Wend. 116. It therefore follows that liquidated and undisputed claims or accounts can be discharged by payment, or by the creditor executing a release under seal, by which he precludes himself from attacking the consideration for the release.

[2, 3] A release, however, must be delivered in order to become effective. The delivery is a separate, independent act from that of executing it. The same is true with reference to a deed of real estate. It has to be delivered in order to pass title and the right of possession of lands. The effect of a delivery of a deed cannot be changed by parol testimony. *Hamlin v. Hamlin*, 192 N. Y. 164, 84 N. E. 805. The reason for this rule is that the title and right of possession passes to the grantee upon delivery, and no person would be secure in his title and possession of real estate if it could be destroyed by oral testimony. The appellant claims that the same rule should apply to the delivery of a release; that the effect of such a delivery cannot be subsequently changed by parol testimony. Our attention has not been called to any case in this court in which this precise question has been decided.

In the case of *Reynolds v. Robinson*, 110 N. Y. 654, 18 N. E. 127, a question arose upon a finding of a contract for the purchase and sale of lumber on credit, accompanied by an oral understanding of the parties that the delivery should be contingent upon satisfactory reports of commercial agencies as to the pecuniary responsibility of the plaintiff. In that case we have a writing which is in form a complete contract which has been delivered upon a parol condition that it was not to become binding until the happening of a future event that had not occurred, and it was held that the condition might be proven by parol.

In the case of *Blewitt v. Boorum*, 142 N. Y. 357, 37 N. E. 119, 40 Am. St. Rep. 600, the action was brought to obtain an accounting, and for damages by reason of the violation of a contract, under seal, entered into between the parties in relation to the right to manufacture and sell a temporary binder for books. The defendants admitted the execution of the contract, but alleged that it had been delivered upon the parol condition that it was not to operate as a contract until the plaintiff had acquired the interest of a third person, which it is alleged he failed to acquire. Upon the trial oral evidence showing the condition and failure to perform was received, and the court found the facts accordingly. The question brought up for review was as to the competency of such evidence, and it was held that the contract was not required to be under seal, and that the evidence was competent. *Peckham, J.*,

in delivering the opinion of the court, referred to a number of cases in which oral testimony had been permitted with reference to conditional deliveries, and then referred to the case of *Cocks v. Barker*, 49 N. Y. 107, in which parol evidence had been permitted to show that a bond was delivered conditionally; but the court had found against the existence of the condition. *Allen, J.*, in commenting upon that case, held that the evidence was not admissible, because a deed could not be delivered to a party upon such a condition, citing *Worrall v. Munn*, 5 N. Y. 229, 55 Am. Dec. 330, and *Gilbert v. No. Am. Fire Insurance Co.*, 23 Wend. 43, 35 Am. Dec. 543. This opinion was criticised by Judge *Peckham*, holding that, in view of the fact that the trial court had found against the conditional delivery, the comments of *Allen, J.*, were not necessary to the decision, and then he says: "I think the doctrine that a bond could not thus be delivered is not borne out by the cases in this state, and certainly not by the later cases in England already cited." Page 364 of 142 N. Y., page 121 of 37 N. E., 40 Am. St. Rep. 600. He then proceeds to distinguish that case from the one under consideration by saying: "But a bond imports the existence of a seal, and the latter is requisite to the legal existence of a bond. The instrument in this case was an ordinary agreement, not requiring a seal for its validity, and we think the rule as to sealed instruments, however far it may be carried in regard to such instruments as require a seal for their validity, should not be extended in any event to those cases where the instrument is in law not in the nature of a specialty, and where the presence of a seal is totally unnecessary to its validity." He consequently holds that the rule which applies to deeds or writings conveying or relating to the conveyance of real estate or an interest therein is not applicable to an instrument not in any way relating to or affecting real estate, and which does not require a seal for its validity, although the instrument is in fact sealed. We thus have the dictum of Judge *Allen* in the case of *Cocks v. Barker*, holding that a conditional delivery of a bond cannot be shown by parol, it being an instrument under seal, and the dictum of Judge *Peckham* in *Blewitt v. Boorum*, to the contrary; and in each case the rest of the court concurred in the views expressed in the opinion.

Attention has been called to the common-law effect of a seal, and to the fact that the rule has not been changed by statute so far as releases are concerned. A release or receipt, however, is perfectly good without a seal, provided the holder can show that full payment has been made therefor. The seal is only necessary when the payment of adequate consideration is questioned. With a delivery of a deed of real estate the rights of parties change. The grantor parts with his title and possession, and the grantee is

vested with title and the right to immediate possession. In the acknowledgment of the payment of a claim or the delivering of a release therefrom, the change that takes place between the parties is entirely different. If the release be delivered without consideration, the maker receives nothing and only parts with his right to prosecute the claim. The person receiving the release receives no additional property right, but merely is relieved from a claim that might be prosecuted against him. The reasons, therefore, which exist with reference to the delivery of deeds of real estate, do not exist with reference to the delivery of releases. The act of executing releases is separate and distinct from acts of delivery. The delivery has to be shown independent of the instrument; and, while parol evidence is incompetent for the purpose of changing or explaining the meaning of the written instrument, we incline to the view that oral evidence may be given for the purpose of showing whether the delivery of the instrument was intended to be absolute or conditional.

[4] With reference to the second question brought up for review, it appears, as we have seen, that the plaintiffs' reply did not specifically allege that the release was delivered conditionally and was to be returned in case the defendant was not forced into bankruptcy. Of course, parties may make their own pleadings by their conduct on the trial. The plaintiff may produce evidence which, if received without objection, may sustain his right to recover, even though it was not covered by any allegation of the complaint. But we think the condition in this case was different. Immediately upon the impaneling of a jury the defendant moved for judgment upon the pleadings. In this motion the court had its attention drawn to the sufficiency of the allegations of the reply. Again, after the plaintiffs had opened their case, making the statement as to what they intended to prove, a motion was again made for judgment upon the opening. Here the court had its attention called to the sufficiency of the pleadings with a knowledge of the evidence that the plaintiffs proposed to submit. The evidence was then taken, under the objection of the defendant's counsel, that it was incompetent, irrelevant, and immaterial, and, specifically, that it was incompetent as seeking to contradict a formal deed which cannot be done by parol, and, after the receipt of the evidence, a motion was again made to strike it out upon the same ground. And, finally, the defendant moved for judgment upon various grounds, among which was the ground that it was not pleaded in the reply that there was any parol condition in regard to the delivery. All of these motions were denied and exceptions taken.

We think that the reply was defective in the particular mentioned, and that conse-

quently the court erred in its rulings with reference thereto. It follows that for this reason the judgment should be reversed and a new trial ordered, with costs to abide the event.

CULLEN, C. J., and WERNER, WILLARD BARTLETT, HISCOCK, and COLLIN, JJ., concur. CHASE, J., absent.

Judgment reversed, etc.

(202 N. Y. 259.)

**DARCY v. PRESBYTERIAN HOSPITAL
IN CITY OF NEW YORK.**

(Court of Appeals of New York. May 30, 1911.)

1. DEAD BODIES (§ 1*)—RIGHT TO POSSESSION—DISPOSITION IN GENERAL.

A mother, when the nearest surviving relative and next of kin, is entitled to the disposition of the dead body of her son, and may against one depriving her of the body maintain an action to recover damages for her wounded feelings and mental distress.

[Ed. Note.—For other cases, see *Dead Bodies*, Cent. Dig. §§ 1, 2; Dec. Dig. § 1.*]

2. DEAD BODIES (§ 9*)—CIVIL LIABILITY—COMPLAINT—STATUTE.

In an action by a mother against a hospital to recover damages because the hospital refused to deliver the body of her son, the complaint stated that, immediately after the death of the son, the mother demanded his body, and sent an undertaker for it, but that the defendant refused to deliver it until after it had caused the coroner to send a physician to make an autopsy, to which plaintiff had refused her consent. Penal Law (Consol. Laws 1909, c. 40) § 2213, provides that the right to dissect the dead body of a human being exists whenever prescribed by special statutes, whenever a coroner is authorized by law to hold an inquest upon a body, whenever authorized by the husband, wife, or next of kin, and whenever any district attorney shall deem it necessary. Section 2214 makes the unauthorized dissection of a human body a misdemeanor, while Code Cr. Proc. § 773, makes it the duty of a coroner to inquire into all suspicious deaths. Consolidation Act (Laws 1882, c. 410) § 1773, makes it the coroner's duty in case of a suspicious or unusual death to require a physician to view the body or perform an autopsy, and Laws 1895, c. 846, § 1775, makes it the duty of any citizen who should become aware of the death of any person to report such death to a coroner. *Held*, that as an unauthorized autopsy is a misdemeanor, and the complaint stated nothing to show that the autopsy in this case was legal, it stated a cause of action; the matter contained in the other statutes being matter of defense.

[Ed. Note.—For other cases, see *Dead Bodies*, Cent. Dig. §§ 13, 14; Dec. Dig. § 9.*]

Appeal from Supreme Court, Appellate Division, First Department.

Action by Jane Darcy against the Presbyterian Hospital in the City of New York. From a judgment of the Appellate Division (137 App. Div. 924, 122 N. Y. Supp. 1126) affirming a judgment of the trial court dismissing her complaint, plaintiff appeals. Reversed and remanded.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes

Carlisle Norwood, for appellant. Robert Thorne, for respondent.

HAIGHT, J. This action was brought to recover damages for the interference and prevention of the plaintiff of her right to receive the body of her deceased son from the defendant, and for wounded feelings and mental distress suffered by reason of the mutilation and dissection of his body. Upon the trial the complaint was dismissed at the opening of counsel on the ground that it did not state sufficient facts to constitute a cause of action.

The complaint alleges, in substance, that she was the mother of John Darcy, who died at the defendant's hospital on the 31st day of October, 1906, at the age of 20 years, unmarried and without children; that his father had died several years before, leaving the plaintiff, his mother, as his next of kin and entitled to the possession of his body for burial. The decedent was taken to the defendant's hospital on the 24th day of September, 1906, by the plaintiff, to receive treatment for ailments with which he was then afflicted, she agreeing with the agent of the hospital to pay \$1 per day for such treatment; that immediately after the decease of her son the plaintiff asked the superintendent of the hospital for his body, and sent an undertaker for the same, for the purpose of interment, but the defendant refused and neglected to then deliver the body to her; that the superintendent and one Robert Anderson Cooke, a physician in charge of the hospital, asked for her consent to make an autopsy, which she expressly refused to permit, and thereupon Cooke, with the cognizance and approval of the defendant, caused a coroner of the city of New York to send his physician to the hospital, and there, in the presence of Cooke and several other surgeons, performed an autopsy on the body of the decedent, thus depriving her of the right to the possession of the body for burial, greatly wounding her feelings and causing her great mental distress, anguish, etc.

[1] The first question presented for determination is as to whether a cause of action for damages exists. Under the allegations of the complaint, the mother of the decedent was his nearest and only next of kin, and consequently was the person who was entitled to his body for burial. It must be conceded that in some jurisdictions it has been held that since there can be no property in a dead body a personal representative of decedent cannot maintain an action for damages for the willful or negligent mutilation of the body, although he may sue for injury to the wearing apparel. 13 Cyc. 281, citing *Griffith v. Charlotte*, 23 S. C. 25, 55 Am. Rep. 1. This was doubtless the rule under the ecclesiastical law of England, as appears from the remarks of Lord Coke. 3 Inst. 203; 2 Bl. Com. 429.

While we adopted the common law in or-

ganizing our state governments, we have never considered ourselves bound by the ecclesiastical decisions, many of which were inapplicable to our form of government. But even in England, in more recent periods, the courts have recognized the right of possession of a dead body in those nearest in relation for the purpose of burial or other lawful disposition of it. *Queens v. Fox*, 2 Q. B. 246. The most elaborate consideration of the question in the courts of this country appears in the case of *Larson v. Chase*, 47 Minn. 307, 50 N. W. 238, 14 L. R. A. 85, 28 Am. St. Rep. 370, in which, after an examination of the authorities both in this country and in England, the conclusion is reached that, while no action can be maintained by the executor or administrator upon the theory of any property right in a decedent's body, the right to the possession of a dead body for the purpose of preservation and burial belongs to the surviving husband or wife or next of kin, in the absence of any testamentary disposition; and this right the law will recognize and protect from any unlawful mutilation of remains by awarding damages for injury to the feelings and mental suffering resulting from the wrongful acts, although no pecuniary damage is alleged or proved. This case has been followed in Massachusetts in the case of *Burney v. Children's Hospital*, 169 Mass. 57, 47 N. E. 401, 38 L. R. A. 413, 61 Am. St. Rep. 273, in which it was held that the father of a child, who is its natural guardian, has a right, in case the child dies, to the possession of its body for burial, and may maintain an action for an unauthorized autopsy performed upon the body of the child—citing *Meagher v. Driscoll*, 99 Mass. 281, 96 Am. Dec. 759, and numerous other cases therein referred to. In 4 American Law Times, 127, it was held in Ohio that a husband might recover damages for the maltreating of the dead body of his wife by physicians to whom the body had been delivered for the purpose of dissecting and examining the throat; and in our state it has been held that a widow has the right to the possession of the body of her deceased husband, and that she may recover damages for an unauthorized dissection of his remains. *Foley v. Phelps*, 1 App. Div. 551, 37 N. Y. Supp. 471.

We shall not at this time attempt a further discussion of the question, for there is little which we can add by way of argument to that which has already been well stated in the cases to which reference has been made. The rule adopted in the Minnesota case fully meets our approval, and consequently the plaintiff, being the mother and the nearest surviving next of kin to the decedent, is entitled to maintain the action and to recover damages for her wounded feelings and mental distress.

[2] It is contended, however, on behalf of the defendant, that the complaint does not state a cause of action. The plaintiff, as we have seen, clearly alleges that immediately

after the decease of her son she demanded of the defendant his body, and sent an undertaker for it; but that the defendant refused to deliver it until after it had caused the coroner to send his physician to make an autopsy on the body, and that, after, the plaintiff had refused her consent to such autopsy. Section 2213 of the Penal Law (Consol. Laws 1909, c. 40) provides that "the right to dissect the dead body of a human being exists in the following cases: (1) In the cases prescribed by special statutes; or, (2) whenever a coroner is authorized by law to hold an inquest upon a body, so far as such coroner authorizes dissection for the purposes of the inquest, and no further; or, (3) whenever and so far as the husband, wife or next of kin of the deceased, being charged by law with the duty of burial, may authorize dissection for the purpose of ascertaining the cause of death, and no further; or, (4) whenever any district attorney in this state, in the discharge of his official duties, shall deem it necessary," etc. Section 2214 provides that "a person who makes, or causes or procures to be made, any dissection of the body of a human being, except by authority of law, or in pursuance of a permission given by the deceased, is guilty of a misdemeanor." The duties of a coroner are as follows: "Whenever a coroner is informed that a person has been killed or dangerously wounded by another, or has suddenly died under such circumstances as to afford a reasonable ground to suspect that his death has been occasioned by the act of another by criminal means, or has committed suicide, he must go to the place where the person is and forthwith inquire into the cause of the death, or wounding, and in case such death, or wounding, occurred in a county in which is situated in whole, or in part, a city having a population of more than five hundred thousand as appears by the last state enumeration, but not otherwise, summon not less than nine, nor more than fifteen persons, qualified by law to serve as jurors, to appear before him forthwith, at a specified place, to inquire into the cause of the death," etc. Code Cr. Proc. § 773. It is further provided that "a coroner shall have power, when necessary, to employ not more than two competent surgeons to make post mortem examinations and dissections and to testify to the same, the compensation therefor to be a county charge. This section also applies to the county of New York." County Law (Consol. Laws 1909, c. 11) § 194. Under the Consolidated Laws of the city of New York (Laws 1882, c. 410, § 1773), the coroner was made a public officer in whom was reposed the duty of investigating the cause of death where any person shall die in a suspicious or unusual manner, and in such case it was his duty to require one of the coroner's physicians to view the body of the deceased or perform an

autopsy thereon as may be required. And under section 1775, chapter 846, of the Laws of 1895, it was made the duty of any citizen who should become aware of the death of any person who died in a suspicious or unusual manner to report the death forthwith to one of the coroners, or to the clerk in attendance at the coroners' office. And by section 1571 of the Greater New York Charter (Laws 1901, c. 406) the above was continued in force.

It thus appears from the provisions of the statute referred to that an unauthorized autopsy is prohibited and made a misdemeanor, and there is nothing in the allegations of the complaint that indicates that the decedent died in a suspicious or unusual manner, or that there was reasonable ground to suspect that his death had been occasioned by criminal means or the act of another. We are consequently of the opinion that the complaint stated a cause of action.

It may be that upon the trial of this case the defendant will be able to show that the decedent died in a suspicious and unusual manner, and that there was reasonable ground to suspect that his death was occasioned by criminal means. If so, it was its duty to notify the coroner, and it then became the duty of that officer to investigate, either in person or by his physician, the clinical history of the case, and, if he then had grounds to suspect criminal agency had caused death, to hold the body for autopsy. But these are matters of defense, and are no part of the plaintiff's original case.

The judgment should therefore be reversed, and a new trial ordered, with costs to abide the event.

CULLEN, C. J., and WERNER, WILLARD BARTLETT, CHASE, and COLLIN, JJ., concur. HISCOCK, J., absent.

Judgment reversed, etc.

(202 N. Y. 552)

LEVY v. POPPER et al.

(Court of Appeals of New York. May 16, 1911.)

1. JUDGMENT (§ 222*)—PLEADINGS—CONFORMITY TO ISSUES.

A judgment in a suit in equity, which finally adjudicates the differences between the parties, should include the amount conceded by defendant to be due plaintiff, and which was tendered by defendant before the commencement of the action, unless the amount was paid into court, or the tender kept alive.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 402; Dec. Dig. § 222.*]

2. COSTS (§ 238*)—COSTS ON APPEAL.

Where the correction of a judgment could be made on motion at the Special Term, without the expense of an appeal on a case and exceptions, the court on appeal, modifying the judgment, will grant costs to respondent.

[Ed. Note.—For other cases, see Costs, Cent. Dig. § 908; Dec. Dig. § 238.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes

Appeal from Supreme Court, Appellate Division, First Department.

Action by William Levy against Edward Popper and another. From a judgment of the Appellate Division (134 App. Div. 963, 119 N. Y. Supp. 1132), affirming a judgment granting insufficient relief, plaintiff appeals. Modified and affirmed.

John R. Dos Passos, for appellant. Daniel P. Hays, for respondents.

PER CURIAM. [1, 2] Upon the merits we have reached the conclusion that the issues joined in the pleadings have been properly determined. But it appears that through some oversight the amount conceded to be due and owing the plaintiff, to wit, the sum of \$1,709.54, which was tendered to him by the defendants before this action was brought, was not included in the judgment. In view of the fact that this was an equity action, and is a final adjudication of the differences existing between the plaintiff and the defendants, the item should have been included in the judgment, unless it appeared that the amount had been paid into court or the tender kept alive. The respondents' counsel, upon the argument of this appeal, consented that the item might now be included. This correction, however, could have been made on motion at the Special Term, without the expense of an appeal upon a case and exceptions. We therefore are of the opinion that the modification ordered should not affect the question of costs.

The judgment should be modified, so as to allow the plaintiff to recover the amount tendered, to wit, \$1,709.54, and, as so modified, affirmed, with costs to the respondents.

CULLEN, C. J., and GRAY, HAIGHT, VANN, WERNER, HISCOCK, and COLLIN, JJ., concur.

Judgment accordingly.

(202 N. Y. 124)

In re SCHNABEL.

(Court of Appeals of New York. May 9, 1911.)

EXECUTORS AND ADMINISTRATORS (§ 469*)—ACCOUNTING—JURISDICTION—STATUTORY PROVISION.

Code Civ. Proc. § 2731, providing that where a contest arises between an administrator or executor, on the settlement of his account, and any of the other parties, respecting property alleged to belong to the estate, but to which the accounting party lays claim, either individually or as the representative of the estate, the contest must, except where the claim is made in representative capacity, be tried in the same manner as any other issue arising in the Surrogate's Court, does not give the surrogate authority to surcharge the account of an administratrix with a sum received on the sale of personal property after the death of intestate, which had been transferred to her by the intestate during his lifetime, on the ground that such transfer was fraudulent as

to creditors of the intestate; the mere claim of a creditor that the property belonged to the estate of the deceased being insufficient to give the surrogate any power to pass upon the question.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 2000-2013; Dec. Dig. § 469.*]

Appeal from Supreme Court, Appellate Division, First Department.

In the matter of the accounting of Katherine Schnabel, as administratrix. From an order of the Appellate Division (136 App. Div. 522, 121 N. Y. Supp. 54), striking out an item with which the surrogate surcharged the account of the administratrix, a contending creditor appeals. Affirmed.

See, also, 137 App. Div. 923, 122 N. Y. Supp. 1144.

Jerome Koehler, for appellant. Edward Herrmann, for respondent.

GRAY, J. Upon this appeal the contending creditor is appellant and the administratrix is respondent in a proceeding which was instituted by the former to compel the latter to account. The only one of the questions arising out of their controversy, which we need consider, is over the power of the surrogate to surcharge the account of the administratrix with a sum of money received by her upon a sale of personal property, made after the death of the intestate. The surrogate sustained the claim of the creditor and surcharged the account; but the Appellate Division struck out the item.

The intestate had conducted the business of a liquor saloon for some years, and some time before his death he duly executed and delivered to his wife, this administratrix, a bill of sale, which transferred to her the saloon fixtures and his interest in the business. After his death, she transferred her interest in the property to another, and upon this accounting her account naturally contained no reference to the transaction. Upon the trial before a referee, to whom the matter was referred, the facts respecting it were brought out. The referee found the fact of the making of the bill of sale; but he further found that it was not recorded, that there had been no change of possession, and that the consideration was nominal. Thereupon he found, as conclusions of law, that the bill of sale was fraudulent, and therefore void, as to the creditors of the decedent, and that the administratrix should be charged with the price received by her upon her subsequent sale of the property. The surrogate overruled her exceptions and confirmed the referee's report. Upon her appeal to the Appellate Division from the decree of the Surrogate's Court, it was held that the surrogate was without jurisdiction to hear and determine the question as to the validity of the bill of sale, and that, until competently set aside in a proper action, it was conclusive evidence

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

as to the personal interest of the administratrix in the property.

I think that this determination was correct, and that the decree of the Surrogate's Court was properly reversed upon the exceptions. The appellant contends that the surrogate had the power to decide the question of fraud, inasmuch as there was a contest between the administratrix, who was accounting, and the petitioning creditor, respecting what was property of the estate. Section 2731 of the Code of Civil Procedure, upon which reliance is placed to support this contention, provides that, "where a contest arises between the accounting party and any of the other parties respecting property alleged to belong to the estate, but to which the accounting party lays claim either individually or as the representative of the estate, * * * the contest must, except where the claim is made in a representative capacity, * * * be tried and determined in the same manner as any other issue arising in the Surrogate's Court." That section may not be construed as conferring any such extensive jurisdiction as was exercised in this case. The power to set aside the instrument, by which the property was transferred by the deceased to his wife could only be exercised by a court possessing general equitable jurisdiction. The Surrogate's Court is one of limited powers and jurisdiction, and, though the surrogate possesses such legal and equitable powers as are necessary for the discharge of the duties devolved upon him by the statute, he has no general equitable jurisdiction.

The power to distribute the estate of a decedent and to determine contested claims does not comprehend the power to hear and determine questions of the validity of transfers of property, when attacked upon the ground of fraud in their procurement. To concede such a power to the Surrogate's Court is to concede the general power of a court of equity, which, as yet, the Legislature has not conferred upon it. The jurisdiction, which courts of equity exercise in cases of fraud, has existed as long as there has been a court of chancery, and it is regulated, in its exercise, by the principle of administering justice according to honesty and conscience, not contravening rules of law, but supplying a remedy where the legal remedy is inadequate. Courts of equity proceed upon broad principles in protecting the rights of creditors, whether by giving effect to the statute against fraudulent conveyances or in cases not reached by the statute. Our Surrogates' Courts have never had such general jurisdiction, nor have they other powers than have been given by the Legislature. In this case the Surrogate's Court, in undertaking to determine the question of fact as to the fraud in the transfer of his property by the deceased, and the resultant equities, has assumed a power not to be read

into the express powers conferred. Of course, the mere allegation or claim of the creditor that the saloon business and property belonged to the estate of the deceased did not give to the surrogate any power to pass upon it. *Matter of Thompson*, 184 N. Y. 36, 40, 76 N. E. 870. This question should be regarded as definitively settled by decisions of this court in cases, where, similarly, it has been contended that the jurisdiction of the surrogate extended to the setting aside or annulment of instruments of release and of assignment affecting the distribution of estates and claimed to have been fraudulent. *Matter of Wagner*, 119 N. Y. 28, 36, 23 N. E. 200; *Sanders v. Soutter*, 126 N. Y. 193, 27 N. E. 263; *Matter of Randall*, 152 N. Y. 508, 46 N. E. 945. In all such cases resort for relief must be had to a court possessing general equity powers.

The order should be affirmed.

CULLEN, O. J., and HAIGHT, VANN, WERNER, HISCOCK, and COLLIN, JJ., concur.

Order affirmed with costs.

(202 N. Y. 242)

MURPHY v. ERIE R. CO.

(Court of Appeals of New York. May 30, 1911.)

1. DEATH (§ 60*)—DAMAGES—EVIDENCE.

In an action for negligent death, plaintiff can show decedent's age, sex, health, and general intelligence, and his relation to the next of kin and their condition in life, as bearing upon the pecuniary loss suffered by those for whose benefit the suit is brought.

[Ed. Note.—For other cases, see *Death*, Cent. Dig. § 79; Dec. Dig. § 60.*]

2. DEATH (§ 60*)—DAMAGES—EVIDENCE.

In an action for negligent death, it was error to admit evidence showing the number of next of kin's children, and services and expenditures rendered and made by decedent for the benefit of the children.

[Ed. Note.—For other cases, see *Death*, Cent. Dig. § 79; Dec. Dig. § 60.*]

Appeal from Supreme Court, Appellate Division, Fourth Department.

Action by Catherine E. Murphy, as administratrix of Emily J. Warth, against the Erie Railroad Company. From a judgment of the Appellate Division (134 App. Div. 992, 119 N. Y. Supp. 183), affirming a judgment for plaintiff, defendant appeals. Reversed, and new trial granted.

F. A. Robbins, for appellant. Waldo W. Willard, for respondent.

WERNER, J. On July 30, 1908, Emily J. Warth, the plaintiff's intestate, while riding in a wagon upon the invitation of the driver thereof, was killed in a collision between the wagon and one of the defendant's trains. The accident occurred in the city of Corning at

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes

the place where the defendant's tracks cross First street. There were gates at this crossing intended for the protection of travelers upon the highway, but through the neglect of the defendant they were not lowered at the approach of the colliding train. This is the usual action for damages, brought by the administratrix of the intestate. The jury rendered a verdict in favor of the plaintiff for \$4,000. Upon appeal to the Appellate Division the judgment entered on the verdict was affirmed, and that court was united in holding that, as regards the alleged negligence of the defendant and the intestate's freedom from contributory negligence, the evidence was ample to sustain the recovery. There was a division of opinion, however, upon the question whether the trial court had erred in admitting certain evidence bearing upon the question of damages. That is the only question which we shall discuss, as our examination of the record has satisfied us that the evidence bearing upon the two fundamental questions of negligence and contributory negligence justified the submission of the case to the jury.

Plaintiff's intestate at the time of her death was about 52 years of age. She had been a seamstress, earning on the average between \$400 and \$500 a year. Her only next of kin were a half-sister, who is the plaintiff, and a half-brother, residing out of the state. The intestate had always lived in the household of the plaintiff who was married. Upon the direct examination of the plaintiff, the fact was elicited that she had borne four children, one of whom had died in infancy and the other three of whom were living; the eldest being then ten years of age. Defendant's counsel objected to this evidence, and the learned trial court, after taking the matter under consideration, ruled that, if it should appear that the intestate had helped the plaintiff about the household by taking care of the children at times, and doing things for them that the mother was not able to do, the evidence would be admissible as tending to prove the loss incurred by the plaintiff as one of the next of kin. Defendant's counsel took an exception to this ruling. The plaintiff was thereafter permitted to testify, under persistent objections by defendant's counsel, that the intestate had been accustomed to looking after the children when the plaintiff had been ill, that she had made the children's dresses, that she bought all the clothes for Mary, the eldest, and that she had bought the shoes and stockings for all of them. It was also shown that the intestate had paid to the plaintiff for her board \$3.50 a week, that she had given her a Christmas present each year, as she did to the half-brother, and had performed some other small services for plaintiff. The verdict of the jury was for \$4,000.

[1] The Code of Civil Procedure provides that damages in such actions as this are exclusively for the benefit of the decedent's hus-

band or wife and next of kin (section 1903), and they are to be a fair and just compensation for the decedent's death to the person or persons for whose benefit the action is brought (section 1904). Under these very general provisions of the statute it has been impossible for the courts to formulate any strict or definite rules for the guidance of juries in estimating damages, and they have, therefore, given the law a broad and liberal construction. Thus, in *Ihl v. Forty-Second St. & G. St. F. R. R. Co.*, 47 N. Y. 317, 7 Am. Rep. 450, where the action was for the benefit of the parents to recover for the death of a child of tender years, it was held that the absence of proof of special pecuniary damage to the next of kin resulting from the death of the child would not have justified the court in nonsuiting the plaintiff, or in directing the jury to find only nominal damages, and in similar cases this court has decided that the statute does not limit the right of recovery to cases in which there is exact proof of actual pecuniary loss. *Oldfield v. N. Y. & Harlem R. R. Co.*, 14 N. Y. 310; *O'Mara v. Hudson River R. R. Co.*, 38 N. Y. 445, 450, 98 Am. Dec. 61. It is always proper, and sometimes necessary, to make proof of such facts as the age, sex, health, and general intelligence of the person killed, his relation to the next of kin, and their condition in life. *Houghkirk v. President, etc., D. & H. C. Co.*, 92 N. Y. 219, 44 Am. Rep. 370; *Lockwood v. N. Y., L. E. & W. R. R. Co.*, 98 N. Y. 523, 526; *Meekin v. B. H. R. R. Co.*, 164 N. Y. 145, 152, 58 N. E. 50, 51 L. R. A. 235, 79 Am. St. Rep. 635. All these things have a bearing upon the question of pecuniary loss suffered by those for whose benefit the action may be maintained, and these are the decedent's husband or wife and next of kin.

[2] In the case at bar the plaintiff was permitted to prove the number of her children. These children were not next of kin to the decedent. This evidence was supplemented by proof of specific services and expenditures rendered and made by the decedent for the benefit of these children. This evidence was admitted upon the theory that it tended to prove the pecuniary loss which was sustained by the plaintiff, the mother of these children, in the death of her intestate. That is a theory, however, which is obviously fallacious, for its effect is to place before the jury extraneous facts calculated to excite sympathy and induce a verdict based on elements of loss not contemplated by the statute. The reception of similar evidence was condemned by this court in *Lipp v. Otis Bros. & Co.*, 161 N. Y. 559, 56 N. E. 79, where the plaintiff, who sued to recover for the death of his son, was permitted to prove the circumstances of the sisters, brothers, nephews, and nieces of the decedent, none of whom had any legal interest in the recovery. In *Pennsylvania Co. v. Roy*, 102 U. S. 451, 460, 26 L. Ed. 141, the plaintiff was a married man, who brought suit to recover damages for injuries to him-

self. Upon the trial he was permitted to give evidence of the number and ages of his children. The judgment was reversed by the United States Supreme Court upon this ground alone, and in condemning that evidence that court said: "The manifest object of its introduction was to inform the jury that the plaintiff had infant children dependent upon him for support, and, consequently, that his injuries involved the comfort of his family. This proof * * * was well calculated to arouse the sympathies of the jury, and to enhance the damages beyond the amount which the law permitted."

We do not suggest that the verdict in this case is excessive, for with that question we have nothing to do. It is our duty, however, to see that verdicts in this class of cases, whether large or small, are supported by competent evidence relevant to the measure of damages prescribed by the statute. The evidence relating to the services and expenditures of the decedent for the children of the plaintiff was incompetent, and it may have been influential in determining the amount of the recovery.

It was, therefore, not a harmless error, and for that reason the judgment should be reversed, and a new trial granted, costs to abide the event.

CULLEN, C. J., and GRAY, HAIGHT, and COLLIN, JJ., concur. HISCOCK, J., concurs in result. VANN, J., not sitting.

Judgment reversed, etc.

(202 N. Y. 129)

RIGGS v. NEW YORK TUNNEL CO.

(Court of Appeals of New York. May 9, 1911.)
EXPLOSIVES (§ 12*)—INJURIES FROM BLASTING
—SUFFICIENCY OF EVIDENCE.

Evidence in an action against a contractor for wrongful death, caused by a delayed explosion of dynamite in blasting, *held* insufficient to show negligence on the part of the defendant. [Ed. Note.—For other cases, see Explosives, Cent. Dig. §§ 9, 10; Dec. Dig. § 12.*]

Appeal from Supreme Court, Appellate Division, Second Department.

Action by Mary Hatch Riggs, as administratrix of Clarence B. Riggs, deceased, against the New York Tunnel Company. From a judgment of the Appellate Division (134 App. Div. 672, 119 N. Y. Supp. 548), affirming a judgment for plaintiff, defendant appeals. Reversed, and new trial granted.

Franklin Nevius, for appellant. Don R. Almy, for respondent.

WILLARD BARTLETT, J. This is an action to recover damages for negligently causing the death of the plaintiff's intestate, who was killed in the subway under the East River, while it was in process of construction, by the unexpected explosion of a charge of

dynamite in the course of the blasting necessary in doing the work which was being carried on by the defendant. The plaintiff's intestate was an inspector employed by the city of New York, who was charged with the duty of reporting the progress of the work in the tunnel at the end of each shift of workmen, and who also at the end of each month measured the entire quantity of work done during that month. There is no doubt that he was lawfully in the tunnel at the time of the fatal explosion. Whether he was properly in the place where he was when killed is a question which it is not necessary to decide. However that may be, we concur with the dissenting member of the Appellate Division in the opinion that the record does not contain proof sufficient to sustain a verdict that the defendant was negligent in its method or manner of doing the work.

The defendant's agents and servants had fired a blast, which gave out a report that indicated the complete explosion of all the dynamite cartridges which had been inserted in the heading of the tunnel. They then disconnected the electric firing apparatus, and the defendant's foreman in charge of the blasting called out to his own workmen: "It's all over, boys; go in and blow out the smoke." That portion of the tunnel into which they were thus directed to go was filled with a dense volume of smoke and gas, so that, although the workmen carried candles, they could hardly see one another. The plaintiff's intestate advanced toward the heading with the defendant's employes, who were carrying forward a hose with which to blow out the smoke and gas, when a second explosion occurred, by which he and several others were fatally injured.

We can discover nothing in the evidence which points to any negligence on the part of the defendant toward the plaintiff's intestate. It is argued that the defendant's foreman was negligent in representing to the "boys" that the explosion was "all over." This representation, however, was not made to the unfortunate inspector. It was expressly addressed only to the employes of the defendant, and did not call upon the plaintiff's intestate to take any action whatever. Indeed, the conditions in that part of the tunnel at that time were such as rendered it impossible for him then to make any measurements until the smoke and gas should have been cleared out; so that the defendant's foreman could have had no reason to suppose that the inspector's movements would be in any wise influenced by his words. It may be that what he thus said in the hearing of the inspector was such an assurance of safety as to free the latter from any imputation of contributory negligence in going forward when and where he did; but that mistaken assurance, addressed only to his own gang of workmen, cannot be regarded as an act of

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

negligence on his part toward the plaintiff's intestate, for which his principal can be held responsible.

It is further contended in behalf of the plaintiff that the method employed by the defendant in loading and firing the two series of blast holes made in the face of the heading was essentially improper and dangerous; and this proposition is pressed upon us with much elaboration and detail. It is enough to say in regard to it that, however defective, objectionable, or unsafe the method may have been, there is not a particle of evidence to show that the explosion which killed the plaintiff's intestate was due to any feature in the manner of doing the work which is now criticised by plaintiff's counsel. The system may have been objectionable, but it is not shown that its objectionable character had anything to do with the death of the inspector.

Another basis for the imputation of negligence is found by counsel in the failure of the defendant's foreman to do more than he did to ascertain that all the cartridges had been exploded before he directed his men to proceed and clear out the smoke and gas. It appears, however, as already stated, that the electric connections by which the blasts were fired had been severed before this direction was given, and that the sound of the blast indicated that all the cartridges had gone off. Even if some remained unexploded, the foreman had no reason to suppose that they would explode thereafter, in the absence of the application of electricity, or any other force, while his men were blowing out the noxious vapors near the heading. Indeed, the proof fails to suggest any plausible explanation as to the cause of the fatal explosion.

For these reasons, in addition to those stated by Mr. Justice Jenks in the dissenting opinion below, we think that the judgment should be reversed, and a new trial granted, with costs to abide the event.

CULLEN, C. J., and GRAY, WERNER, HISCOCK, CHASE, and COLLIN, JJ., concur.

Judgment reversed, etc.

(202 N. Y. 289.)

HOOVER v. HUBBARD et al.

(Court of Appeals of New York. May 30, 1911.)

1. LIMITATION OF ACTIONS (§ 155*)—JOINT CONTRACTORS—PAYMENTS.

Where one of two joint makers of a note which was barred by limitations except for payments made by the other had never made any of the payments nor authorized his co-maker to make them as his agent, nor ratified them, such payments were unavailable as against him to toll limitations, under the rule that payments made by one of two or more joint contractors, in order to be effective to remove the bar of limitations as to others, must have been made

by previous authorization or subsequent ratification.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 624; Dec. Dig. § 155.*]

2. PLEADING (§ 36*)—ESTOPPEL.

One of two joint makers of a note, by pleading full satisfaction and discharge of the indebtedness did not bar his right to claim that the note was barred by limitations as against him; it appearing at the trial that the allegation of payment was a mistake, and it not appearing by such allegation that the note was paid or discharged by the pleader.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 81-86; Dec. Dig. § 36.*]

Appeal from Supreme Court, Appellate Division, Fourth Department.

Action by Elbie G. Hoover against Henry H. Hubbard, impleaded with another. From a judgment for plaintiff affirmed by the Appellate Division (134 App. Div. 909, 118 N. Y. Supp. 1114), defendant Henry H. Hubbard appeals. Reversed, and new trial granted.

John Conboy, for appellant. Jerome B. Cooper, for respondent.

CHASE, J. On March 1, 1895, the defendants borrowed of Charles Genter \$800, for which they gave to him a promissory note, of which the following is a copy: "\$800.00. Theresa, March 1, 1895. For value received, we jointly and severally promise to pay Charles Genter, or bearer, six hundred dollars one year after date, at five per cent. interest. Elmer E. Hubbard. Henry H. Hubbard."

The defendant Elmer E. Hubbard paid the interest on said note annually for 11 years. He also paid thereon \$300 on account of principal. Prior to the commencement of this action, the plaintiff became the owner and holder of said note, and on April 28, 1908, this action was commenced thereon. The appellant, Henry H. Hubbard, answered the complaint, in which he alleged: "First. That prior to the commencement of this action he fully satisfied and discharged any and all claims and indebtedness in said complaint set forth by payment in full. Second. That the cause of action set forth in said complaint did not accrue nor did any part thereof accrue at any time within 6 years next preceding the commencement of this action." It affirmatively appears that the appellant never made any payments upon said note. It is claimed by the respondent that some of the payments made by the defendant Elmer E. Hubbard were in the presence of the appellant.

[1] It was held by this court in *McMullen v. Rafferty*, 89 N. Y. 456, 459, that: "It is the settled law of this state that payments made by one joint contractor cannot save from the statute of limitations a claim against another joint contractor, and that payments made by the principal debtor cannot save from the statute a claim against

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

the surety; and it makes no difference that the payments were made with the knowledge of the other party liable for the same debt. To make payments effective against a party to save a claim from the statute, they must have been made by him, or for him by his authorized agent. One joint contractor may make payments as agent for all the contractors, or the principal debtor may make payments for and in the name of his surety as his agent, or payments may thus be made in the name of all the joint contractors, or of the surety without previous authority, but be subsequently ratified, and in all such cases the running of the statute may be prevented. *First National Bank of Utica v. Ballou*, 49 N. Y. 155. But in all cases to make the payments effective they must by previous authorization or subsequent ratification be the payments of the party sought to be affected by them." It does not appear that the appellant authorized the defendant, Elmer E. to make any payment upon such note.

Unless a payment by one of two joint and several debtors prevents the running of the statute of limitations as to all, there is no evidence on which to sustain the judgment as against the appellant. There has been a controversy in some jurisdictions as to the legal consequences of a payment made upon an indebtedness by one of two or more joint debtors, so far as it affects the running of the statute of limitations against the debtors other than the person making the payment. In *Shoemaker v. Benedict*, 11 N. Y. 176, 181, 62 Am. Dec. 95, referring to payments made by one of several makers of a promissory note before the statute of limitations had barred an action thereon, it was said that: "Before the decision of *Van Keuren v. Parmelee*, 2 N. Y. 623, 51 Am. Dec. 322, it would have been considered very well settled upon authority that such payments did operate to prevent the statute of limitations from attaching to the demand." It was, however, by *Shoemaker v. Benedict*, supra, clearly settled in this state that a payment made by one of the joint and several makers of a promissory note either before or after an action upon it is barred by the statute of limitations and within 6 years before suit brought does not affect the defense of the statute as to the others. There have been many cases in this court approving and confirming the authority of that case. Among the most recent of the reported decisions is *Brooklyn Bank v. Barnaby*, 197 N. Y. 210, in the opinion in which case, at pages 219 and 220, 90 N. E. 834 at page 837, 27 L. R. A. (N. S.) 843, the authority of *Shoemaker v. Benedict*, supra, is again referred to, approved and reasserted.

[2] It is also claimed by the respondent that the appellant is precluded from claiming the statute of limitations as a bar to

this action by reason of the first paragraph of his answer, in which he alleges the full satisfaction and discharge of the indebtedness. The record shows that the appellant was mistaken in his allegation that the indebtedness was fully satisfied and discharged. If we accept the pleading as an admission, it does not appear thereby independently of the evidence received upon the trial or by the record as an entirety, that the appellant satisfied and discharged the indebtedness or made any payments thereon at a time within 6 years prior to the commencement of the action.

The judgment should be reversed, and a new trial granted, with costs to abide the event.

CULLEN, C. J., and GRAY, VANN, WILLARD BARTLETT, HISCOCK, and COLLIN, JJ., concur.

Judgment reversed, etc.

(302 N. Y. 280)

NESTELL v. HART et al.

(Court of Appeals of New York.)

1. MORTGAGES (§ 8*)—CONSTRUING INSTRUMENTS TOGETHER—CONVEYANCE AS SECURITY.

Plaintiff, pending a proceeding against her husband to compel him to account as executor and trustee of an estate in which defendants were interested, and to secure an adjournment of the accounting, conveyed real property to a trustee for the purposes set out in a declaration of trust executed by him to the plaintiff, whereby the trustee was required to pay all sums which upon a proper accounting by plaintiff's husband should be found due to defendants or other persons, and to pay over any balance over such sums, due and payable to defendants, to the plaintiff, with power of sale for such purposes. *Held*, that the deed, construed with the declaration of trust, was in effect a mortgage, and that plaintiff had a right of redemption after the satisfaction of the defendants' claims, with a right to a reconveyance contingent upon the outcome of the accounting.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. §§ 7, 8; Dec. Dig. § 8.*]

2. FRAUDS, STATUTE OF (§ 63*)—"INTEREST IN REAL PROPERTY"—CONVEYANCES.

Held, also, that plaintiff's remaining interest in the property under her deed to the trustee and his declaration of trust was "an interest in real property," within Real Property Law (Consol. Laws 1909, c. 50) § 242, prohibiting the conveyance of such interests except by writing subscribed by the grantor, or his agent thereto authorized in writing, so that her oral consent to a conveyance of the property by the trustee to the defendants pending the accounting was no bar to her interest.

[Ed. Note.—For other cases, see *Frauds*, Statute of, Cent. Dig. §§ 97-104; Dec. Dig. § 63.*]

For other definitions, see *Words and Phrases*, vol. 4, pp. 3692-3709; vol. 8, p. 7691.]

3. TRUSTS (§ 356*)—TRUST DEED AS SECURITY—CONVEYANCE BY TRUSTEE—EFFECT.

Where plaintiff conveyed land to one who executed a declaration that he held it in trust to pay any amount found due from plaintiff's husband by the decree in his accounting as ex-

ecutor, and pending the accounting the trustee conveyed the land to defendants, who took with express notice of the terms of the trust, defendants held the land subject to plaintiff's rights the same as while held by the original trustee.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 529-538; Dec. Dig. § 856.*]

Appeal from Supreme Court, Appellate Division, First Department.

Action by Emma E. Nestell against Charles H. Hart and others. From a judgment of the Appellate Division (137 App. Div. 919, 122 N. Y. Supp. 1138), affirming a judgment for defendants, plaintiff appeals. Modified and affirmed.

Dallas Flannagan, for appellant. William H. Van Benschoten, for respondents.

HAIGHT, J. This action was brought for the purpose of obtaining an adjudication that the plaintiff is the owner in fee of the premises known as 76 West 125th street, in the city of New York, and that the defendants, who claim title under a deed from William D. Leonard, be directed to convey the premises to the plaintiff and account for the rents received by them.

Joseph B. Hart died in the city of New York on or about the 4th day of December, 1878, leaving a last will and testament, which was duly admitted to probate on the 23rd day of December thereafter. He left him surviving Emma S. Hart, his widow, and the defendants, who were his children. In his will he created a trust in favor of his widow during her life, with remainder over to his children, and appointed John Jay Nestell, George W. Hart, and Emma S. Hart executors and trustees under his will. John Jay Nestell qualified as such executor, etc., and became the sole manager of the estate. Emma S. Hart, the widow of the testator, died on the 21st day of September, 1907, and thereupon her children, the remaindermen, called upon Nestell for an accounting as to his management of the estate. The plaintiff is the wife of Nestell, and on the 30th day of December, 1907, he conveyed to her the premises in question. After proceedings had been instituted in the Surrogate's Court by the remaindermen for an accounting of Nestell as executor and trustee, an examination of his accounts was had by an accountant, who reported him short in a large amount, and thereupon a claim was made that he had conveyed the real estate in question to his wife in violation of the rights of the remaindermen, and, in order to procure an adjournment of the accounting before the Surrogate's Court, the plaintiff was induced to execute a deed of the premises which had been conveyed to her by her husband, to his attorney, William D. Leonard, to be held by him in trust for the purpose of securing any amount that might be found due from her husband to the de-

fendants. Thereupon "Leonard executed and delivered to the defendants a declaration of trust to the effect that he had accepted the conveyance above mentioned and held the premises therein described for the following uses and purposes, viz.: First. To pay any and all sums which, upon a proper accounting by the said John J. Nestell, as sole surviving executor and trustee under the last will and testament of Joseph B. Hart, deceased, shall be decreed to be due and payable by him to Irene N. Collord, Charles H. Hart, Emma J. Sheridan and such other persons, if any, as by said decree shall be determined and adjudged. Second. To pay over any balance that may remain after the payments aforesaid to Emma E. Nestell, the grantor named in the said conveyance above mentioned, her executors, administrators or assigns. Third. For the purpose of carrying out the provisions above mentioned, to sell or dispose of the above-mentioned premises at public auction or private sale as may be deemed most expedient, and to execute and deliver to the purchaser or purchasers thereof, good and sufficient deeds or conveyances for the same, the proceeds thereof to be applied in accordance with the provisions above mentioned."

The proceedings before the surrogate for an accounting were thereupon adjourned from time to time, and subsequently and on or about the 3d day of July, 1908, an agreement in writing was entered into by John Jay Nestell and the defendants, by which he turned over and assigned to them a number of bonds, mortgages, and stocks of corporations, of the value of \$257,000, to be applied upon his indebtedness to them when the amount should be ascertained, and also agreed to cause to be transferred to them the real estate in question to be valued at \$55,000, to also be applied upon such indebtedness, the surplus, if any, to be returned to him; and thereupon Leonard, the plaintiff's trustee, conveyed the premises to the defendants, pursuant to that agreement. The trial court has found that this conveyance was made with the knowledge and consent of the plaintiff. It is not claimed, however, that she joined in the written contract, or that her consent was in writing. The court further found as a fact that \$55,000 was the full value of the premises, and, as conclusions of law, that the deed executed by the plaintiff to Leonard was a valid conveyance; that the conveyance by Leonard to the defendants was also valid, and was in all respects ratified and confirmed by the plaintiff; that the defendants are entitled to the possession and control of the premises, and to the rents, issues, and profits thereof, until such time as there shall be a final determination as to whether or not Nestell is indebted to the defendants by reason of his acts as executor and trustee under the will of Joseph B.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.

Hart, deceased. And if the amount due from him exceeds the value of the premises as fixed by the agreement between him and the defendants, and the other personal property transferred by him to them, the defendants shall be adjudged to be entitled to retain the same as owners in fee, but, if it shall be adjudged that any less sum than the total amount of the valuations placed upon the real estate in question and the personal property is due from Nestell, the defendants, on paying to him the difference, shall likewise be entitled to retain the real estate in question as owners in fee.

[1] We are of the opinion that the deed from the plaintiff to Leonard is a valid instrument, and under the findings it cannot now be set aside as void; but it must be construed in connection with the declaration of trust executed by Leonard, and, when so construed, it becomes in effect a mortgage upon the real estate. Leonard, as her trustee, is authorized to pay the defendants the amount that shall be decreed by the surrogate to be due and owing by her husband upon his accounting as an executor and trustee of Joseph B. Hart, deceased, and to return any balance that may remain after such payment to the plaintiff. The plaintiff, therefore, continued to retain the right of redemption and to be the owner of the equity that should exist after the satisfaction of the defendants' claim. Should the decree entered upon the accounting fail to show any indebtedness upon the part of Nestell over and above the bonds, mortgages, and stock turned over to the estate, then the plaintiff would have the right to have the premises reconveyed to her.

[2] But, if the decree was for a greater amount than that turned over by Nestell, she would only be entitled to have the premises reconveyed upon paying the amount so found due, or to receive back the surplus, if any, that may remain after a sale and the discharge of such decree. This, we think, is an interest in real property of which she cannot be deprived except by operation of law, or by her deed of conveyance in writing.

By section 242 of the real property law (Consol. Laws 1909, c. 50), it is provided: "An estate or interest in real property * * * or any trust or power, over or concerning real property, or in any manner relating thereto, cannot be created, granted, assigned, surrendered or declared, unless by act or operation of law, or by deed or conveyance in writing, subscribed by the person creating, granting, assigning, surrendering or declaring the same, or by his lawful agent, thereunto authorized by writing." It has not been found as a fact nor is it claimed by counsel that Nestell or Leonard, the trustee, were ever authorized in writing to convey her interest in the premises to the defendants or to her husband. The most that is found upon the subject is that the contract was made by her husband and the convey-

ance by Leonard, with her knowledge and consent. This, we think, is not sufficient. Nor do we think it amounts to ratification, for, if she could not convey by oral direction, it would hardly amount to ratification. It may be that, had she accepted the defendants' offer to pay her an annuity in writing, it would have operated as a ratification. But, while she appears to have signed the offer when it was first presented to her, she changed her mind and canceled her signature while it was in the hands of her attorney before it had been delivered, and consequently it amounted to nothing by way of ratification. Under the deed executed by the plaintiff to Leonard and his declaration of trust, he is given the power to sell or dispose of the real property mentioned, "for the purpose of carrying out the provisions above mentioned," which are, for the purpose of paying any decree that the surrogate may enter against the plaintiff's husband as executor and trustee in favor of the defendants, and to return the balance to her. No decree has ever been entered by the surrogate so far as is disclosed by the record before us. The accounting is still pending before the surrogate. There was, therefore, no necessity for the exercise of his power of sale for the purpose of paying any decree. But it does appear that an accountant had been through the books of the executor and trustee and had found a large sum owing by him, the amount is not stated, and that thereupon the plaintiff's husband had turned over a large amount of securities amounting to upwards of \$250,000, to apply upon such indebtedness; and in an agreement then made by him with the defendants, the value of the real estate in question should be fixed at the sum of \$55,000, and that it should be conveyed by Leonard to them as security for the payment of any deficiency that may be found due in the final decree of the surrogate.

[3] The trial court found as a fact that \$55,000 is the full value of the property. No claim was made upon the argument or in the brief of counsel that this amount was not the full value of the premises. The plaintiff's husband and the defendants were endeavoring to reach a settlement of their differences, but, until the final amount had been determined by the decree, the defendants desired to have the real estate in question held as security for the payment of any deficiency that may be found. It was under these circumstances that Leonard exercised his power of sale in conveying to the defendants. It may be that had Leonard protected the interest of the plaintiff in the premises in making the conveyance, the provision under which the sale was made might possibly be construed as sufficient to authorize the transfer; but he clearly had no power by such a conveyance to deprive the plaintiff of her right to redeem or to have returned to her any surplus that may

be left after the discharge of the decree of the surrogate on the final accounting of her husband as executor and trustee. The defendants had before them the declaration of trust. It or a copy had been delivered to them, as appears by the findings. They, therefore, were chargeable with knowledge as to the powers of Leonard as trustee. Ordinarily in finding errors of the character disclosed herein, we should order a reversal and a new trial. But, in view of the fact that no question has been made that \$55,000 was not the full value of the premises, we incline to the view that justice may be done between the parties by ordering a modification of the judgment so as to provide that, if no indebtedness is found owing by Nestell to the defendants, the premises be reconveyed by the defendants to the plaintiff and they account for the rents and profits. But, if the decree be that a balance is still due and owing from Nestell to the defendants, then that the balance of the \$55,000 remaining after paying such decree, together with the rents and profits, be returned to the plaintiff, and as so modified, affirmed, without costs of this appeal to either party.

CULLEN, C. J., and WERNER, WILLARD BARTLETT, HISCOCK, CHASE, and COLLIN, JJ., concur.

Judgment accordingly.

(202 N. Y. 306)

SMITH v. GEIGER.

(Court of Appeals of New York. May 30, 1911.)

1. REFERENCE (§ 83*)—DECISION—SUFFICIENCY.

Under Code Civ. Proc. § 1019, requiring a referee to file a written report, and under section 1022, requiring his decision to state separately the facts found and direct entry of judgment, it is insufficient to merely file an opinion and the requests of the parties to find, with the disposition thereof by the referee.

[Ed. Note.—For other cases, see Reference, Dec. Dig. § 83.*]

2. REFERENCE (§ 83*)—DECISIONS—SIGNATURE—SUFFICIENCY.

A referee's report and decision should be authenticated by a signature at length; signature by initials being insufficient.

[Ed. Note.—For other cases, see Reference, Dec. Dig. § 83.*]

3. SIGNATURES (§ 1*)—OFFICIAL SIGNATURES—SUFFICIENCY.

The surname is an essential part of an official signature, preceded either by the initials or by the entire given name.

[Ed. Note.—For other cases, see Signatures, Cent. Dig. §§ 1-4; Dec. Dig. § 1.*]

4. APPEAL AND ERROR (§ 1176*)—REVERSAL—DISPOSITION.

Where a judgment appealed from is invalid because a referee's findings have not been made and signed as required by law, it is properly reversed and remitted to the referee for

formal decision without new trial; he having announced his conclusion in an opinion.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4588-4596; Dec. Dig. § 1176.*]

5. COSTS (§ 238*)—COSTS ON APPEAL—RIGHT TO.

On reversal of a judgment for invalidity in a referee's decision, neither party should recover costs of appeal where both argued the appeal upon the defective record.

[Ed. Note.—For other cases, see Costs, Dec. Dig. § 238.*]

Appeal from Supreme Court, Appellate Division, Second Department.

Action by Jeffrey Smith against William Geiger. From a judgment of the Second Appellate Division (118 N. Y. Supp. 1143) affirming a judgment for defendant, plaintiff appeals. Reversed and remitted.

This action was brought by a real estate broker to recover the compensation alleged to be due him from the defendant for his services in procuring a purchaser of certain real estate in the town of Babylon, county of Suffolk. The complaint alleges that the defendant employed the plaintiff as a broker to find and procure a purchaser, and that the plaintiff did find and procure one, who entered into contract accordingly. He demanded judgment for the sum of \$364.68, alleged to be the reasonable and usual commission in such cases. The defendant by his answer put at issue all the material allegations of the complaint. A judgment entered dismissing the complaint, with costs, was affirmed by the Appellate Division, one of the justices dissenting, and the plaintiff appealed to this court.

Sidney H. Swezey, for appellant. Percy L. Housel, for respondent.

VANN, J. (after stating the facts as above). [1] The issues in this action were duly referred to Clinton M. Flint, Esq., to hear and determine, and the case was tried and submitted to him for decision. He has made no report as yet, although judgment has been entered in favor of the defendant. He wrote a brief opinion and signed it as referee, stating that he was unable to find from the evidence that the plaintiff was the procuring cause of the sale and giving his reasons for reaching this conclusion. He found no facts therein, however, and gave no direction for judgment. A paper appears in the judgment roll headed, "Plaintiff's requests to find," which recites the reference to Mr. Flint and states that: "I, Clinton M. Flint, referee, do hereby make and find the following findings of fact and conclusions of law with respect thereto." Then follow 19 findings of fact with four conclusions of law, underneath each of which is written, "Found, C. M. F.," or "Refused, C. M. F." The final conclusion of law as requested is "that the plaintiff is entitled to recover from the defendant the

sum of \$364.68 with interest." Underneath this is written, "Refused, C. M. F." There is also another paper headed "Defendant's requests to find," which states that "the defendant requests the court to find as facts," and then follow 35 separate statements of fact, and underneath each of these is written, "Found, C. M. F.," or "Refused, C. M. F." Three conclusions of law were requested, each one of which was marked, "Found, C. M. F.," the third being "that the defendant is entitled to judgment upon the merits," but there was no direction for judgment. Other than these requests to find thus marked by the initials of the referee there is nothing in the record to authorize the entry of judgment. The clerk, however, entered a judgment, which after reciting that the case had been duly referred and that the referee had made and filed his decision directing that the defendant have judgment on the merits, dismissed the complaint, with costs.

Section 1019 of the Code of Civil Procedure provides for a "written report," and section 1022 requires that "the decision of the court or the report of a referee upon the trial of the whole issues of fact must state separately the facts found and the conclusions of law, and direct the judgment to be entered thereon, which decision so filed shall form part of the judgment roll." We find in the record no decision such as this section requires, but simply an opinion and the requests of both parties with the disposition thereof by the referee as required by section 1023 of the Code. There was no direction for the entry of judgment dismissing the complaint on the merits, with costs, although judgment was entered by the clerk in that form.

[2] Moreover, the requests were not signed by the referee, except with his initials, and those proposed by the defendant contained nothing by way of recital or otherwise to show whose initials they were or in what capacity they were attached. The referee evidently did not intend that judgment should be entered upon the requests as disposed of by him, but that the attorney for the prevailing party should prepare formal findings and present them to him for his official signature. The general practice requires this; and, while the Code does not in terms say that the referee must sign the decision by subscribing his name, the intention of the Legislature in that regard is plainly to be implied.

[3] A report in writing must be authenticated by the signature of the referee, and mere initials are not a signature in legal proceedings. The surname is an essential part of an official signature, preceded either by the initials or by the entire given name. It would be loose and unsafe to allow the use of mere initials in the place of the usual signature to authorize the entry of judgment for hundreds of thousands, or even for millions of dollars. While the decisions of the appellate courts are not usually signed by

the judges in any way, they are handed to the clerk in open court and thereby authenticated most completely. The report of a referee, however, and the decision of the whole issues of fact and law after the trial of a case by the court without a jury, are not handed down in open court, and should be authenticated by the official signature at length. It is true that in the transaction of certain kinds of business initials are sufficient to satisfy the law. Thus, signing by the initials of the party to be charged has been held to comply with the statute of frauds. *Salmon Falls Mfg. Co. v. Goddard*, 14 How. 446, 14 L. Ed. 493; *Sanborn v. Flagler*, 9 Allen (Mass.) 474; *Phillimore v. Barry*, 1 Campb. 513. So it was held in *Palmer v. Stephens*, 1 Denio, 471, that one may become liable as maker of a note by signing the initials of his name thereto, intending thereby to bind himself, but this case has not escaped criticism. *Sheffield v. Ladue*, 16 Minn. 392 (Gil. 346), 10 Am. Rep. 145. The initials of the name of the holder of a check written on the back of it were held in an early case enough to charge him as indorser. *Merchants' Bank v. Spicer*, 6 Wend. 443. The signing in these cases, however, was by private individuals in the transaction of private business, and we think that greater formality is required in signing an official report which may authorize the entry of judgment for the recovery of a vast sum of money or the award of relief by injunction which may suspend the operation of business conducted on an extensive scale. The referee in making his official report represents the sovereignty of the state in a formal act of justice, and his action should be authenticated in a formal way on account of the importance and dignity of the act.

The authorities upon the subject tend to support these views, although not all those cited are directly in point. *Benjamin v. Allen*, 35 Hun, 115; *People ex rel. Havron v. Dalton*, 77 App. Div. 499, 78 N. Y. Supp. 1051; *Kent v. Common Council of Binghamton*, 90 App. Div. 553, 86 N. Y. Supp. 411; *Edinger v. McAvoy*, 134 App. Div. 869, 119 N. Y. Supp. 327; *Gilman v. Prentice*, 132 N. Y. 488, 30 N. E. 981; *Matter of Sprague*, 125 N. Y. 732, 26 N. E. 532; *Matter of Kellogg*, 104 N. Y. 648, 10 N. E. 152; *Hewlett v. Elmer*, 103 N. Y. 156, 164, 8 N. E. 387; *Angevine v. Jackson*, 103 N. Y. 470, 9 N. E. 56; *Bridger v. Weeks*, 30 N. Y. 328. In *Benjamin v. Allen* it was held that findings of fact and conclusions of law must be made and signed, and that the signature of the trial judge is required—citing *Thomas v. Tanner*, 14 How. Prac. 426; *Burger v. Baker*, 4 Abb. Prac. 11; *Bridger v. Weeks*, 30 N. Y. 328. It was further held that the county clerk was not authorized to enter judgment upon an opinion, and that there could be no review upon a trial of an issue of fact unless a decision was signed and filed. The appeal in that case was dismissed. In *People ex rel.*

Havron v. Dalton, Judge Willard Bartlett, speaking for the court, said: "Where the requisite findings or decision have been omitted upon the trial of an action and the case on appeal has disclosed such omission, it has been the custom of this court to remit the case to the trial judge, in order that the requisite decision may be made *nunc pro tunc*." 77 App. Div. 500, 78 N. Y. Supp. 1052—citing *Hall v. Beston*, 13 App. Div. 116, 43 N. Y. Supp. 304; *Shaffer v. Martin*, 20 App. Div. 304, 46 N. Y. Supp. 992. The same course was pursued in *Kent v. Common Council of Binghamton*, where it was said: "No motion having been made to vacate the judgment for want of a decision, we must reverse it and will do so, without costs to either party, and remit the case to the Special Term for decision." 90 App. Div. 535, 86 N. Y. Supp. 412. In *Edinger v. McAvoy* separate and distinct findings of fact and law were submitted by codefendants, and, instead of noting in the margin of these statements the manner in which each proposition was disposed of as required by section 1023, the court signed the two statements of findings proposed at the end of each and the record presented no other decision signed by the court. It was held that the two sets of findings, although duly signed, could not be treated as a decision, and that the judgment entered thereon was premature. The judgment was reversed and the case remitted to the Trial Term, without costs of appeal to either party. In *Gilman v. Prentice* the appeal was dismissed and in *Matter of Sprague* the judgment was affirmed.

[4] It will be observed upon consulting the authorities that the practice pursued on appeal when findings have not been made and signed so as to satisfy the statute is in a doubtful and uncertain state. In some cases the appeal was dismissed. In others the judgment was affirmed, while in others still the judgment was reversed and the case remitted to the court or referee. If the appeal is dismissed, a judgment entered without authority is allowed to stand, while in case of affirmance such a judgment is sanctioned and sustained. Neither result is logical or satisfactory, for there is no review and the unauthorized judgment remains upon the records of the court, although the rights of the parties have not actually been determined. Assuming that the record may be cleared by motion, it is better to clear it on the appeal, if one is taken, and an appellate court has an inherent right to do so.

By reversing the judgment before us as prematurely entered the record will be cleared, but a new trial should not be granted, for none is needed, as the action has been tried although not yet decided. While the referee has announced his conclusion in an opinion, he has not officially determined the issues, and exact justice can be done only

by remitting the case to him for formal decision as required by law.

[5] As both parties are in fault for arguing the appeal upon the record in such a condition, neither should recover the costs of appeal.

The judgment should be reversed and the action remitted to the referee for decision, without costs to either party.

CULLEN, C. J., and GRAY, HAIGHT, WERNER, WILLARD BARTLETT, and CHASE, JJ., concur.

Judgment reversed, etc.

(203 N. Y. 293)

TANENBAUM et al. v. BOEHM et al.

(Court of Appeals of New York. May 30, 1911.)

1. BROKERS (§ 63*)—COMPENSATION—WHEN EARNED.

Where brokers employed by a landlord procured a tenant who orally agreed to the conditions imposed by the landlord, and nothing remained to be done except to put the agreement in the form of a lease, which was never executed because the landlord's attorney thereafter insisted on an unreasonable provision, that the contract between the landlord and the tenant was not enforceable because of the statute of frauds prior to the execution of the written lease did not render the negotiations executory so as to preclude plaintiffs from recovering commissions.

[Ed. Note.—For other cases, see *Brokers*, Cent. Dig. §§ 79, 81, 94-96; Dec. Dig. § 63.*]

2. BROKERS (§ 63*)—LEASE OF BUILDING—COMPLETION OF EMPLOYMENT—UNREASONABLE TERMS.

Where plaintiffs procured a tenant for defendants' building who was ready and willing to execute a lease in accordance with terms orally agreed on, but the negotiations terminated because the landlord's attorney insisted on a new provision as to summary proceedings, the failure of the negotiations was no defense to plaintiffs' right to commissions; such requirement being unreasonable as inapplicable under Code Civ. Proc. § 2231, enumerating cases in which such remedy is authorized.

[Ed. Note.—For other cases, see *Brokers*, Cent. Dig. §§ 79, 81, 94-96; Dec. Dig. § 63.*]

Vann, J., dissenting.

Appeal from Supreme Court, Appellate Division, First Department.

Action by Leon Tanenbaum and another, copartners, doing business under the name of L. Tanenbaum, Strauss & Co., against Abraham Boehm and another, doing business under the name of Boehm & Coon. From a judgment for plaintiffs, entered on a directed verdict, and from an order denying defendants' motion for a new trial, affirmed by the Appellate Division (135 App. Div. 286, 120 N. Y. Supp. 392), defendants appeal. Affirmed.

Edward W. Hatch, for appellants. Ernest Hall, for respondents.

GRAY, J. The plaintiffs are real estate brokers, and they have brought this action to

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

recover the commissions, which were earned by them, as they allege, by finding for the defendants a party able and willing to take a lease of their property on terms agreed upon. At the conclusion of the trial, the court directed a verdict for the plaintiffs, denying a similar motion in behalf of the defendants, and, also, their request to submit the case to jury. It is necessary, therefore, briefly, to examine the evidence, in order that it may be seen whether the facts, material to the establishment of the plaintiffs' case, were in dispute. Upon the undisputed facts, Did there remain a question whether the minds of the property owners and of the proposed lessee had met upon the essential terms of a proposed lease? If they show that they had and that the contract of lease was not consummated by reason of the subsequent fault of the defendants in making unreasonable, or capricious, demands, then, there was no error in the ruling of the trial court. The Appellate Division has affirmed the judgment recovered by the plaintiffs, although the justices divided sharply in opinion upon the question.

The defendants owned the premises at the southwest corner of Fifth avenue and Thirty-Fifth street, in the city of New York, and they requested the plaintiffs to procure a tenant for them for a long term of years. The plaintiffs submitted an offer by Mr. Ball, of the firm of Best & Co., a person amply responsible for his engagements, and after some negotiations a meeting took place on December 14, 1905, at which were present the two plaintiffs, the two defendants, with their attorneys, and Mr. Ball, with his attorney. The meeting was very prolonged over the discussion of what a lease for a long term should require and provide for. With respect to what took place there is no dispute between the parties, and, when they separated, there does not appear to have been a difference upon any subject proposed to be covered by the written lease and the difficulty arose only, when, some days later, the defendants, advised by their attorney, insisted upon incorporating a particular provision in the instrument. The agreement reached by the parties on December 14th was that there should be a lease for 23 years, at an annual rental, payable quarterly, for the first two years, of \$65,000, and, for the remaining 21 years, at \$100,000, with the privilege of two renewals for periods of 21 years each, at a rental of 4 per cent. upon the appraised value of the land. A new building was to be erected upon the land by the lessee, upon the expiration of some existing leases, having two years to run, and the nature of the building, its dimensions, construction, and divisions were all agreed upon. The lessee was to pay all taxes, assessments, or other charges against the property, and to assume the existing leases. It was agreed that, if an existing mortgage for \$1,450,000 should be called, the lease should be subordinated to a

new mortgage for \$1,500,000 at the same interest rate. To secure the performance by the lessee of the covenants of the lease, Mr. Ball was to mortgage to the defendants his house in the sum of \$75,000. The lessee, also, was to pay in advance the amount of rental which would become due for the last quarterly period of the first two years of the term. Thus, there was reached an agreement, which involved a lease of defined property, for a certain period of years, at a stated rental, payable quarterly, and by which the lessee was, at his own expense, to erect a new commercial building, within a certain time, of a certain description, to bear all the charges imposed by the authorities upon the property, and to give security for the performance of the covenants of the lease. All this was shown by the testimony of Mr. Coon, who, alone of the defendants, was examined, and he makes it very clear that, when the meeting of December 14th broke up, all that was left to be done was to prepare a written form of lease. A proposal by the plaintiffs that an agreement be then reduced to writing was negatived, because of the lateness of the hour, and the defendants' attorney promised a form of lease at an early date. I quote from defendant Coon's testimony: "After we finished these negotiations which I have described, when we had after a great many discussions finally agreed upon these terms, Mr. Ball and I both said: 'Now, gentlemen, we have agreed upon these financial terms. It is up to the lawyers to draw the lease, and put this in good legal verbiage, so that we can execute and have it in writing.' * * * I think I asked Mr. Ball if he would pay the last quarter of the first two years in advance; that is, on the signing of the lease. I think I was the one that did it. I think Mr. Ball said to me: 'Now, gentlemen, is there anything that you have in your mind that might possibly enter here into these further discussions? If I accede to that, will that be practically all that you require of me?' I said: 'I don't know of anything, excepting that these attorneys—it is up to these attorneys to draw the lease.' He said: 'I accede then.' I think he said, or we both said, 'Of course, the attorneys are to draw the lease.' After I said there was nothing further, Mr. Ball said: 'Then I agree to it.' Then some one there shook hands and some one said: 'The matter is closed.'" This last demand of the defendants upon Mr. Ball was motivated by the desire to obtain moneys to pay the plaintiffs' commissions of \$22,300. Mr. Coon testified that the plaintiffs had asked to have them paid, as soon as the transaction was closed, and "that was what caused me to call Mr. Ball back," to "try whether Mr. Ball would pay the last quarter of the second year." The plaintiffs, Mr. Ball, his, and defendants' attorneys were examined, and there is no substantial variance in their testimony as to what occurred during the meeting. Subsequently, Mr. Putzel, the defendants' attorney, proposed forms

of lease, which, at first, were objected to by Mr. Ball's attorney, for various reasons relating to what had been the agreement of the parties, at their meeting, and to the reasonableness of certain proposed provisions; but in the end the matter came down to one ground of objection. As to the ordinary and usual provisions to be inserted in a lease of such a nature and with the conditions theretofore agreed to, Mr. Ball testified that there was no objection. As the appellants' counsel now states it, "the transaction finally fell through, because of inability to agree upon this subject, the tenant's attorney insisting that, in the event of the failure of the tenant to erect the building, the landlord's remedy must be confined to ejectment; while the landlord's attorney insisted that the landlord should have the remedy by summary proceedings." Or, as Mr. Putzel, the defendants' attorney, testified: "I understood from the terms of the lease that absolutely all the difference between us was the remedy that we should have in the event of failure to erect the building. Under the paper I gave him he had the 23 years lease, if he lived up to his agreement, and, if he did not, we could put him out summarily, instead of by ejectment. That was the only difference between us." Mr. Putzel's final letter to the lessee's attorney describes this difference as the one upon which they "split," and "I have no doubt," he writes further, "we can agree on the other clauses of the lease. I insist that * * * the landlord should have the right to dispossess," referring to the building clause.

The dissenting opinion below holds, in effect, that the failure to consummate the transaction, because of the insistence by the defendants upon the provision for summary proceedings, was a fact which went to the completeness of any agreement between the parties and which, if it did not entitle the defendants to the direction of a verdict, required a submission of the case to the jury. It was thought that it was a question of fact whether there had been a meeting of the minds upon all the essential provisions of a lease, and, if the failure to agree was due to the subsequent act of the defendants, then that it was for the jury to say whether the proposed terms were unreasonable. I think that the learned dissenting justices have failed to apprehend the full effect of the evidence, or to appreciate—if it is permissible to use the term—the extra-legal nature of the defendants' demand, and that the trial court committed no error in the direction of the verdict.

[1] There had been such an agreement between Mr. Ball and the plaintiffs' employers, the defendants, on December 14th, upon the essentials of a contract of lease of the property, as to have rendered it enforceable by an action. That the requirement of the statute of frauds that the agreement must be evidenced in writing, might be pleaded in defense has

no bearing upon the question of whether the plaintiffs had earned their commissions. That alone depended upon whether the minds of the parties had met upon an agreement for a lease, and whether the brokers had been the procuring cause. The rule of law applicable to such cases has been long settled. It was expressed by Judge Finch in *Sibbald v. Bethlehem Iron Co.*, 83 N. Y. 378, 382, 383, 38 Am. Rep. 441, in this language: "In all the cases, under all and varying forms of expression, the fundamental and correct doctrine is that the duty assumed by the broker is to bring the minds of the buyer and seller to an agreement for a sale, and the price and terms on which it is to be made, and until that is done his right to commissions does not accrue." And it was held in that case that, while the risk of failure is the broker's, there is an "important and necessary limitation. If the efforts of the broker are rendered a failure by the fault of the employer, if capriciously he changes his mind after the purchaser, ready and willing, and consenting to the prescribed terms, is produced, * * * then the broker does not lose his commissions. * * * But this limitation is not even an exception to the general rule affecting the broker's right, for it goes on the ground that the broker has done his duty, that he has brought buyer and seller to an agreement, but that the contract is not consummated and falls through the afterfault of the seller." If the broker produces a person ready and willing to enter into a contract upon his employer's terms, he has earned his commissions, and, if his efforts have been rendered futile by his employer's fault, the latter will not be heard to say that the broker has not performed. *Mooney v. Elder*, 56 N. Y. 238; *Wylie v. Marine Nat. Bank*, 61 N. Y. 415; *Smith v. Peyrot*, 201 N. Y. 210, 94 N. E. 662. It goes without saying that the doctrine of the cases relating to sales of real estate is equally applicable to those of leases of real estate. In this case all that the parties had left to be done was the preparing of a form of lease, which should incorporate the material features of their important agreement. Those having been settled upon, it was assumed that the lease would be drawn in such terms and with such conditions as would be appropriate. It was left to the lawyers, as Mr. Coon says, to put the lease "in good legal verbiage." In fact, as already shown, the proposed lessee made no objection to the propriety of numerous clauses inserted in the lease by the owner. The work of the lawyers was simply to arrange the form of the contract. The transaction, by which the premises were to be transferred and held in lease for a term of years, upon certain terms and conditions, the principals had themselves closed. There was no refusal by the proposed lessee to execute a lease, containing what had been agreed to with the defendants and the ordinary provisions inserted by their lawyer. The refusal was because of a demand for a

condition that had not been within the understanding of the parties and was quite improper.

[2] The demand of the defendants, that the lease should contain a provision, in the event of a default by the lessee to erect the building, which would authorize the institution of summary proceedings to recover the possession, was unreasonable, in that it proposed a remedy inapplicable under the statute. The statute (Code of Civ. Proc. § 2231) enumerates five cases, in which such proceedings are authorized, namely, where a tenant or lessee holds over after the expiration of his term, where he holds over after default in payment of rent, where he holds over after default in the payment of any taxes or assessments, which he has agreed to pay, where he has taken the benefit of an insolvent act, or has been adjudicated a bankrupt, and where the demised premises are used as a bawdy house, or for any illegal trade, or business. To insist, therefore, upon such a remedy for the violation of the condition relating to the erection of a building was, altogether, improper, and the consequent failure to consummate the agreement to lease was due to the fault of the defendants. Enough has been said to show that the minds of the parties had, in fact, met in agreement upon the essential terms and conditions of a lease, and that, as the subsequent failure to consummate it formally was due to an unreasonable demand of the defendants, the plaintiffs could not be deprived of the right to their commissions.

I think that none of the exceptions upon the appellants' brief would justify a new trial, and therefore that the judgment should be affirmed.

CULLEN, C. J., and WILLARD BARTLETT, HISCOCK, CHASE, and COLLIN, JJ., concur. VANN, J., dissents.

Judgment affirmed, with costs.

(202 N. Y. 170)

URTZ v. NEW YORK CENT. & H. R. R. CO.
(Court of Appeals of New York. May 16, 1911.)

1. FRAUD (§§ 3, 25*)—ACTIONABLE FRAUD—ELEMENTS—PECUNIARY LOSS.

One suing for damages for fraud must allege and prove representation, falsity, knowledge, deception, and injury, and the pecuniary loss to the party deceived is essential to the maintenance of the action.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. §§ 1, 24; Dec. Dig. §§ 3, 25.*]

2. FRAUD (§ 25*)—ACTIONABLE FRAUD—ELEMENTS—PECUNIARY LOSS.

An administrator, suing a railroad company for damages for false representations made to her by the company's claim agent, inducing a settlement of her claim against the company for the negligent death of her intestate, must show that she had a valid and ex-

isting claim against the company originally, and it is not sufficient to show that there was a claim which was disputed and contested, and that she could reasonably apprehend that she had a just claim.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. § 24; Dec. Dig. § 25.*]

Vann and Hiscock, JJ., dissenting.

Appeal from Supreme Court, Appellate Division, Fourth Department.

Action by Rose M. Urtz, as administratrix of Richard M. Urtz, deceased, against the New York Central & Hudson River Railroad Company. From a judgment of the Appellate Division (140 App. Div. 915, 124 N. Y. S. 1132), affirming a judgment for plaintiff, defendant appeals. Reversed, and new trial ordered.

The action is to recover the damages sustained by the plaintiff through the false representations made to her by the defendant. April 9, 1906, the plaintiff's husband and intestate was killed at a highway crossing of defendant's railroad through a collision between an engine of the defendant and a wagon in which the intestate was riding. The team of the intestate was also killed and his wagon demolished. One McCormick was a division claim agent of defendant, and it was his duty to investigate the accident and report the facts to its chief claim agent with his opinion as to its liability. He investigated the circumstances surrounding the accident, and then entered upon a series of misrepresentations to both the plaintiff and defendant. The result of those to the defendant was that on April 17, 1906, he was authorized by it to settle with the plaintiff on the best terms he could within the sum of \$2,500, and on April 27th the defendant forwarded to him its check for \$2,250, payable to the order of and to be delivered to the plaintiff upon the execution by her of a voucher and a general release of her claim. On April 30th McCormick told the plaintiff that he had looked up all the facts and talked with everybody who knew anything about the case. He had found out that the intestate was drunk, and when a man told him that the train was coming he said he could take care of himself, and he did not care whether the train was coming or not. The train was going eight miles an hour, and the bell was ringing and the whistle blowing. One could see up and down the track for half a mile at the point of the accident. He would pay well for the team and wagon, but not for killing the intestate, as the law was now that they would not have to pay for anything, only property. The team and wagon were worth about \$200, and the defendant wanted to be liberal and made it \$500, and that was all it would pay. The plaintiff on that occasion accepted \$500 in full settlement of her claim and signed the voucher and release. She subsequently brought this action, alleging by her complaint

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

that all the representations made by McCormick were false and fraudulent and induced her to make the settlement, and demanding judgment for the damages she had thereby sustained. At the trial the plaintiff introduced evidence in proof of the false and fraudulent nature of the statements of McCormick and her reliance thereon, and the defendant introduced opposing evidence. The trial judge in his charge instructed the jury in substance that if they found that the statements made by McCormick were misrepresentations of facts, and were fraudulently made and were relied upon by the plaintiff, then she was entitled to recover as damages "the amount the plaintiff could reasonably obtain on a settlement where nothing but the true facts were given or relied upon; deduct from that the amount paid, and the residue would be the recovery. In other words, how much could the plaintiff reasonably have demanded and received from the defendant by way of settlement if these false representations had not been made?" The defendant's counsel requested the judge to charge that the plaintiff, in order to maintain the action, must show, in the first instance, that she had a valid and existing claim against the defendant originally, and the judge responded, "I refuse to charge in that language. She must show that there was a claim which was disputed and contested; that she was alleging a claim based upon facts sufficient that she could reasonably apprehend that she had a just claim and that the defendant could also feel that she had a just claim." Proper exceptions thereto were taken. The verdict of the jury in favor of plaintiff was unanimously affirmed.

Henry Purcell, for appellant. Fred B. Pitcher, for respondent.

COLLIN, J. (after stating the facts as above). [1] In an action for the recovery of damages caused by the fraud of the defendant, the plaintiff must allege and prove that he has been injured by the fraud which he charges. The essential constituents of the action are firmly fixed and are tersely stated in *Arthur v. Griswold*, 55 N. Y. 400, as, "representation, falsity, sceler, deception, and injury." Pecuniary loss to the deceived party is absolutely essential to the maintenance of the action. Fraud and deceit alone do not warrant the recovery of damages. Deceit and injury must concur. *Taylor v. Guest*, 58 N. Y. 262; *Ettlinger v. Well*, 184 N. Y. 179, 77 N. E. 31.

[2] In the action at bar the plaintiff was not defrauded by the transactions between herself and McCormick, unless, as a result thereof, she lost something of value. In case that result was a gain to her or purely negative, representing neither gain nor loss, clearly there is no room for the application thereto of any rule of damages; the enforcement of any measure of damages, when loss and damage are wholly lacking, is impossible

and inconceivable. *Dung v. Parker*, 52 N. Y. 494; *Hicks v. Deemer*, 187 Ill. 164, 58 N. E. 252. In *Hicks v. Deemer*, supra, the action was to recover the damages sustained by the plaintiff because of the false representations on the part of the defendants, in that they induced the plaintiff to convey his interest in certain land under the erroneous belief created by defendants' deceit that he owned only a life estate therein, whereas, as he alleged, he was the owner in fee simple. At the trial the plaintiff gave evidence supporting his absolute ownership and the defendants sought to prove that his sole estate was an interest for his life. The court held that plaintiff's right of action depended upon his ownership of the fee, and that the trial court erred in refusing to charge the jury that, before they could find injury and damage to the plaintiff, they must find that he was the owner in fee simple of the land.

The jury in the case here found that the deceit of the defendant moved the plaintiff to release unto the defendant, in consideration of the sum of \$500, whatever right or cause of action she had against it through the killing of her husband. Unless the right of action had a value and a value greater than \$500, the plaintiff was not defrauded. If what she parted with had a value less than or only equal to the value of that which she received, she was not injured; if greater, she was injured and in a sum equal to its excess of value. The basic principle underlying all rules for the measurement of damages in actions for fraud and deceit is indemnity for the actual pecuniary loss sustained as the direct result of the wrong. *Krumm v. Beach*, 96 N. Y. 398. Neither advantage nor disadvantage resulting to the plaintiff from the settlement enters in any way into our consideration. The question is what was the value of that with which plaintiff parted and what was the value of that which she received? If the plaintiff's claim against the defendant had been based upon an alleged promissory note made by defendant, and McCormick had effected a compromise thereof by false and fraudulent statements as to defendant's solvency and the existence of a counterclaim, she, in an action to recover her damages caused by the fraud must have given evidence in proof of the validity of the note to afford the jury a starting point for the measurement of her damages, and, if they found that the note was forged and not made by defendant, they would find also that she had sustained no damage and could not maintain the action. Unless she had the valid note of the defendant, she had and released in the compromise nothing of value. Resuming the discussion of the present case, the jury were bound, having found the fraud, to determine whether the plaintiff was injured through the fraud, and, if injured, the sum of her damages. In case the right of action had no value, she had gained by the transaction and was not injured. It had no value

whatever if the true state of facts disclosed that it was an invalid and nonexistent claim, or, in other words, that the defendant was not negligent, or, if the defendant was negligent, that the intestate was not free from contributory negligence. If, however, the true state of facts would have established that the defendant was negligent and the intestate free from contributory negligence, then the plaintiff had a valuable right of action, the acquirement of which through the fraud may have injured her. Until the jury found the real facts and that they created a valid claim against the defendant, they had not a basis for estimating the damages the plaintiff had sustained. The action is not to enforce or vacate the compromise, but to recover the actual pecuniary loss sustained by the plaintiff. An alleged value of the claim based upon the accident and the death or facts sufficient to warrant the reasonable belief of the plaintiff that she had a just claim is of a nature too speculative and warring to be recognized by the law in this action for fraud. The jury in considering the question of damages should first ascertain whether or not the plaintiff was originally entitled to a recovery of some amount. Otherwise they could not determine whether, by executing the release, she parted with value, and, if they could not determine that, they could not decide whether or not she was damaged. Through what method or by what means would they be able to know that the sum of \$500 was not equal to the fair value of the right of action until they knew that the right of action had validity and would entitle her to some amount? She was entitled to the fair value of this disputed claim but that value must be ascertained through a rule possessing reasonable certainty and working a reasonably just result. If the jury determine that she was not originally entitled to recover, then their verdict would be for the defendant. If they determine that she was entitled to recover, then they would proceed to measure the damages, and the rule by which they should be guided therein has been clearly expressed by us in *Gould v. Cayuga County National Bank*, 99 N. Y. 333, 2 N. E. 16. Assuming that the parties meant to avoid litigation and compromise their dispute, and that the true facts and defendant's contradiction of them were disclosed, how much could the plaintiff have reasonably demanded and the defendant reasonably have allowed as a final compromise above and beyond the \$500, in fact allowed and received? That the jury must answer. They would take into view the probabilities of the successful enforcement of the cause of action, the probable extent and expense of the expected litigation over this disputed claim, the law's delays, the probability of the continuing solvency of the defendant, and such other facts pertinent to the question of damages as the evidence presented. What under all the conditions and circumstances was this

claim of the plaintiff, valid under the true, yet opposed and contradicted, state of facts, worth for purpose of sale, transfer or cancellation, if anything at all, above the \$500?

In *Gould v. Cayuga County National Bank*, supra, the action was brought to recover damages sustained by the plaintiff by means of false representations on the part of the defendants. Plaintiff's cause of action was that he had loaned government bonds while on deposit with defendant bank for safe-keeping to the defendant bank upon the agreement of the defendants that the bank would replace the bonds within a certain period, and he was advised after the expiration of that period that there were no bonds on deposit belonging to him; that he thereupon made a claim that the defendants return the bonds or pay him their value, which they rejected upon the ground that the cashier of the defendant bank had stolen the bonds from the bank; that negotiations were entered into between the plaintiff and the defendants in regard to a settlement of the claim, it being insisted on the part of the plaintiff, and denied on the part of said defendants, that the defendants were legally bound to replace said bonds or pay him the value thereof; that throughout these negotiations it was represented upon the part of the defendants that the bonds were within the agreed period after the loan replaced with the defendant bank for the plaintiff and thereafter had been wrongfully taken from it by the cashier and converted to his own use; that plaintiff was ignorant of and unable to ascertain the fact and was induced to believe the representations of defendant and to settle his claim and execute a release thereof in consideration of \$25,000; that he subsequently learned that the bonds were never replaced, and that the representations were false and fraudulently made. The defendants denied that the bonds had not been replaced as agreed and the fraudulent representations, and alleged that the claim of the plaintiff had been validly compromised and released. The issues thus framed were litigated and the trial justice consulted the plaintiff, the plaintiff asking to go to the jury upon each of the questions, (1) were the bonds replaced, (2) were the fraudulent representations made. The General Term set aside the nonsuit and ordered a new trial upon the ground that the jury would have been justified in finding: (1) That the bonds were never replaced in the vault or delivered to Mr. Gould. (2) That the fraudulent representations were made to induce the plaintiff to compromise his claim, and plaintiff, relying thereon, was induced to compromise and release his claim. From the order of the General Term the defendants appealed to this court and the order of the General Term was affirmed. Judge Finch, writing for this court, said: "If we can see that the sum received as the then fair value of the disputed claim was not such value, and would not have been so received had the

truth been told as it was known or believed, but instead a larger sum would have been required as the condition of a compromise, why is not the fraud in inducing the inadequate sum to be accepted a fraud in the subject-matter of the compromise agreement?" 99 N. Y. 338, 340, 341, 2 N. E. 18, 19. And again he said: "If no falsehood as to the facts had been told him (the plaintiff), while defense and resistance were still threatened and contemplated, and his claim still disputed and denied, and a litigation needed to enforce his rights, how much more than the sum allowed ought he to have received and the defendants to have paid by way of compromise?" And still again: "The result will be that the plaintiff, affirming the compromise agreement and unable to recover the contract balance, is entitled in accordance with the general rule to have such compromise agreement made as good for him as it reasonably and fairly would have been if only the truth had been told instead of a falsehood asserted. When that is done, the loss due to the fraud, and that only, is recovered. The true value of the disputed claim and not the false value." We have written thus at length concerning the Gould Case for the purpose of showing as clearly as possible the error of respondent's counsel in asserting that it conclusively decides that the plaintiff was not required to show that she had at the time of the compromise a valid and existing claim against the defendant. In that case the validity of the plaintiff's claim rested upon the fact that the bonds were replaced on deposit with the defendant bank. Whether they were was an issue made by the pleadings and litigated at the trial. The General Term expressly found that the evidence justified the jury in finding that they were and that such fact and the fraudulent representations and plaintiff's belief therein and reliance thereon constituted fraud. This court assumed throughout that part of the opinion relevant to the questions now before us that the issues of fact were established in the plaintiff's favor, that the bonds were replaced, and the plaintiff had a valid and subsisting claim against the defendant which he compromised under fraudulent representations relied upon by him.

There was error in the refusal of the trial judge to charge that the plaintiff in order to maintain the action must show, in the first instance, that she had a valid and existing claim against the defendant originally, and in charging that "she must show that there was a claim which was disputed and contested; that she was alleging a claim based upon facts sufficient that she could reasonably apprehend that she had a just claim."

Inasmuch as the decision of the Appellate

Division was unanimous, we do not consider the contention of the appellant that the evidence did not establish ordinary care and caution on the part of the plaintiff and fraud on the part of the defendant.

The judgment should be reversed and a new trial ordered, with costs to abide the event.

VANN, J. I dissent upon the ground that the plaintiff was not bound to show that she had an absolute and certain right of recovery in an action for negligence had one been brought, for it was sufficient if she proved that she had a reasonable chance to recover. A compromise does not necessarily involve the surrender of a certainty, but has valid support if it involves the surrender of a reasonable probability. A reasonable chance to recover a sum of money has a pecuniary value depending upon the strength of the probability and the plaintiff lost that chance on account of the fraud practiced upon her by the defendant through its dishonest agent. She parted with value when she gave up her chance of convincing a jury that the defendant was negligent, and that her intestate was free from contributory negligence. The action for negligence, if brought, might have involved a close question of fact, and she was not obliged to convince the jury in this action that the jury in that would necessarily have found in her favor. She might or might not have succeeded in that action, but she lost her chance to make the attempt when she executed the release in question relying upon the false representations made in behalf of the defendant. The jury could find, and, as we must presume, they did find, that her chance of recovery was worth as much more than the sum received on the compromise as to warrant the verdict rendered in her favor for the balance.

These views, instead of conflicting with those of the court in a case relied upon by the majority of my associates (*Gould v. Cayuga County National Bank*, 99 N. Y. 333, 2 N. E. 18), are in strict accord therewith, as it appears to me. The nonsuit granted at the trial in that case was set aside by the court at General Term, and we affirmed their judgment. As Judge Finch held in that case, so I say in this that the question is what "was the then fair value of the disputed claim which was released?" The plaintiff herein has recovered on that basis only, and, hence I vote to affirm.

CULLEN, C. J., and GRAY and WERNER, JJ., concur with COLLIN, J.; HISCOCK, J., concurs with VANN, J. HAIGHT, J., absent.

Judgment reversed, etc.

(202 N. Y. 182.)

**PEOPLE ex rel. CENTRAL TRUST CO. OF
NEW YORK v. PRENDERGAST,**
City Comptroller.

(Court of Appeals of New York. May 16,
1911.)

**1. STATUTES (§ 106*)—TITLE OF ACT—NATURE
—GENERAL OR LOCAL LAW.**

Highway Law (Consol. Laws 1909, c. 25)
§ 59a, added by Laws 1910, c. 701, providing
that awards under any statute for damages to
real estate by change of grade of any street,
etc., shall bear interest, is a general, and not a
local, law, as affecting the sufficiency of the
title of the act.

[Ed. Note.—For other cases, see Statutes,
Cent. Dig. §§ 119, 120; Dec. Dig. § 106.*]

**2. STATUTES (§ 134*)—AMENDMENT OF SEVERAL
ACTS—SUFFICIENCY OF SINGLE ACT.**

Several statutes relating to the change of
grade of streets, etc., applicable to particular
localities, may be amended by one general act
which may also apply to future statutes of the
kind amended.

[Ed. Note.—For other cases, see Statutes,
Dec. Dig. § 134.*]

3. STATUTES (§ 106*)—TITLE—NECESSITY.

The form of the title of a general act is
unimportant, since such acts require an enact-
ing clause only.

[Ed. Note.—For other cases, see Statutes,
Cent. Dig. §§ 119, 120; Dec. Dig. § 106.*]

**4. STATUTES (§ 38*)—NATURE—TRANSMISSION
TO LOCAL AUTHORITIES—NECESSITY.**

Highway Law (Consol. Laws 1909, c. 25)
§ 59a added by Laws 1910, c. 701, providing
that awards under statutes for damages to real
estate caused by change of grade of any street,
road, etc., shall bear interest, is not a general
city law nor a special city law so as to require
the transmission to the mayor of New York
City as provided by Const. art. 12, § 2.

[Ed. Note.—For other cases, see Statutes,
Cent. Dig. § 41; Dec. Dig. § 38.*]

**5. STATUTES (§ 263*)—CONSTRUCTION—RETRO-
ACTIVE OPERATION.**

While courts are loath to construe a statu-
te retroactive, the Legislature's manifest in-
tent will be followed.

[Ed. Note.—For other cases, see Statutes,
Cent. Dig. § 344; Dec. Dig. § 263.*]

**6. MUNICIPAL CORPORATIONS (§ 878*)—IM-
PROVEMENTS—DAMAGES—RETROACTIVE OP-
ERATION OF STATUTE.**

Highway Law (Consol. Laws 1909, c. 25)
§ 59a, added by Laws 1910, c. 701, providing
that awards under statutes for damages to real
estate caused by change of grade of any street,
road, etc., shall bear interest, embraces awards
made after passage of the act for damages pre-
viously inflicted.

[Ed. Note.—For other cases, see Municipal
Corporations, Cent. Dig. § 918; Dec. Dig. §
878.*]

**7. MUNICIPAL CORPORATIONS (§ 871*)—GIFTS
OF PUBLIC MONEY—CONSTITUTIONAL PROVI-
SIONS.**

Highway Law (Consol. Laws 1909, c. 25)
§ 59a, added by Laws 1910, c. 701, providing
that awards under statutes for damages to real
estate caused by change of grade of any street,
road, etc., shall bear interest, is not unconsti-
tutional as constituting a gift of money belong-
ing to a municipal corporation in violation of
Const. art. 8, § 10, upon the theory that Laws
1893, c. 537, which authorizes payment of the
principal of damages, exhausted the power of

the Legislature to recognize the moral obliga-
tion upon which the awards are made.

[Ed. Note.—For other cases, see Municipal
Corporations, Cent. Dig. § 1817; Dec. Dig. §
871.*]

**8. CONSTITUTIONAL LAW (§ 26*)—LEGISLA-
TIVE POWER.**

The Legislature has full legislative power
except as limited by Constitution, expressly
or by necessary implication.

[Ed. Note.—For other cases, see Constitution-
al Law, Cent. Dig. § 30; Dec. Dig. § 26.*]

**9. MUNICIPAL CORPORATIONS (§ 871*)—CLAIMS
—CONSTITUTIONAL LAW.**

A statute authorizing payment by munici-
pal corporations of claims founded in justice
and supported by a moral obligation does not
infringe Const. art. 8, § 10, prohibiting gifts of
municipal money.

[Ed. Note.—For other cases, see Municipal
Corporations, Cent. Dig. § 1817; Dec. Dig. §
871.*]

Appeal from Supreme Court, Appellate Di-
vision, First Department.

Action by the People of the State of New
York, on the relation of the Central Trust
Company of New York, as substituted trustee
under Jason Rogers' will, against Wil-
liam A. Prendergast, Comptroller of the City
of New York. From an order of the Appel-
late Division (128 N. Y. Supp. 1139) affirm-
ing an order (129 N. Y. Supp. 428) granting
a peremptory writ of mandamus, defendant
appeals. Affirmed.

Archibald R. Watson, Corp. Counsel (Clar-
ence L. Barber, of counsel), for appellant.
Barclay E. V. McCarty, for respondent.

VANN, J. This litigation has a long and
varied history. It began in 1893 shortly after
the passage of chapter 537 of the laws of
that year, which authorized the appointment
of commissioners to estimate the loss and
damage sustained by abutting owners owing
to a change of grade made in certain streets of
the city of New York pursuant to chapter
721 of the Laws of 1887. The owners affect-
ed were authorized to prove the damages
sustained by them, if any, and to recover the
amount thereof from the city. The commis-
sioners were required to make a just and
equitable award, and the comptroller was
directed to pay the same through the issue of
bonds for the purpose. While the change of
grade had been directed several years before,
it was not physically made in front of the
premises in question until about September,
1893. One Jason Rogers had owned said
premises from 1857 until his death in 1868,
and since then by virtue of his will the title
thereto has been in trustees, and is now in
the relator as substituted trustee. In No-
vember, 1893, the trustees then in charge of
Mr. Rogers' estate filed their claim, which,
together with all others of like character,
was strenuously contested by the city. In
December, 1901, the commissioners made an
order dismissing the Rogers claim on the
ground that they had no jurisdiction to pass

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

upon it and it was not until April, 1905, after protracted efforts, that the order was vacated and the claim sent back to the commissioners for determination. The city, however, appealed from the order of the Special Term so sending the claim back, but in July, 1905, the appeal was dismissed by the Appellate Division. The city authorities at an early stage in their opposition to claims filed contended that no damages could be awarded unless the property had been injured in connection with the depression of railroad tracks and a test case, brought to settle that question, was not finally decided until 1908 when the Appellate Division overruled the contention of the city. *People ex rel. Astor v. Stillings*, 124 App. Div. 195, 108 N. Y. Supp. 903. As soon as the time to appeal from the decision in that case had expired and it was known that no appeal could be taken, the Rogers claim was tried, and in August, 1909, the commissioners awarded the sum of \$20,400, but, although duly requested to allow interest from the date of the physical change of grade, they refused to do so. Upon review through a writ of certiorari issued in behalf of the relator, it was held that, while the Legislature could require a municipality changing the grade of public streets to pay consequential damages to abutting owners, no interest could be allowed on the award from the time the change was actually made until the date of payment unless the statute specifically so provided. *People ex rel. Central Trust Co. v. Stillings*, 136 App. Div. 433, 121 N. Y. Supp. 13; *Id.*, 198 N. Y. 504, 92 N. E. 1096.

After the question of interest had thus been settled, a writ of certiorari, issued in behalf of the city to review said award of \$20,400, resulted in an order made by the Appellate Division setting it aside and granting a new trial upon the ground that, although the evidence justified the amount, the commissioners had acted without power in supplementing the evidence before them by a personal view of the premises affected. *People ex rel. City of New York v. Stillings*, 138 App. Div. 168, 123 N. Y. Supp. 349.

From the outset, as appears from affidavits read on behalf of the relator and not denied by the comptroller, it was the settled policy of the city authorities, but not including the present administration, to prevent the prompt making of awards and to delay the payment thereof when made. It was shown that in one of the many proceedings instituted by the city to set aside awards made one of the commissioners stated officially that "for a period of about two years since I have been on this commission, the municipal authorities were urging us to proceed slowly and for quite some part of the time insisted that no case should be decided or certificate of award filed in the comptroller's office." *People ex rel. Grout v. Stillings*, 76 App. Div. 143, 78 N. Y. Supp. 942. In another case in which the commissioners had long delayed

their determination, a motion was made to punish them for contempt, and one of them, in an affidavit read in opposition, stated "that on December 9th, 1907, this commission received from the board of estimate and apportionment a formal direction, directing them not to make any awards until further notice."

The decision of this court settling the question of interest under the statute as originally passed was filed on the 22d of February, 1910, and shortly thereafter and owing thereto a bill was introduced at the same time in both Senate and Assembly to remedy the defect, as appears from the affidavit of Mr. Ward, who introduced it in the Assembly. It was supported at hearings before committees and the Governor by many distinguished citizens and it was opposed by the city, but by no one else. It became a law on the 25th of June, 1910, by the signature of Gov. Hughes, who filed a memorandum giving his reasons for approving the same. Among other things, he said: "At common law the owner of land abutting upon a public street is not entitled to consequential damages for an injury he may suffer by reason of a lawful change in the grade of the street upon which his property abuts, but it is obvious that the change of grade may subject him to actual loss and to remedy the apparent injuries which resulted from a common-law rule statutes have been passed allowing damages for changes in grade. By a recent decision of the Court of Appeals it has been held that such awards of damages do not carry interest because the statutes have not expressly provided for interest. This bill is to remedy the defects in the statute. * * * I regard the bill as an act of justice." After the bill became a law and in August, 1910, the Rogers claim was again tried and resulted in an award of \$15,000. Demand was duly made upon the comptroller for payment of that amount together with interest at 6 per cent. from the 15th of September, 1893, when the physical change of grade was made, and that he should issue bonds to provide for payment accordingly. He refused to pay either principal or interest upon the ground that chapter 701 of the laws of 1910 "does not apply to awards made for change of grade damages in the city of New York." Thereupon the relator began this proceeding to compel the payment of said award, with interest. A peremptory writ was granted accordingly by the court at Special Term, and upon appeal to the Appellate Division unanimous affirmance was ordered upon the law, and not in the exercise of discretion. The city appealed to this court.

[1] The constitutionality of the act of June 25, 1910, known as chapter 701 of the laws of that year, is challenged by the appellant on several grounds. That act is an amendment of the highway law and forms chapter 25 of the Consolidated Laws of 1909. A new sec-

tion was added to be known as 59a, which is as follows: "Whenever awards shall be lawfully made, pursuant to any statute of this state, for damages sustained by real estate or any improvements thereon by reason of any change of grade of any street, avenue or road in front thereof, the award for the principal amount of damages sustained shall bear interest at the rate of six per centum per annum from the time of the change of grade to the time of the payment of the award."

The learned counsel for the city claims that this act violates section 16 of article 3 of the Constitution, because, as he argues, since it amends a local law it is itself a local law, yet it does not adequately express the subject in the title. The act, however, does not amend a local law, and it is not a local but a general law, for it applies to awards made pursuant to any statute of the state for damages sustained by reason of any change of grade of any street, avenue, or road in the state. As was well said by Mr. Justice Page at Special Term: "While it applies to awards made pursuant to a local law applicable to the city of New York, it applies to all awards of the same class made anywhere within the state. There is no limitation as to locality." It is part of the highway law which covers the entire state and applies wherever the circumstances permit the application thereof the same as any general law. The section in question applies to all localities in which real estate has been injured by reason of any change of grade of any street, avenue, or road in front thereof, provided some statute authorizes an award of damages therefor. Such localities are spread all over the state.

[2] It was not necessary for the Legislature to amend by a separate act with an appropriate title each of a score or more "change of grade statutes," every one confined to a particular locality, but it could proceed by one general and comprehensive act to cover them all as well as those to be enacted in the future.

[3] As the act is general, the form of the title is unimportant, since a general act requires an enacting clause only. *Ferguson v. Ross*, 126 N. Y. 459, 27 N. E. 954.

[4] The claim that the act of 1910, so far as it applies to the city of New York, is a "special city law" within the meaning of section 2 of article 12 of the Constitution, and, hence, required transmission to the mayor, is untenable, for the statute is neither a "general city law," which relates to "all the cities of one or more classes," nor a "special city law," which relates "to a single city or to less than all the cities of a class." It is not a city law in any sense, but a general law operating throughout the state. It is not limited to cities, but applies to every political division of the state and affects counties, villages, and towns as well as cities. As was recently said by Judge Chase: "If the act relates to persons, places, and things as

a class, and is neither local nor temporary, the mere fact that its practical effect is special and private does not necessarily prove that it violates constitutional provisions against special legislation." *St. John v. Andrews Institute*, 191 N. Y. 254, 270, 83 N. E. 981, 984.

It is unnecessary to consider the claim that the statute might apply to awards made before it was passed, because no such question is now before us, as the award in favor of the relator was not made until after the act had gone into effect. Nor is it necessary in view of what has already been said to discuss the claim that the act does not apply to the city of New York.

While we unite in overruling the various grounds upon which the appellant urges us to reverse the order appealed from, it is suggested that the act should be so construed as to have no retroactive effect, not even to embrace awards made after its passage and should be limited so as to exclude all cases where the damages were inflicted prior to its passage.

[5] While courts are loath to hold that a statute acts on the past, still it is their duty to so construe it when the Legislature manifestly intended that result.

[6] The intention in this instance depends on the language of the act read in the light of the previous decisions of the courts and the history of legislation upon the subject. The words used cover all awards made after the passage of the act, for the command is, "Whenever awards shall be lawfully made, * * * the award for the principal amount of damages sustained shall bear interest," etc. It embraces in terms all awards thereafter made, and, as it is not limited to damages subsequently sustained, it extends to all damages whenever sustained whether in the future or the past. When this language is read in connection with the previous decisions of the courts, the facts which obviously led to the amendment of the act, the grounds of the opposition thereto and the history of the entire legislation, the intention of the Legislature is clear to my mind. As Gov. Hughes said, in his memorandum, the bill is "an act of justice," yet it would not be if confined in its application to damages to be sustained in the future. For nearly 20 years justice to the relator has been delayed without any fault on its part, and I think the Legislature intended to remedy such wrongs at least as to all awards made after the act took effect, wherever the evil existed in any part of the state.

[7] We held in the case of this relator against Stillings, that the act of 1893 is constitutional as a recognition of claims founded upon a moral obligation, but it is suggested that upon the passage of that act the moral obligation became merged in a legal right and exhausted the power of the Legislature. Upon this theory it is argued that the amendment of 1910 virtually authorizes

a gift of money belonging to a municipal corporation, and, hence, violates section 10 of article 8 of the Constitution. As it seems to me, this argument substitutes a theory of law in the place of constitutional power.

[8, 9] The Legislature has all the power of legislation there is, except as limited by the Constitution, either expressly or by necessary implication. It is well settled that a statute authorizing the payment by municipal corporations of claims founded in justice and supported by a moral obligation does not conflict with this provision of the Constitution. *Matter of Borup*, 182 N. Y. 222, 74 N. E. 838, 108 Am. St. Rep. 796. In that case it appeared that a statute passed in 1892 authorized towns and town authorities to repair, grade, and macadamize highways at the expense of the town upon complying with certain conditions. L. 1892, c. 686, § 69. The statute applied to any town in which a highway had been or thereafter should be repaired, graded, and macadamized. In March, 1901, the town authorities caused the highway in front of certain premises to be repaired, graded, and macadamized, and owing to the change the property of one Borup had been damaged to the extent of \$3,000. In 1903, after this damage had been inflicted, a statute was passed which provided that the owners of land adjacent to a highway shall be entitled to recover their damages from the town for any change of grade in the highway or any repairs by the authorities of the town made pursuant to the provisions of section 69 of chapter 686 of the Laws of 1892. L. 1903, c. 610. The following question was certified to us on the appeal: "Is chapter 610 of the Laws of 1903, so far as it may be construed to make the town of East Chester liable for damages sustained through change of grade made prior to the enactment of that act, unconstitutional and void? In answering this question in the negative Judge O'Brien, speaking for all the judges, said: "The improvement of the highway in front of the petitioner's property was, as we have seen, authorized by section 69, chapter 686, of the Laws of 1892. That act, however, made no provision for the damages that property owners might sustain by the change of grade or otherwise, and it was not until two years after the grading and improvement of the highway that there was any law under which the petitioner was entitled to assert his claim against the town for damages, and it is this retroactive feature of the law upon which the contention on the part of the town chiefly rests. It will not be, and is not, contended that when the act of 1892, under which the change of grade was made, was enacted, the Legislature had not ample power to provide for the payment of any damages which property owners might suffer from the improvement of the highway. There is not, we think, anything in the Constitution that prevents the Legislature in 1903 from enacting a law that it might have

enacted in 1892. When an individual is injured or damaged in his property rights by reason of a public work authorized by the Legislature, there is nothing in the Constitution to prohibit the legislative body from providing for just compensation for the injury thus inflicted under its authority. While there was no legal right to damages prior to the act in question, yet the claim of the property owner to compensation for the injury was founded in equity and justice, and it was competent for the Legislature to recognize the justice of such a claim by making it obligatory upon the town to pay it when the amount was ascertained in due course of law. The payment of compensation by the town to the property owners, which the statute provides for, is in no proper sense a gift or gratuity of either the money or property of the town, or a loan of its money or credit to an individual. It is simply a method which the Legislature adopted to repair an injury to an individual inflicted by the town under the authority of law, and the mere fact that the injury was suffered at a time when the property owner was without remedy could not prevent the lawmaking power from providing a remedy afterwards. There is no provision of the Constitution that restricts the Legislature from providing for the payment by a municipality of claims against it that are founded in equity and justice and which could have been authorized originally. The claim in question is of that character." Page 225 of 182 N. Y., page 839 of 74 N. E., 108 Am. St. Rep. 796. When the act of 1893 was passed authorizing the appointment of commissioners to award damages sustained by the relator and other abutting owners, as we have held, the Constitution authorized the payment of principal and interest, but the statute provided for the payment of principal only. *People ex rel. Central Trust Co. v. Stillings*, 136 App. Div. 438, 121 N. Y. Supp. 13; *Id.*, 198 N. Y. 504, 92 N. E. 1096. Without considering the theory that, under the circumstances, interest is a part of the remedy, because if the obligation had been paid as soon as the statute went into effect there would have been no duty, moral or otherwise, to pay interest, I am unable to see how the Legislature lost the power to provide for the payment of interest. The moral obligation to pay interest was as great as the moral obligation to pay the principal, and I cannot find in the Constitution any provision which limits the power of the Legislature to a single effort to do justice in such cases. If something is omitted by oversight or because the Legislature when passing a given act falls for any reason to afford full relief, cannot that body supply the omission or supplement the provisions so as to make them complete in the interest of justice? Can the authority given by one Legislature to discharge part of a moral obligation prevent a subsequent Legislature from authorizing the discharge of the

other part? Does an imperfect effort to do justice exhaust the right and hamper subsequent Legislatures for all time from doing complete justice? In my judgment there is no warrant in the Constitution, either in express language or by necessary implication, for this position. The power to fully discharge a moral obligation cannot be cut down by a legal theory and the merger of moral obligation in legal right is but a theory of law, and is not mentioned in the Constitution. The principle of the Borup Case covers this case, for, when the Legislature acted in 1892, it is presumed that it considered the whole subject, including damages to abutting owners, yet it gave no authority to pay such damages. Eleven years later, after the damages had been inflicted pursuant to that act, another was passed providing for the payment thereof. So, in the case before us, the act of 1893 provided for the payment of damages already caused in theory though not yet inflicted in fact, but did not authorize the payment of interest. In 1910 the payment of interest was directed as to all future awards made for damages whenever sustained, whether in the future or the past.

The power of the state to pass laws through its Legislature is the most important power it possesses, and one that should never be interfered with by the courts except when imperatively required by the fundamental law. There is no express command of the Constitution affecting the statute before us, and to decree a command by implication resting only on a rule of the courts with no foundation in the Constitution would establish a dangerous precedent that might lead to grave difficulties in the future. It would in effect be an amendment of the Constitution made by the courts.

I recommend that the order appealed from be affirmed, with costs.

WERNER, HISCOCK, and COLLIN, JJ., concur. CULLEN, C. J., and GRAY and HAIGHT, JJ., concur in result.

Order affirmed.

(202 N. Y. 247)

BALL et al. v. SHEPARD et al.

(Court of Appeals of New York. May 30, 1911.)

1. PAYMENT (§ 85*)—RECOVERY—MISTAKE OF FACT.

One who pays money under a mistake of fact to one who is not entitled thereto may sue to recover the money.

[Ed. Note.—For other cases, see Payment, Cent. Dig. §§ 272-281; Dec. Dig. § 85.*]

2. PAYMENT (§ 85*)—RECOVERY—MISTAKE OF FACT.

The rule that one who pays money under a mistake of fact to one not entitled thereto may recover it back is subject to the limitations that the mistake must arise in the transaction between the parties to the action, and

there can be no recovery where, by reason of the payment, the party receiving it has so changed his position, to his prejudice, that it would be unjust to require him to repay.

[Ed. Note.—For other cases, see Payment, Cent. Dig. §§ 272-281; Dec. Dig. § 85.*]

3. PAYMENT (§ 85*)—RECOVERY—MISTAKE OF FACT.

Where one under a mistake of fact pays money to another who does not share in the mistake, and who receives the money in good faith in the regular course of business and for a valuable consideration, he cannot recover back the money.

[Ed. Note.—For other cases, see Payment, Cent. Dig. §§ 272-281; Dec. Dig. § 85.*]

4. MONEY RECEIVED (§ 6*)—RIGHT OF ACTION—MISTAKE OF FACT.

A third person purchased bonds from defendant, a stockbroker, and directed that they should be sent to plaintiff, also a stockbroker, who would pay for them. Plaintiff delivered a check to defendant in payment, relying on the third person's fraudulent misrepresentations. The third person was employed by plaintiff as a "customers man" at a regular salary, but the third person was also engaged on his own account in the sale of bonds and unlisted securities, and in such transactions he sometimes "cleared" through plaintiff. Held that, after the payment of the check, plaintiff could not recover from defendant the money paid; the defendant not being chargeable with the fraud of the third person.

[Ed. Note.—For other cases, see Money Received, Dec. Dig. § 6.*]

5. MONEY RECEIVED (§ 6*)—RIGHT OF ACTION—MISTAKE OF FACT.

Where a stockbroker purchased bonds from another stockbroker through a third person fraudulently misrepresenting the facts to the former broker, who delivered to the latter broker a check for the price, and check was paid in the usual course of business without fraud or collusion, the former broker could not recover from the latter broker the amount of the check.

[Ed. Note.—For other cases, see Money Received, Dec. Dig. § 6.*]

Appeal from Supreme Court, Appellate Division, First Department.

Action by Charles E. Ball and others, copartners, composing the firm of Ball & Whicher, against Edward D. Shepard and another, copartners, composing the firm of E. D. Shepard & Co. From a judgment of the Appellate Division (135 App. Div. 612, 120 N. Y. Supp. 830), affirming by a divided court a judgment for plaintiffs, defendants appeal. Reversed, and new trial granted.

L. Lafin Kellogg, for appellants. H. Aaron, for respondents.

WERNER, J. The plaintiffs and defendants, respectively, are firms of brokers, each doing business in the city of New York under the form of a limited partnership. The action is brought to recover the sum of \$24,906.25, which the plaintiffs claim to have paid to the defendants under a mistake of fact. The amended complaint, which rather vaguely presents the transaction in which this payment was made, alleges that in the course of the plaintiffs' business with the defendants and others the plaintiffs frequently

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

receive at their office various stocks and bonds which have been purchased or ordered by parties for whom the plaintiffs "clear," and upon the delivery thereof the plaintiffs pay for the same; that transactions of a similar character were of frequent occurrence between the plaintiffs and the defendants, and that this course of business was well known to the defendants; that on July 28, 1908, the defendants sent to the plaintiffs, in the regular course of business thus described, 25 bonds of the Yankee Fuel Company, each of the face value of \$1,000, and requested as payment therefor the sum of \$24,906.25; that in the belief that these bonds had been bought by one Spingarn and that he had arranged to remit to the plaintiffs the purchase price thereof, and relying upon a representation to that effect, the plaintiffs received the bonds and gave the defendants their check for the purchase price; that, in fact, Spingarn had not bought the bonds, and had not arranged to remit the purchase price thereof, as the plaintiffs had erroneously believed; that the plaintiffs, having thus made payment to the defendants under a mistake of fact, tendered back the bonds, and demanded a return of the purchase price, and that the defendants refused to comply with the demand.

The transaction, as disclosed by the evidence, is characterized by several features which are not mentioned in the complaint. From the testimony introduced by the plaintiffs it appears that one Valentine was employed by them as a "customers man" at a regular salary; that Valentine was also engaged on his own account in the sale of bonds and unlisted securities; that in these transactions he sometimes "cleared" through the plaintiffs and again through others. On the morning of July 28, 1908, Valentine informed one of the plaintiffs that he had put through a \$25,000 bond deal. An hour later the cashier of the plaintiffs reported that the defendants had sent over 25 bonds, and the cashier asked Mr. Chinn, one of the plaintiffs, if he was to give the messenger a check. Mr. Chinn asked the cashier if he had received a check "from the other end," and the cashier replied in the negative. Thereupon the cashier was instructed to hold the matter until Mr. Chinn could see Valentine about it. When Valentine came in, Mr. Chinn said to him, "There are 25 Yankee Fuel bonds over here from Shepard & Co., where is your money from the other end?" Valentine replied: "Why, that is all right, Mr. Chinn, I have sold those bonds to a Mr. Spingarn of Spingarn Bros. He is an uptown milliner. He owns the building he is in. I have sold him over \$200,000 bonds in the past two or three years. In fact I have sold him \$280,000 to be accurate. There is no use holding Shepard up for the payment of these bonds because a certified check will be down here in an hour from Mr. Spingarn." Upon these representations made by Valentine, the plaintiffs' cashier was directed to draw the check of the plaintiffs

payable to the order of the defendants. The check was signed by Mr. Chinn and delivered to the defendants' messenger, who then gave up the bonds. When it subsequently transpired that Valentine had not sold the bonds to Spingarn, or at least that Spingarn disclaimed any transactions with Valentine, plaintiffs tendered back the bonds to the defendants, and demanded a return of their check with the result already stated.

The foregoing is a fair synopsis of the case as it stood when the plaintiffs rested and the defendants moved for a dismissal of the complaint. When this motion had been denied, the defendants presented to the court the other side of the transaction, which, as may be surmised, relates wholly to the dealings between the defendants and Valentine.

From the testimony given on the part of the defendants, it appears that on the morning of July 28, 1908, Valentine went to the office of the defendants and made an offer of 90 flat, without stock, for 25 Yankee Fuel bonds. The employé to whom this offer was made communicated it to the cashier, who called up a Mr. Lincoln in the Philadelphia office, and received word that the deal might be put through on that basis. At Valentine's request the defendants' cashier was instructed to bill the bonds to the plaintiffs at 98 and interest. The bonds were sent to the plaintiffs by a messenger with instructions to get a check on delivery, and to have it certified at once. Within an hour after the bonds had been delivered to the plaintiffs, and their certified check had been given to the defendants, Valentine again went to the office of the defendants and there received a check for his profit in the transaction, which represented the difference between 90, at which he had bought, and 98, at which he had presumably sold. It did not appear that the defendants knew anything about Spingarn, or that they had any reason to suspect that Valentine had made any representations to the plaintiffs, false or otherwise. Neither was it shown that the defendants had any knowledge that the plaintiffs had given their check in the mistaken belief that the bonds had been sold to Spingarn.

Having thus briefly stated what the record discloses, it may be useful to recapitulate a few of the salient facts for the purpose of classifying the transaction. The defendants had bonds to sell. Valentine desired to purchase. A price was agreed upon. At Valentine's request, the bonds were billed to the plaintiffs, who had agreed to "clear" for him; that being the technical term used in cases where one person sells to another and a third party temporarily advances the money with which to facilitate the transaction. The bonds were delivered to the plaintiffs, who gave their check in payment. By way of punctuation, it may be pertinent at this point to observe that, if there were no other facts to characterize the transaction, this would clearly have constituted a binding purchase

by Valentine and a valid sale by the defendants. But we must assume that Valentine had falsely represented to plaintiffs that he had sold the bonds to Spingarn, whose check would be forthcoming, and that the plaintiffs believed that to be the fact when they gave their check to the defendants. Thus it is clear that, as between Valentine and the plaintiffs, there was fraud on the part of the former, and mistake on the part of the latter. Upon proof of this fraud and mistake it is obvious that the plaintiffs would have had a good cause of action against Valentine; but we are at a loss to understand upon what theory the plaintiffs can hold their recovery against the defendants. It is urged that the plaintiffs paid for the bonds under a mistake of fact and, therefore, are entitled to follow the purchase price into the hands of those who received it.

[1] This claim is predicated upon the principle that a party who pays money under a mistake of fact, to one who is not entitled thereto, must in equity and good conscience be permitted to get it back. That is a well-recognized principle of law; but we think it has no application to the case at bar. The simplest statement of the rule invoked by the plaintiffs is that, if A. pays money to B. upon the erroneous assumption of the former that he is indebted to the latter, an action may be maintained for its recovery. The reason for the rule is obvious. Since A. was mistaken in the assumption that he was indebted to B., the latter is not entitled to retain the money acquired by the mistake of the former, even though the mistake is the result of negligence. That is the general rule laid down in *Kingston Bank v. Eltinge*, 40 N. Y. 391, 100 Am. Dec. 516; *Union Nat. Bank of Troy v. Sixth Nat. Bank of New York*, 43 N. Y. 452, 3 Am. Rep. 719; *National Bank of Commerce v. National Mechanics' Banking Ass'n*, 55 N. Y. 211, 14 Am. Rep. 232; *Lawrence v. American Nat. Bank*, 54 N. Y. 432; and *Sharkey v. Mansfield*, 90 N. Y. 227, 43 Am. Rep. 161, which are relied upon by the plaintiffs. The difference between the case at bar and those relied upon by the plaintiffs is concretely illustrated in *Lawrence v. American Nat. Bank*, supra. There the plaintiffs, being indebted to P. on account, made out a statement of the account and paid to the defendant, the assignee of P., the amount which appeared to be due. It transpired that the plaintiffs had made a mistake in omitting to charge the defendant with \$5,000 which they had loaned to P. and for which they were entitled to credit. Here it will be well to note that the reason of the rule which was applied in the *Lawrence Case* must, of necessity, carry with it at least two limitations.

[2] One is that the mistake which is relied upon as the basis of recovery must arise in the transaction between the parties to the action; and the other is that even in such a case there can be no recovery if by reason of the payment the party receiving it has so

changed his position to his prejudice that it would be unjust to require him to refund. *Nat. Bank of Commerce v. Nat. Mechanics' Banking Ass'n*, 55 N. Y. 211, 213, 14 Am. Rep. 232, and *Hathaway v. County of Delaware*, 185 N. Y. 368, 370, 78 N. E. 153, 13 L. R. A. (N. S.) 273, 113 Am. St. Rep. 909. If circumstances do exist taking such a case out of the general rule permitting a recovery, the burden of proving them rests upon the party resisting the repayment. *Mayer v. Mayor*, etc., of N. Y., 63 N. Y. 455.

[3] From what has been said, it is evident that the rule which we have been discussing must have its antithesis, and we find it in that class of cases in which money is paid by one party, who labors under a mistake of fact, to another party who does not share in the mistake, and who receives the money in good faith in the regular course of business and for a valuable consideration. *Justh v. Nat. Bank of Commonwealth*, 56 N. Y. 478; *Stephens v. Board of Education*, 79 N. Y. 183, 35 Am. Rep. 511; *Southwick v. First Nat. Bank of Memphis*, 84 N. Y. 420; *Hatch v. Fourth National Bank*, 147 N. Y. 184, 41 N. E. 403; *Goshen Nat. Bank v. State of New York*, 141 N. Y. 379, 36 N. E. 316. That rule has been tersely and correctly stated by Judge Gray in *Nassau Bank v. Nat. Bank of Newburgh*, 159 N. Y. 456, 459, 54 N. E. 66, 67, as follows: "When money has been received by a person in good faith, in the usual course of business and for a valuable consideration, it cannot be pursued into his hands by one from whom it has been obtained through the fraud of a third person." And the reason for this latter rule has been well stated by Judge Andrews in *Stephens v. Bd. of Education*, supra, where he said: "It is absolutely necessary for practical business transactions that the payee of money in due course of business shall not be put upon inquiry at his peril as to the title of the payor. Money has no earmark. The purchaser of a chattel or a chose in action may, by inquiry, in most cases, ascertain the right of the person from whom he takes the title. But it is generally impracticable to trace the source from which the possessor of the money has derived it. It would introduce great confusion into commercial dealings if the creditor who receives money in payment of a debt is subject to the risk of accounting therefor to a third person who may be able to show that the debtor obtained it from him by felony or fraud. The law wisely, from considerations of public policy and convenience, and to give security and certainty to business transactions, adjudges that the possession of money vests the title in the holder as to third persons dealing with him and receiving it in due course of business and in good faith upon a valid consideration." 79 N. Y. 187 (35 Am. Rep. 511). Perhaps the simplest illustration of this principle is to be found in *Justh v. Nat. Bank of Commonwealth*, supra, where the plaintiffs certified

checks which had been obtained by fraud, were deposited with the defendant bank by the person committing the fraud, in the ordinary course of business, and were paid by the bank on presentation. In that case the court suggested that the plaintiffs were cheated, not by the defendant, but by the fraud of the parties to whom they gave their certified checks, and that the loss occasioned by that fraud could not be transferred to the defendant bank, which was an entirely innocent party. The checks there used were referred to by the court as money which came into the hands of the defendant "in the regular course of business, in a form as current as if it had been bank notes or United States currency," and the court concluded that, if in such a case, it could be followed because the party who paid it procured it fraudulently, "the transaction of business must stop, for no inquiry and no precaution could guard the receiver from responsibility." In the nature of things there are exceptions to this rule, as, for instance, in a case where an agent is entrusted with property which is disposed of by him in fraud of his principal, and where the property or its proceeds may be followed as far as either can be traced (*Van Alen v. Am. Nat. Bank*, 52 N. Y. 1, 8), but these are not germane to the present discussion, and they are mentioned only to obviate the possible misapprehension that we regard the rule by which the case at bar is controlled as one subject to no exception.

Thus it will be seen that the two classes of cases above referred to are divided by a line which is very narrow and yet well defined. In the first class, relied upon by the plaintiffs, the mistake of fact is usually one which arises inter partes, and, in order to justify a recovery in any such case, it must appear that the defendant was not, in the first instance, entitled to receive the money, and that his circumstances have not been so changed through its receipt as to render it unjust to compel him to refund. In the second class the mistake of the payor is usually superinduced by the fraud of a third person and the payee is not only ignorant of the fraud or mistake, but receives the money in good faith in the regular course of business and for a valuable consideration.

[4] The mere statement of this rule seems at once to demonstrate the status of the case at bar. Here the defendants had agreed to sell the bonds to Valentine. The latter directed the former to send the securities to the plaintiffs who would pay for them. Valentine bought the bonds and the plaintiffs advanced to him the purchase price which he was required to pay to the defendants. Let us suppose that Valentine's statement to the plaintiffs had been true and that Spingarn had in fact agreed to buy the bonds from Valentine, but had defaulted in his obligation to do so. In these circumstances the plaintiffs would surely have been confined to a recovery against Valentine. How

is the situation changed because Valentine's statement was false? The plaintiffs were misled by this statement, and not by anything that was said or done by the defendant. That was the precise situation in *Stephens v. Board of Education*, supra, where the plaintiff took from a defaulting member of the defendant board of education a forged mortgage, the proceeds of which were received by the defendant in payment of the defaulter's debt to it, and disbursed by them in the regular course of business. The fact that in the case at bar the payment by the plaintiffs to the defendants was made by check is of no significance except as it might have enabled the plaintiffs, had they seasonably discovered their mistake, to stop payment on the check. Once the check was paid, however, it was the same as though money had been paid in the first instance. In this respect the case at bar does not differ from *Southwick v. First Nat. Bank of Memphis*, supra, in which the bank had innocently and in the regular course of business paid a draft in respect of which there had been fraud by the drawer and mistake by the drawee. The case of *Hathaway v. County of Delaware*, supra, upon which both of the counsel in the case at bar seem to rely to some extent, is one which presents some features common to the class which follow the *Justh Case*, but also some special circumstances which warranted a recovery. In that case, as in the case at bar, the payment was made by check which was drawn to the order of the defendant. In both cases, therefore, the defendants were chargeable with notice of the fact that it was the money of the plaintiffs which was being paid to liquidate the debt of a third person. But at this point there is an end of the parallel between the two cases. In the *Hathaway Case* the check was made payable to the county of Delaware upon the faith of a note purporting to be the obligation of the county, but being in fact a forgery. The check was diverted from the only purpose for which it could lawfully have been made, and was used to pay the debt of a defaulting treasurer to the county, a purpose for which neither of the parties to the action had ever intended to give it currency. These facts, supplemented by the circumstance that the defendant's position had not been changed to its prejudice, were the controlling factors in the decision which upheld the recovery in that case. In the case at bar the check was applied to the identical purpose for which it was made. The plaintiffs knew that it was to go to the defendants in payment for bonds which Valentine had bought. Defendants delivered up the bonds, and obtained the money on the check. There was no mistake in the transaction as between the plaintiffs and the defendants, and the only mistake disclosed by the record is that the plaintiffs confided in a faithless employé and associate.

In this view of the controversy, it is apparent that there was no issue to submit to the jury, and that the one submitted was not in the case. The transaction between the parties could have given rise to but one legal issue, and that was whether the defendants were parties to the fraud of Valentine or the mistake of the plaintiffs. No such issue was either pleaded or proven. The complaint should, therefore, have been dismissed.

[5] The issue submitted to the jury was whether the plaintiffs had purchased the bonds from the defendants, and that question was not in the case, for nothing of that kind is claimed by either party. And even upon that question, assuming it to be in the case, the learned trial court fell into error both in charging as requested by counsel for the plaintiffs and refusing to charge as requested by counsel for the defendants. The court charged, in substance, that, if the plaintiffs were mere clearance agents for Valentine, and had not bought the bonds from the defendants, but had paid for them under the mistaken belief that they had been bought by Spingarn, and if the position of the defendants had not been changed by the transaction, the plaintiffs were entitled to recover. The court also declined to charge that if the jury should find that the check in question was paid in the usual course of business, for a valuable consideration to the defendants without fraud or collusion on the part of the defendants relative to the transaction, the verdict of the jury must be for the defendants. Both of these rulings were erroneous within the principles by which we think this case is controlled.

The judgment should be reversed and a new trial granted, with costs to abide the event.

CULLEN, C. J., and GRAY, HAIGHT, VANN, WILLARD BARTLETT, and CHASE, JJ., concur.

Judgment reversed, etc.

(202 N. Y. 281.)

WEYAND et al. v. PARK TERRACE CO. et al.

(Court of Appeals of New York. May 30, 1911.)

1. PAYMENT (§ 6*)—PLACE.

While generally one must seek his creditor to pay the indebtedness, the place of payment may be governed by agreement between the parties.

[Ed. Note.—For other cases, see Payment, Cent. Dig. §§ 9, 10; Dec. Dig. § 6.*]

2. MORTGAGES (§ 298*)—PAYMENT—PLACE.

Where a bond and mortgage permitted the mortgagee to elect to declare the principal due on default in paying interest, but provided no place for payment, the mortgagee was not entitled to declare a forfeiture for failure of the

mortgagor to tender interest at the mortgagee's place of residence in another state; the latter having no agent to whom payment could be made within the state.

[Ed. Note.—For other cases, see Mortgages, Dec. Dig. § 298.*]

3. CONTRACTS (§ 209*)—PLACE.

Where a contract is made outside of the state in which the promisor resides, and it does not, either by express terms or by fair inference, provide where the same is to be performed, it will be presumed that the parties intend that it shall be performed at the place where it is made, and the promisor must provide at such place to make the payments thereon.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 929-935; Dec. Dig. § 209.*]

4. CONTRACTS (§ 209*)—PLACE.

Where a contract is made in New York either with a person then a resident, who afterwards removes therefrom, or with a non-resident, it is the duty of the promisee to provide a place in this state where payments can be made, and it is not necessary for the debtor to go beyond the bounds of this state to make payments thereon.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 929-935; Dec. Dig. § 209.*]

Appeal from Supreme Court, Appellate Division, Second Department.

Action by Henry Weyand and another against the Park Terrace Company and others. From a judgment of the Appellate Division (135 App. Div. 821, 120 N. Y. Supp. 192), affirming certain judgments and orders, defendant company appeals. Reversed.

See, also, 92 N. E. 1108; 124 N. Y. Supp. 1133.

On the 29th day of January, 1907, the plaintiffs conveyed to the defendant Randall certain real property in the county of Queens, in this state, and took from said Randall a bond of \$11,000 with a mortgage on said real property as collateral thereto as a part of the purchase price thereof. Said bond and mortgage were each dated January 29, 1907, and the amount thereof was by the terms of each payable by said Randall on the 13th day of February, 1910, with interest thereon to be computed from the 13th day of February, 1907, at the rate of 5½ per cent. per annum, and to be paid on the 13th day of August next ensuing the date thereof, and semi-annually thereafter. No place for the payment of interest or principal was expressly stated in the bond or mortgage. It was further provided therein that the principal sum of \$11,000 should become due at the plaintiffs' option after default in the payment of any installment of interest as therein provided for 30 days or after default in the payment of any tax or assessment for 60 days. The interest which fell due thereon August 13, 1907, was not paid within 30 days after it became due. On the 15th day of July, 1907, the mortgaged property was conveyed to the defendant, the Park Terrace Company, a domestic corporation. At all times subsequent to the 12th day of August, 1907, the defendant the Park

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Terrace Company was ready, willing, and able to pay the interest that became due on August 13, 1907, at any place within the state of New York. The plaintiffs at all times subsequent to said 12th day of August, 1907, resided in Waterbury, Conn., and had no agent to whom the interest could be paid within the state of New York. The interest not being paid to the plaintiffs within 30 days after August 13, 1907, they elected that the whole principal sum be immediately due and payable, and on or about the 26th day of September, 1907, said the Park Terrace Company had notice and knowledge of such election. The defendants the Park Terrace Company thereafter tendered said interest to the plaintiffs at Waterbury, but the plaintiffs refused to receive the same, and this action was brought to foreclose said mortgage. At the trial the question litigated was the right of the plaintiffs to declare the principal of said bond and mortgage due and payable by reason of the failure of the defendants to pay said interest within 30 days after August 13, 1907, or tender the same at Waterbury. At the Special Term plaintiffs' complaint was dismissed on the merits. An appeal was taken from the judgment entered thereon to said Appellate Division where the judgment was reversed upon questions of law only. *Weyand v. Randall*, 131 App. Div. 167, 115 N. Y. Supp. 279. An interlocutory judgment was entered and a reference was granted to compute the amount due. A report was made by the referee and final judgment was thereafter entered for the foreclosure and sale of the mortgaged property. An appeal was taken therefrom to the Appellate Division, where such judgment was unanimously affirmed. *Weyand v. Park Terrace Co.*, 135 App. Div. 821, 120 N. Y. Supp. 192. Further facts appear in the opinion.

H. Schleffelin Sayers, for appellant. Frederick S. Jackson, for respondents.

CHASE, J. (after stating the facts as above). The fact that contracts between residents of different states and countries are and have been for many years very numerous, and that there are comparatively few reported decisions affecting the question involved in this action, indicates that there has been for a long period of time generally recognized rules governing the place where payments pursuant to contract must be made.

The intention of the parties to a contract as to the place where payments are to be made usually appears by express provision, or necessary inference in the contract itself. In cases where the intention does not thus appear, the rules governing the place of such payments are not so important as that they shall be certain and not shifting or subject to misunderstanding. The rules heretofore established and asserted are therefore important to determine what decision should

be made in this case. The subject of the place of payment was discussed to some extent by ancient writers, and there are a few reported cases in which the question has been considered, from some of each we will quote.

Coke on Littleton (first American from the last London edition, vol. 2, star page 47, 1827), quoting from Littleton, says: "Also upon such case of feoffment in mortgage, a question has been demanded in what place the feoffor is bound to tender the money to the feoffee at the day appointed, etc. And some have said, upon the land so holden in mortgage, because the condition is depending upon the land. And they have said that, if the feoffor be upon the land there ready to pay the money to the feoffee at the day set and the feoffee be not then there, then the feoffor is quit and excused of the payment of the money, for that no default is in him. But it seemeth to some that the law is contrary, and that default is in him; for he is bound to seek the feoffee if he be then in any other place within the realm of England. As if a man be bound in an obligation of 20 pound upon condition indorsed upon the same obligation, that if he pay to him, to whom the obligation is made, at such a day ten pound, then the obligation of 20 pound shall lose his force and be holden for nothing; in this case it behoveth him that made the obligation to seek him to whom the obligation is made, if he be in England and at the day set to tender unto him the said 10 pound otherwise he shall forfeit the sum of 20 pound comprised within the obligation, etc. And so it seemeth in the other case, etc. * * *

And it seems to them, that it shall be more properly said, that the estate of the land is depending upon the condition, than to say that the condition is depending upon the land," etc. And Coke, commenting upon such quotation, approves the statement that the feoffor's obligation to seek the feoffee does not extend without the realm of the kingdom. And in connection therewith he says: "'Within the realm of England.' For if he be out of the realm of England he is not bound to seek him or to go out of the realm unto him." Referring to the same section of Littleton, it is said in Shepard's Touchstone (star page 378): "If the condition of an obligation be to pay money or to do any like transitory act to the obligee on a day certain, but no place is set down where it shall be done; in this case it must be done to the person of the obligee, wheresoever he be; and for this purpose the obligor must at his peril seek out the obligee, if he be intra quattuor maria, otherwise the obligation is forfeit; but if the obligee be not within the kingdom at the time when the thing is to be done, he is not bound to seek him, so neither is the obligation forfeit for not doing of the thing."

The common-law rule in England did not in any way prevent making a contract ex-

pressly stating where the obligation should be performed, and, in a case where a contract was made out of the kingdom, it was by the English courts in the absence of an express agreement held that the intention of the parties was to perform the contract at the place in which the contract was made. In *Fessard v. Mugnier*, 18 Com. Bench (N. S.) 286, the chief judge delivering the opinion of the court says: "The authorities seem to me to establish this distinction: that if the plaintiff was in England when the contract was made, and went beyond the seas afterward the law would not cast upon the defendant the duty of following him for the purpose of paying or tendering the money." The contract in that case would be construed to mean that the debtor would on the day named pay the creditor the money, provided he was then in England ready to receive it. But where, as here, the contract was made in Paris and the plaintiff was residing in Paris at the time of the execution of the deed and at the time of its registration his absence abroad affords no excuse for the defendant's not tending him the money." It will be seen that the place of making the contract and not the residence of the creditor determines whether the debtor is required to seek the creditor beyond the bounds of the kingdom to make payment of the obligation.

[1] It is always competent for the parties to a contract to provide thereby in express terms the place where payments which shall become due thereon are to be made. While it is a rule of quite general acceptance that a debtor must seek his creditor to pay his indebtedness, it is always open to the parties to show by the express terms of the contract or by fair inference therefrom that it was the intention of the parties to pay at a particular place or within a particular state or country. The state or country in which the contract is made has an important or perhaps controlling bearing in determining whether a debtor is required to go beyond the bounds of the state or country of his residence to make payments upon the contract.

In *De Wolf v. Johnson*, 10 Wheat. 367, 6 L. Ed. 343, a contract for the loan of money was made in Rhode Island and secured by a mortgage upon real property in Kentucky. The court referring to the contract says: "With regard to the locality of the contract of 1815 we have no doubt that it must be governed by the law of Rhode Island. The proof is positive that it was entered into there, and there is nothing that can raise a question but the circumstance of its making a part of the contract, that it should be secured by conveyances of Kentucky land. But the point is established that the mere taking of foreign security does not alter the locality of the contract with regard to the legal interest. Taking foreign security does not necessarily draw after it the consequence that the contract is to be fulfilled where the security is taken.

The legal fulfillment of a contract of loan, on the part of the borrower, in repayment of the money, and the security given is but the means of securing what he has contracted for, which, in the eye of the law, is to pay where he borrows, unless another place of payment be expressly designated by the contract. No tender would have been effectual to discharge the mortgagee, unless made in Rhode Island. On a bill to redeem, a court of equity would not have listened to the idea of calling the mortgagee to Kentucky in order to receive a tender." *Allshouse v. Ramsay*, 6 Whart. (Pa.) 331, 37 Am. Dec. 417.

[2] If the contract of loan in the action now under consideration had been made in Waterbury, the language quoted from the opinion in *De Wolf v. Johnson* would be peculiarly applicable. While the findings in the action under consideration do not show that the contract was executed in the state of New York, neither do they show that the plaintiffs, at the time of the execution of the contract, were residents of Waterbury. It appears, however, from the record that the plaintiffs were residents of Waterbury when the contract was made, and also that the bond and mortgage constituting the contract between the parties were executed and delivered in this state as a part of the transaction in the transfer of the real property described from the plaintiffs to the defendant Randall, and as security for the payment of a part of the purchase price of said real property. The presumption that the parties to a contract intend that the borrower shall pay where he borrows has been quite generally sustained, at least to the extent of inferring an intent to pay within the state or country where the contract requiring the payment is made. It appears from the quotation from *Fessard v. Mugnier*, supra, that such is the rule in England. The case of *Chapman v. Robertson*, 6 Paige, 627, 31 Am. Dec. 264, so far as it holds that the place where the mortgaged property is situated governs in determining the place of payment as against the place where a loan is made which is secured by the mortgage on such property, has been frequently criticised. Story on Conflict of Laws (8th Ed.) 402; *Cope v. Alden*, 53 Barb. 350; 2 Kent's Comm. 461, note "b"; *Curtis v. Leavitt*, 15 N. Y. 9, 89; *Dickinson v. Edwards*, 77 N. Y. 573, 33 Am. Rep. 671; *Manhattan Life Ins. Co. v. Johnson*, 188 N. Y. 108, 112, 80 N. E. 658, 9 L. R. A. (N. S.) 1142.

It was said in this state early in the last century by Cowen in his treatise that: "If a place of payment or performance be mentioned in the contract the tender can only be made there. If no place be mentioned for paying a sum in gross, it must be tendered to the party personally if in the state, but the tenderer is not bound to seek the party out of the state." *Allshouse v. Ramsay*, supra; *Littell v. Nichols*, Hardin (Ky.) 66; *Tasker v. Bartlett*, 5 Cush. (Mass.) 359; *King v. Finch*,

60 Ind. 423; *Galloway v. Standard Fire Ins. Co.*, 45 W. Va. 237, 31 S. E. 969; *Gill v. Bradley*, 21 Minn. 15. It is quite generally asserted in the encyclopedias and text-books that the rule is well settled that a debtor is not required to seek a creditor out of the state. 22 Am. & Eng. Ency. of Law, p. 533, and cases cited; 30 Cyc. p. 1185; *Thomas on Mortgages* (2d Ed.) § 231; *Beach, Modern Law of Contracts*, § 329; 3 Page on Contracts, §§ 329, 1420.

The question was considered in this court in *Hale v. Patton*, 60 N. Y. 233, 236, 19 Am. Rep. 168, and it was by that case established in this state that, where a contract is made within the state and the creditor, between the time of entering into the contract and the time when the payment becomes due thereon departs from the state, the debtor is not required to follow the creditor for the purpose of paying the indebtedness. The court in that case say: "In general a debtor who is indebted on a money obligation is bound, if no place of payment is specified in the contract, to seek the creditor and make payment to him personally. But this rule is subject to the exception that, if the creditor is out of the state when payment is to be made, the debtor is not obliged to follow him, but readiness to pay within the state in that case will be as effectual as actual payment to save a forfeiture. *Co. Litt.* 304, 2; *Smith v. Smith*, 25 Wend. 405; *Allshouse v. Ramsay*, 6 Whart. (Pa.) 331, 37 Am. Dec. 417; *Southworth v. Smith*, 7 Cush. (Mass.) 391; *Tasker v. Bartlett*, 5 Cush. (Mass.) 359. The judge before whom the case was tried found that the plaintiff was absent from the state from the 8th of January, 1873, and that the defendant during the whole of that month had the money and was ready and willing to pay the interest. This, within the general rule, excused the defendant from actual performance of the condition."

In *Houble v. Volkening*, 49 How. Prac. 169, the court say: "If a contract is made in this state between residents in this state, the presumption is that it is to be performed within this state; and it would be a great hardship to compel the debtor to travel all the world over to make his tender. The rule has long been established in England that the debtor was not bound to follow his creditor beyond the four seas to make a tender, and the same rule has been adopted in our state." *Grussy v. Schneider*, 55 How. Prac. 188. The Appellate Division cited as authority for a contrary conclusion *Taylor v. Blair*, 59 Hun, 347, 13 N. Y. Supp. 154, and *Penn. Lumbermen's Mut. F. Insurance Co. v. Meyer*, 197 U. S. 407, 25 Sup. Ct. 483, 49 L. Ed. 810. In the *Taylor v. Blair* Case there was an agreement in connection with the purchase of certain shares of stock that at the end of one year from the date of the purchase, if the plaintiff's intestate desired to sell the shares at the price paid for them, the defendants would pur-

chase the same and pay to the plaintiff's intestate the amount paid by him for the same, with interest. It was in that action held that it was incumbent upon the plaintiff to tender a transfer of said shares to the parties agreeing to purchase the same. The defendants at the time the contract was made and at the time when it was necessary to make the tender resided in Pennsylvania, but the corporation whose stock was under consideration had an office in the city of New York, and one of the defendants, the president of said corporation, and the other of the defendants, one of its trustees, made the office of said corporation their headquarters in New York, and the case holds that nothing relieved the plaintiff's intestate from making a tender or offer of the shares of stock to the defendants personally at their place of residence in the state of Pennsylvania or at their office in the city of New York.

In the *Penn. Lumbermen's Mut. F. Ins. Co. v. Meyer* Case the defendant was a resident of the state of New York and the insurance company was a foreign corporation with its office in Pennsylvania. The insurance policies upon which the action was brought were executed in Philadelphia and sent to Meyer in Rochester. The question involved in that case was whether the service of the summons within the state of New York upon a resident director of the defendant under the facts fully stated in the case constituted a valid service conferring jurisdiction on a federal court sitting within the state of New York. The suggestion in the opinion that the language of this court in *Hale v. Patton*, supra, referred only to the subsequent absence of the creditor from the state which was his domicile when the contract was made was unnecessary to the decision in that case, and is but an expression of opinion.

The rules relating to the place where payments should be made upon contract have been established by long usage and can be stated briefly as follows:

(1) It is a general rule that a debtor must seek his creditor to make payment of his indebtedness.

(2) The parties to a contract may provide therein where payments thereon shall be made.

[3] (3) Where a contract is made outside of the state in which the promisor resides, and it does not, either by express terms or by fair inference, provide where the same is to be performed, it will be presumed that the parties intend that it shall be performed at the place where it is made, and the promisor must provide at such place to make the payments thereon.

[4] (4) Where a contract is made in this state either with a person then a resident of this state, who afterwards removes therefrom, or with a nonresident of this state, it is the duty of the promisee to provide a place in this state where payments can be

made, and it is not necessary for the debtor to go beyond the bounds of this state to make payments thereon.

Where a person promises to pay specified amounts from time to time pursuant to a written contract, if he or the payee desire that the same be paid at a particular place, it is just as easy to specify in the instrument the place where, as the time when, such payments are to be made.

Other questions are suggested by the briefs and the arguments of counsel, but upon the findings of fact made at the trial at Special Term, which have never been reversed and are in no way assailed in this court, the judgment of the Special Term dismissing the plaintiff's complaint was right, and the judgments appealed from should be reversed and the judgment of the Special Term entered upon said findings dismissing said complaint should be affirmed, with costs to the appellant in this court and in the Appellate Division.

CULLEN, C. J., and GRAY, HAIGHT, VANN, WILLARD BARTLETT, and COLLIN, JJ., concur.

Judgment accordingly.

(202 N. Y. 306)

BREEZE v. BAYNE et al.

(Court of Appeals of New York, May 16, 1911.)

1. CHATTEL MORTGAGES (§ 198*)—STATEMENT—FILING—NECESSITY.

Under Lien Law (Consol. Laws 1909, c. 33), § 235, making a chattel mortgage invalid as against the mortgagor's creditors after the first or any succeeding year reckoned from the first filing, unless within 30 days preceding expiration of such period a certain statement is filed, a mortgagee, who prior to the expiration of the year from the time when the chattel mortgage is first filed and after default by the mortgagor takes the property as such mortgagee under a mortgage then valid, subject only to an accounting pursuant to said statute, does not make his title as such mortgagee in possession invalid as against the creditors of the mortgagor.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. §§ 442-449; Dec. Dig. § 198.*]

2. CHATTEL MORTGAGES (§ 198*)—FILING—EFFECT OF POSSESSION.

Lien Law (Consol. Laws 1909, c. 33), § 235, makes a chattel mortgage invalid as against the mortgagor's creditors after the first or any succeeding year reckoned from the first filing unless within 30 days preceding expiration of such period a certain statement is filed. Before expiration of the first year after a chattel mortgage was filed, defendant, a third party, being in possession of the property, agreed to keep it as agent for the mortgagee. Defendant subsequently, on obtaining judgment against the mortgagor, had execution levied on the same property. On expiration of the year no statement was filed. Held, that the purchaser at a

sale under the mortgage obtained good title as against defendant.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. §§ 442-449; Dec. Dig. § 198.*]

Appeal from Supreme Court, Appellate Division, Fourth Department.

Action by William B. Breeze against Trivot Bayne and others. From a judgment of the Fourth Appellate Division (136 App. Div. 909, 120 N. Y. Supp. 1115) affirming a judgment, plaintiff appeals. Reversed, and new trial granted.

On February 25, 1907, Elbert Bane executed and delivered to Fred Fisher an instrument in writing, including a chattel mortgage, upon certain property therein described, which instrument was duly filed as a chattel mortgage on February 27, 1907. On February 27, 1907, said Bane executed and delivered to said Fisher another chattel mortgage on personal property therein described, which was duly filed February 27, 1907. On March 23, 1907, said Bane executed and delivered a third chattel mortgage to said Fisher on one brown horse, which was duly filed on March 23, 1907. On March 27, 1908, the said Bane being indebted to the defendant, Trivot Bayne, for money loaned in an amount exceeding \$500, confessed judgment to said Trivot Bayne before a justice of the peace in the county of Orleans, and judgment was duly entered against said Elbert Bane for said amount of \$500, and on the same day an execution was duly issued thereon and delivered to the defendant James H. Bolton, a constable, and said constable pursuant to the directions of said execution levied upon all of the goods and chattels described in the complaint herein and in said chattel mortgages and took the same into his actual possession. He thereupon posted notices of a sale of said goods and chattels by virtue of said execution and levy to take place on April 1, 1908. On March 21, 1908, John V. Parker, acting for and on behalf of a committee duly appointed on March 16, 1908, of the person and estate of said Fred Fisher, then a lunatic, posted notices of a sale of the goods and chattels described in said chattel mortgages to take place by virtue of said chattel mortgages March 28, 1908. On March 28, 1908, the goods and chattels were sold pursuant to said chattel mortgages. The purchasers at said sale were unable to obtain possession of said goods and chattels, including said horse, because they were then held by the defendant Bolton pursuant to said execution. The purchasers at said sale transferred and assigned their claims and title, respectively, as such purchasers to the plaintiff, and this action was brought against Trivot Bayne, the judgment creditor, under said judgment, and the defendant Bolton, the constable, holding possession of the goods and chattels by virtue of

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

the execution issued on said judgment, to recover possession of said goods and chattels, and said goods and chattels were actually taken pursuant to an order duly issued in this action. Upon the trial of the action judgment was rendered in favor of the defendants for the amount of said judgment, and also in case the said judgment is not collected, for the goods and chattels, including said brown horse, all as described in said judgment. The value of the goods and chattels is not found, but it is found by the court that "the right of possession of said goods and chattels by the defendant Bolton was a special property herein, the value of which is hereinafter fixed, because the value of said special property is less than the value of said goods and chattels at the time of the trial." An appeal was taken from the judgment entered thereon to the Appellate Division, where the judgment was unanimously affirmed.

Leon M. Sherwood, for appellant. Benjamin W. Hall, for respondents.

CHASE, J. (after stating the facts as above). The only question for our consideration is whether the findings of fact support the conclusions of law based thereon.

It is provided by the lien law (Consol. Laws 1909, c. 33, § 235) as follows: "A chattel mortgage * * * shall be invalid as against creditors of the mortgagor * * * after the expiration of the first or any succeeding term of one year, reckoning from the time of the first filing, unless, (1) within thirty days next preceding the expiration of each such term, a statement containing a description of such mortgage, the names of the parties, the time when and place where filed, the interest of the mortgagee or any person who has succeeded to his interest in the property claimed by virtue thereof, * * * (2) A copy of such mortgage and its indorsements, together with a statement attached thereto or indorsed thereon, showing the interest of the mortgagee or of any person who has succeeded to his interest in the mortgage, is filed in the proper office. * * * No statement was filed as required by said statute at the expiration of the first term of one year from the first filing of said chattel mortgages, or either of them, or at any time.

It is, however, found by the court as follows: "Nineteenth. That heretofore, and on the 9th day of March, 1908, the said Trivot Bayne was in the apparent possession of the stock and chattels described in the complaint, when the said Parker, as agent as aforesaid, entered upon the premises occupied by the said Bayne for the purpose of taking possession of said property in the course of the foreclosure of said chattel mortgage, and that it was then mutually agreed between the said Parker and the said Trivot Bayne that the said Bayne, in con-

sideration that the said Parker would not remove the chattel mortgaged property and effects from the said premises, that he, the said Trivot Bayne, would keep, care for, and turn over the same to the said Parker, as agent of the Fishers, on demand." Except for the facts stated in the finding quoted, it is undisputed that by the express terms of said statute said chattel mortgages were on March 28, 1908, invalid as against said defendant Bayne, a judgment creditor. *Stephens v. Perrine*, 143 N. Y. 476, 39 N. E. 11; *Russell v. St. Mart*, 180 N. Y. 355, 73 N. E. 31; *Porter v. Parmley*, 52 N. Y. 185. On March 9, 1908, the first two chattel mortgages had become invalid as against creditors, but the third chattel mortgage had at that time been duly filed, and one year had not expired since it was so duly filed. It is found as stated that Parker on that day, as agent of the mortgagee, entered into a mutual agreement with the defendant Trivot Bayne that he, the said Bayne, would keep, care for, and turn over the said goods and chattels to said Parker as such agent on demand. The possession of the defendant Trivot Bayne became the possession of the mortgagee, and it does not appear in any way that he returned the property to the mortgagee. He apparently delivered the same to the constable holding an execution issued in his (Bayne's) behalf upon the judgment confessed by the mortgagor to him.

[1] A mortgagee, who prior to the expiration of the year from the time when a chattel mortgage is first filed and after default by the mortgagor takes the property into his actual possession, holds the title to said property as such mortgagee under a mortgage then valid, subject only to an accounting, and his failure to subsequently refile the mortgage pursuant to said statute does not make his title as such mortgagee in possession invalid as against the creditors of the mortgagor. *Jones on Chattel Mortgages* (5th Ed.) §§ 294, 699; *Porter v. Parmley*, supra; *Steele v. Benham*, 84 N. Y. 634; *Tremaine v. Mortimer*, 128 N. Y. 1.

[2] The purchaser of the brown horse at the chattel mortgage sale, therefore, as against Trivot Bayne, the defendant beneficially interested in this action and the person who contracted to keep and care for the same as the agent of the mortgagee, obtained good title to it and was entitled to the possession of said horse when the demand was made therefor upon the defendants. *Dezell v. Odell*, 3 Hill, 215, 38 Am. Dec. 628; *Cornell v. Dakin*, 38 N. Y. 253; *Western Transportation Co. v. Barber*, 56 N. Y. 544, 552; *Ouderkirk v. Central Nat. Bank*, 119 N. Y. 263, 23 N. E. 875. It is difficult for us upon the record to determine the ultimate effect of holding that the brown horse was improperly withheld from the possession of the plaintiff, even if as suggested by the respondent such horse died subsequent to the same

being taken pursuant to the order in this action.

The conclusion of law that the third chattel mortgage was invalid as against the defendants is not sustained by the findings, and the judgment is wrong so far as it is based upon such erroneous conclusion.

The judgment should be reversed and a new trial granted, with costs to abide the event.

CULLEN, C. J., and GRAY, HAIGHT, VANN, and WERNER, JJ., concur. WILLARD BARTLETT, J., absent.

Judgment reversed, etc.

(202 N. Y. 128)

PEOPLE ex rel. STABILE v. WARDEN OF CITY PRISON OF CITY OF NEW YORK.

(Court of Appeals of New York. May 9, 1911.)

1. CRIMINAL LAW (§ 867*)—DISCHARGE OF JURY—POWER OF COURT.

Code Cr. Proc. § 428, authorizing the court to discharge the jury before verdict on the occurrence of some injury affecting accused, the jury, or some one of them or the court, or when, after the lapse of such time as shall seem reasonable to the court, the jury shall declare themselves unable to agree, or when, with the leave of the court, the public prosecutor and counsel for accused consent to the discharge, limits and defines the discretion resting in the court to discharge a jury before a verdict, and supersedes the rule that the discharge of a jury in all cases rests in the sound discretion of the court.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2071-2078; Dec. Dig. § 867.*]

2. CRIMINAL LAW (§ 867*)—DISCHARGE OF JURY—POWER OF COURT.

Code Cr. Proc. § 428, authorizing the court to discharge the jury before verdict when, after the lapse of a reasonable time, the jury shall declare themselves unable to agree, does not permit a discharge before the jury has declared their inability to agree; and, where the jury in a murder case retired for deliberation at 5:15 o'clock p. m., their discharge five hours later without any request from the jury, and on the foreman's statement in response to a query that the jury had not as yet agreed on a verdict, was unauthorized.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2071-2078; Dec. Dig. § 867.*]

3. CRIMINAL LAW (§ 173*)—FORMER JEOPARDY—ACTS CONSTITUTING.

Where one is placed on trial on an indictment duly found and sufficient in form, and he pleads thereto and proceeds with a trial before a jury duly sworn, he is placed in jeopardy within the Constitution, providing that a person shall not for the same offense be twice put in jeopardy, though things may occur during the trial which will leave him subject to a trial before a new jury.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 289; Dec. Dig. § 173.*]

4. CRIMINAL LAW (§ 184*)—FORMER JEOPARDY—ACTS CONSTITUTING.

Where a jury is discharged without the consent of accused merely because the prosecut-

ing attorney is not prepared, accused is entitled to his discharge as having once been put in jeopardy within the Constitution.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 333-343; Dec. Dig. § 184.*]

5. CRIMINAL LAW (§ 182*)—FORMER JEOPARDY—ACTS CONSTITUTING.

Where a jury is arbitrarily discharged without the consent of accused, and no circumstances exist calling for the exercise of a discretion by the court, accused has been placed in jeopardy within the Constitution, and the discharge is a reason why he should not be again brought to trial on the same indictment.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 330-332; Dec. Dig. § 182.*]

6. CRIMINAL LAW (§ 200*)—PLEAS—FORMER ACQUITTAL—"JUDGMENT OF ACQUITTAL."

The arbitrary discharge of a jury before verdict without the consent of accused, and without the existence of circumstances justifying the discharge, is not a judgment of acquittal within Code Cr. Proc. § 332, enumerating pleas that may be interposed to an indictment, and a former conviction or acquittal which may be pleaded in bar is a conviction or acquittal on the merits.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 666; Dec. Dig. § 290.*]

7. HABEAS CORPUS (§ 4*)—OTHER REMEDY—APPEAL.

Under Code Cr. Proc. § 517, allowing appeals from a judgment of conviction after indictment, one remanded to custody and denied his application for his discharge from custody after the wrongful discharge of the jury without his consent before verdict is not entitled to appeal, and hence habeas corpus will lie to review the decision of the court.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. § 4; Dec. Dig. § 4.*]

8. HABEAS CORPUS (§ 3*)—OTHER REMEDY—MOTION IN ARREST.

Nor is his right to the writ of habeas corpus prevented by the remedy of motion in arrest of judgment, since there is no prospective judgment to arrest.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. § 3; Dec. Dig. § 3.*]

9. HABEAS CORPUS (§ 111*)—GROUNDS FOR RELEASE—FORMER JEOPARDY.

Under Code Civ. Proc. §§ 2015, 2016, 2043, authorizing a person restrained in his liberty to apply for a writ of habeas corpus except in enumerated cases, etc., one remanded to custody and denied his discharge on the wrongful discharge of the jury before verdict is entitled to his discharge on habeas corpus; the act of the court in discharging the jury being in effect an acquittal of accused, who should not be again placed on trial on the indictment.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. § 100; Dec. Dig. § 111.*]

Cullen, C. J., and Hiscock, J. dissenting.

Appeal from Supreme Court, Appellate Division, First Department.

Application for writ of habeas corpus by the People, on the relation of Vincent L. Stabile, against the Warden of the City Prison of the City of New York. From an order of the Appellate Division (139 App. Div. 488, 124 N. Y. Supp. 341), affirming an order sustaining the writ and discharging relator from custody, defendant appeals. Affirmed.

The relator was indicted for the crime of murder in the first degree. The indictment

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

was brought to trial at a term of the Court of General Sessions of the city and county of New York, held by a judge of said court with a jury. The trial continued from the 7th until the 14th day of March, 1910. The jury was then discharged, and the relator was remanded to custody. On March 22, 1910, a writ of habeas corpus was obtained by the relator and duly served. The return to the writ stated that the relator was in the custody of the warden of the city prison by virtue of a commitment issued by the Court of General Sessions of the county of New York following the relator's indictment for murder in the first degree. The traverse to said return denied that the relator was held under any legal warrant or writ, and it also stated that he was tried upon said indictment, and testimony was duly taken by and in behalf of the prosecution and by and in behalf of the relator upon the issues formed by his plea to said indictment of not guilty. The traverse further stated: That at the close of taking testimony on said trial the jury was charged by the court, "and thereupon the jury retired for deliberation at 5:15 o'clock p. m. Thereafter, at 6:30 p. m., the jury was taken to dinner by officers of the court, and returned from dinner at 8 o'clock p. m. and resumed their deliberation. That at 9:22 o'clock p. m. upon the same day the jury was brought into court and further charged by the court and again retired for deliberation, not less than 20 minutes being occupied in obtaining said additional charge. Thereafter upon the same day at 10:10 o'clock p. m. the jury was brought into court by order of the court without previous consultation with the defendant or his counsel and without defendant or his counsel being informed of the purpose thereof, and without the jury requesting it, and the jury being in court, the following took place between the court and the jury: The Court: Mr. Foreman, have you agreed upon a verdict? The Foreman: Not as yet. The Court: Well, I am loath to keep you together any longer. You have been in session now for over five hours, and I have charged you as fully upon the law as I can charge you. I do not see that there is any additional explanation of the law that I can give you. I discharge you from further consideration of the case." It also appears therefrom that the entry made by the clerk in the minutes of the court as the same was modified by consent of counsel is as follows: "The jury at 10:10 p. m. o'clock return to the bar, and say that they have not as yet agreed upon a verdict. Thereupon the public prosecutor and the defendant and his counsel being present and interposing no objection thereto, and in the opinion of the court a reasonable time having elapsed since the case was committed to the jury, and it appearing to the court that the jury are unable to agree upon a verdict, it is ordered that the jury be, and they hereby

are, discharged from further consideration of the case." It also appears that a stipulation was entered into by and between the district attorney and the counsel for the relator that the entry in the minutes of the clerk of the court "was not intended to mean that the counsel for the defendant was informed in advance that the jury were to be discharged, and were consulted with and consented in advance that the jury be discharged, but was intended to mean that, after the jury had been discharged, no objection was interposed nor exception taken on the record, but the said counsel remained silent." It further appears from the affidavits annexed to the traverse that a few moments before the jury were discharged they were deliberating among themselves, and at that time stood ten for acquittal of the defendant and two for a verdict of manslaughter in the first degree, and that, while they were thus discussing the matter before them, an officer who had charge of the jury directed them to get their hats and coats and follow him, which they did, and they were conducted into the courtroom, and the statements made by the court and by the foreman of the jury were made as hereinbefore stated. The traverse to said return further stated that by reason of the trial, deliberation, and discharge of the jury as stated the relator was once put in jeopardy, and cannot be retried upon said charge of murder in the first degree, or in any other way prosecuted for said crime, and is entitled to his discharge upon the writ of habeas corpus. The relator was discharged and the opinion written by the judge holding the Special Term is reported in 67 Misc. Rep. 202, 122 N. Y. Supp. 284. An appeal was taken to the Appellate Division, where the order discharging the relator was affirmed, and the opinions written thereon are reported in 139 App. Div. 488, 124 N. Y. Supp. 341.

Charles S. Whitman, Dist. Atty. (Robert C. Taylor, of counsel), for appellant. Austen G. Fox, for respondent.

CHASE, J. (after stating the facts as above). In England, during the reign of Edward III, vigorous means were resorted to for the purpose of compelling unanimity among jurymen. Jurors who dissented from the rest were committed to prison, and justices resorted to carrying jurors about with them in carts until they agreed. Crabb's English Law, 300. It became the common-law rule that persons serving as jurymen must decide upon a verdict in every case presented to them, and coercion in different forms was permitted and generally exercised. Such rule not only is no longer accepted and enforced, but the rule itself is now only a matter of interest to persons studying the history and development of the law. The old rule is stated by legal writers (Lord Coke, 1 Inst. 227b; 3 Inst. 110), and the records of cases establishing and asserting it have

been frequently collated and discussed in more recent opinions. *People v. Olcott*, 2 Johns. Cas. 301, 307, 309, 1 Am. Dec. 168; *People v. Sheldon*, 156 N. Y. 268, 50 N. E. 840, 41 L. R. A. 644, 66 Am. St. Rep. 564. There is no reason that would justify the repetition of such quotations in this opinion, and I refer to the old rule simply as a statement preliminary to quoting the statute that now asserts and controls the discretion resting in a trial judge or justice regarding the discharge of a jury, called and sworn in a criminal case, prior to rendering a verdict. Coercion of jurors has never found favor in this state. By the Revised Statutes of 1829 it was provided: "Attaints upon untrue verdicts are abolished; and for any verdict rendered by him, no juror shall be questioned, or be subject to any action or proceeding, civil or criminal, except to indictment for corrupt conduct in rendering such verdict, in the cases prescribed by law." 2 R. S. pt. 3, c. 7, tit. 4, art. 4, § 69. Early in the last century Mr. Justice Kent in *People v. Olcott*, supra, referring to the common-law rule and reviewing at length many of the cases that had been decided prior to that time, said: "The doctrine of compelling a jury to unanimity, by the pains of hunger and fatigue, so that the verdict, in fact, be founded not on temperate discussion, and clear conviction, but on strength of body, is a monstrous doctrine, that does not, as St. Germain evidently hints, stand with conscience, but is altogether repugnant to a sense of humanity and justice. A verdict of acquittal or conviction obtained under such circumstances, can never receive the sanction of public opinion. And the practice of former times of sending the jury in carts from one assize to another, is properly controlled by the improved manners and sentiments of the present day." Growing out of the common-law rule that we have stated, it was, by Lord Coke, asserted that a jury sworn and charged in a criminal case could not be discharged until they had rendered a verdict.

In the case of *People v. Olcott*, supra, Justice Kent reviews the authorities to sustain the claim that a court has no power to discharge a jury in a criminal case until they have agreed upon a verdict, and concludes that the power to discharge a jury in certain cases before they render a verdict exists. In the *Olcott* Case the defendants were indicted for a misdemeanor, and Justice Kent left a possible doubt as to the rule stated by him being applicable to capital cases by saying: "If the question in capital cases be doubtful, there is nothing to render it so in cases of misdemeanor." Long before the adoption of our Code of Criminal Procedure in 1881, it became the settled rule in this state that the discharge of a jury in all cases rests in the sound discretion of the court. *People v. Denton*, 2 Johns. Cas. 275; *People v. Olcott*, supra; *People v. Good-*

win, 18 Johns. 187, 205, 9 Am. Dec. 203; *People v. Green*, 13 Wend. 55; *People v. Grant*, 4 Parker's Cr. R. 527.

The right to discharge a jury in all cases was asserted by Spencer, J., in *People v. Goodwin*, supra, and he at the same time formulated a rule to be followed in the exercise of such discretion. We quote from the opinion in that case: "Upon full consideration, I am of opinion that although the power of discharging a jury is a delicate and highly important trust, yet that it does exist in cases of extreme and absolute necessity, and that it may be exercised without operating as an acquittal of the defendant; that it extends as well to felonies as misdemeanors; and that it exists, and may discreetly be exercised in cases where the jury, from the length of time they have been considering a cause, and their inability to agree, may be fairly presumed as never likely to agree unless compelled so to do from the pressing calls of famine or bodily exhaustion."

[1] Under the rule established, the safeguard of the public and of persons charged with crime against an improper discharge of a jury rested in the good judgment and integrity of the judges. Prior to the adoption of the Code of Criminal Procedure, it is asserted that in one or more cases in this state a jury had been discharged without the exercise of that good judgment which is usually manifested in all matters resting in the discretion of the courts. It is also asserted that the criticisms arising therefrom resulted in the insertion in the Code of Criminal Procedure of section 428, which asserts, defines, and limits the discretion resting in the courts relating to the discharge of a jury before it has arrived at a verdict. Said section 428 reads as follows: "When jury to be discharged before agreement.—After the jury have retired to consider of their verdict, they can be discharged before they shall have agreed thereon only in the following cases: (1) Upon the occurrence of some injury or casualty affecting the defendant, the jury or some one of them, or the court, rendering it inexpedient to keep them longer together; or, (2) when after the lapse of such time as shall seem reasonable to the court, they shall declare themselves unable to agree upon a verdict; or, (3) When, with the leave of the court, the public prosecutor and the counsel for the defendant consent to such discharge." In the case now under consideration it is not claimed that the judge presiding at the Court of General Sessions had the right to discharge the jury by reason of the first subdivision of said section.

There was no opportunity given the defendant or his counsel to consider the contemplated action of the trial judge when he called the jury before him. He did not indicate in any way in advance what action he was going to take. The discharge of the

jury was precipitate and arbitrary, and it would appear to have been a surprise not only to the jury but to the counsel engaged in the trial of the case. The right to discharge the jury does not come within the third subdivision of said section.

[2] The discharge of the jury necessarily rests upon the statutory authority contained in the second subdivision of said section. The right was therefore dependent upon the jury having declared themselves unable to agree upon a verdict. The jury did not declare themselves unable to agree upon a verdict either in terms or by any fair inference. They were in the midst of their deliberations upon the case when, without a suggestion from them, and without the defendant or his counsel being informed of the purpose thereof, the judge presiding at the trial arbitrarily directed them to come before him. Upon their appearance before him they were not asked whether they were able to agree upon a verdict, but as to whether they had in fact agreed in language as follows: "Mr. Foreman, have you agreed upon a verdict?" If the jury had responded through their foreman by a simple negative, it could not by any fair construction be said to have been a declaration of inability to agree. The answer in this case, however, includes much more than a simple negative. When the foreman said in answer to the question by the trial judge, "Not as yet," he clearly indicated that the jurymen had not completed their discussion and deliberation in an effort to reach a verdict, and that they were in the midst of such discussion and deliberation, and that they required further time before they could determine whether they were able to agree upon a verdict. The reply included by implication a hope and perhaps even an expectation of an agreement. It is suggested by the district attorney that the simple fact that the jury had not as yet agreed carried with it necessarily the fact that they were at that time unable to agree. If the jurymen had been asked five minutes after the submission of the case to them and before they had had any discussion or deliberation upon the verdict that should be rendered in the case, whether they had agreed upon a verdict, the answer would necessarily have been substantially the same as that given to the question asked by the court. Such an answer would be appropriate and true in every case from the moment it was submitted to a jury until a verdict was reached. It would have been true if the last ballot taken before they were directed to come before the court had resulted in 11 votes for acquittal and one in some doubt leaning toward an acquittal. In this case, at the time the jury was discharged, ten jurors had voted for an acquittal, while the other two then favored a conviction for a lesser offense than that for which the relator was charged in the indictment.

From the plain language of the statute it-

self it appears that it was not the intention of the Legislature to permit the court to exercise discretion in discharging a jury at any point of time prior to a declaration by them of their inability to agree. If the statute means that the court has the right in its discretion to discharge a jury at any time before it has agreed, then the last clause of subdivision 2 of the section quoted is meaningless. If it had been the intention of the Legislature to leave it for the court to say that the jury were unable to agree without a statement from them relating thereto, it would have passed a statute similar to the one now existing in the state of California. The Penal Code of California provides:

"Sec. 1139: If, after the retirement of the jury, one of them be taken so sick as to prevent the continuance of his duty, or any other accident or cause occur to prevent their being kept for deliberation the jury may be discharged.

"Sec. 1140: Except as provided in the last section, the jury cannot be discharged after the cause is submitted to them until they have agreed upon their verdict and rendered it in open court, unless by consent of both parties entered upon the minutes, or unless, at the expiration of such time as the court may deem proper, it satisfactorily appears that there is no reasonable probability that the jury can agree."

Under such a statute a reasonable discretion at all times rests in the court to determine whether "it satisfactorily appears that there is no reasonable probability that the jury can agree." We repeat that our statute is plain. Any other words attempting to construe it lead to confusion, and not to clearness. It was intended to take away the unqualified discretion that had theretofore existed in the courts in regard to discharging a jury and make the discretion of the courts dependent upon a prior declaration by the jury of their ability or inability to agree. A declaration even by a minority of the jurors that in their opinion a further deliberation by them would lead to an agreement would under our statute require the court to send the jury back for such further deliberation. The jury in this case were improperly discharged without determining the relator's guilt or innocence. It is a fundamental principle of common law as well as a right guaranteed by Constitution that a person shall not for the same offense be twice put in jeopardy of life or limb. *People v. Goodwin*, supra. It is provided by the fifth amendment to the Constitution of the United States that a person shall not "be subject for the same offense to be twice put in jeopardy of life or limb." It is provided in our state Constitution, article 1, § 6: "No person shall be subject to be twice put in jeopardy for the same offense." Where a person charged with crime has been once duly acquitted or convicted before a court of competent jurisdiction, he can plead such acquittal or conviction in bar to any

further prosecution for such crime. Under our Code of Criminal Procedure, a judgment of conviction or acquittal of the crime charged is necessary to constitute a good plea. Code Cr. Proc. § 332.

[3] If a person accused of crime is placed upon trial therefor upon an indictment duly found and sufficient in form, and he pleads thereto and proceeds with the trial before a jury duly sworn to try the issues so joined, he is placed in jeopardy within the constitutional provisions. There are many things that may occur during a trial which will for reasons stated by the courts permit of the discharge of a jury before rendering a verdict with or without the consent of the defendant and leave the defendant subject to a trial before a new jury as though the first jury had never been impaneled and sworn.

[4] If the jury is discharged without the defendant's consent merely because the public prosecutor is not prepared with his evidence, the defendant is entitled to his discharge because he has once been put in jeopardy within the constitutional provisions. *People v. Barrett*, 2 Caine, 304, 2 Am. Dec. 239; *People v. Grant*, 4 P. Cr. R. 527; *Klock v. People*, 2 P. Cr. R. 676.

[5] Where a jury is arbitrarily discharged in a criminal case without the consent of the defendant, and no circumstances exist calling for or permitting the exercise of a discretion by the court, the defendant has by reason of the trial that thus comes to a sudden end been placed in jeopardy within the constitutional provision, and such discharge is a reason within the Constitution why the defendant should not be again brought to trial upon the same indictment. *People v. Barrett*, supra; *People v. Grant*, supra; *King v. People*, 5 Hun, 297; *People v. Cage*, 48 Cal. 323, 17 Am. Rep. 436; *State v. Allen*, 59 Kan. 758, 54 Pac. 1060; *Wright v. State*, 5 Ind. 290, 61 Am. Dec. 90; *People v. Jones*, 48 Mich. 554, 12 N. W. 848; *Dobbins v. State*, 14 Ohio St. 493; *Commonwealth v. Fitzpatrick*, 121 Pa. 109, 15 Atl. 466, 1 L. R. A. 451, 6 Am. St. Rep. 757; 12 Cyc. 270, and cases cited; 17 Am. & Eng. Ency. of Law, 1261, and cases cited.

There remains but one other question for consideration, and that is whether the relator's right to a discharge can be determined in this proceeding. Although the discharge of the jury was not in form an acquittal of the defendant, it was in effect such an acquittal.

[6] It was not, however, a judgment of acquittal within the express provisions of section 332 of the Code of Criminal Procedure restricting and enumerating the pleas that may be interposed to an indictment by a defendant. A former conviction or acquittal which may be pleaded in bar is a conviction or acquittal on the merits. *People v. Smith*, 172 N. Y. 210, 227, 64 N. E. 814; *People v. Goodwin*, supra. It is not important to consider the relator's chances of being discharged if he should move in the Court of General Sessions for an order for his discharge upon

the ground that he has been once placed in jeopardy.

[7] The relator's claim to a discharge was substantially decided against him when he was remanded to the custody of the defendant. There is no appeal from the direction of the court given at the time that the defendant was remanded, and there would be no appeal from an order of the Court of General Sessions denying a further application for a discharge. The only appeal allowed to a defendant in a criminal case is from a judgment of conviction after indictment. Code Cr. Proc. § 517.

[8] He cannot move in arrest of judgment, for there is no prospective judgment to arrest. Assuming that he could assert his claim by a subsequent plea to the indictment or by a motion in arrest of judgment in case of a conviction on a second trial, it would be necessary for him to remain in custody until the case is again called for trial by the representative of the people and another trial is had. If there is no authority to again place the defendant upon trial upon the indictment, there is no right to restrain him of his liberty. We hold as a matter of law that the relator is in effect acquitted of the charge against him and should not be again placed upon trial upon the indictment.

[9] A person imprisoned or restrained in his liberty within the state for any cause is entitled, except in one of the cases specified in section 2016 of the Code of Civil Procedure, to a writ of habeas corpus for the purpose of inquiring into the cause of the imprisonment or restraint. Code Civ. Proc. § 2015. If it appears that the prisoner is unlawfully imprisoned or restrained in his liberty the court or judge must make a final order discharging him forthwith. Code Civ. Proc. § 2043. This court held in *People ex rel. Collins v. McLaughlin*, 194 N. Y. 556, 557, 86 N. E. 1119, 1120, that "except in rare cases where the facts before the court cannot be materially changed, qualified or explained the determination of important issues ought not to be made in a habeas corpus proceeding." In that case the court referred to and quoted from the United States Supreme Court, with approval, as follows: "The Supreme Court of the United States has recently announced its adherence to this doctrine." In *Riggins v. United States*, 199 U. S. 547, 548, 26 Sup. Ct. 147, 148, 50 L. Ed. 303, Mr. Chief Justice Fuller states: "Ordinarily the writ will not be granted when there is a remedy by writ of error or appeal, yet in rare and exceptional cases it may be issued, although such remedy exists."

In this case the right to discharge the jury does not rest upon a question of fact. The facts are conceded and the authority of the presiding judge at the trial depended solely upon a question of law. He had no discretion to exercise because the jury had not declared their inability to agree. The defendant has been once placed in jeopardy, and is entitled

by Constitution as by common law to his liberty. Although entitled to his liberty as in case of a verdict of acquittal, he is in custody with no right of appeal from any mandate by which he is restrained. The relator's constitutional rights cannot be adequately preserved other than by the writ of habeas corpus. This is one of the cases where the facts before the court cannot be materially changed, and where the writ should be sustained. *Ex parte Nielsen*, 131 U. S. 176, 9 Sup. Ct. 672, 33 L. Ed. 118; *Ex parte Glenn* (C. C.) 111 Fed. 257; *Ex parte Davis*, 48 Tex. Cr. R. 644, 89 S. W. 978, 122 Am. St. Rep. 775; *People v. Olcott*, supra; *People ex rel. Perkins v. Moss*, 187 N. Y. 410, 80 N. E. 383, 11 L. R. A. (N. S.) 528; *People ex rel. Tweed v. Liscomb*, 60 N. Y. 559, 19 Am. Rep. 211.

This case is distinguishable from *People ex rel. Scharff v. Frost*, 198 N. Y. 110, 91 N. E. 376. In that case the relator was held by virtue of a judgment. The court had jurisdiction of the relator and of the crime of which he was charged, and the reason why the relator therein claimed that he was entitled to a discharge rested upon the determination of a question of fact in connection with the construction of a statute. If the relator therein had availed himself of a motion in arrest of judgment, he would have had an adequate opportunity to review the action of the trial court in granting the judgment against him.

As we have already shown in this case, no adequate remedy has existed or now exists for the protection of the relator.

The order should be affirmed.

CULLEN, C. J. (dissenting). I vote for the reversal of the order appealed from. Though originally the common law was different, it became the settled law of this state, prior to the enactment of the Code of Criminal Procedure, that the time at which a jury, which after consideration of a case had been unable to agree upon a verdict, was to be discharged rested solely in the discretion of the trial judge. This was so held by the old Supreme Court even where the jury had the case under advisement for a period of only 30 minutes. *People v. Green*, 13 Wend. 55. Such is also the conceded law in the United States courts. The learned counsel for respondent cites some declarations in *People v. Grant*, 4 Parker's Or. R. 527, but there is nothing in that case in conflict with the *Green Case*. On the contrary, the *Green*

Case is cited with approval. But the plea of the defendant was sustained because it alleged that the discharge of the jury was arbitrary "where no circumstances exist calling for the exercise of the discretion of the court," and the validity of the plea, as a plea, was to be determined by its face, and not by the proofs offered to sustain it. The question is, therefore, whether section 423 of the Code of Criminal Procedure, which provides that "after the jury have retired to consider of their verdict, they can be discharged before they shall have agreed thereon only in the following cases. * * * (2) When after the lapse of such time as shall seem reasonable to the court, they shall declare themselves unable to agree upon a verdict," has altered the common-law rule. No such intent should be ascribed to the Legislature unless the language of the section is express to that effect. The language of the Code is, "they shall declare themselves unable to agree upon a verdict." The jury was asked whether it had agreed upon a verdict, and the foreman responded: "Not as yet." This was a clear declaration that at the time the response was made the jury was unable to agree upon a verdict. What the section calls for is not any declaration from the jurors as to their belief, expectation, or hopes that in future they may be able to agree, but for a present fact and existing condition. Let us see where the doctrine which has prevailed below will lead. Suppose that, though the jury is not able to agree, some of the jurors think they may be able, after future deliberation, to agree, while others entertain a contrary view. What action can the court take? Must the jury be unanimous in their belief as to inability to agree and may one dissenter keep the jury out indefinitely at his election, or shall the court poll the jury, and is the question to be decided by a majority, contrary to the usual rule which requires the action of a jury to be unanimous? It is true that case is not before us, but a great part of the difficulties in which at times courts find themselves involved arises from failure to look forward and see what will be the result of the rules of law they declare.

VANN, WERNER, and WILLARD BARTLETT, JJ., concur with CHASE, J. HISCOCK, J., concurs with CULLEN, C. J. HAIGHT, J., absent.

Order affirmed.

(84 Oh. St. 118)

CLEVELAND LEADER PRINTING CO. v. NETHERSOLE

(Supreme Court of Ohio. April 18, 1911.)

(Syllabus by the Court.)

1. LIBEL AND SLANDER (§ 5*) — MALICE — WHEN INFERRED.

In an action for libel, malice is inferred upon proof of the publication of defamatory matter, whatever the intention, unless published in the performance of some duty, legal or moral, or in the exercise of some right or privilege. But, where the publication is found not to be defamatory in the sense of constituting a libel per se, malice is not presumed, and there can be no recovery in the absence of proof of special damage.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. § 278; Dec. Dig. § 5.*]

2. LIBEL AND SLANDER (§ 6*)—MATTER "LIBELOUS PER SE"—SPECIAL DAMAGES.

To constitute a publication respecting a person "libelous per se," it must appear that the publication reflects upon the character of such person by bringing him into ridicule, hatred, or contempt, or affects him injuriously in his trade or profession. Hence a statement published in a newspaper of and concerning a woman that she "had hysterics," the same not containing any imputation upon her as an individual, or in respect to her profession or business, is not, though untrue, per se libelous, and cannot be made a ground of recovery of damages in the absence of proof of special damage.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 3-16; Dec. Dig. § 6.*]

For other definitions, see Words and Phrases, vol. 5, pp. 4116-4125; vol. 8, p. 7705.]

3. LIBEL AND SLANDER (§ 19*)—WHAT CONSTITUTES LIBEL.

A statement published in a newspaper that a play owned by such woman had been hissed is a statement prejudicial to property, and, even if untrue and libelous, is not a statement involving a libel upon the owner of the play.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 98, 99; Dec. Dig. § 19.*]

4. LIBEL AND SLANDER (§ 123*)—ABSENCE OF SPECIAL DAMAGE—DIRECTING VERDICT.

In an action to recover for an alleged libel, the question whether the publication is or not libelous per se is a question for the court. *Mauk v. Brundage*, 68 Ohio St. 89, 67 N. E. 152, 62 L. R. A. 477. And where the publication is, as matter of law, not libelous per se, and no evidence has been given tending to show special damage, it is the duty of the court to sustain a motion by defendant, made at the close of the evidence, to direct the jury to return a verdict for defendant.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 356-364; Dec. Dig. § 123.*]

(Additional Syllabus by Editorial Staff.)

5. LIBEL AND SLANDER (§ 34*)—"PRIVILEGED COMMUNICATION."

A "privileged communication" is one in which the words are not defamatory.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. § 113; Dec. Dig. § 34.*]

For other definitions, see Words and Phrases, vol. 6, pp. 5591-5598; vol. 8, p. 7764.]

Error to Circuit Court, Cuyahoga County.

Action by Olga Nethersole against the Cleveland Leader Printing Company. Ver-

dict for plaintiff was affirmed in the Circuit Court, and defendant brings error. Reversed.

The action below was by the defendant in error, Olga Nethersole, against the plaintiff in error, the Cleveland Leader Printing Company, in libel, commenced and tried in the court of common pleas of Cuyahoga. The plaintiff below is an actress and a producer of plays upon the stage; the defendant below is the publisher of a daily newspaper called the Cleveland Leader, published in the city of Cleveland and of extensive circulation in that city and throughout surrounding territory. The alleged libel was published in the Sunday edition of the paper of date March 25, 1906. During the preceding week Miss Nethersole had produced in the opera house in Cleveland four plays known respectively as "Camille," "Carmen," "The Labyrinth," and "Sappho," appearing herself in one of the leading parts in each. The publication embraced certain criticisms of the theater generally, and of the above-named plays in particular. The whole article here follows:

"The regulation clerical Boanerges who thunders against the stage has no personal knowledge of the truth of his charges. He frankly admits that he has never stepped foot within a theater. He speciously claims that his ignorance is inspired; that he can sniff the carrion odor from afar.

"It has always seemed to me that such a fellow purposely kept his eyes shut tight that he might open his mouth the wider. With no bars up, he could range the whole universe of misrepresentations and invective. When such a one does strike a truth or half-truth, the bias, the illogic of the rest blunts his effects. He cries 'Wolf!' too often and too stentoriously.

"There are clergymen, however, who look at the question honestly. They examine and analyze. They see before they shout. One can respect their sincerity if he cannot approve all their findings. And it often happens that they say things that are true and needed.

"Of this class is the Rev. Dr. Reuben A. Torrey, the evangelist, who set all England aflame a few months ago and is now stirring up Philadelphia. That town is ripe for a revival. The quickening of the public conscience in regard to political iniquity has attuned it to individual awakening on its religious and moral side.

"In his daily addresses, Dr. Torrey has not let the theater pass unscathed, but his terms have been so moderate, so free from sensationalism, so devoid of the rant and bluster and bombast of the evangelist of the familiar type, that they inspired the dramatic critic of the Philadelphia Evening Telegram to seek Dr. Torrey out and have a heart to heart talk with him.

"In his talk Dr. Torrey was perfectly uncompromising upon the question of the thea-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

ter, and equally temperate. He condemned, but did it moderately.

"He gave his views as follows: 'My position is that the theater is a safe place for the Christian to stay away from. I do not speak from hearsay or from theory, but from knowledge. I formerly attended the theater, and know it.

"I want to be understood as not for a moment declaring that all actors are impure and immoral, and I think that Clement Scott went too far. But take the life of most of them. They seem to think that they are exempt from all the canons of morality, and put their belief into practice.

"Most plays are directed at the domestic relation, and are subversive of and insidiously attack the domestic state. Theoretically, the theater can be made an educational influence and a force for good in the life of a people, but in practice it cannot.

"My observation is that the morals of the stage are worse now than they ever were, and I know what I speak of. I know a young woman, pure and good who went on the stage. I went abroad, and when I returned I found that she was playing parts calling for men's attire.

"I have frequently received letters from actors drawing my attention to the many noble men and women of the stage, but in each instance these men and women were dead.

"Once in London I met the greatest actor in Europe, and we had a long talk upon this very question, and when we had finished I was more satisfied than ever of the impossibility of the stage.

"There is nothing for a Christian to do but to stay away from the theater. Its atmosphere is bad, and it raises questions in the minds of young people that are unnecessarily dangerous. I believe in relaxation and amusement for people, but not those of the theater. In my congregations I have had theater goers and nontheater goers, and the latter always enjoyed life more quietly and peaceably than the former.'

"There is food for thought in much that Dr. Torrey says. Indeed, if I am not mistaken, much of the criticism he makes has been in our minds also, and no one can accuse us of antagonism to the stage. In fact, our love for it makes us its sternest critics at times.

"We can pass over without much comment his remarks on the unwholesome atmosphere of the stage and its pernicious effects on the youthful mind. All it needs is the qualification 'sometimes.' One of those times was last week, when the whole Nethersollan repertory failed to provide a helpful situation or one that was not tarred with suggestiveness. All the plays left nasty tastes in the memory. As I recall them, 'The Labyrinth' was the worst of the lot. Cleveland received it frigidly, as is the American way when displeased or disgusted, but when it was produced in

London it was hissed so soundly that Miss Nethersole had hysterics.

"We can guard against these brazen, fleshly plays, however. The honest-minded writer about the stage will point out their dangers. The greater evil lies in the subtle undermining of the character which follows upon laughing attacks made upon domestic life.

"If you have witnessed any of the farces that have been popular in the past score of years, you will recall that they have all been variants of one theme. And that was the hoodwinking of a wife by a larky husband.

"The changes that have been rung on this one idea show greater ingenuity than morality on the part of the dramatists. They have only put the husband in a single situation—an entanglement, more or less serious, with a woman—but they have found a thousand and one ways of extricating him from it.

"The danger of such plays lies in the way that the audience receives them quite as much as that in which they are presented. The complications are always so humorous that they convulse the auditor. And when you laugh at an evil you condone it.

"I am not a prude and I don't wish to be a preacher, but there is a great danger here, and a growing one. The whole social situation doesn't make, as it should, for the sanctity of married life and its preservation. The follies of the world have too great a grip upon both husband and wife. They do not trot in double harness as smoothly as they did; they do not try to get each other's gait, as was once the case.

"Under such conditions is it a positive evil to have the stage made mock of marital misdemeanors with all of its misplaced eloquence and ingenuity. It is like touching torch to tow in some cases. In all it is destructive.

"The danger, too, does not lie alone in the way the masculine mind grasps its opportunity and improves upon it. There is also a perverse feminine education. It teaches the wife that what is sauce for the goose is also sauce for the gander. And it puts before the young girls who are contemplating marriage—which means them all, for there is none predestined to spinsterhood—a false and unwholesome idea of the world. It makes them suspicious. It breeds a distrust that may, in turn, breed something worse.

"Now, the average woman doesn't believe in man. It is part of her creed to hold him as wicked or full of potential wickedness. If she is a domestic body, loyal to her own fireside, she will exclude her own male relatives, but the rest of the world is tarred with a big black stick. When the stage emphasizes this belief or this disbelief, rather, when it shows man as errant in his love and chortling over it, then it demands the denunciation of the laymen and the scourging of the clergy far more than in its open, flagrant fleshliness.

"The church can do much for the purity of the stage by treating it truthfully and temperately. If it froths at the mouth at evils

which do not exist, it will nullify the good it might accomplish when it scores those that are obvious.

"Let the next clergyman who wishes to denounce the theater speak from knowledge and let him speak moderately. Let him select one of these farces which turn man's deceit and woman's righteous indignation into merriment. Then let him go up in his pulpit and reason out the matter with his people.

"And when he has done that he has only performed half his duty. Let him visit the theater again and this time select a play—and there are many of them—which teaches sound morality; which has the call to better life and thoughts to those who see it; which stirs them like a trumpet blast to duty; and which makes them fierce and denunciatory toward brazen evil and compassionate toward that which is the result of ignorance and environment and heredity, and which, moreover, is sought to be overcome by its victim.

"With this better knowledge let him mount to his pulpit again and relate his experiences and his impressions.

"Then, as men are free agents and he but a monitor and not a master, let him place upon his people the burden of right choosing.

"Such a man would have a following that would fill his church and his contribution box and he would work inestimable good.

"Who would be the first man of the cloth to try? Sage."

The plaintiff's petition contained apt innuendos and averments common to petitions in libel respecting the falseness of the article, of its libelous character, of malice on the part of the publisher in publishing it; that it has caused plaintiff great mental distress, and she has been greatly damaged in her good name, and brought into public shame; and that her business as manageress and actress has been injured, and she has sustained great loss thereby. The answer contained denials of these averments and alleged that the publication was made in defendant's capacity as a public journalist, that the same was a fair, impartial criticism, and that the publication was privileged. The petition also contained an averment of special damage; but the evidence of plaintiff failed to support that claim. Hence the question was, and was stated by the trial judge to be, whether or not the article contained words which of themselves are actionable per se, and would warrant a verdict for plaintiff without proof of special damage. Counsel for defendant contended for the negative of this proposition, and, standing on that claim, presented at the conclusion of all the evidence a motion asking the court to arrest the case from the jury and direct a verdict for the defendant; which motion was overruled. Proceeding thereupon to instruct the jury, the court eliminated from their consideration as respecting words libelous per se all of the ar-

ticle save that part which related to the play called "The Labyrinth," and with respect to that part charged the jury as follows: "I therefore say to you that the publication to the effect that the production of 'The Labyrinth,' as presented by Miss Nethersole in Cleveland, was received frigidly, and when it was produced in London, it was hissed so soundly that Miss Nethersole had hysterics, must be deemed to be libelous as affecting the plaintiff in her business and profession, and she is entitled to recover a verdict in this case." A verdict for plaintiff in the sum of \$2,500 followed, and judgment was rendered thereon. On error in the circuit court that judgment was affirmed. The printing company asks a reversal of both judgments.

Squire, Sanders & Dempsey, for plaintiff in error, cited the following cases: Davis v. Brown, 27 Ohio St. 326; Spurlock v. Lombard Inv. Co., 59 Mo. App. 225; Swan v. Tappan, 5 Cush. (Mass.) 104; Gott v. Pulsifer, 122 Mass. 235, 23 Am. Rep. 322; Dooling v. Budget Publishing Co., 144 Mass. 258, 10 N. E. 809, 59 Am. Rep. 83; Boynton v. Shaw Stocking Co., 146 Mass. 219, 15 N. E. 507; Divens v. Meredith, 147 Ind. 693, 47 N. E. 143; Victor Safe & Lock Co. v. Deright, 147 Fed. 211, 77 C. C. A. 437; Kennedy v. Press Publishing Company, 41 Hun (N. Y.) 422; Marlin Firearms Company v. Shields, 171 N. Y. 384, 64 N. E. 163, 59 L. R. A. 310; Anonymous, 1 Ohio, 83, note; Goldrick v. Levy, 6 Ohio Dec. 20.

J. P. Dawley and Blandin, Rice & Ginn, for defendant in error.

SPEAR, C. J. (after stating the facts as above). Manifestly the crucial question in the case is whether or not the comment respecting the play called "The Labyrinth," connected with the statement that Miss Nethersole "had hysterics," was libelous per se. One assumption in support of the affirmative of this question is that the article was directed against the plaintiff below, while the contrary claim is that it was directed against the play—the thing itself. Was it directed against the plaintiff? The article is entirely free from anything like a libelous attack upon Miss Nethersole. [2] True, she is referred to, and it is stated that she had hysterics. That a woman has fainted, or has had hysterics, is so common an occurrence that a statement to that effect, though untrue (and the legal effect of the record is that it was in this case untrue), falls far short of being a libel per se upon such woman, and, leaving that reference to the plaintiff out, the statement is at once but a statement that the play was soundly hissed in London, which was also untrue. As tersely stated by counsel for defendant below: "It" (the article) "has no reference whatever to Miss Nethersole; it does not say that she is not qualified for her profession; it does

not say that Miss Nethersole was received frigidly in Cleveland; it does not say that Miss Nethersole was hissed in London. It says that the play 'The Labyrinth' was received frigidly in Cleveland; it says that the play 'The Labyrinth' was hissed in London." Besides, the record shows that Miss Nethersole was not charged with any lack of character or of womanliness as a woman; and the court as we understand it found as a fact that there was no charge or imputation against her as a woman.

It is, however, claimed that the alleged libel was against her in her profession or business. Here, again, the record contradicts the claim. She was not charged with any lack of ability or character as an actress, nor with any lack of ability or of good judgment as a manager; indeed, no reference whatever to her conduct or management in either respect was had, the court having distinctly so found and held. The case, therefore, presented a situation where the evidence afforded no ground for an allegation of actual malice, and no ground for a claim that the plaintiff had, by reason of the publication, been subjected to public disgrace, contempt, or ridicule, and where the only part of the article which was found to be libelous *per se* could not be considered as evidence of express malice in respect to criticisms otherwise not unfair or unreasonable. The learned judge held that the balance of the article was not of itself unfair, or unreasonable, and therefore not libelous.

How, then, could the article be treated as a libel upon Miss Nethersole? It is alleged that by reason of this article she has suffered mental distress. Quite likely. But is that a test of whether the article is against her rather than exclusively against the plays? No person, man or woman, can witness sharp criticism of his or her own production, play, book, song, or what-not, without more or less mental discomfort, and possibly, in a remote way, some trivial loss. Take a familiar event as an example. Recently there appeared before the American public, on the lecture platform, and in other public places perhaps, a somewhat noted navigator offering certain proofs of his claim that he had discovered the north pole. Newspapers and scientific journals commented severely upon the proofs, seeking to show that they were bogus. Undoubtedly the navigator felt much distress, and it is quite likely that many people thought less of him because of those attacks; but does that afford any reason for saying that the attack was upon the man? And though the writer of such criticism had, in some nonessential particular, been mistaken as to a fact, would that show that the attack was on the navigator rather than on the proofs, and give an action as upon a libel *per se*? It would seem not. And is fair criticism of proofs of an exhibition to be penalized because it may cause some distress or even loss of prof-

its to the exhibitor, especially, where the amount of such loss might thereby be saved to the public?

Although the distinction between a libel upon a person and a libel upon that which is the property of a person is somewhat nice, and although in many cases the distinction is not easy to demonstrate, it often being difficult to apply the settled rules of law to the particular facts of the case, and although the decisions illustrating the subject are not altogether consistent, one with another, yet the rule seems to be well established to the effect that while by the law of libel defamatory language is actionable without special damage when it contains a damaging imputation against one as an individual, or in respect to his office, profession, or trade, it is not actionable when it is merely in disparagement of one's property unless it occasions special damage. Illustrations of the principle are found in text-books and in a number of reported cases, a few only of which will be here cited. In *Tobias v. Harland*, 4 Wend. (N. Y.) 537, being a slander suit for uttering words injurious to a manufactured article, the court held that "where the words are spoken not of the trader or manufacturer, but of the quality of the article made or dealt in, to render them actionable *per se*, they must import that the plaintiff is guilty of a deceit or malpractice in the making or vending, or of want of skill in the manufacturing of the article"; *Marcy, J.*, stating in the opinion that "no instance can be found, I believe, where an action has been sustained on words for misrepresenting the quality of any single article which a person has for sale, unless special damages are alleged and proved." The holding in *Young v. Macrae*, 113 C. L. R. (a libel suit), is to the effect that if a person falsely and maliciously disparages an article which another manufactures or vends, and special damage results, an action will lie although no imputation is cast on the personal or professional character of the manufacturer or vendor; the plain inference being that unless special damage results no recovery could be had. In *Dooling v. Budget Pubg. Co.*, 144 Mass. 258, 10 N. E. 809, 59 Am. Rep. 83, it is held that the publication of an article stating that a dinner furnished by a caterer on a public occasion was "wretched," and "was served in such a way that even hungry barbarians might justly object," is not actionable without proof of special damage. In *Kennedy v. Press Pub. Co.*, 41 Hun (N. Y.) 422, it is held that an article severely reflecting on a Coney Island saloon was a libel on the place and not on the proprietor, and, in the absence of any averment of special damage, the facts stated did not constitute a cause of action. *Townsend*, in his work on *Slander and Libel* (section 130), observes: "Whether the libel concerns a person or thing, i. e., the affairs of a person, is material in this respect:

That language, when it concerns a person and is discommendatory, is always, in the absence of any evidence to the contrary, regarded as uncalled for, as published without any lawful excuse, and is not to be believed and considered as true unless its truth be established, or, as the phrase is, such language is presumed to be malicious and false. But, if it is language concerning a thing, no such presumption is indulged, and upon those who allege language concerning a thing to be false and malicious is the burden of establishing those conclusions by other evidence than that afforded by mere production of the language. And besides, to give a cause of action for language concerning a thing, damage, general or special, must in all cases be alleged and proved." In *Marlin F. A. Co. v. Shields*, 171 N. Y. 384, 63 N. E. 163, 59 L. R. A. 310, *Parker, C. J.*, after reviewing *Tobias v. Harland*, *Kennedy v. Press Pub. Co.*, and *Dooling v. Budget Pub. Co.*, heretofore cited, and *Le Massena v. Storm*, 62 App. Div. 150, 70 N. Y. Supp. 882 (a suit in slander), all to the effect that "words relating merely to the quality of the article made, produced, furnished, or sold by a person, though false and malicious, are not actionable without special damage," adds: "We need not stop to consider the reason for the rule, for it has been too long and too firmly established to admit of question at this day." The holding in the instant case is that "unjust and malicious criticisms of a manufactured article, published in a magazine, for which the manufacturer has no remedy at law because of his inability to prove special damage, are not the subject of equitable cognizance, and their future publication cannot be restrained by injunction." Reference to other cases of like import, cited by counsel for plaintiff in error, will be found in the reporter's notes.

A not unimportant consideration pertinent to the general subject is that of so-called "privilege." It rests upon that clause of our Bill of Rights (section 11) which provides: "Every citizen may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of the right; and no law shall be passed to restrain or abridge the liberty of speech, or of the press." Then follows that which relates to criminal prosecutions for libel, to the effect that if the matter charged as libelous is true, and is published with good motives, and for justifiable ends, the party shall be acquitted. The liberty thus given is to publish truth with good motives and for justifiable ends, and this is so whether the publication affects government, property, or individuals. Not that this implies a distinction as to limitation of right between a newspaper publisher and any other individual, for the publisher is not, at common law, privileged as such in the dissemination of news, but is liable for what he publishes in the same manner as any other individual.

But it is not to be inferred that the publisher is subject to any severer rule as to liability. Townsend on Libel, § 252. Hence it follows, as held in *Henwood v. Harrison*, 7 L. R. C. P. 606, that "the fair and honest discussion of or comments upon a matter of public interest is in point of law privileged, and is not the subject of an action, unless the plaintiff can establish malice." The rule is more fully stated by *Gray, C. J.*, in *Gott v. Pulsifer*, 122 Mass. 235, 23 Am. Rep. 322: "The editor of a newspaper has the right, if not the duty, of publishing for the information of the public, fair and reasonable comments, however severe in terms, upon anything which is made by its owner a subject of public exhibition, as upon any other matter of public interest; and such a publication falls within the class of privileged communications for which no action can be maintained without proof of actual malice."

[5] A recent text-writer indicates an opinion that the word "privileged" means that the words are not defamatory—that criticism is no libel. *Newell on S. & L.* p. 566. Either construction vindicates the right. See, also, the comments of the author on the general subject on pages 567 and 586. See, also, comments of Townsend, in his work on Libel (section 252). Also *Folkard's Starkie*, §§ 255, 256.

Attention is called to *Mauk v. Brundage*, 68 Ohio St. 89, 67 N. E. 152, 62 L. R. A. 477, as justifying the ruling below. We think that case so essentially different as to afford but little, if any, light. The publication directly concerned acts, practice, and treatment of his patients by the party as a physician, and so affected him injuriously in his business; in no sense was it a libel upon his property. Nor do we find any Ohio case on an exact parallel with the case at bar. *Davis v. Brown*, 27 Ohio St. 326, was for defamation of a person. The court held that to be actionable words must import either a charge of an indictable offense involving moral turpitude or infamous punishment; or impute some offensive or contagious disease calculated to deprive a person of society; or tend to injure him in his trade or occupation—each class affecting and confined to defamation of the person. That is not our case. The other Ohio cases cited by the counsel, each and all, involve charges against, or defamation of, the person; not one of the charges is directed against property. Among the cases specially referred to by counsel is that of *State v. Smily*, 37 Ohio St. 30, 41 Am. Rep. 487. That was a criminal prosecution upon an indictment charging the defendant with having falsely and maliciously published of another that his house had been searched, under legal process, for the discovery of goods recently stolen, and supposed to be there secreted. This court held the publication to be a libel. There is a discussion in the opinion as to certain distinctions that exist between words spoken

and the same words written and published. These distinctions are recognized by the text-writers and by certain decisions; but as we do not rest our conclusion wholly or mainly on cases in slander, but principally upon cases in libel, it is not necessary to pursue the reasoning upon which those distinctions obtain. As to this criminal case, it is enough to say that it concerns the person only, and, in its facts, there is no sort of resemblance to the case at bar. We have felt it safer to adhere to what we conceive to be the well-established rules respecting actions of this general character, rather than seek to extend or enlarge them, and in this course we but follow the policy of decisions beginning with *Wilson v. Robbins*, Wright, 40, followed by *Alfele v. Wright*, 17 Ohio St. 238, 93 Am. Dec. 615, and of *Davis v. Brown*, supra, where comment in both the other cases is quoted to the effect that: "We feel neither disposed nor authorized to extend the innovation." It is true that these three cases were actions in slander, and that the innovation demanded was the application to words uttered concerning a man rules regarding liability which had been held to apply to words uttered, concerning a woman, but we are unable to perceive why any distinction should be made as to the matter of policy itself.

[3] It is urged by the learned counsel for defendant in error that this court should look beyond the part held by the trial court as libelous and consider the entire article in determining whether at the conclusion of all the evidence a verdict should have been directed. We agree with this claim and have examined and considered the entire record. Such consideration, however, leads to the conclusion that the excluding from the jury of certain parts of the article, being all that part except the paragraph hereinbefore quoted as part of the charge to the jury, save for such use as may be pertinent for an understanding of the statement of "The Labyrinth" being received frigidly in Cleveland and hissed in London, was entirely proper, as is shown by the learned judge's opinion, which well justifies the withdrawal. A synopsis of it here follows:

There is nothing in the article, says the judge, which reflects disparagingly upon Miss Nethersole's private character or which tends to subject her to public disgrace, contempt, or ridicule; the case proceeding only on the claim that she had suffered injury to her business and profession. When one offers a production or performance for public exhibition, he submits it to fair and reasonable criticism, and, unless the writer passes beyond the limits of such criticism, his language cannot be held to be libelous. Whether or not the falsity of such a statement tends to prove express malice need not be considered here, for, even though the statement as to the hissing of "The Labyrinth" in London be untrue, it cannot be considered

as evidence of express malice in respect to criticism which is otherwise fair and reasonable. The plays all treat of illicit relations between the sexes. They all present situations which suggest the yielding to animal passions. The life which they represent is not according to the universally accepted standards of morality and decency of conduct. It may be that intelligent and right-minded persons may take different views as to the tendency of such plays, and as to the policy of presenting them. Some may say that the picture of the consequence of an evil life will deter people from entering upon such a life. Others may say that such a representation gives knowledge of evil and suggests thoughts which tend to wrongdoing. Still others may say if a play represents any phase of life it should be judged wholly as a work of art. There may be honest and fair criticism from either standpoint. The true test is whether the description of the plays is fairly given, and whether the opinions expressed are such as may be reasonably entertained and expressed by an honest person. Judged by this test, there can be no doubt that the criticism complained of is fair and reasonable, and the case is not one where different minds may properly arrive at different conclusions in respect to its fairness and reasonableness.

For these and cognate reasons his honor excluded from the jury all parts of the article to which he had called attention except for such use thereof as may be pertinent for understanding the statement respecting the hissing of "The Labyrinth" as hereinbefore quoted. Then followed a holding to the effect that the context showed that the play was so received on account of its character as described in the article, and that the statement was not privileged, if untrue.

This opinion makes clear the narrow margin of support there is for any recovery of damages in the case. It rests wholly on the theory that if any possible damage, however remote or slight, can be imagined as coming to the owner of property by a libel upon such property, a case is made for an inquiry of damages generally by the jury, though no special damage be alleged or proven, and although the published words do not, as found by the trial court, naturally tend to expose the person concerning whose property the same were published, to public hatred, contempt, or ridicule, or deprive her of the benefits of public confidence or social intercourse—a conclusion which utterly obliterates and destroys the distinction as affecting the establishment of damages between a libel upon the person and a libel upon the property of such person, while, at the same time, it allows nothing by way of privilege or duty to the public.

Upon the question of actual malice, the record shows that the gentleman who was the editor of the paper and was vice presi-

dent of the company, on the stand testified to the effect that no malice existed on the part of defendant, showing that neither he nor the others of the managers had any ill will toward the plaintiff, nor did the witness know of that article before it was published. The dramatic critic, upon the stand, disclaimed any ill will toward the plaintiff, and any intent to injure her. He testified, also, that, when he wrote the article, that relating to "The Labyrinth" as well as the other parts, he believed all to be true; that he had been told of the London incident by a man connected with the stage, and had also seen a dispatch, or cable, from London telling of the same incident. No evidence was offered in contradiction of this testimony, or to establish otherwise the charge of actual malice, and the conclusion is justified that the accusation as to actual malice failed.

[1] We suppose the rule to be well established that, while malice is implied if the publication be per se libelous, yet, if not, and malice is alleged, the charge must be supported by evidence. We have therefore a case where there is a published criticism of that which is the property of a person, without the presence of actual malice, and without proof of special damage. By force of the authorities, and upon reason, we hold that such a case presents no ground justifying a verdict in damages. To hold otherwise would be to ignore the rule respecting libels against property shown by a long line of decisions, a few only of which have been heretofore cited.

[4] Counsel argue that the plaintiff below was entitled to special consideration because she is a woman, and cite the chivalrous language of Read, J., in *Malone v. Stewart*, 15 Ohio, 321, 45 Am. Dec. 577. That language was manly and appropriate in that kind of a case (which involved a gross slander upon a woman); but we think is out of place as applied to this case. Of course, the plaintiff below had the same right to considerate and decorous treatment as a man in a like situation would have had and a just and reasonable award of damages if any special damage had been proven; but, the matter being strictly a business enterprise, she could have no superior right. The case was given to the jury in a way to permit them, with no proof of special damage, and almost without guide as to any damage, to wander at will and return such sum as imagination might conjure up, and the amount of the verdict itself, which was criticised by the trial judge himself as to amount, shows a lamentable want of comprehension of the real case submitted. It is a pregnant and significant instance of the great risk of giving to juries unlimited range in contentions of this kind. Remembering, however, that the plaintiff was present at the trial, and on the stand as a witness, it is not

any wonder that, giving way to the charm of a talented and captivating woman, the jury inclined to reach into the till of what they doubtless considered "a soulless corporation," and return a sum one-fifth of which would have been thought adequate had the complaining party been a man. It is no answer to say that newspapers often exceed the bounds of fairness and decency in comments upon people and their private affairs. Every intelligent reader knows that some papers do, and cause great distress and wrong thereby, but others are scrupulous and careful. Nor can it be denied that the press owes a duty to its readers in regard to its notices of the theater and plays therein presented. The theater is, in a sense, a public institution; that is, it is a place to which the public at large is invited, subject to such regulations as the manager may see fit to adopt. As yet the press has not been generally excluded, and, while its representatives are permitted to be present and essay notice and criticism of the performances there witnessed, it is not only their privilege but their duty to give truthful accounts, commendatory when justified, deprecatory if required, and, while such criticisms are fair and substantially correct, the newspaper is not only not blameworthy, but is thereby rendering a valuable service to the public. It will be a sorry day when it becomes a perilous thing for a newspaper to justly characterize as demoralizing many of the plays nightly presented on the boards of our theaters at this time, and it is the duty of the courts to see that the rules of law are not so applied as to discourage just and truthful criticism.

Other errors are alleged by plaintiff in error. It is not necessary to notice all of them. One, however, may be referred to, viz., the complaint as to misconduct of counsel for plaintiff in the closing argument. It consisted of a question put to opposite counsel. We regard the question as a mistake; but, for that matter, the counsel himself seemed to see it in that light at the time and promptly withdrew it. It is proper to add that we think the complaint trivial rather than serious.

We are of opinion that the motion of the defendant below, at the conclusion of all the evidence, to take the case from the jury and render judgment for the defendant, should have been sustained, and that it is the duty of this court now to render the judgment that the common pleas should have rendered. Judgment of the circuit court and of the common pleas will be reversed, and judgment will be entered for the plaintiff in error.

Reversed.

DAVIS, PRICE, JOHNSON, and DONAHUE, JJ., concur.

(84 Oh. St. 207)

STATE v. VAUSE.

(Supreme Court of Ohio. May 9, 1911.)

*(Syllabus by the Court.)***ELECTIONS (§ 314*)—CRIMINAL OFFENSES—
MISCONDUCT OF ELECTION OFFICERS.**

When an indictment drawn under favor of sections 2966-7, 2966-37, and 2950, Revised Statutes, charges, in substance, that the defendant, being the duly appointed and qualified presiding judge at an election, received a ballot offered by an elector, properly folded, to be by him deposited in the ballot box; and thereupon the defendant unlawfully, fraudulently, knowingly, and willfully unfolded said ballot and looked at the same and saw for what persons said elector had voted, and thereupon disclosed to certain persons how and in what manner and for whom said elector had marked his ballot and voted, such indictment charges an offense which is punishable as prescribed in section 2966-46, Revised Statutes.

[Ed. Note.—For other cases, see Elections, Cent. Dig. §§ 340, 341; Dec. Dig. § 314.*]

Exceptions from Court of Common Pleas, Ross County.

Joseph Vause was indicted for misconduct as an officer of election. From an order sustaining a demurrer to the indictment, the State excepts. Exceptions sustained.

Peter J. Blosser, Pros. Atty., for the exceptions. James I. Boulger, opposed.

DAVIS, J. The defendant was indicted for misconduct as an officer of election. There were two counts in the indictment. The two counts were identical except as to the name of the voter, and they charged that on November 3, 1908, at an election duly authorized and held in Liberty township, in Ross county, in this state, for the election of national, state, and county officers, the defendant, James Vause, was one of the duly appointed, qualified, and acting judges of said election, and was the presiding judge thereof; that theretofore the defendant had been duly sworn by a person authorized to administer oaths that he would faithfully discharge the duties of judge of election in said precinct, and that, if he gained knowledge as to how an elector voted at said election, he would not disclose the same; that then and there, when the polls were open for the reception of votes as required by law, a duly qualified elector, duly entitled to vote in said precinct, offered to and did vote in said precinct and presented his ballot properly folded to the defendant, the presiding judge, to be by him deposited in the ballot box; that thereupon the defendant unlawfully, fraudulently, knowingly, and willfully unfolded said ballot and looked at the same and saw for whom and for what persons said elector had voted, and thereupon disclosed to one Joseph Vause and other persons to the grand jurors unknown how and in what manner and for whom said elector had marked his ballot

and voted, contrary to the form of the statute, etc. The defendant demurred to the indictment on the ground that the facts contained in each of the counts thereof do not constitute an offense punishable by the laws of this state. The court of common pleas sustained the demurrer and discharged the defendant; and the case comes to this court on a bill of exceptions by the prosecuting attorney.

Two questions are presented by these exceptions. They are: (1) What is the duty of a judge of election so far as that duty is referable to the circumstances of this case? (2) What is the penalty, if any, prescribed for violation of that duty?

The answer to the first question involves a consideration of sections 2966-7, 2966-37, and 2950, Revised Statutes, as they were arranged and numbered when this indictment was returned. These sections of the statutes, as we think, clearly and without ambiguity disclose the mode of depositing a ballot by the elector, its reception by the presiding officer, and the duty of the latter upon receiving the ballot. The elector shall fold his ballot so as to conceal the marks thereon and deliver the same, so folded, to the presiding election officer; and the latter shall upon receipt of the ballot pronounce with an audible voice the name of the elector, "and if no objection be made as to the right of such elector to vote * * * he shall immediately put the ticket into the box without inspecting the names written or printed thereon." All of this is fully in accord with the policy of the original Australian ballot law (Act April 30, 1891 [88 Ohio Laws, p. 449]) as expressed in its title, as follows: "An act to provide for the mode of conducting elections, to insure the secrecy of the ballot and prevent fraud and intimidation at the polls." The provisions of section 2966-37, Revised Statutes, are found in part in the act just now cited, and will be found verbatim in the act amendatory and supplementary thereto passed April 18, 1892 (89 Ohio Laws, p. 432, § 22).

We will consider in this connection the oath which is required to be administered to clerks and judges of elections (section 2966-7, Revised Statutes), the last clause of which is as follows: "And I further solemnly swear that if, in the discharge of my official duties, I gain knowledge as to how any elector voted at said election I will not disclose the same." It is contended for the defendant that this oath imposes no obligation on the clerk or judge taking it to keep secret the knowledge of how any elector voted if such knowledge was acquired by a violation of law; and that the oath applies only to knowledge acquired while in the performance of a duty imposed by law, for example, when a judge assists a blind or illiterate voter. Casuistry such as this seems

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

to deserve a place beside the Devil's quotations of Scripture, for it is remarkable as much for what it suppresses as for what it asserts. The assertion is: "Nowhere in this act is it made an offense for the judge to divulge how a person, other than a blind, illiterate, or disabled voter voted. * * * There is no duty prescribed in such act for the judge to keep silent as to the manner in which any other elector voted." But this reasoning suppresses and ignores the fact that the oath is just as obligatory on clerks of elections as upon judges, and that clerks of elections have nothing to do with blind, illiterate, or disabled voters. Therefore the Legislature, in prescribing the form of the oath, was not contemplating a limitation of its obligations to the duty of a judge to assist such voters. When we give effect to the expressed purpose of the act in which all or these provisions appeared originally or have been incorporated by amendment, namely, "to insure the secrecy of the ballot and prevent fraud and intimidation at the polls," it would rather seem to be the legislative intent to impose both a legal and a moral duty, with solemn sanctions, to keep secret the knowledge of how an elector voted, however that knowledge may be acquired, during the time the officer is exercising the functions of his office, whether the knowledge be acquired legitimately or by accident or by violation of legal duty. Since the defendant insists upon the strict construction of the language of this statutory oath, it is proper to say that we do not violate precedent in our construction. In *Barker v. State*, 69 Ohio St. 68, 68 N. E. 575, Spear, J., said: "We are quite aware that the rule of law and of this court is that a statute defining an offense is not to be extended by construction to persons not within its descriptive terms, yet it is just as well settled that penal provisions are to be fairly construed according to the expressed legislative intent, and mere verbal nicety, or forced construction, is not to be resorted to in order to exonerate persons plainly within the terms of the statute." And in *Conrad v. State*, 75 Ohio St. 52, 78 N. E. 957, 6 L. R. A. (N. S.) 1154, it was held that the rule as to strict construction of penal statutes does not require the courts to go to the extent of defeating the purpose of the statute by a severely technical application of the rule.

But is the contention of defendant correct that there is no penalty prescribed for the violation of the duties so imposed by section 2966-37, Revised Statutes, and section 2950, Revised Statutes? The defendant calls to his aid the rule that a penal statute must be strictly construed and strenuously insists that the words "this act" in section 2966-46, Revised Statutes, limit the operation of that section to the duties defined in the act in which it appears in its present

form, and that it cannot be applied to any others, even though they may have become by amendment a part of the statute in which this penal section is found. This proposition is not tenable. The penal section 2966-46 in all of its essential features appears in the original ballot law already cited. Act April 30, 1891 (88 Ohio Laws, p. 449, § 21). It appears again, exactly as it was when the offense here charged was committed, in the act amendatory of and supplementary to the foregoing, also referred to above (Act April 18, 1892 [89 Ohio Laws, p. 432]). So that by the original enactment and by amendment, sections 2966-7, 2966-37, and 2966-46, Revised Statutes, were blended into one consistent and harmonious whole. Section 2950, Revised Statutes, first appears in 50 Ohio Laws, p. 311, and was carried along until April 23, 1904, when, along with the sections before mentioned, it became part of the Revised Laws of Ohio relating to conduct of elections, by act of that date: "To revise the laws of Ohio relating to the conduct of elections * * * and to amend, repeal and supplement certain laws and sections of the Revised Statutes of Ohio herein named." Act April 23, 1904 (97 Ohio Laws, p. 185). Therefore the whole contention of defendant as to these sections falls before the settled rule that the whole statute after an amendment has the same effect as if re-enacted with the amendment. *McKibben v. Lester*, 9 Ohio St. 628; *State ex rel. v. Cincinnati*, 52 Ohio St. 419, 40 N. E. 508, 27 L. R. A. 737; 36 Cyc. 1164, 1165.

The demurrer to the indictment ought to have been overruled; and, since we hold that the acts charged are punishable under section 2966-46, Revised Statutes, it is unnecessary to review the case with reference to section 7058, Revised Statutes.

Exceptions sustained.

SPEAR, C. J., and SHAUCK, PRICE, JOHNSON, and DONAHUE, JJ., concur.

(34 Oh. St. 224)

CRAWFORD v. ZEIGLER et al.

(Supreme Court of Ohio. May 31, 1911.)

(Syllabus by the Court.)

EXECUTORS AND ADMINISTRATORS (§ 516*)—ACCOUNTING—CONCLUSIVENESS.

After the expiration of the eight months allowed by section 6187, Revised Statutes, for filing exceptions when the account is settled in the absence of a person interested and without actual notice to him, the judgment of a probate court settling the final account of an executor or an administrator becomes absolute and conclusive and cannot be attacked, except for fraud of the prevailing party.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. § 2199; Dec. Dig. § 516.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Error to Circuit Court, Lawrence County.

Petition of Wolfgang H. W. Ziegler and others against William H. Crawford, administrator, to open account filed by said administrator. Judgment of the common pleas dismissing the petition was modified on appeal, and the administrator brings error, and the petitioners assign cross-error. Reversed.

On the second day of August, 1900, William H. Crawford was appointed by the probate court of Lawrence county, Ohio, administrator with the will annexed of the estate of Elizabeth Mueller, deceased, gave bond, and entered upon his duties as such. In the process of the settlement of the estate, he filed five several accounts; the last or final account being filed on November 15, 1904. In these separate accounts there was an additional allowance made to said administrator for extra services performed in the administration of said estate, and in several of said accounts there was an allowance made to him for counsel fees claimed by him to have been expended in the interest of said estate. On the 30th day of March, 1906, Wolfgang H. W. Ziegler and others, beneficiaries under the will of Elizabeth Mueller, deceased, filed their petition in the common pleas court of Lawrence county, Ohio, against William H. Crawford, William H. Crawford, as administrator with the will annexed of the estate of Elizabeth Mueller, deceased, and certain other beneficiaries under the will of Elizabeth Mueller, deceased, who refused to join as plaintiffs. This petition contained five separate causes of action, each cause of action being founded upon the separate accounts respectively filed by said administrator, asking that said accounts should be opened up and the amounts allowed to said administrator for extra compensation and allowed him for counsel fees be not allowed, and he be ordered to account for the same and distribute the same to the legatees and next of kin of said decedent; averring that the allowance of the same had been procured by false and fraudulent representations, concealments, and acts of said administrator; averring that said administrator gave no actual notice of the filing of either of said accounts, or the date of the hearing or allowance thereof, or either of them; that said plaintiffs had no knowledge that said fifth and final account had been allowed, confirmed, or settled, or that distribution of said estate had been ordered by the probate court, and that they had no such knowledge until eight months after the same was allowed; that plaintiffs did not have knowledge or notice of, or discover any of, said acts or frauds herein complained of until more than eight months after December 26, 1904, and that neither or any of said fraudulent representations, concealments, and acts were presented to or passed upon

at such hearing, allowance, confirmation, or settlement of said fifth and final account. Said petition also averred that a large majority of these beneficiaries were, and are, residents of Germany, and were represented in the United States by the Imperial German consul located at Cincinnati, Ohio, and by attorneys appointed by said consul who resided at Cincinnati, Ohio; that said Crawford knew the residence and addresses of said plaintiffs and of their respective counsel and representatives.

A demurrer to this petition was overruled. William H. Crawford, personally, and as administrator, filed his answer, admitting his appointment as administrator with the will annexed of the estate of Elizabeth Mueller, deceased; that the defendants were represented by the Imperial German consul located at Cincinnati, Ohio, and by attorneys appointed by said consul, and that some of the plaintiffs and defendants were nonresidents of Ohio; admitting the filing of each of said accounts and the allowance to him as a credit of the several items complained of in said petition; and denying that he was guilty of any fraud or concealment, false representation, or bad faith in any particular; averring that plaintiffs had actual knowledge of the filing and settlement in the probate court of Lawrence county, Ohio, of each and all of said accounts and made no objections thereto, either at the time or within eight months thereafter, and that no exceptions were ever filed by said plaintiffs to any of said accounts, or either of them, and averring that the judgment of the probate court was a final judgment, binding and conclusive upon said plaintiffs.

To this answer the plaintiff filed a denial as to the knowledge and notice of the filing in the probate court of the various accounts mentioned in the petition within eight months after the same were filed and settled; denying they had opportunity to file any objections or exceptions thereto within eight months, thereafter; and that the fraud was not discovered by them until after the expiration of eight months.

Upon the issue so joined, the common pleas court found for the defendant, dismissing plaintiff's petition, with costs. An appeal was taken to the circuit court of Lawrence county, and that court found generally on the issues joined for the defendant, except as to the allowance to said defendant in his third account of the sum of \$1,000 for extra services, but did allow him \$100 for such services, and ordered and directed that he account for the other \$900, and error is prosecuted to this court to reverse that judgment of the circuit court. The plaintiffs below file a cross-petition in error, also seeking to reverse the judgment of the circuit court. The circuit court upon request of all parties to the suit made a separate finding of facts, but these findings are

of such length that it is not practical or necessary to copy them in full here. It is sufficient to say that these findings favor the contention of the plaintiff in error as to each cause of action, except as to the one item in the third account of \$1,000 additional allowance for extraordinary services, which amount it finds to be excessive and reduces the same to \$100.

The court also specifically finds that the items of charges in the first, second, fourth, and fifth accounts were not excessive, and that the administrator was not guilty of any of the fraud set out in the first, second, fourth, and fifth causes of action. The court also finds that Crawford's correspondence concerning said estate was full, direct, honest, fair, and responsive to all inquiries on behalf of the heirs of said estate, and free from any deceit or concealment, and said correspondence was not false or fraudulent. In reference to the item of \$1,000 allowed for extraordinary services, the court finds as follows: "And we further find from the evidence adduced upon this trial as to the issue joined as to the \$1,000 extra compensation or allowance to said Crawford, as such administrator, that said Crawford did perform extra services, which we find were of the value of \$100, and this court finds that the allowance of \$1,000, as such extra compensation to said Crawford, to be grossly excessive, fraudulent, and out of proportion to the extra services we find said Crawford rendered as such administrator, to the amount of \$900, and that said settlement of said third account as to said administrator's extra allowance should be opened up and the judgment of approval by said probate court set aside, and that said Crawford should be charged with \$900 in addition to the balance found in his hands as shown by said third account, and we find no other excessive charge or charges and no fraud or concealment as is set out in said third cause of action, or otherwise as to said third account."

"Eleven. The court also further finds that on February 12, 1905, counsel for said heirs of said Elizabeth Mueller, deceased, came from Cincinnati to Ironton, Ohio, and saw and examined all of said accounts at the probate office in Lawrence county, Ohio, and had actual notice of, and knew of, the charges therein contained, which are now complained of, and that said plaintiffs and neither of them filed exceptions within eight months from the allowance and settlement of said fifth and final account."

A. R. Johnson, for plaintiff in error. Julius L. Anderson and Powell & Smiley, for defendants in error.

DONAHUE, J. (after stating the facts as above). The first question arising upon the record is the right of the plaintiffs below to maintain this suit. Section 8 of article 4

of the Constitution of Ohio provides that: "The probate court shall have jurisdiction in probate and testamentary matters, the appointment of administrators and guardians, the settlement of the accounts of executors, administrators and guardians. * * *" Section 524, Revised Statutes (section 10,492, General Code), provides that probate courts shall have jurisdiction "to direct and control the conduct and settle the accounts of executors and administrators, and order the distribution of estates." Section 6187, Revised Statutes (section 10,834, General Code), provides that: "When an account is settled in the absence of any person adversely interested, and without actual notice to him, the account may be opened, on his filing exceptions to the account at any time within eight months thereafter; and upon every settlement of an account by an executor or administrator, all his former accounts may be so far opened as to correct any mistake or error therein; excepting that any matter of dispute between two parties, which had been previously heard and determined by the court, shall not be again brought into question by either of the same parties without leave of the court. * * *"

This fifth and final account of the administrator was filed on the 15th day of November, 1904, and was settled by the probate court on the 28th day of December, 1904. The eleventh finding of the circuit court is to the effect that counsel for defendants in error, who were plaintiffs below, came from Cincinnati to Ironton, Ohio, on the 12th day of February, 1905, and then saw and examined all of said accounts at the probate office in Lawrence county, Ohio, and then had actual notice of, and knew of, the allowance of the items therein contained which are now complained of, and that said plaintiffs and neither of them filed exceptions within eight months of the settlement of said fifth and final account.

It is true that the cross-petition in this case seeks to reverse these findings, for the reason that they are not sustained by any evidence; but it clearly appears that this particular finding is fully sustained by the evidence, and that counsel for the plaintiffs below knew within a very short time after the settlement of the final account just what allowances had been made to the administrator for extra compensation and for counsel fees for services in behalf of said estate, and if these allowances seemed excessive to them, or to their clients, ample remedy was provided by section 6187, conditioned only that exceptions should be filed within eight months next after the settlement of said account, and upon the hearing of such exceptions all the former accounts could have been opened up and corrected, but after the expiration of eight months the judgment of the probate court settling said several accounts, and said final account,

could only be attacked for fraud in procuring that judgment. *Eichelberger v. Gross*, 42 Ohio St. 549.

This court has many times declared that "the probate courts of Ohio are in the fullest sense courts of record; they belong to the class whose records import absolute verity, that are competent to decide their own jurisdiction, and to exercise it to final judgment, without setting forth the fact and evidence on which it is rendered." *Schroyer, Guardian, v. Richmond et al.*, 16 Ohio St. 455; *Railroad Co. v. Village of Belle Centre*, 48 Ohio St. 273, 27 N. E. 464; *Railroad Co. v. O'Hara*, 48 Ohio St. 343, 28 N. E. 175.

From the findings of the circuit court, it appears that these plaintiffs and their counsel were fully advised that this judgment was entered against them, but, instead of availing themselves of the method provided by the statute, they did absolutely nothing until after the expiration of the eight months limited for the filing of exceptions, as provided in section 6187, Revised Statutes.

It is the policy of the law that all controversies should reach speedy determination. The peace of society demands that the judgment of every court having jurisdiction of a cause should be a final adjudication of that cause, unless it is reversed or vacated in the manner and by the methods provided therefor. The statutes limiting the time in which various actions may be brought, or limiting the time in which an appeal may be taken, or a prosecution in error instituted, may seem to work a hardship in some particular case, but these laws are wholly beneficial to society at large and undoubtedly prevent the perpetration of many wrongs. When an individual is fully advised of his rights and fully advised that these rights have been invaded or denied him, it becomes his duty to avail himself of the remedy the law affords within the time provided for such remedy. In this particular case this estate was in process of settlement for many years. Each particular account was filed at the time the statute required it should be filed. These plaintiffs and their counsel are presumed to know that these accounts would be filed, and it was their duty to give such attention to this business in which they had such a vital interest as would inform them in reference to the progress of the settlement of this estate. That they did not do so is their folly and their misfortune.

The judgment of the probate court is just as conclusive and binding upon the parties as would be the judgment of any other court, and before the judgment of any court can be opened up and set aside it must appear, first, that the court had not jurisdiction of the parties to the action, or of the subject-matter of the suit, or, second, that the judgment was obtained by fraud of the prevailing party. It is urged by counsel for defendant in error that a practice has grown up in that

county of allowing exorbitant fees to administrators and their counsel. If that be true, it is a deplorable condition of affairs, but the law furnishes ample remedy for the correction of these abuses, and the fact, if it is a fact, that these abuses do exist would not justify this court in disregarding the Constitution or the law of the state. If the probate court is not the proper forum in which accounts of executors and administrators should be settled, then the remedy lies in a change of the Constitution, and not in ignoring its provisions; therefore, unless fraud has been shown, the judgment of this probate court settling these several accounts must control.

The circuit court found upon the evidence squarely against the contention of plaintiffs that the administrator was guilty of fraud, false pretenses, and concealment, and we are not disposed to say that these findings are not sustained by evidence.

The circuit court does find that the allowance of \$1,000 extra compensation was grossly excessive, fraudulent, and out of proportion to the extra services the administrator rendered, but it does find that the administrator did render extra services and was entitled to extra compensation. The circuit court differed with the probate court only as to the amount that ought to have been allowed. There is no finding that the administrator procured, through fraud or false representations or collusion, the probate court to make such an allowance, but rather, by reason of it being so grossly out of proportion to the services rendered, that that fact of itself makes it fraudulent. It will be remembered that this is not an error proceeding or an appeal from the judgment of the probate court settling these accounts, but is an action to open up the judgment of the probate court for fraud in procuring the same. The mere fact that the circuit court in this character of case disagrees with the probate court as to the amount that should have been allowed would not justify it in substituting its own judgment for that of the probate court. It must first find and determine that this judgment was procured by fraud, before it is authorized to open up and set aside the judgment; and, while the fact that such allowance is grossly out of proportion to the value of the extra services rendered is some evidence of fraud, it does not necessarily show that the judgment was procured by fraud, or by collusion with the court. If the circuit court had found that no services were performed, then there would be nothing upon which to predicate the judgment of the probate court making the allowance of \$1,000, and it would follow as a logical, as well as a legal, conclusion, that the judgment must have been fraudulently obtained; but, having found that there was a basis for the judgment of the probate court, and that court having by the Constitution and the laws of this state jurisdiction to in-

quire and determine the amount of extra compensation to which the administrator is entitled, the judgment of the probate court imports absolute verity, and can only be avoided by proof of actual fraud in obtaining the same.

The fact that the circuit court has not found any fraud, but, on the contrary, found that there was no fraud, disposes of any questions that might be raised on the cross-petition. Having made such finding, it should have entered a judgment dismissing plaintiffs' petition at their costs. For its error in failing to do so, the judgment of the circuit court opening up the third account and reducing the allowance from \$1,000 to \$100 is reversed, set aside, and held for naught, cross-petition of defendants in error dismissed, and judgment for plaintiff in error, and judgment for plaintiff in error on the facts found by the circuit court.

Judgment reversed.

SPEAR, C. J., and DAVIS, SHAUCK, PRICE, and JOHNSON, JJ., concur.

(209 Mass. 321)

ATTORNEY GENERAL v. RAFFERTY.

(Supreme Judicial Court of Massachusetts.
Suffolk. June 20, 1911.)

TAXATION (§ 890*)—INHERITANCE TAX—LIABILITY OF EXECUTRIX.

An executrix, who distributes property liable to the inheritance tax, which has not been paid, is not protected from liability by the decree of distribution of the probate court under which it acted, though it had jurisdiction, and the decree of distribution and decree allowing accounts were all properly entered, and she acted in good faith.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. § 1711; Dec. Dig. § 890.*]

Appeal from Supreme Judicial Court, Suffolk County.

Information in equity by the Attorney General on the relation of Elmer A. Stevens, Treasurer and Receiver General for the Commonwealth, against Ann Rafferty. From a decree for informant, respondent appeals. Affirmed.

J. P. Leahy and F. T. Leahy, for appellant. J. M. Swift, Atty. Gen., and Andrew Marshall, Asst. Atty. Gen., for appellee.

MORTON, J. The respondent admits that some of the property distributed by her was subject to an inheritance tax under St. 1891, c. 425, and that the tax has never been paid. She contends that she is protected from liability by the decrees of distribution of the probate court under which she acted. It is not disputed that the probate court had jurisdiction of the estate and we assume in the respondent's favor that the decrees of distribution and the decrees allowing her accounts were all properly entered and that

she acted in good faith. No reference was made to the inheritance tax in any of the proceedings. Since this case was argued the case of *Attorney General v. Stone*, 209 Mass. 186, 95 N. E. 395, has been decided. The precise point here raised was the subject of consideration in that case, and was determined adversely to the respondent. It is unnecessary, we think, to do more than refer to that case. We may add that no question is raised in regard to interest and we have no means of knowing whether it was computed in this case according to the rule laid down in that case or not.

Decree affirmed.

(209 Mass. 351)

GEORGE G. FOX CO. v. BEST BAKING CO. et al.

SAME v. FRIEND et al.

(Supreme Judicial Court of Massachusetts.
Suffolk. June 19, 1911.)

1. TRADE-MARKS AND TRADE-NAMES (§ 75*)—UNFAIR COMPETITION—IMITATION.

Where the court found that loaves of bread made by the defendant were, except for slight differences in the labels, substantially the same in appearance as those long made and advertised by plaintiff, it was error to find that such imitation was not likely to deceive the ordinary purchaser, or to constitute an instrument of fraud in the hands of a retail dealer.

[Ed. Note.—For other cases, see *Trade-Marks and Trade-Names*, Cent. Dig. § 86; Dec. Dig. § 75.*]

2. TRADE-MARKS AND TRADE-NAMES (§ 70*)—UNFAIR COMPETITION—IMITATION.

The ruling that, where plaintiff had long made and extensively advertised loaves of bread of certain shape under a certain name, another was not entitled to make loaves of the same shape without differentiating by mark or brand, so as not to deceive the public, did not depend on whether or not the shape of plaintiff's loaf was uneconomical and generally less convenient, or was a desirable and economic one.

[Ed. Note.—For other cases, see *Trade-Marks and Trade-Names*, Cent. Dig. § 81; Dec. Dig. § 70.*]

3. TRADE-MARKS AND TRADE-NAMES (§ 85*)—UNFAIR COMPETITION—RIGHT OF PLAINTIFF TO RELIEF.

Plaintiff made and extensively advertised a bread as "Creamalt," a "new bread made with milk and malt." It was found that plaintiff used malt as one of the ingredients, with milk, and that the ingredients were of good quality and skillfully combined, and baked in accordance with a formula devised by plaintiff's agent as the result of experiments. Held, that plaintiff was not precluded from maintaining proceedings to prevent defendant from imitating the bread, on the ground that plaintiff did not come with clean hands; the word "Creamalt" not necessarily implying the use of pure cream, and it being fair to term the bread a new bread, though these ingredients had been used before.

[Ed. Note.—For other cases, see *Trade-Marks and Trade-Names*, Cent. Dig. § 84; Dec. Dig. § 85.*]

4. TRADE-MARKS AND TRADE-NAMES (§ 85*)—UNFAIR COMPETITION—RIGHT OF PLAINTIFF TO RELIEF.

Plaintiff, seeking to prevent defendant from imitating loaves of bread, was not precluded

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

from his right to relief by the defense that he did not come with clean hands, on account of false advertising, where the findings showed merit in the bread as made by plaintiff and that he had stopped all false advertising for a year and a half before the bill was filed.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 94; Dec. Dig. § 85.*]

Report from Superior Court, Suffolk County; Edward P. Pierce, Judge.

Bills by the George G. Fox Company against the Best Baking Company and others and against Leslie A. Friend and others. Orders overruling certain exceptions to the master's report, and dismissing the bill. Cases reported. Orders reversed, and decree entered in favor of plaintiff.

J. T. Brennan, J. J. McCarthy, and Oliver Mitchell, for complainant. G. W. Anderson and W. C. Rogers, for defendants.

LORING, J. [1] These bills are brought by the plaintiff in *George G. Fox Co. v. Glynn*, 191 Mass. 344, 78 N. E. 89, 9 L. R. A. (N. S.) 1096, 114 Am. St. Rep. 619, and in *George G. Fox Co. v. Hathaway*, 199 Mass. 99, 85 N. E. 417, 24 L. R. A. (N. S.) 900. The master in the case at bar has found (1) that the defendant began to sell the loaves heré complained of "soon after the decree of the superior court of this county (referred to in these bills) dismissing the bill in the case of the *George F. [sic?] Fox Company v. Hathaway* was entered," and (2) that "the defendants' loaves here in question are, except for slight differences in the labels, substantially the same in appearance as those in question in *Fox [sic?] v. Hathaway*"; but, in the words of his report, (3) "upon all the facts, as above stated and upon an inspection of the exhibits in the cases, I therefore find that the defendants' loaves, without any bands or names upon or about them were not so similar to the 'Creamalt' loaf as to be likely to deceive the ordinary purchaser, having some knowledge of the appearance of the 'Creamalt' loaf, or to constitute an instrument of fraud in the hands of the retail dealer." In *George G. Fox Co. v. Hathaway*, we found as a fact that the visual appearance of the loaf there in question, which was "substantially the same in appearance" as that in question in the two suits now before us, was likely to mislead the ordinary purchaser into thinking that the defendants' bread was the plaintiff's bread. We adhere to our former finding. The master was plainly wrong in the last of the three findings stated above, and the first, third, fourth and fifth exceptions to his report must be sustained.

The defendants contend that for two reasons this does not bring these two cases within the decision in *George G. Fox Co. v. Hathaway*, supra. The first of these rea-

sons is that it appeared in the *Hathaway Case* "that the oval shape adopted by the plaintiff was uncommon, although not entirely novel, and that it was uneconomical, and less convenient and satisfactory generally for the cutting of slices for all kinds of uses than the shapes generally adopted. There was nothing to show that the defendants' business interests required the combination of this shape with the same size, color and general visual appearance that had become associated with the plaintiff's trade in this Creamalt bread," while in the cases now before us it has been found as a fact that the oval-shaped loaf with its flaring sides and exaggerated rounding of the top is on the whole an advantageous loaf and for the following reasons: (1) It has an appearance of bulk and size which no other loaf of the same weight has and therefore purchasers who wish to get as much as possible for their money prefer it. (2) It has a handsome and attractive appearance. (3) Its rounded corners are less likely to be broken in transportation and the pans are more easily cleaned. (4) Although it is a fact that it is less adapted to being cut into uniform slices, that fact is of little importance in the "family trade," for which the plaintiff's and defendants' loaves are primarily intended.

[2] The fact in the *Hathaway Case* that the plaintiff's oval-shaped loaf was an uneconomical loaf and generally less convenient and satisfactory was spoken of because since that was the fact the case there presented was not a case of conflicting rights, but a case where the only explanation of the defendants' adopting the oval-shaped loaf was that they hoped to take advantage of the plaintiff's good will and to pass off their bread as the plaintiff's bread. There is nothing in that opinion which implies that if it had been found there as a fact that the oval-shaped loaf was a desirable one the opposite result would have been reached. Not only that, but it is there stated in terms that the opposite result would not have been reached had that been the fact. After setting forth that the oval-shaped loaf was an undesirable one and that there was nothing to show that the defendants' business interests required the adoption of it, this court went on to say: "The plaintiff had no exclusive right in any one of the features of the combination, and if the defendants had required the use of this combination for the successful prosecution of their business, they would have had a right to use it, by taking such precautions as would prevent deception of the public and interference with the plaintiff's good will."

The second ground on which the defendants seek to take the cases at bar out of the decision in the *Hathaway Case* lies in the fact that the master has found that "if the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes

fact is material * * * the defendants, perceiving that a loaf like the 'Creamalt' loaf, with rounded and flaring sides, suited the public taste or whim, and desiring to meet the competition of the 'Creamalt' loaf, decided to make a loaf having such rounded and flaring sides." The plaintiff has no exclusive right to make and sell bread having an oval shap, flaring sides and an exaggerated rounding of the top. And the defendants would have a right to make and sell bread which has that shape were it not for the fact that bread of that shape means to the public that it is made by the plaintiff. From this it follows (as was decided in *Flagg Manuf. Co. v. Holway*, 178 Mass. 83, 59 N. E. 667, and as was stated in that part of the opinion of this court in *George G. Fox Co. v. Hathaway*, quoted above) that the defendants can use that shape of loaf if they take such precautions as will prevent their bread from being taken for the plaintiff's bread. The only precautions taken by them in these cases consists in stamping their names on the bottom of the loaves and placing bands around them. But the master has found in terms that these two means of distinguishing the defendants' loaves from the plaintiff's loaves "would not be an adequate means of distinguishing the loaves."

We are therefore of opinion that there is nothing in these cases which takes them out of the decision in *George G. Fox Co. v. Hathaway*, 190 Mass. 99, 85 N. E. 417, 24 L. R. A. (N. S.) 900, and that the twelfth exception to the master's report must be sustained.

[3] A new defense, however, is set up, namely, that the plaintiff does not come with clean hands. The master has found (first) that the representation made by the plaintiff as to the ingredients of the bread is that it is made of milk and malt unless calling it "Creamalt" "may be taken to connote the use of pure cream." In our opinion it does not. Secondly, the master found that when the bill was filed "the plaintiff widely advertised 'Creamalt' bread as the 'new bread made with milk and malt.'" The findings of the master are that the plaintiff used malt as one of the ingredients of its bread, because "it was also thought by the plaintiff to impart a desirable flavor to the bread," and that "the ingredients used in making 'Creamalt' bread were of good quality and were skillfully combined and baked, in accordance with a formula devised by the plaintiff's agents as the result of experiments." The bread therefore appears to have been made according to a new formula, and so might be fairly termed a new bread, although all the ingredients had been used in combination before in making bread. Thirdly, up to and including the year 1906 the plaintiff did make misrepresentations of

fact with respect to its "Creamalt" bread. It advertised that "it has twice the food value of any other bread." And there were other similar misrepresentations. But these advertisements had been stopped nearly a year and a half before these bills were filed on June 4, 1908. Although it is not so found in terms, we take it to be the fact on the findings made by the master that the increase in the plaintiff's daily sales from "about 100 loaves" to "about 6,000 loaves" may have come in some degree from these false representations.

[4] Notwithstanding that the plaintiff has built up a large and remunerative business in selling a good bread which the public like, and the defendants have put upon the market an imitation of its loaves, adapted to use in deceiving that part of the public who had only a general knowledge and recollection of that which had been recommended to them or which they had been accustomed to buy. The question we have to decide is whether the plaintiff who, for nearly a year and a half before the bill was filed, stopped all advertisements which were not true, is to be precluded from having the defendants enjoined from selling their bread as the plaintiff's bread because some of its former advertisements contained statements which were not true. In our opinion that would be going too far, and the only authorities we have seen are to that effect. *Moxie Co. v. Modox* (C. C.) 153 Fed. 487; *Benedictus v. Sullivan*, 12 R. P. C. 25.

The orders overruling the first, third, fourth, fifth and twelfth exceptions to the master's report taken by the plaintiff must be reversed and said exceptions must be sustained. The orders for decrees dismissing the bills must be reversed and decrees entered in favor of the plaintiff.

So ordered.

(209 Mass. 456)

PUTNAM v. TOWN OF MIDDLEBOROUGH.

(Supreme Judicial Court of Massachusetts.

Plymouth. June 26, 1911.)

1. TAXATION (§ 99*)—PROPERTY SUBJECT TO.

Though, under Rev. Laws, c. 12, § 2, and St. 1909, c. 490, pt. 1, § 2, not only all property, real and personal, within the commonwealth is taxable, but also all personality of its inhabitants, wherever situated, unless specifically exempted, petitioner residing in another state and having in his possession in this commonwealth, as executor, property formerly belonging to testatrix, is not taxable on property had by him in such other state as ancillary executor; such property never having come into his possession as executor within the state.

[Ed. Note.—For other cases, see Taxation, Dec. Dig. § 99.*]

2. EXECUTORS AND ADMINISTRATORS (§ 523*)—ANCILLARY ADMINISTRATIONS—RIGHTS OF EXECUTOR.

An executor has no right to immediate payment or delivery of property in the hands of an ancillary executor; it being only that re-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes

maining after the completion of the ancillary administration that comes to the principal executor.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. § 2329; Dec. Dig. § 523.*]

3. PLEADING (§ 129*)—ADMISSIONS—FAILURE TO DENY ALLEGATIONS.

Where an agreed statement of facts does not show petitioner's residence, but it is a matter averred in the petition, and not denied in the answer, it is admitted under Rev. Laws, c. 173, § 24.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. §§ 270-275; Dec. Dig. § 129.*]

Appeal from Superior Court, Plymouth County; Marcus Morton, Judge.

Petition by Osgood Putnam against the Town of Middleborough to abate taxes. Judgment for defendant, and petitioner appeals. Reversed.

G. W. Stetson, for appellant. Nathan Washburn, for appellee.

SHELDON, J. [1] The petitioner is a resident of the state of California. As executor of the will of Harriot O. Peirce, he had in his possession in this commonwealth certain personal property formerly of that testatrix, and as ancillary executor of the same will he had in California other personal property of hers. The latter property never came into his possession as executor in this commonwealth. The question is whether, as executor here, he is taxable upon the latter property, which he had in California in his capacity merely of ancillary executor under appointment by the proper court of that state.

It is true, as the respondent contends, that our laws subject to taxation not only all the property, real and personal, situated within the commonwealth, but also all personal property of its inhabitants, wherever situated, unless by reason of some specific exemption. R. L. c. 12, § 2; St. 1909, c. 490, pt. 1, § 2; *Brooks v. West Springfield*, 193 Mass. 190, 195, 79 N. E. 337; *Hunt v. Perry*, 165 Mass. 287, 43 N. E. 103; *Bemis v. Boston*, 14 Allen, 366. But the property in question does not come under either of these heads. It is not actually within the commonwealth, and its owner is not a resident thereof. See the opinion by a former Chief Justice of this court in *Dallinger v. Rapello* (C. C.) 14 Fed. 32. The fact that he is the executor of the will of a resident of the commonwealth does indeed subject him to the jurisdiction of our courts so far as his rights and liabilities in that capacity are concerned, and appropriate legislation has been passed for the enforcement of that jurisdiction. R. L. c. 139, § 8. But this does not make him in any sense a resident of the commonwealth, or subject

him to the jurisdiction thereof except to that limited extent.

[2] This property situated in California was not in his possession as executor here. It was in his hands in California as ancillary executor there, to be administered there under the direction of the court which had appointed him. Doubtless any final balance in his hands there would be paid over to himself as principal executor here, and would then be held by him in the latter capacity, and well might be taxable here. But it is not the money or property itself taken by the ancillary executor that is to be paid or delivered to the principal executor, nor has the latter the right to demand an immediate payment or delivery. It is only what may remain after the ancillary administration has been completed that will come to the possession of the principal executor. *Stevens v. Gaylord*, 11 Mass. 256; *Newell v. Peaslee*, 151 Mass. 601, 25 N. E. 26; *Welch v. Adams*, 152 Mass. 74, 25 N. E. 34, 9 L. R. A. 244. Property which the petitioner, himself a resident of California, has in his possession in that state as ancillary executor merely is not in his possession or control as principal executor of the same testatrix in this commonwealth. *Fay v. Haven*, 3 Metc. 109. See *Norton v. Palmer*, 7 Cush. 523.

[3] Our only doubt has arisen from the manner in which the case has been presented. It was submitted to the superior court, and has come to us by appeal, upon an agreed statement of facts, with no power to draw inferences therefrom. Unless these facts show upon the face of the record that the petitioner is entitled to the relief sought, it cannot be given to him. But these agreed facts do not state his residence. That however is averred in the petition, and not denied in the answer. It must be taken to have been admitted. R. L. c. 173, § 24.

A very different question would have been presented if the petitioner, acting simultaneously in these two capacities, had been a resident of this commonwealth.

The view which we take makes it unnecessary to consider whether the list or statement which the petitioner filed with the assessors, a reasonable excuse having been shown for his delay, was conclusive upon them under the terms of R. L. c. 12, § 46, St. 1909, c. 490, pt. 1, § 46. See *Case v. Boston*, 193 Mass. 522, 527, 79 N. E. 736, and cases there cited.

The petitioner is entitled to an abatement of so much of the tax which he has paid as was assessed upon the amount in his hands as ancillary executor in California, and to judgment therefor with interest.

So ordered.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes

(209 Mass. 345)

BIGWOOD v. BOSTON & N. ST. RY. CO.
(three cases).**BUTTERFIELD v. SAME.**(Supreme Judicial Court of Massachusetts.
Suffolk. June 21, 1911.)**1. CARRIERS (§ 316*)—ACTION FOR INJURIES—
EXPLOSION—RES IPSA LOQUITUR—BURDEN
OF PROOF.**

Where defendant's street car, on which plaintiff was a passenger, was proceeding at such speed that it might have been quickly stopped and in a short distance, and was completely wrecked—as to the forward part—by an explosion conceded to have been caused by dynamite, and there was no evidence whatever that defendant or its servants had special information of such unusual danger, or could have obtained it by the exercise of that high degree of care exacted of carriers, the happening of the explosion was not evidence of negligence.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1283-1294; Dec. Dig. § 316.*]

2. NEGLIGENCE (§ 121*)—RES IPSA LOQUITUR.

Plaintiff, in an action for injuries, had the affirmative burden of showing that the negligence of defendant caused his injury, and such showing cannot be left to a surmise or conjecture, but there must be something amounting to proof, either by direct evidence or by rational inference of probabilities from established facts; and while plaintiff is not bound to exclude every other possibility of cause for his injury, except that of the defendant's negligence, he is required to show by evidence a greater likelihood that it resulted from an act of negligence for which defendant was responsible than from a cause for which he was not liable, and if, on all the evidence, it is just as reasonable to suppose that the cause is one for which no liability attaches to the defendant as one for which defendant is liable, plaintiff fails to sustain the burden of proof.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 218, 225; Dec. Dig. § 121.*]

3. CARRIERS (§ 320*)—INJURIES TO PASSENGERS—MANAGEMENT OF CAR.

It cannot be said to be negligence for a motorman to run upon so small an object as a single stick of dynamite in the nighttime.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 1318; Dec. Dig. § 320.*]

Exceptions from Superior Court, Suffolk County; John F. Brown, Judge.

Separate actions by Thomas C. Bigwood and others against the Boston & Northern Street Railway Company. Judgment for defendant, and plaintiffs except. Exceptions overruled.

C. W. Bartlett, J. W. Bartlett, F. E. Jennings, and A. T. Smith, for plaintiffs. H. F. Hurlburt, D. E. Hall, and P. N. Jones, for defendant.

RUGG, J. These are actions brought to recover damages for injuries received by passengers of the defendant. The car in which they were traveling came to a place on Main street in Melrose on a slightly descending grade at about 7 minutes before 8 o'clock on the evening of September 21, 1904, when an explosion of terrific violence occurred, which completely wrecked the forward part of the

car, granulated the stone pavement of the street, blew away a portion of one rail of the defendant's track and killed and injured many people. The evidence as to the operation of the car immediately before was slightly conflicting. Several witnesses testified that it came to a stop, and then started forward slowly; others said it was coming to a stop; while one thought it was going six or eight miles an hour. If moving, its speed was such that it might have been stopped quickly and in a short distance. It appears to be conceded that dynamite was the cause of the catastrophe. The evidence as to dynamite was this in substance: The city of Melrose had ordered 200 pounds of dynamite to be delivered at its stone crusher, and on the afternoon of September 21st this had been brought from a hulk in the harbor where a quantity was stored. It was in four pine or spruce boxes, each about 17½ inches long, 11½ inches wide and 8¾ inches deep, and containing 100 cartridges. Each cartridge was cylindrical in form, 1¼ inches in diameter and 8 inches long, weighing one-half pound, and they were packed in tiers in sawdust. Each box weighed about 50 pounds. The evidence is not clear as to how securely the box covers were attached, but there was perhaps some to the effect that it was by four nails. These four boxes were delivered in Boston to the driver of an express team to be transported to Melrose, who put them on his load with other merchandise where they fitted best, one being on the top of a dry goods box. The load was not perfectly bound, and at some place between Charlestown and Everett another rope was used for binding, and nothing appears to have been missed from the load at this time. He then drove on to Melrose, and, at about the place where and a few minutes before the explosion occurred, crossed the tracks of the defendant and continued on to his stable not far away. Within half an hour after the explosion he discovered that the box which had been on the top of the dry goods box was gone, and only three boxes of dynamite could be found. There was no evidence aside from the explosion as to where this box was, or in what position or how the box or its contents was upon the street, or how or if at all the car came in contact with the dynamite. So far as disclosed on the record no one saw it after it was bound more securely upon the top of the dry goods box between Charlestown and Everett. There was evidence that empty boxes were kept on the hulk in the harbor "as oftentimes one gets broken; the men will drop a box 10 or 15 feet and smash it and the dynamite is repacked"; and that dynamite was more or less of "an erratic substance." The car was equipped with a fender, the exact height of which above the ground was not fixed, but there was some evidence that it was 6 inches.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

[1] The plaintiffs claim upon this evidence that a jury would be justified in finding that the explosion was caused by the collision of the defendant's car with a box of dynamite on its track brought about by the negligence of the defendant or its motorman. The calamity which injured the plaintiffs was so extraordinary as to be wholly outside the pale of experience. It is not like derailment, a misplaced switch, sudden stopping or starting, a flash of electricity or any one of those not uncommon accidents, which might be taken to speak for itself of some lack of care or want of control of instrumentalities within the custody of the carrier and used by it in conducting its business. It did not result from any agency actually or constructively within the possession of the defendant. It did not flow from any cause upon the property of the defendant, like escaping gas, electricity or water, but from something upon the public way, over which the defendant had no control, and for the condition of which it had no responsibility. Ordinarily no one would have the slightest reason to suspect that dynamite would be lying about the street. There is no evidence whatever that the defendant or its servants had special information of this unusual danger or could have obtained it by the exercise of that high degree of care exacted of common carriers of passengers. Under these circumstances it has not been and could not properly be argued that the happening of the explosion was itself evidence of negligence. The plaintiffs put their case frankly on the ground of the failure of the motorman to avoid striking an obstacle left through the gross carelessness of somebody who was a stranger to the defendant, and which turned out to be an explosive of high power. This is the main proposition, although there are subsidiary charges of negligence of the defendant in failing to furnish sufficient light to enable the motorman to see and escape the danger.

By bringing their actions the plaintiffs assumed the obligation to show that the negligence of the defendant caused their injury. This was an affirmative burden and could not be left to surmise, conjecture or imagination. There must be something amounting to proof either by direct evidence or rational inference of probabilities from established facts. While the plaintiff is not bound to exclude every other possibility of cause for his injury except that of the negligence of the defendant, he is required to show by evidence a greater likelihood that it came from an act of negligence for which defendant is responsible than from a cause for which the defendant is not liable. If on all the evidence it is just as reasonable to suppose that the cause is one for which no liability would attach to the defendant as

one for which the defendant is liable, then a plaintiff fails to make out his case.

[2] There is no evidence here as to how the accident occurred. No eye now living saw the dynamite upon the street or observed the impact of the car against it. It is conceivable that it may have occurred by the car running upon the box of dynamite while it was intact. It is equally reasonable to theorize that the box, as it worked out from under its binding on the top of the dry goods box and fell six or more feet, broke open in striking on the stone-paved street, and a single stick rolled upon the rail while the rest remained outside the rail, but near enough to be exploded by the detonation of the single stick as the car rolled over it. It is also not inconceivable that as it fell a wheel of the heavy express wagon may have rolled against the box in such a way as to break it open and scatter its contents. It cannot be said to have been negligence for a motorman to run upon so small an object as a single stick of dynamite in the nighttime. It might be suggested with like plausibility that the motorman observed the box, if it was whole and partly in front of his car, and proceeding slowly brought his fender or the wheel of his car against it in the expectation that it would be pushed aside, the car being so fully under his control as to enable him with certainty to prevent derailment, and that the dynamite exploded by the jar and friction thus engendered. These hypotheses illustrate the wide range of rational speculation available in the vain effort to point with any greater assurance to one rather than to another as the way in which the misfortune occurred.

[3] When the mind is left in such uncertainty it cannot be said that a cause attributable to the negligence of the defendant has been indicated by a probability sufficient to be removed from the realm of fancy. We know of no case closely similar to this in its facts, but the principle upon which this decision turns has been frequently applied. *Wadsworth v. Boston Elev. Ry. Co.*, 182 Mass. 572, 66 N. E. 421; *Hunt v. Boston Elev. Ry.*, 201 Mass. 182-185, 87 N. E. 489; *Jameson v. Boston Elev. Ry. Co.*, 193 Mass. 560, 79 N. E. 750; *Faulkner v. Boston & Maine R. R.*, 187 Mass. 254, 72 N. E. 976; *Thomas v. Boston Elev. Ry. Co.*, 193 Mass. 438, 79 N. E. 749; *MacDonald v. Edison Elec. Ill. Co.*, 208 Mass. 199, 94 N. E. 259; *Ormandroyd v. Fitchburg & Leominster St. Ry. Co.*, 193 Mass. 130, 78 N. E. 739, 118 Am. St. Rep. 457; *Kupiec v. Warren, Brookfield & Spencer St. Ry. Co.*, 196 Mass. 463, 82 N. E. 676; *Bevard v. Lincoln Traction Co.*, 74 Neb. 802, 105 N. W. 635, 3 L. R. A. (N. S.) 318.

Exceptions overruled.

(202 N. Y. 423)

DAVIDSON v. STOCKY et al.

(Court of Appeals of New York. June 16, 1911.)

1. BROKERS (§ 88*)—ACTION FOR COMMISSIONS—QUESTION FOR JURY.

In an action for broker's commissions, it was error to grant defendant's motion for a nonsuit if the evidence would have justified the jury in finding that plaintiff procured a purchaser for defendants' real estate ready, able, and willing to purchase on the terms and at the price fixed by defendants.

[Ed. Note.—For other cases, see Brokers, Dec. Dig. § 88.*]

2. BROKERS (§ 63*)—COMMISSIONS—PERFORMANCE OF CONTRACT FOR SERVICES.

Where plaintiff was employed to sell defendants' property for \$320,000, and obtained a purchaser able and willing to pay that sum, but the sale was not consummated because defendant insisted on a clause that the buyer purchase subject to any and all encroachments, to which the buyer refused to assent, on it appearing from a survey that the building encroached on the street and also on adjoining property, the sale failed by reason of the unreasonable imposition of new terms by the vendor, and plaintiff was entitled to commissions.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. §§ 79, 81, 94-96; Dec. Dig. § 63.*]

Appeal from Supreme Court, Appellate Division, First Department.

Action by John R. Davidson against Peter V. Stocky and others. From a judgment of nonsuit (137 App. Div. 945, 123 N. Y. Supp. 1113), plaintiff appeals. Reversed, and new trial granted.

Bertram L. Krauss, for appellant. Abraham Benedict, for respondents.

WILLARD BARTLETT, J. [1] The sole issue presented by the pleadings in this case was the question whether the plaintiff procured for the defendants a purchaser for the real estate mentioned in the complaint who was ready, able, and willing to purchase the same upon the terms and at the price fixed by the defendants, to wit, the sum of \$320,000. It was error to nonsuit the plaintiff if the evidence laid before the jury would have warranted them in answering that question in the affirmative. In the absence of contradiction, that evidence, if believed, would not only have justified but it required a finding favorable to the plaintiff.

[2] The employment of the plaintiff to procure a purchaser of the property for \$320,000 was admitted. He testified that he succeeded in getting one Mr. James Madden to consent to pay that amount. Mr. Madden gave the plaintiff a check for \$1,000 "to bind the bargain," which the plaintiff turned over to one of the defendants, who receipted for it on account of the purchase price for 101 West 85th street, New York City, "Contract to be signed at the office of Guggenheimer, Untermeyer & Marshall, 11 a. m., Tuesday, December 4th, 1906." The parties met at the time and place thus specified to sign the

contract, when counsel representing the defendants said: "You will notice I have put a clause in there that the buyer takes this property subject to any and all encroachments." Mr. Madden inquired what encroachments there were, and was told that the defendants did not know there were any, but their representative nevertheless insisted that they wanted the provision in the contract. "I don't want to buy a piece of property in this way," said Mr. Madden. "I will buy it—I will close the matter right up now if you will take these encroachments out." This was declined, and the parties agreed to postpone the matter for a week or ten days in order that a survey might be made. It appears that the survey showed that the building encroached upon the street and upon adjoining property to such an extent that Mr. Madden thought he ought to have a deduction of \$5,000 from the purchase price on account of the encroachments. The defendants would allow nothing on account thereof and no contract was ever executed.

According to the plaintiff's testimony, he had no intimation of the existence of any encroachments until December 4, 1906, when the contract was to have been signed, and, as has already been shown, Mr. Madden was ready and willing on that day to sign a contract binding him to buy the property for \$320,000, providing nothing was said in the contract about any encroachments. A real estate broker employed by a landowner to effect the sale of a lot of land has earned his commission when he produces a purchaser willing and able to buy upon the terms prescribed by the landowner. *Gilder v. Davis*, 137 N. Y. 504, 33 N. E. 599, 20 L. R. A. 398, and cases therein cited. When such a purchaser has been procured who assents to all the terms which the vendor has prescribed to the broker, the broker cannot be deprived of his commission by the vendor's capricious or obstinate insistence upon additional and unreasonable provisions to be inserted in the contract of purchase. In such a case the broker has done all that the vendor employed him to do and all that he undertook to do. The sale is defeated, not by reason of any lack of ability or willingness on the part of the intending purchaser, or any refusal on his part to comply with the terms prescribed by the vendor to the broker and by him disclosed to the buyer, but on account of the unreasonable imposition of new terms by the vendor. The broker's claim to compensation cannot thus be nullified. We have recently held in the case of *Tanenbaum v. Boehm*, 202 N. Y. 293, 95 N. E. 708, that a broker's claim to commissions for effecting a lease of real estate cannot be defeated in this way. The same rule, of course, applies to the case of a broker employed to effect a sale.

The plaintiff's proof entitled him to go the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes 95 N.E.—48

jury. It was therefore error to direct a nonsuit, and the judgment must be reversed and a new trial granted, with costs to abide the event.

CULLEN, C. J., and GRAY, VANN, WERNER, HISCOCK, and COLLIN, JJ., concur.

Judgment reversed, etc.

(202 N. Y. 426)

PEOPLE ex rel. NIAGARA FALLS HYDRAULIC POWER & MFG. CO.
v. STATE BOARD OF TAX COM'RS.

(Court of Appeals of New York. June 16, 1911.)

1. APPEAL AND ERROR (§ 1094*)—FINDINGS OF FACT—AFFIRMANCE BY APPELLATE DIVISION—CONCLUSIVENESS.

A finding of fact unanimously affirmed by the Appellate Division that an assessment of relator's franchise by the Board of Tax Commissioners was less than the actual value was conclusive on the Court of Appeals, unless it appeared from the other findings that the trial court had adopted a principle prejudicial to relator.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4324; Dec. Dig. § 1094.*]

2. TAXATION (§ 376*)—ASSESSMENT OF FRANCHISE—WATER POWER—RIGHTS ON STREETS.

Where relator was authorized to construct a water power canal across certain streets in the city of Niagara Falls, the water power created by the canal was neither a part of the tangible property within the lines of the streets, to wit, the canal, nor was it any part of the special franchise, and was improperly considered as a part of the canal in assessing a franchise tax against relator for the use of the streets.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 625, 629-631; Dec. Dig. § 376.*]

3. TAXATION (§ 496*)—FRANCHISE TAX—CERTIORARI.

On certiorari to review the imposition of a franchise tax, the burden is on relator to affirmatively show that the assessment imposed on it was excessive.

[Ed. Note.—For other cases, see Taxation, Dec. Dig. § 496.*]

4. TAXATION (§ 376*)—FRANCHISE TAX—EXCESSIVENESS.

Where relator was authorized to construct a power canal across certain streets in a city, and for this privilege agreed to construct bridges over the canal where it crossed the streets, it would be presumed that the value of the privilege was worth what the relator paid for it, and the court having found that the value of the canal itself on land within the streets was \$98,986.77, and the value of the bridges constructed and which relator was bound to construct was \$50,163.57, which was \$36,000 less than the assessed value of relator's franchise, the assessment which was based not only on the tangible property, but on the privilege of crossing the city streets, was not excessive on the theory that the bridges, on being constructed, became the property of the city.

[Ed. Note.—For other cases, see Taxation, Dec. Dig. § 376.*]

Appeal from Supreme Court, Appellate Division, Fourth Department.

Certiorari by the People, on the relation of the Niagara Falls Hydraulic Power & Manufacturing Company, against the State Board of Tax Commissioners to review an assessment of relator's franchise for the year 1908. From an order affirming the assessment (65 Misc. Rep. 213, 119 N. Y. Supp. 925) affirmed on appeal to the Appellate Division (140 App. Div. 881, 124 N. Y. Supp. 1125), relator appeals. Affirmed.

John L. Romer, for appellant. W. H. Cuddeback, for respondent.

CULLEN, C. J. The certiorari in this case was issued to review the determination of the respondent, the State Board of Tax Commissioners, in the assessment of the special franchises of the relator in the city of Niagara Falls. We are of opinion that the order appealed from should be affirmed. One of the findings made by the trial court is: "(10) The valuation of the relator's special franchise fixed and determined by the State Board of Tax Commissioners for the year 1908 at the sum of \$185,400 was less than the actual value of said franchise."

[1] This finding of fact, having been unanimously affirmed by the Appellate Division, is conclusive on us, unless it appears from the other findings that in reaching the finding quoted the trial court adopted a principle prejudicial to the relator. The relator has constructed and maintained a hydraulic canal on its own property from a point above the falls to a point below the falls. The value of this water power the court found to be in excess of \$23,000,000, and, treating the power as being appurtenant to the canal, it held that the proportionate part of that value appurtenant to so much of the canal as was included in the street crossings exceeded \$700,000. The value of the tangible and intangible property, as fixed by the respondent, was \$185,000. If the court was right in regarding the proportionate part of the water power as part of the tangible property in the streets, the assessment fixed by the respondent was far too low.

[2] We think, however, that the trial court erred in the view entertained by it. The water power was neither a part of the tangible property within the lines of the street, to wit, the canal, nor was it any part of the special franchise. Nevertheless we think the relator is not entitled to have the orders below reversed.

[3] It was incumbent on the relator to affirmatively show that the assessment imposed by the respondent was excessive (People ex rel. Jamaica Water Supply Co. v. State Board of Tax Commissioners, 196 N. Y. 39, 89 N. E. 581) and, though the trial court erred in considering the water power as an element of the special franchise, we think the relator is equally in error in the claim that

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

the facts it established, and which were found by the trial court, entitled it to a reduction of the assessment. In consideration of the privilege given to construct and subsequently to widen the canal across streets in the village, now city, of Niagara Falls, the relator agreed to construct and forever maintain bridges across the canal at the intersection of several streets or highways. The trial court found that the value of the canal itself or the land on which it stood was \$98,986.77, and the value of certain bridges which the relator was bound to construct and maintain was \$50,163.57, making the total value of the tangible property in the street \$149,150.34, or about \$36,000 less than the assessed value. The relator's first claim is that these bridges, though constructed by the relator, were not its property, but the property of the public, and therefore their value should have been deducted from the assessment. It is not at all necessary to determine in whom the title to the bridges vested. What the relator was to be assessed for was not only the value of the tangible property belonging to it but the value of the privilege of crossing and severing the streets of the city.

[4] Assuming for the discussion that the bridges became the property of the municipality, the only effect of that assumption is to increase the value of the special franchise or right to cross the streets. For this privilege the relator agreed to pay the cost not only of the construction of the bridges to be built by it but also their subsequent maintenance, and we may assume that the privilege was worth what the relator agreed to pay and did pay for it. The only finding the relator has is of the present value of the bridges, which may have deteriorated since their erection, and there is no finding as to the cost of maintenance. We think, therefore, that, despite the erroneous view of the trial court to which we have alluded, the relator did not show itself entitled to relief.

The order appealed from should be affirmed, with costs.

GRAY, HAIGHT, WERNER, WILLARD
BARTLETT, CHASE, and COLLIN, JJ., con-
cur.

Order affirmed.

(202 N. Y. 419)

HEIBERGER et al. v. KARFIOL

(Court of Appeals of New York. June 16,
1911.)

1 APPEAL AND ERROR (§ 1094*)—FINDINGS OF
FACT—AFFIRMANCE BY APPELLATE DIVISION
—CONCLUSIVENESS.

A finding that an original deed when delivered for record contained the name of the grantee affirmed by the Appellate Division is

conclusive on a further appeal to the Court of Appeals.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4324; Dec. Dig. § 1094.*]

2. VENDOR AND PURCHASER (§ 130*)—MARKETABLE TITLE.

The record of a deed in plaintiff's chain of title did not contain the name of the grantee. The original indices, however, referred to N. as the grantee, and a purchase-money mortgage was given by N. to the mortgagor of the same date as the deed and recorded simultaneously with it, and referred to the deed as containing the name of N. as grantee. The mortgage appeared of record to have been satisfied and discharged by the mortgagee, who was grantor in the deed, within two years after its execution. *Held*, that the apparent defect in the record of the deed was conclusively disproved by the other record evidence affecting the title so as to estop the grantor and his heirs from ever asserting that he had not conveyed the property, and hence such apparent defect did not render the title unmarketable.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 245, 246; Dec. Dig. § 130.*]

Appeal from Supreme Court, Appellate Division, Second Department.

Suit by Sophia Heiberger and others against Benzion Karfiol. From a judgment for plaintiffs affirmed by the Appellate Division (134 App. Div. 935, 118 N. Y. Supp. 1112), defendant appeals. Affirmed.

Herman S. Bachrach, for appellant. Edward T. Horwill, for respondents.

GRAY, J. This action was brought to compel the defendant specifically to perform a contract in which he had agreed to purchase of the plaintiffs certain real property. The plaintiffs recovered a judgment, which the Appellate Division has affirmed. The one objection to the plaintiffs' title, which the defendant insists upon, in this court, is the omission of the name of a grantee in a deed from Marvin Palmer in 1873, then the owner of the premises. This omission was not made to appear from the original deed, but from its record in the register's office. It was proved upon the trial that the deed was lost and could not be produced; but the trial court found as a fact that, when delivered to the register for record, it contained the name of Patrick Newman, as grantee. Other facts found were that "the original indices of grantors and grantees in use, in 1873, refer to the name of Patrick Newman, as being the name, which was in the original deed," and that a purchase-money mortgage was given by Newman to Palmer, of the same date as the deed, which was recorded simultaneously with it and "refers to such deed as containing the name of Patrick Newman as grantee." This mortgage appears of record to have been satisfied and to have been discharged by Palmer within two years of its execution.

[1] The finding of the trial court that the original deed contained the name of the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

grantee when delivered for record, in view of the unanimous affirmance of the judgment by the Appellate Division, must be regarded as conclusive.

[2] But it is contended by the appellant that, as the judgment rests upon record evidence and the testimony of witnesses, however binding upon the parties to this action, it would not conclude the heirs of Palmer. It is argued in his behalf that a court of equity should not require a purchaser to take a title, which depends for its completeness upon parol evidence, and which may fairly be questioned thereafter. That is doubtless the rule, and a purchaser will not be required to take a title which is so defective as that he may be left to defend his possession by litigation. If the fact were shown that the original deed from Palmer contained no name of a grantee, instead of the fact being that the register had been careless in recording it upon his books, if, even, the evidence to establish the fact of the grantee's name having been in the deed was so inconclusive as to leave room for reasonable doubt hereafter by Palmer's heirs, I should doubt the correctness and justice of this decree. That is not the case. The evidence of record is absolutely conclusive upon any one, who might claim under Palmer, upon the ground discussed. The record of the purchase-money mortgage given by Newman to Palmer, reciting that it conveyed the same premises, which had been conveyed to him by Palmer by deed, etc., and that it was "to secure the payment of a part of the purchase money therefor," with the record of its later satisfaction and discharge by Palmer, would estop Palmer, or those claiming under him, from ever asserting that he had not conveyed the property.

In the case of *Hellreigel v. Manning*, 97 N. Y. 56, a similar action to this, in the chain of title, the defect alleged was that the records did not show that one Electa Wilds had conveyed the land. They showed that some years after she acquired it one Electa Wilder had executed a deed, which was lost. The plaintiff gave evidence in support of his contention that there had been a mistake in the recording and succeeded in obtaining a decree for specific performance. In this court, there was an affirmance; Judge Earl, speaking for the court, after holding that the plaintiff proved conclusively that there was a mistake in the record, saying: "The deed to Snashell (from Electa Wilder) had been destroyed after the title had passed out of him; but the mortgage given back by him for purchase money was produced, and in that Electa Wilds was the mortgagee." Page 59.

In the present case no defect was shown to have been in the deed. The claim is based upon an inference from the record, which the indices and the purchase-money mortgage disprove conclusively as to every one who

might assert it. Therefore the appeal must fail; for the reason that, though the appellant raised a doubt of the plaintiffs' title, it is shown not to be a reasonable doubt, which would render the title to the land unmarketable, or affect its value. The records, which furnished the ground for the doubt, furnish the enduring evidence to dispel it. The judgment should be affirmed.

CULLEN, C. J., and HAIGHT, VANN, WERNER, HISCOCK, and COLLIN, JJ., concur.

Judgment affirmed, with costs.

(302 N. Y. 330)

PEOPLE v. KINNEY.

(Court of Appeals of New York. June 13, 1911.)

1. CRIMINAL LAW (§§ 419, 420*)—EVIDENCE.

In a prosecution for murder alleged to have been committed to rob deceased, evidence of a conversation between witness and deceased on the day before the homicide, when defendant was not present, showing that deceased had money in his possession, was inadmissible.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 973-983; Dec. Dig. §§ 419, 420.*]

2. WITNESSES (§ 318*)—SEPARATE EVIDENCE—REDIRECT EXAMINATION.

Where the state claimed that defendant killed deceased in order to rob him, a witness having testified that nearly a month before the homicide he paid deceased certain bills which corresponded with those possessed by accused after the homicide, and being subjected only to an ordinary cross-examination in an attempt to impeach his memory as to the denomination of the bills without any attack on his veracity, it was error to permit the state on redirect examination to introduce in corroboration an affidavit made by the witness several days after the homicide in proceedings not connected with accused, in which the witness swore that he had paid to deceased the bills detailed in the direct examination.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1084, 1086; Dec. Dig. § 318.*]

3. HOMICIDE (§ 170*)—EVIDENCE—IDENTIFICATION.

Accused, having been arrested for killing deceased in order to rob him, on the day of his arrest and some considerable time thereafter was taken to the office of the chief of police in the courthouse. While there accused visited a public toilet in the building, and a few minutes after he had left a bunch of six keys was found there between a pipe in the wall in plain sight. Three of the keys were found to unlock doors of the house occupied by deceased at the time of the homicide. The people claimed that deceased had been shot after he emerged from the house, and that his body was dragged back into the house and the door locked. Held, that in the absence of any other evidence tending to connect accused with the keys, or to show that others having access to the toilet might have placed them there, or as to the length of time that they had probably remained there, they were inadmissible.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 305; Dec. Dig. § 170.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

4. CRIMINAL LAW (§ 814*)—CONFESSIONS—VOLUNTARY CHARACTER.

It was not error to omit to submit to the jury the question whether improper methods had been used to obtain confessions from accused where there was no request for such submission, and no evidence of the use of improper methods sufficient to require such submission.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1979; Dec. Dig. § 814.*]

5. CRIMINAL LAW (§ 532*)—CONFESSIONS—VOLUNTARY CHARACTER—PRELIMINARY EXAMINATION—SCOPE.

Where defendant's counsel was permitted to pursue an examination to determine whether certain confessions alleged to have been made by accused had been obtained by improper methods to some extent, and he had made no substantial headway in attaining his purpose when he was stopped by the trial judge, the court's refusal to permit him to proceed further was not an abuse of discretion.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 532.*]

6. CRIMINAL LAW (§ 1186*)—NEW TRIAL—GROUNDS—MISCONDUCT OF TRIAL JUDGE.

Where the trial judge in rulings on evidence in giving directions to counsel for accused and in charging the jury inadvertently and unintentionally did things which in the aggregate were calculated to create such a prevailing atmosphere of apparent prejudice to the accused's cause that the jury could scarcely escape its substantial influence, accused was entitled to a new trial, regardless of the strength of the people's case on the question of guilt or innocence.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 1186.*]

Haight and Werher, JJ., dissenting.

Appeal from Supreme Court, Trial Term, Clinton County.

John Kinney was convicted of murder in the first degree, and he appeals. Reversed, and new trial granted.

Patrick J. Tierney and David H. Agnew, for appellant. Arthur S. Hogue, Dist. Atty., for the People.

HISCOCK, J. The appellant has been convicted of murder in the first degree for the alleged killing of one Bouvia at a small hamlet called Jericho, in the county of Clinton, December 29, 1909.

The theory of the prosecution, and in accordance with which the appellant must have been found guilty, was and is that the latter arose very early on the morning of the day in question, went some distance to the house where the deceased lived alone in a sparsely-settled locality, laid in wait and shot him as he came out of his house, thereafter dragged the dead body back into the house, procured the money which furnished the motive for the crime, locked the house, and went away. The crime was not discovered until three or four days thereafter, when the appellant was promptly charged therewith and arrested.

There were no eyewitnesses of the crime, but the testimony offered by the people consisted of alleged confessions and of various items of circumstantial evidence. The legitimate evi-

dence which was offered and received was quite sufficient to sustain the judgment of conviction if the trial had been fairly conducted. We find, however, that substantial errors were committed of a nature calculated seriously to affect the rights of the appellant, and which, therefore, we are unwilling to disregard. Some of the alleged errors are so inconsequential and so unlikely to arise on another trial that I shall not discuss them, referring simply to those which are more important and which might be repeated. As I have said, the alleged motive for the murder was that of robbery, and it therefore became important for the people to show that the deceased had money, that the appellant knew of it, and, if possible, to identify some of the bills found on appellant after the murder with those earlier in the possession of the deceased.

[1] One Spinks was allowed to testify to a conversation occurring with the deceased on the day before the homicide, when the appellant was not present, tending to show that the former had money in his possession. Of course, this evidence was absolutely incompetent, and, while the presence of other testimony tending to show the same fact might be made an excuse for overlooking this error if it were the only one, such situation made it all the less excusable to crowd in objectionable testimony.

[2] One Trudeau, called by the people, testified that nearly a month before the homicide he paid to the deceased certain bills which corresponded with those possessed by appellant after the homicide. This evidence manifestly was of substantial importance. The witness was subjected to an ordinary cross-examination in the attempt to impeach his memory as to the denomination of the bills, and therefore the reliability of his testimony. Thereupon, on the redirect examination, the court allowed in evidence in corroboration of him an affidavit made by him several days after the homicide in proceedings in no wise connected with appellant that he had made to the deceased the payment of bills detailed in the direct examination. It is sufficient to state somewhat dogmatically that this evidence was utterly incompetent, for this is so baldly the law that there is no chance for debate or discussion. It is doubtless true that there are some very exceptional circumstances under which the evidence of a witness may be corroborated and relieved from suspicion by proving something which he had said or done on a prior occasion. But those few cases are so wholly dissimilar from this one that there is no opportunity to find any similarity which would make them a precedent or authority for what was done on this trial.

[3] On the day of appellant's arrest and some considerable time thereafter he was taken to the office of the chief of police in

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

the courthouse. There was in the building a toilet room which was never locked, which was used by all the people occupying the building and was also accessible to so much of the public as frequented the building, and this must have included a large number of people, inasmuch as there were various courtrooms therein. A deputy sheriff testified that a few moments after the appellant had visited this room he found stuck between a pipe and the wall in plain sight a bunch of keys. A bunch of keys more or less satisfactorily identified as the one thus found was produced upon the trial and received in evidence over the appellant's objection. It was testified in connection therewith that three of the six keys thus found unlocked doors in the house occupied by the deceased at the time of the homicide, some of them at least outside doors. There was not the slightest bit of proof to connect appellant with the possession of the keys except the mere fact that they had been found in a public toilet room a short time after he had been there. I regard this evidence as one of the most damning pieces of testimony found in the people's case, and, if it was incompetent, its admission was certainly a grievous error.

As I said at the commencement, the body of the deceased after he had been presumably killed on the outside was dragged back into the house and the doors locked. The presence on this bunch of three keys out of six which fitted doors in the small house where deceased lived established an apparent relationship, between the keys and the house too unusual to be readily overlooked as a mere coincidence. If then the jury found, as they were permitted to, that appellant had these keys in his possession after the homicide, they could scarcely fail to draw the plain conclusion that he it was who had locked up the doors after the deceased had been murdered and dragged back into the house. After this there would be little need for the people to go further in their line of proof. Scant room was left for the play of any uncertainty or speculation with the inquiry who it was that was busily engaged around the scene of the murder immediately after the victim had been killed. So then we come to the question whether this evidence was made competent. Clearly it was not. We have the sole facts that the appellant had been in a public and much-frequented toilet room, and that thereafter a bunch of keys was found there in plain sight where any one might have placed them. For all that is disclosed, they may have been there for three or four days before the appellant was arrested. Not only might some one else have placed them there, but the appellant during the day had had opportunities for getting rid of the keys if they were actually in his possession. I do not lose sight of the fact that a brutal murder had been committed apparently from the meanest mo-

tives, and that in the interest of justice the people should be allowed to introduce any evidence which legally served to fix the identity of the murderer. If there had been anything which logically and fairly tended to connect the appellant with the deposit of these keys where they were found, it would have been the duty of the trial court to receive them and of this court to affirm such action. It was not indispensable to show by direct testimony their possession by him before they were found or to establish conclusively that they were not present in the toilet room the very last moment before he went in there. But, as has been said, on the evidence as now presented the keys may have been where found for three or four days before appellant went to the toilet room. Such a condition did not justify their admission in evidence. Certainly, if there was no sufficient connecting testimony of any other kind, there should have been presented some evidence which related to such a time before as well as after appellant went there as would reasonably justify the conclusion and inference that they were not placed where found by some one else.

Neither of the cases cited by the district attorney to sustain the admission of this evidence does so. In *People v. Hill*, 198 N. Y. 64, 91 N. E. 272, the court received in evidence some keys found in a remote spot where the defendant was believed, and by other evidence shown, to have lain in wait for his victim. They had on them a tag bearing the defendant's name and this was considered by some of the members of the court to constitute some evidence of their ownership. But even under these circumstances we did not pass on the competency of the evidence, holding that, even though incompetent, it was too inconsequential under all of the circumstances of that case to require a reversal of the judgment.

In *People v. Del Vermo*, 192 N. Y. 470, 85 N. E. 690, a knife was received which had been found in an out of the way place where defendant had been. In that case, however, there was evidence outside of the discovery of the knife at the place in question which authorized the jury to find a connection between it and the defendant. Even then there was strong dissent from the prevailing opinion as to the competency of the evidence.

An important item of evidence introduced against the appellant consisted of alleged confessions, and it is vigorously claimed by his counsel that errors were committed by the trial court in refusing to permit him to conduct a preliminary examination of the witness by whom some of these confessions were proved, for the purpose of showing that improper inducements were used to procure them, and also that the question whether some of the confessions were so improperly induced should have been submitted to the jury. While the manner in which the trial judge treated this subject and the appellant's

counsel in connection therewith constituted one of those unfortunate incidents hereafter discussed, it seems proper to say that in our opinion no strictly legal error was committed in the rulings of the court on this evidence.

[4] There is no foundation for the assertion that the question whether appellant's alleged confessions to the chief of police were induced by improper methods should have been passed on by the jury. In the first place there was no request for any such disposition as this, and in the second place I find no evidence which made it proper for the trial court to submit any such question.

[5] The preliminary examination which appellant's counsel desired to conduct for the purpose of showing that appellant in making the alleged confessions was influenced by fear commenced with a period antedating by many hours the time when they are alleged to have been made. He was allowed to pursue this examination to some extent before he was stopped. The limit to which such a preliminary examination may be pursued must of course be determined in some measure by the sound judgment and discretion of the trial judge. I cannot see that the counsel had made any substantial headway in attaining the purpose of his preliminary examination at the time he was stopped by the trial judge, and, in the absence of some assurances or prospects of success, the latter undoubtedly had a right to curtail the examination. *People v. Brasch*, 193 N. Y. 46, 85 N. E. 809.

[6] I come now to that feature of the trial already adverted to which very substantially influences us in awarding a new trial, and which need be referred to only in a brief manner. The judge before whom the trial was conducted has since died, and we may take notice of what is generally known that already at the time when the trial occurred his health had become seriously impaired. In his anxiety conscientiously to fulfill his duties he undertook in the trial of this case burdens which it was beyond his strength to carry. Under these circumstances, in ruling on evidence, in giving directions to the counsel for the accused, and in charging the jury he did inadvertently and unintentionally do those things which, probably negligible if limited to one or two instances, in the aggregate were calculated to create such a prevailing atmosphere of apparent prejudice towards the appellant's case that the jury could scarcely escape its substantial influence. However strong the people's case may be regarded, the accused is entitled to have the question of his guilt or innocence determined by the jury unaffected by any improper thoughts or considerations of importance. Because of the features now being pointed out, in connection with the admission of improper evidence, we think this opportunity was not afforded to this appellant, and that, therefore, a new trial must be granted.

HAIGHT, J. I concur in the opinion of HISCOCK, J., except as to the paragraph pertaining to the finding of the keys. As to that I dissent upon the ground that the evidence taken of the finding of the keys and of their fitting the locks on the doors of the decedent's house was competent. The evidence so taken in connection with the other facts and circumstances developed in the case was sufficient to be considered by the jury as forming one of the circumstances or links in the chain of evidence, even though the evidence connecting the defendant with the possession of the keys may be slight.

CULLEN, C. J., and WILLARD BARTLETT, CHASE, and COLLIN, JJ., concur with HISCOCK, J. HAIGHT, J., concurs in result in memorandum, with whom WERNER, J., concurs.

Judgment of conviction reversed, etc.

(203 N. Y. 333)

CITY OF TROY v. UNITED TRACTION CO.

(Court of Appeals of New York. June 13, 1911.)

STREET RAILROADS (§ 70*)—OPERATION—PUBLIC SERVICE COMMISSION—ORDERS—CITY ORDINANCE.

Public Service Commissions Law (Laws 1907, c. 429; Consol. Laws 1910, c. 48) provides that whenever the commission after hearing shall be of the opinion that the service of any street railway corporation is inadequate, the commission shall first determine what would be adequate service and prescribe the same by an order to be served on the carrier, and that every order so made shall take effect at the time therein specified, and shall continue in force for the period therein designated, unless earlier modified or abrogated by the commission, or unless unauthorized by law, or in violation of the Constitution of the state or the United States. *Held*, that where the commission passed on and prescribed the frequency with which a street railroad company should operate cars on certain of its lines, the city had no power by ordinance to require a more frequent service, though the railroad company's charter reserved to the city the power to prescribe reasonable regulations with reference to the operation of the road in accordance with public requirements and convenience.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 147½-149; Dec. Dig. § 70.*]

Appeal from Supreme Court, Appellate Division, Third Department.

Suit by the City of Troy against the United Traction Company, to compel defendant to comply with an ordinance regulating the frequency of service. From a judgment of the Appellate Division (137 App. Div. 935, 122 N. Y. Supp. 1124) unanimously affirming the judgment of the Rensselaer County Court dismissing the complaint, complainant appeals. Affirmed.

George B. Wellington, for appellant. Lewis E. Carr, for respondent.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

CHASE, J. The plaintiff is a city of the second class. It has been subject to the provisions of the uniform charter of cities of the second class since January 1, 1908. Laws of 1906, c. 473, now chapter 53 of the Consolidated Laws. Prior to January 1, 1908, it had been since January 1, 1900, subject to chapter 182 of the Laws of 1898 (White charter), and prior to 1900 it was subject to special charter.

The defendant is a street railroad corporation, and it has succeeded to the rights and franchises of the Troy City Railway Company, another street railroad corporation, which had succeeded to the rights and franchises of the Troy & Albia Horse Railroad Company, another street railroad corporation.

The plaintiff, on August 5, 1890, granted certain franchises to the Troy & Albia Horse Railroad Company by an ordinance, section 8 of which is as follows: "The said company shall place suitable cars on its said railroad so extended for the convenience and comfort of passengers, and shall run the said cars each and every day, both ways, as often as the public wants and convenience may require and under such reasonable directions and regulations as the common council may from time to time prescribe by a two-thirds vote of all the members of that body."

On November 21, 1895, it granted a franchise to the Troy City Railway Company to operate a street railroad on Oakwood avenue in said city by an ordinance, section 2 of which is in part as follows: " * * * The extension of such railroad and the operation thereof on the streets and avenue above mentioned are hereby made subject to all the conditions and provisions mentioned in the ordinance passed August 5, 1890, relative to the extension of the railroad of the Troy & Albia Horse Railroad Company (predecessors of the Troy City Railway Company) as fully as if the same were incorporated herein." The Oakwood avenue line was built and operated, and on January 23, 1900, an ordinance was passed by the plaintiff which required the defendant's predecessor in title to run cars on each of its lines, both ways, at intervals not to exceed 10 minutes, from 5 o'clock in the morning until 7 o'clock in the evening, and thereafter as the public wants and conveniences might require. The defendant failed to comply with said ordinance, and on February 28, 1908, the mayor of the city of Troy, on behalf of himself individually, as a resident and taxpayer in said city and as the mayor of the city, petitioned the Public Service Commission of the state of New York, in the Second district, to "determine the just, reasonable and adequate service hereafter to be enforced on said Oakwood avenue line to be observed by said United Traction Company, and fix and prescribe the same by an order to be served upon said United Traction Company, and that said United Traction Company be order-

ed to comply with the terms of said ordinance and to satisfy the cause of complaint herein and order said United Traction Company to increase the number of its cars on said Oakwood avenue route, so that there may be a car both ways, every day, at intervals not to exceed 10 minutes, from 5 o'clock in the morning until 7 o'clock in the evening." In his petition he alleged the facts stated herein, and he further alleged, among other facts, that "said United Traction Company has for several years last past failed to comply with the terms of said ordinance (ordinance of January 23, 1900), in that it has not run over said Oakwood avenue route or line, both ways, every day, cars at intervals not to exceed 10 minutes, from 5 o'clock in the morning until 7 o'clock in the evening. * * * Said railroad corporation does not run cars enough reasonably to accommodate the passenger traffic offered to it, and does not run cars with sufficient frequency or at reasonable or proper times on its said Oakwood avenue route."

The United Traction Company answered said petition, and, among other things, denied the allegations of the petition charging it with failure to operate a sufficient number of cars on the Oakwood avenue line to accommodate the public. A hearing was had upon said petition and answer, and it resulted in the Public Service Commission making an order, on July 30, 1908, the material parts of which are as follows:

"Ordered, that said United Traction Company be and it is hereby directed to furnish on its Oakwood Avenue line, in Troy, N. Y., a passenger car service as follows:

"On week days: A fifteen-minute service beginning at the Union Station and running northward at least to Frear avenue, and as far northward beyond that point as may be found practicable without increasing the number of cars now in use on said line, viz., two.

"The first car to leave Union Station at 6:15 a. m. and the last car to leave Union Station at 12 midnight, except that between the hours of 9:00 a. m. and 11:40 a. m. and between the hours of 2:10 p. m. and 5:10 p. m. the service shall be a twenty-minute service, and the cars shall run from Union Station to St. Peter's Cemetery, the end of the line, on the twenty-minute schedule only.

"On Sundays: The service to be a twenty-minute service from 6:15 a. m. to 12:00 midnight, beginning at Union Station and running through to St. Peter's Cemetery, the end of the line.

"It is further ordered that this order shall take effect on August 10, 1908, and shall continue in force until modified or abrogated by this commission."

It is asserted and not denied that the Public Service Commission, on November 1, 1908, modified the order of July 30, 1908, which modification is evidenced in the record by a telegram sent to the defendant on

that day, as follows: "Order in Oakwood Ave., Troy, line suspended until further notice will be satisfactory to resume 20 minute service to terminus that line commencing Nov. 2nd. * * * " The orders of the Public Service Commission have been obeyed. On November 5, 1908, the plaintiff passed another ordinance by a vote of more than two-thirds of all the members of the common council of said city, of which the following is a copy:

"Section 1. From and after the first day of December, 1908, the United Traction Company shall run its cars on its Oakwood avenue line, throughout its entire length from Hoosick street to St. Peter's Cemetery, so that there shall be a car both ways every day at intervals not to exceed ten minutes, from six o'clock in the morning until nine o'clock in the evening, and thereafter at intervals not to exceed fifteen minutes until 12:30 at night.

"Sec. 2. For each and every day's refusal or neglect of said United Traction Company to obey the provisions of section 1 of this ordinance the company shall forfeit and pay to the city of Troy the sum of twenty-five dollars, to be collected by the city of Troy in a civil action brought by it in its name."

It is conceded that the defendant did not obey said ordinance. This action was commenced January 13, 1909, to recover a penalty of \$25 for each day from the time when said ordinance took effect to the day of the commencement of the action.

The action has been twice tried. Upon the first trial, the plaintiff recovered judgment as demanded in its complaint. An appeal was taken from such judgment to the Appellate Division, where the judgment was reversed and a new trial granted. *City of Troy v. United Traction Co.*, 134 App. Div. 756, 119 N. Y. Supp. 474. Upon the second trial, the plaintiff's complaint was dismissed. An appeal was taken therefrom to the Appellate Division, where the judgment of dismissal was affirmed, as stated, without opinion. *City of Troy v. United Traction Co.*, 137 App. Div. 935, 122 N. Y. Supp. 1124.

There is but one question requiring our consideration in the determination of this appeal. It is whether the plaintiff had any authority or power to pass an ordinance inconsistent with an order duly made by the Public Service Commission relating to the frequency with which cars should be run and maintained by the defendant on its Oakwood avenue line in said city. The Public Service Commission's law (Laws 1907, c. 429, now chapter 48 of the Consolidated Laws of 1910) expressly provides: " * * * Whenever the commission shall be of opinion, after a hearing, had upon its own motion or upon complaint, that the regulations, practices, equipment, appliances, or service of any such common carrier, railroad corporation or street railroad corporation in re-

spect to transportation of persons, freight or property within the state are unjust, unreasonable, unsafe, improper or inadequate, the commission shall determine the just, reasonable, safe, adequate and proper regulations, practices, equipment, appliances and service thereafter to be in force, to be observed and to be used in such transportation of persons, freight and property, and so fix and prescribe the same by order to be served upon every common carrier, railroad corporation and street railroad corporation to be bound thereby; and thereafter it shall be the duty of every common carrier, railroad corporation and street railroad corporation to observe and obey each and every requirement of every such order so served upon it. * * * " Section 49.

Such law also provides: "If, in the judgment of the commission having jurisdiction, any railroad corporation or street railroad corporation does not run trains enough or cars enough or possess or operate motive power enough, reasonably to accommodate the traffic, passenger and freight, transported by or offered for transportation to it, or does not run its trains or cars with sufficient frequency or at a reasonable or proper time having regard to safety, or does not run any train or trains, car or cars, upon a reasonable time schedule for the run, the commission shall, after a hearing either on its own motion or after complaint, have power to make an order directing any such railroad corporation or street railroad corporation to increase the number of its trains or of its cars or its motive power or to change the time for starting its trains or cars or to change the time schedule for the run of any train or car or make any other suitable order that the commission may determine reasonably necessary to accommodate and transport the traffic, passenger or freight, transported or offered for transportation." Section 51.

Such law also provides: " * * * Every order of a commission shall take effect at a time therein specified and shall continue in force for a period therein designated unless earlier modified or abrogated by the commission or unless such order be unauthorized by this or any other act or be in violation of a provision of the Constitution of the state or of the United States." Section 23.

The Public Service Commission was established, among other things, for the purpose of promoting uniformity and consistency in authoritative directions to be given to public service corporations, and to constitute a tribunal trained to consider and determine controversies and problems relating to such corporations, and to direct and supervise their relations to and dealings with the public as their patrons. A construction of the Public Service Commission's law that would permit any municipality to disregard and

set at naught the orders of the Public Service Commission in cases like the one now before us would not only cause confusion of authority, but would make of no effect some of the work of the commission for the doing of which it was established.

The power of the city of Troy, in the enactment of ordinances under the charter of cities of the second class, is stated in section 30 as follows: "The legislative power of the city is vested in the common council thereof, and it has authority to enact ordinances, not inconsistent with law, for the government of the city and the management of its business, for the preservation of good order, peace and health, for the safety and welfare of its inhabitants and the protection and security of their property. * * *"

Section 12 of chapter 182 of the Laws of 1898 is substantially the same as section 30 of the second-class cities law just quoted. Under the special charter of the city of Troy (Laws 1892, c. 670), the power of the city to enact ordinances is expressly limited to such as are "not inconsistent with this act and the Constitution and laws of the state." No act has been called to our attention that gives the plaintiff power and authority to enact an ordinance inconsistent with the Public Service Commissions law.

The right, if any, now existing in the city of Troy to enact ordinances relating to the running of cars in that city is subject to the qualification expressly provided in its charter that the same shall not be inconsistent with law. An ordinance inconsistent with an order duly made by the Public Service Commission would be, and is, inconsistent with law. The ordinance of November 5, 1908, was wholly inconsistent with the order of the Public Service Commission and in defiance and apparent nullification of the same. The power of the Public Service Commission to make the order relating to the Oakwood avenue line was not dependent upon the receipt of a complaint or petition therefor from a person or corporation, but by express statutory authority the commission is given power to make such an order upon its own motion.

Any person interested may, after an order has been made, apply to the Public Service Commission for a rehearing in respect to any matter determined therein, and the commission shall grant and hold such rehearing if, in its judgment, sufficient reason therefor be made to appear. Public Service Commissions Law, § 22.

The judgment should be affirmed, with costs.

CULLEN, C. J., and GRAY, HAIGHT, VANN, WERNER, and WILLARD BARTLETT, JJ., concur.

Judgment affirmed.

(202 N. Y. 313)

PEOPLE ex rel. INTERBOROUGH RAPID TRANSIT CO. v. O'DONNELL et al., Com'rs of Taxes.

(Court of Appeals of New York. June 6, 1911.)

1. FIXTURES (§ 1*)—DETERMINATION OF CHARACTER.

Whether personalty affixed to real estate becomes a fixture depends upon the relationship of the parties, and, often, on their intent.

[Ed. Note.—For other cases, see Fixtures, Cent. Dig. §§ 1, 6; Dec. Dig. § 1.*]

2. FIXTURES (§ 27*)—DETERMINATION OF CHARACTER.

In many cases principles relating to fixtures may be controlled by special agreement.

[Ed. Note.—For other cases, see Fixtures, Cent. Dig. §§ 5, 22, 25, 44, 45, 54; Dec. Dig. § 27.*]

3. TAXATION (§ 231*)—RAILROADS—TAXATION—"REAL PROPERTY."

Rapid Transit Act (Laws 1891, c. 4) § 35, as amended by Laws 1900, c. 616, § 4, exempting the equipment of subway roads from taxation except as to "real property," exempts machinery placed in permanent power houses to generate motive power, but not the power houses.

[Ed. Note.—For other cases, see Taxation, Dec. Dig. § 231.*]

For other definitions, see Words and Phrases, vol. 7, pp. 5939-5951; vol. 8, pp. 7778, 7779.]

4. STATUTES (§ 212*)—CONSTRUCTION—KNOWLEDGE BY LEGISLATURE.

The Legislature in enacting Rapid Transit Act (Laws 1891, c. 4) § 35, as amended by Laws 1900, c. 616, § 4, excluding "real property" from property used in operating a road exempted from taxation, is presumed to have known that much of the equipment would be so affixed to power houses as to become fixtures under ordinary definitions.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 289; Dec. Dig. § 212.*]

5. TAXATION (§ 231*)—EXEMPTION—CONSTRUCTION—SUBWAY EQUIPMENT.

Such exemption, being a proposal to the person who should contract with the city to operate the subways, is not within the rule for strict construction of exemptions, but should be reasonably construed according to the intent of the parties.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 371-378; Dec. Dig. § 231.*]

6. TAXATION (§ 231*)—PUBLIC UTILITIES—"REAL PROPERTY."

Property of a public utility corporation becomes no less real property for the purpose of taxation because laid in the streets.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 371-378; Dec. Dig. § 231.*]

7. TAXATION (§ 231*)—EXEMPTION.

Under Rapid Transit Act (Laws 1891, c. 4) § 35, as amended by Laws 1900, c. 616, § 4, exempting from taxation the equipment used in operating subway railroads, such equipment is not taxable because under an exchange of power with another company a little more power was furnished than was received.

[Ed. Note.—For other cases, see Taxation, Dec. Dig. § 231.*]

Appeal from Supreme Court, Appellate Division, First Department.

Action by the people of the State of New

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes

York on the relation of the Interborough Rapid Transit Company, against Frank A. O'Donnell and others, Commissioners of Taxes and Assessments of the city of New York. From an order of the First Appellate Division (127 N. Y. Supp. 1187) affirming an order denying relator's petition, relator appeals. Modified, and proceedings remitted.

The relator is, and at the times involved was, engaged in operating the subway roads constructed by the late John B. McDonald under contract with the city of New York, and as assignee of that portion of said contract which related to the equipment and operation of said roads. In fulfillment of its contract for equipment and operation the relator acquired several pieces of valuable real estate in the city of New York whereon it erected power houses in which it installed machinery for the generation and supply of electrical power to be used in operating its road, and it is over the assessment of this property that the present contest has arisen.

The aggregate value of each class of property as fixed for the purposes of assessment aggregated several millions of dollars. The power houses are permanent and very substantial buildings, constructed for the most part of brick, stone, and steel with deep foundations. The machinery consisted for the most part of ponderous and complex apparatus installed in and affixed to the power houses for the purpose of generating and supplying electrical motive power on the relator's road. It was stipulated in regard to the latter as follows: "Every detail of construction of the main power house and substations was adopted in view of the possibility that each and every appliance in them might become worn out or obsolete and so that they could by taking them apart be removed from the power house or substations without damage or injury to the walls or foundation of the buildings, and each of the pieces of machinery may be so removed without damage to walls or foundations of the buildings," and also "the machines and apparatus were brought to the buildings in parts and there assembled and erected, and to remove them it would be necessary to take them apart and separate them into the component parts in which they were supplied." Originally the relator contended that all three classes of property, land, power houses and machinery, were exempt from taxation, but its contention in the end has practically narrowed down to the claim that only the power houses and machinery were exempt. This claim to the exemption was and is based on section 35 of the so-called rapid transit act (chapter 4, Laws of 1891), as amended by Laws 1900, c. 616, § 4, which at the time of the assessment in question read as follows: "Sec. 35. The equipment to be supplied by the person, firm or corporation operating such road shall include all rolling stock, motors, boilers, engines, wires, ways, conduits and mechanisms, machinery, tools, implements

and devices of every nature whatsoever used for the generation or transmission of motive power and including all power houses, and all apparatus and all devices for signaling and ventilation. Such person, firm or corporation shall be exempt from taxation in respect to his, their or its interest under said contract and in respect to the rolling stock and all other equipment of said road, but this exemption shall not extend to any real property which may be owned or employed by said person, firm or corporation in connection with the said road."

Henry W. Taft, for appellant. Archibald R. Watson, Corp. Counsel (Curtis A. Peters, of counsel), for respondents.

HISCOCK, J. (after stating the facts as above). [1] The ultimate question of importance in this case is whether large and permanent power houses with deep foundations, and massive machinery installed in and affixed to such power houses for generating electrical motive power for relator's subway road, are to be regarded as real property for purposes of taxation. This question which under ordinary circumstances would be readily and quite surely solved in the affirmative is made debatable in this case by certain provisions of the rapid transit act which are applicable and controlling.

As assignee of the original contractor the relator undertook to equip and operate the subway roads constructed under contract with the city of New York. In fulfillment of its obligations it purchased the lands, erected the power houses, and installed the machinery above referred to. Under the provisions of section 35 of the rapid transit act already quoted at length, the equipment to be supplied by one operating the road and which primarily was made exempt from taxation specifically and clearly included the power houses and machinery. The controversy arises over the final exception to or proviso ingrafted on the exemption that it "shall not extend to any real property which may be owned or employed * * * in connection with the said road." This clause presents the query, whether under the circumstances the Legislature intended to or in fact did cover power houses and machinery by the general term "real property," and thereby withdraw them from the exemption which had just been given. It seems so clear that the lands owned by relator are assessable that I do not deem it necessary to discuss that item of the assessment originally, but not now seriously, complained of. Of the other two items I shall consider first that of the machinery and apparatus installed in the power houses.

There is no inflexible and universal rule by which to determine under all circumstances whether that which was originally personal property has become part of the realty through being affixed thereto and used in connection therewith. As we all know, the rule differs in different relationships. It is broad-

er and stricter, for instance, in transforming personalty into realty as between an ordinary vendor and vendee than as between a landlord and tenant in the cases of improvements made by the latter. Many times other facts are so indeterminate that the intention of the parties becomes almost a controlling element in determining whether the property in question has become a fixture.

[2] But beyond this it is well settled that in many cases general and otherwise controlling principles may be avoided by agreement and the character of personal property as such be maintained in spite of circumstances which without such agreement would turn it into real property. Perhaps the latest illustration of this rule in this court is in the case of *Davis v. Bliss*, 187 N. Y. 77, 79 N. E. 851, 10 L. R. A. (N. S.) 458, where we held that the vendor of an engine might by express agreement preserve its character as personal property against his vendee and the latter's vendor under contract of the real estate, even though it had been so affixed as to become a part of the realty under the rules ordinarily applicable.

Applying these considerations to the facts in this case, it is apparent that even though the equipment in question here, consisting originally of personal property, ordinarily would have become part of the realty by reason of its attachment thereto, its character as personal property might be preserved by proper agreement or provision.

[3] The rapid transit act provides for the ultimate sale by the relator to the city of its real property, and undoubtedly it might have provided that the equipment in question should continue to be regarded as personal property, and not come under this clause. In like manner the Legislature could provide that for purposes of taxation as between the relator and the city this equipment should preserve its character as personal property under the exemption section which has already been quoted and not become real property. It might do this in express language or by implication on a fair interpretation of the entire statute. I think that it has done the latter; that section 35, already quoted, when fairly construed in its entirety, means that the machinery and apparatus enumerated as equipment when installed in the power houses shall continue to be regarded as personal property; and that it was not intended to include it in the term "real property" in the exception to the exemption clause but that it remains exempt from taxation. If we hold that the term "real property" in the exception does mean and include machinery and apparatus which has been installed in the power houses, then the Legislature has been guilty of rather absurd legislation, and that fault is not to be assumed or found if we can avoid it. It has enumerated at length several classes of articles, including those now under discussion as the "equipment" to be supplied by the corporation operating the road. It has

expressly provided that such corporation shall be exempt from taxation "in respect to the rolling stock and all other equipment of said road," and then it has added the clause "this exemption shall not extend to any real property which may be owned or employed by said * * * corporation in connection with the said road," which, if the words "real property" are construed as urged by respondent, appears to wipe out the entire list of exemptions with the exception of rolling stock.

[4] Undoubtedly the Legislature is to be charged with knowledge that much of the equipment to be supplied in the operation of the subways although originally personal property, would be so affixed to the power houses as to become real property under ordinary definitions, and that, therefore, the result which I have pointed out would follow if a broad general meaning was given to the term "real property," and I cannot believe that it intended to indulge in any such hollow and self-nullifying legislation. It seems more reasonable to believe that having granted the exemptions of equipment which it did, and which included not only the articles specified, but "all other equipment," it occurred to the mind that the operator during the life of the contract might acquire a large and unforeseen amount of what was essentially real property—lands and buildings—and that this might be claimed to be within the exemption. Apparently it was considered that this would be too great an allowance, and so there was added this final clause that the exemption should "not extend to real property," it thereby being intended not to indicate the lines of machinery which had just been expressly enumerated and exempted, but this possible accumulation of what was intrinsically real property, lands and buildings which could scarcely be called "equipment," and which still might be claimed to be such under the general terms employed in the preceding clauses relating to equipment. This interpretation I believe to be permissible, and it at least gives the Legislature credit for reasonable consistency, and avoids the imputation which would follow the adoption of respondent's contention, that with one hand it extended as an inducement to possible contractors various exemptions from taxation, while with the other it immediately withdrew them.

[5] Of course, I do not lose sight of the principle that taxation is the rule rather than the exception, and that under ordinary circumstances a statute claimed to give an exemption should be construed strictly against the one claiming benefits thereunder. As I conceive it, however, that general principle plays a small part in this case. In the first place, this is not a case of an exemption as a gratuity. The statute of which section 35 is a part provided for a contract between the city of New York and whoever should be willing to undertake it on the other side, for the construction and operation

of the subway roads. It provided for the imposition upon the contractor of onerous obligations on the one hand and for rights and the possibility of profits on the other, and this exemption from taxation was not a gratuity, but one of the provisions to be incorporated in the contract as an inducement to those who might consider undertaking the contract. Furthermore, there is no dispute that the Legislature intended to and did make some exemption. The only question is the extent of that exemption, and this, in turn, is dependent on the further query how far a general clause is to be curtailed by a proviso or exception. Under these circumstances, no rule requires us to discriminate against the relator or do otherwise than give to the statute that fair and reasonable interpretation which it fairly seems must have been within the contemplation of the parties. On two occasions the respondents and their predecessors in office in assessing appellant have granted exemptions to the latter in line with those above discussed and approved; and, while such action is not to be regarded as conclusive in this proceeding, it does show a practical construction of the statute which is entitled to consideration.

In 1904 the relator, having been assessed for its power house and substations and machinery therein, instituted certiorari proceedings to review said assessment on the ground that said property was exempt from taxation. After a return by the assessors indicating doubt as to the taxability of such property and after due consideration, an order was entered by consent reducing the assessments to the assessed value simply of the unimproved real estate.

Again, at the time the assessment here under review was made, relator was assessed in the sum of \$800,000 for tracks, tunnels, ducts, coal, and ash-conveying devices, etc., lying outside of the power houses. Subsequently such assessment was voluntarily canceled on the ground "that the property assessed was owned by the city of New York in part and in part constituted personal property owned by the relator and exempt from taxation under section 35 of the rapid transit act."

[8] The stipulation on this item is not very full, but, as I understand it, part of the property was exempted from taxation on the ground that while otherwise real property it was laid in streets of the city of New York, and therefore not assessable. The property did not the less become real property because laid in streets (Tax Law [Consol. Laws 1909, c. 60] § 2; *People ex rel. D. & F. R. R. Co. v. Cassity*, 46 N. Y. 46), and this theory was not tenable. Nevertheless, if the assessors acted on this belief, although erroneous, it would prevent their action from being a practical construction of the act in accordance with the contention now made by appellant. But it still appears that other property was exempted solely on the ground

that this was required by that provision of the rapid transit act which has been discussed and as to such property the action of the assessors did give a practical construction to the exemption provision of the statute. From all of the description which I am able to gather of the property thus exempted, I am unable to see on what theory it was less real property or more exempt under the statute than machinery and appliances placed in the power house, and, if it was exempt, the latter ought to be.

I come now to the further contention made by the appellant, that the power houses are also exempt from taxation. As has already appeared, these buildings are specifically enumerated in section 35 as part of the equipment to be supplied and which is primarily exempted from taxation, the question being whether they as well as the machinery and other equipment of that character, may be withdrawn from the operation of the final clause that the exemption shall not extend to "real property."

It is argued that the only difference between the power houses attached to the land and machinery attached to the power houses as being or not being real property is one of degree. This, of course, is true, but this is so many times where one thing is placed on one side of the dividing line and another on the other. It is also argued that there was no fundamental reason why valuable machinery should be exempted from taxation because used in the operation of the road, and the power house which sheltered the machinery not be exempted. This may or may not be strictly correct. Possibly the Legislature may have acted without deliberation and logic; but, on the other hand, they may have reached the conclusion on further consideration that, while they were willing to exempt machinery and rolling stock, they were not willing to give exemption for buildings and land which, during the lifetime of the contract, might run into enormous and unforeseen valuations. But however this may be, as we have had occasion to say in substance in the case of *People ex rel. Interborough R. Tr. Co. v. Williams*, 200 N. Y. 93, 93 N. E. 505, it is not for us to decide what the Legislature might have done in dealing with the proposed construction and operation of the subways. It is for us simply to determine on a fair and justifiable construction of the statute what it did do. Pursuing this course, it does not seem to me that we can fairly say that "real property," as used in the statute, did not include power houses, and therefore did not annul the relator's prior exemption in respect to them.

The machinery and other equipment which I have held not to be designated as real property, as I have pointed out, is primarily and essentially personal property. It is only made real property, if at all, by the accidental process of annexation to the realty, and the interested parties may still preserve

its original character notwithstanding this latter process. On the other hand, these power houses were most substantial structures, composed in large measure of brick and stone and steel and iron. They were so constructed on the land that apparently they could only be removed by utter demolition. They were primarily and essentially real property, and never had existence in any other character. They were so fundamentally real property that probably interested parties dealing with them could not, by express agreement, have given them any other character than that of real property. *Ford v. Cobb*, 20 N. Y. 344, 350, 351.

It is practically impossible to conceive of the real property withdrawn by the Legislature from the exemption to taxation as consisting of vacant lots and not including these buildings which had been erected thereon. While it is possible that the Legislature may have done something different than it intended by withdrawing the houses from the exemption provision, we still must give a reasonable interpretation to the language which it used, and doing this I am unable to conclude that the term "real property" did not include them.

[7] A single minor disagreement between the parties remains to be considered. It appears that between one of relator's power houses and the power house of the Manhattan Railway Company there was a "tie line" over which electrical power was exchanged between the two companies during the time for which this assessment was made. The relator furnished to the Manhattan Company 5,784,250 K. W. H. and received from it 3,650,850, showing a balance furnished by relator of something over 2,000,000 K. W. H., and which was about two per cent. of the entire power generated by it during the time in question.

It is urged that the exemption granted by the statute only applied to such equipment as was exclusively used by the relator in operating the subway roads, and that because it furnished this comparatively small balance of power to another it was not exclusively using its equipment for the purpose designed and should not be exempted. The only finding by the court on this subject is that "the main power house was not used exclusively for the subway operation." It was stipulated, however, that "each power house was designed for the needs of the system intended to be operated by it, and there is continuously an interchange of power due to varying conditions affecting the production and consumption of power; and, in case of a break-down or extraordinarily heavy requirement of either system, the reserve capacity of the two power houses combined may be delivered to the system requiring it." I do not think that this in-

cidental exchange of power resulting in the supply by the relator of an inconsequential net balance to the Manhattan Company deprived it of the benefit of any exemption which it otherwise enjoyed. It is not stipulated or found that the relator installed its equipment with any intention of manufacturing and selling a surplus of power. Apparently it only installed such equipment as business prudence and foresight required, having in view reasonable changes and growth to be expected in its business. It is easily to be seen that the arrangement by which it secured from the Manhattan Railway Company at times a large amount of power may have avoided the necessity of installing a much larger amount of equipment than was employed. The fact that in this exchange in the course of a year it furnished a little more power than it received is not sufficient at least under the findings in this proceeding to destroy the primary and substantial purpose for which the equipment was installed or the exemption predicated on that purpose. *City of N. Y. v. Interborough R. T. Co.*, 125 App. Div. 437, 109 N. Y. Supp. 885; affirmed, 194 N. Y. 528, 87 N. E. 1116; *People ex rel. N. Y. Hospital v. Purdy*, 58 Hun, 386, 12 N. Y. Supp. 307; *Temple Grove Seminary v. Cramer*, 98 N. Y. 121.

The order appealed from should be modified as above indicated, and the proceedings should be remitted to the Special Term for action in conformity herewith, without costs to either party.

CULLEN, C. J., and HAIGHT, VANN, WERNER, and COLLIN, JJ., concur. GRAY, J., absent.

Ordered accordingly.

(202 N. Y. 313)

PEOPLE ex rel. INTERBOROUGH RAPID TRANSIT CO. v. RAYMOND et al.,
Com'rs of Taxes and Assessments.

(Court of Appeals of New York. June 6, 1911.)

TAXATION (§ 231*)—PUBLIC UTILITIES—EXEMPTIONS.

Exemption from taxation of equipment used in operating a subway road is not affected because surplus power to a small amount is supplied to other railway companies; it not appearing that equipment in excess of that reasonably proper to operate the road was installed.

[Ed. Note.—For other cases, see Taxation, Dec. Dig. § 231.*]

Appeal from Supreme Court, Appellate Division, First Department.

Action by the People of the State of New York, on relation of the Interborough Rapid Transit Company, against Frank Raymond and others, Commissioners of Taxes and Assessments of the City of New York. From an order of the First Appellate Division (127

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

N. Y. Supp. 1138) affirming an order denying relator's petition, relator appeals. Modified and remitted.

Henry W. Taft, for appellant. Archibald R. Watson, Corp. Counsel (Curtis A. Peters, of counsel), for respondents.

HISCOCK, J. This appeal involves the assessment made against the relator for 1906. With one exception the facts are so similar to those involved in the appeal relating to the assessment for the preceding year, and considered in our opinion on that appeal, that there is no necessity for discussing them. The only respect in which the facts differ is in the supplying of electrical power by relator to other parties. During the year 1906 the balance of electrical power supplied by it to the Manhattan Railway Company over the tie line running between power houses of the two companies amounted to a little over 100,000 K. W. H. During the same time it supplied to the New York City Interborough Railway Company 344,931 K. W. H. and to the Queens County Railway Company 486,400 K. W. H. The total amount generated by the relator during the period was 142,188,750 K. W. H. The supply to the latter companies was under a prior agreement that relator out of its surplus current not required in the operation of lines of railroad, owned, leased, or operated by it would furnish electricity to enable them respectively to operate their lines of road. It appeared by the stipulation as in the other case in substance that relator's power house was designed for the needs of the system intended to be operated by it, and that during the year 1906 it had at all times on hand machinery and equipment capable of producing electrical current in excess of its immediate requirements, and that the current furnished to the other companies was surplus current not required by the relator in the proper operation of its road. The only finding by the court was as in the other case that its main power house was not used exclusively for subway operation. There was no finding or stipulation that relator installed equipment in excess of what was reasonable and proper in the exercise of reasonable prudence and foresight for the purpose of enabling it to sell power. Apparently it sold an inconsequential amount of power produced at times in excess of its requirements by equipment which at other times or in the near future it might be required to use to its full capacity for the proper operation of its road. I do not think that the additional facts developed on this point justify any differentiation between the two cases. Of course, it is not intended to say that facts might not appear or findings be made indicating a distinct plan on the part of the relator to install equipment beyond what was reasonable for its legitimate purposes with

the object of generating and selling power at a profit. In such a case different considerations would be presented to us. We simply think that on the present appeal no such situation is presented.

The order appealed from should be modified as above indicated, and the proceedings should be remitted to the Special Term for action in conformity herewith, without costs to either party.

CULLEN, C. J., and HAIGHT, VANN, WERNER, and COLLIN, JJ., concur. GRAY, J., absent.

Ordered accordingly.

(202 N. Y. 398)

GEORGE v. VILLAGE OF CHESTER.

(Court of Appeals of New York. June 13, 1911.)

WATERS AND WATER COURSES (§ 196*)—RIPARIAN RIGHTS—INJUNCTION.

Judgment enjoining a village from interfering with a riparian owner's use for bathing, boating, etc., by himself and his guests, of a lake used by the village as a source of water supply, should be limited to reasonable use and enjoyment.

[Ed. Note.—For other cases, see Waters and Water Causes, Cent. Dig. § 270; Dec. Dig. § 196.*]

Appeal from Supreme Court, Appellate Division, Second Department.

Action by Samson W. George, as trustee, against the Village of Chester. Judgment (137 App. Div. 889, 121 N. Y. Supp. 1131) affirming a judgment for plaintiff (59 Misc. Rep. 553, 111 N. Y. Supp. 722), and defendant appeals. Modified and affirmed.

A. H. F. Seeger and H. N. Kane, for appellant. R. M. Cox, for respondent.

HISCOCK, J. The plaintiff, as trustee, is and for some time has been in possession and enjoyment of certain premises adjacent to and in part constituting the bed of a small body of water known as "Long Pond" or "Walton Lake." It is found that he and "his predecessors in title have from time immemorial freely exercised in and upon said lake, and particularly the part thereof over and adjacent to said premises and as an incident and appurtenance to the ownership thereof, the rights of swimming, bathing, watering cattle, boating, fishing, and all other rights which are capable of exercise by riparian owners"; also that the property in question "is and has for many years been of considerable value by reason of its attractiveness to persons desiring to spend the summer, or some part thereof, upon or near its shore," and that "plaintiff has for several years derived material income from said premises, by reason of leasing or letting the same, or parts thereof, adjacent to said Walton Lake,

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

for camping privileges upon said premises to parties during the summer season."

Several years since the appellant undertook to make this lake a part of its municipal water supply, and thereafter in accordance with the statute the state commissioner of health prescribed a series of regulations concerning the use of the lake and land adjacent thereto calculated to preserve the purity of said water. Some of these regulations prohibited the exercise of those rights which are an ordinary incident to the ownership of riparian premises such as are in the possession of respondent, and others prohibited acts some of which would necessarily create nuisances, and others of which might be found as a matter of fact to amount to such and be an unreasonable use of the premises. Thereafter, as found by the trial court, the appellant threatened and prepared to enforce these regulations, and especially without condemnation, or any other method or offer of compensation, to interfere with the enjoyment by respondent and his family and lessees of such reasonable and incidental rights as those of bathing, boating, fishing, swimming, watering cattle, etc., on and in the waters of the lake. Thereupon this action was brought to restrain such interference by appellant with respondent's rights. There is no finding, and no request to find, that respondent was making or intended to make any unreasonable use of his premises, and judgment was rendered restraining the appellant generally from enforcing "each and all" of the regulations hereinbefore mentioned, and also specifically from "interfering with the use by plaintiff and by his family, guests, and lessees of the said lake and the waters thereof for bathing, boating, fishing, swimming, watering cattle, and such drainage therein from his farm and the buildings thereon as is natural and usual."

The last provision of the judgment quoted would be right if it restrained interference with the enjoyment of the rights therein specifically mentioned while exercised in a reasonable degree, and I think from his opinion that it was the intention of the trial judge so to provide. The trouble with the judgment as actually made, however, is that it does not limit its restraint of appellant to such a condition and degree of reasonable use and enjoyment in the cases of some of the rights mentioned, but restrains it unconditionally from interfering with the exercise by respondent, his family, and guests of those rights, even though they be pursued to an unreasonable extent; and further than this by its first provision the judgment restrains appellant from enforcing those regulations which prohibit acts which are or may be found to be nuisances, and therefore unlawful, even when exercised by a riparian owner.

For these reasons the judgment cannot be affirmed, but it should be modified, by striking out the clause restraining the defendant

"from enforcing each and all of the rules and regulations of the New York state commissioner of health for the protection of Walton Lake from contamination," and by providing that the restraint of appellant as in said judgment adjudged from interfering with the uses by plaintiff, his family, guests, and lessees specifically mentioned in the judgment, continue so long as these are exercised reasonably; and, as so modified, the judgment should be affirmed, without costs.

CULLEN, C. J., and GRAY, VANN, WIL-LARD BARTLETT, CHASE, and COLLIN, JJ., concur.

Judgment accordingly.

(202 N. Y. 603)

HEATON v. VILLAGE OF CHESTER.

(Court of Appeals of New York. June 18, 1911.)

Appeal from Supreme Court, Appellate Division, Second Department.

Action by Stephen B. Heaton against the village of Chester. Judgment (137 App. Div. 892, 121 N. Y. Supp. 1135) affirming a judgment for plaintiff (59 Misc. Rep. 558, 111 N. Y. Supp. 725), and defendant appeals. Modified and affirmed.

A. H. F. Seeger and M. N. Kane, for appellant. R. M. Cox, for respondent.

HISCOCK, J. Judgment modified, in accordance with opinion in *George v. Village of Chester*, 95 N. E. 767, and, as so modified, affirmed, without costs.

(84 Ohio St. 235)

COBLENTZ v. STATE.

(Supreme Court of Ohio. May 31, 1911.)

(*Syllabus by the Court.*)

1. FALSE PRETENSES (§§ 26, 27*)—INDICTMENT—OBTAINING SIGNATURE TO NOTE.

An indictment under section 7076, Revised Statutes, for procuring a signature to a bond, note, or other evidence of indebtedness, must allege that the signature was secured, not only by false pretense but with intent to defraud, and must aver all of the material facts necessary to be proved in order to convict, with such reasonable certainty as to advise the defendant what he may expect to meet at the trial.

[Ed. Note.—For other cases, see *False Pretenses*, Cent. Dig. §§ 31, 32; Dec. Dig. §§ 26, 27.*]

2. CRIMINAL LAW (§ 369*)—EVIDENCE—OTHER OFFENSES.

On the trial under such an indictment evidence of previous transactions which necessarily involve guilty knowledge by the defendant with reference to the transaction in question is admissible, but as to transactions occurring subsequent to that on which the indictment is based evidence is not admissible.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 822-824; Dec. Dig. § 369.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Error to Circuit Court, Miami County.

William S. Coblentz was convicted of obtaining a signature to a note by false pretenses, and brings error. Reversed.

At the October term, 1909, of the court of common pleas of Miami county, an indictment was returned against William S. Coblentz, in which he was charged with the offense of unlawfully, and by false pretenses, procuring the signature of one Ira M. Albaugh, as maker, to a promissory note of the value of \$5,000. On the trial of the case in common pleas at the close of the testimony offered by the state, the defendant moved the court to direct a verdict in his favor on the ground that no case had been made out by the state, and that the indictment did not charge a crime under the law. The court overruled this motion. The defendant was convicted and sentenced, and this judgment was affirmed by the circuit court. Error is prosecuted here to reverse the judgments below. Other alleged errors are noticed in the opinion.

Robert R. Nevin, W. A. Haines, and A. C. McDonald, for plaintiff in error. J. Guy O'Donnell, Pros. Atty., and E. H. & R. A. Kerr, for the State.

JOHNSON, J. (after stating the facts as above). The indictment is founded on section 7076, Revised Statutes, which relates to obtaining money, etc., by false pretenses. There are defined in the section three different offenses. First, obtaining by any false pretense with intent to defraud, anything of value from another; second, procuring by any false pretense, with intent to defraud, the signature of any person as maker, indorser, etc., of any bond, note, or other evidence of indebtedness; and, third, selling, or offering to sell, any such instrument, knowing the signature to have been obtained by false pretenses. The indictment in this case, it is conceded, was intended to describe an offense included in the second class. It alleges that said Coblentz, on the 7th of March, 1907, in said county of Miami and state of Ohio, then and there being, unlawfully did falsely pretend, with intent to defraud, to one Ira M. Albaugh, that the Gem City Acetylene Generator Company, a corporation located with its principal place of business at Dayton, Ohio, was solvent and entirely out of debt and did not owe any man a dollar. And, proceeding, alleges that he pretended that the company was doing an excellent business and making sufficient money to pay the expenses of the company and declare dividends of 20 per cent. on the capital stock, that it had paid 20 per cent. dividends, and then had on hand a sufficient surplus of net earnings to pay a 20 per cent. dividend, but that the money was needed in the business, and that he, Ira M. Albaugh, would receive his equal proportion thereof the same as if he had been a stockholder at the time the

dividend was earned, and, further, that he represented that he was selling stock of the company for the purpose of procuring funds to increase the output and then sets out the names of some of those to whom he pretended to have sold stock. And, further, that every dollar that was paid on stock so sold by him had been, and would be, expended by the company in the increase of its business whereby the earnings could be greatly increased from those aforesaid, by which said false pretenses the said William S. Coblentz then and there did unlawfully procure the signature of the said Ira M. Albaugh, as maker, to a promissory note of the value of \$5,000, and then sets out a copy of the note. The indictment then proceeds to allege that in truth and fact said company was not solvent, and was not out of debt, but, on the contrary, its indebtedness was much in excess of its assets and a statement from the books of the company is set out in the indictment in support of this allegation. The indictment then proceeds to set out facts showing that the company was largely indebted to other parties, naming them, and that this indebtedness in the aggregate exceeded the available assets of the company, and alleges that it was not then doing an excellent business, or even a good business, and had never made any money, and was then actually losing money, and that all of these facts were well known to William S. Coblentz at the time he made the statements heretofore referred to. The indictment contains a further allegation that the \$5,000 paid by the said Ira M. Albaugh was not expended by the company in the increase of the company's business, but alleges that it was paid part to Coblentz, and part on then existing indebtedness of the company, and concludes with the allegation that said William S. Coblentz at the time he so falsely pretended, as aforesaid, well knew the said false pretenses to be false, he being the general manager of the said company on said 7th of March, 1907, and had been for more than one year prior thereto.

When tested by well-settled rules, does this instrument meet the requirements of a valid indictment? A criminal charge should be preferred with such certainty and precision as will reasonably apprise the party charged of that which he may expect to meet and be required to answer, and so that the court and jury may know what they are to try, and the court may determine without unreasonable difficulty what evidence is admissible; also, that the record to be made will be sufficiently definite to make it clear of what the party has been put in jeopardy. *Dillingham v. State*, 5 Ohio St. 280; *Du Brul v. State*, 80 Ohio St. 52, 87 N. E. 837. And an indictment for procuring a signature to a promissory note by false pretenses, with intent to defraud, under section 7076, should allege that the signature was secured not only by false pre-

tenses, but with intent to defraud. Where a statute makes a certain intent an element of the offense, that intent must be averred directly and specifically in the indictment by proper affirmative allegation. *Drake v. State*, 19 Ohio St. 211; *Kennedy v. State*, 34 Ohio St. 314-316; *State v. Daniels*, 90 Iowa, 491, 58 N. W. 891; *Marshall v. State*, 31 Tex. 471; 19 Cyc. 436; 2 Wharton's Criminal Law (10th Ed.) § 1226.

[1] First. It must be noted that this indictment contains no averment that there was any attempt to induce Albaugh to purchase stock in the company. There is no allegation in the indictment that Albaugh ever did purchase stock in the company. And, although there is an averment that "the \$5,000 paid by Ira M. Albaugh was not expended by the company in the increase of the company's business," there is no direct allegation that he ever did pay \$5,000 to the company, or, if he did, whether or not he paid it in payment of the note to which his name was signed and secured as alleged. There is no allegation that Albaugh was induced to sign the note on the understanding that he was to receive anything therefor, so that so far as appears by the indictment nothing was held out to Albaugh which he was to receive in consideration of or as an inducement to his signing that note. It must be remembered that the charge is not that he obtained by false pretenses, with intent to defraud, \$5,000 or any other thing of value from Albaugh, but that he procured the signature of Albaugh to a promissory note of the value of \$5,000.

As was said by the court in *Tarbox v. State*, 38 Ohio St. 583, "the provision of the section concerning the procuring of a signature was intended to cover an entirely different class of offenses, a good illustration of which would be the case of one who should present to another, with a request that he should sign it, a paper falsely represented to be a certificate of character, a subscription paper, or the like, whereas the paper is, in reality, a promissory note or check, or bill of sale." Now, there is no allegation in this indictment that the note to which Albaugh's signature was procured was not what it had been represented to him to be. The inference here is that the signature to the note was an incident of, and not the end in fact sought, or to which the pretense related. There is no allegation whatever that the defendant, or the company, ever received anything of value on account of the note, or that they ever promised to Albaugh that they would give him anything of value in return for it, or that Albaugh expected to receive anything of value in return for his signature to the note. The important matter is that the false pretense or false representations as to the business and the financial condition of the company are not shown by the indictment to have had any connection with the giving of the note. No consideration for it is stated. So far as any direct averment is concerned,

the note may have been given for a loan. It is only from indirect averments that one may infer that it was given for stock.

Second. It will be observed that the allegation in the indictment as to the procuring of the note is as follows: "By which said false pretenses the said William S. Coblentz then and there did unlawfully procure the signature of the said Ira M. Albaugh as maker, to a promissory note of the value of \$5,000.00 which said promissory note was in the words and figures following." There is no allegation that the signature was procured with intent to defraud. The intent to defraud is specifically made an essential element in the crime by the statute, and, under the authorities above given, it is necessary that the indictment should aver that the signature was procured with intent to defraud. It is true that in the first part of the instrument there is a general averment that the defendant did unlawfully and falsely pretend with intent to defraud one Ira M. Albaugh, etc., but, as already shown, there is no connection between those allegations, and the allegations later on in the indictment as to the procuring of the signature of Albaugh. In *Drake v. State*, 19 Ohio St. 211, the rule is stated as follows: "An intent to prejudice, damage, or defraud is an essential ingredient in the crime of forgery, and an indictment for that crime must therefore charge such an intent directly and specifically, and a mere statement of such an intent in the conclusion of such an indictment by way of deduction or inference from the facts previously found is not sufficient." And also in *Commonwealth v. Dean*, 110 Mass. 64. It is insisted by counsel for the state that *Tarbox v. State*, 38 Ohio St. 581, supports their contention as to the sufficiency of this indictment. The charge in that case was obtaining a check by false pretenses. The court held that a check was a thing of value within the meaning of the first clause of section 7076, and that the indictment could be properly laid under that clause. But the court points out that in that section there are three distinct classes of crime described, and that under section 6794, Revised Statutes, "anything of value" shall include "a check or bond given for payment of money." The court then state that the clause "concerning the procuring of a signature was intended to cover an entirely different class of offenses." In this case the averment is that it was the signature that was secured. In *Kennedy v. State*, 34 Ohio St. 310, which was a case where B., a county auditor, fraudulently issued an order on the county treasurer in favor of A., and received payment thereof on the false pretense that he was authorized by A. to do so, while in fact as he well knew A. had no claim against the county, the court, after a full examination and discussion of the averments of the indictment, say at page 316 of 34 Ohio St.: "If the indictment had contained the averment that Kennedy by means of false pretenses ob-

tained the check from House with intent to defraud it would have been sufficient, but it contained no such averment." We feel forced to the conclusion that this indictment does not state the nature and cause of the accusation against defendant so as to directly and specifically advise him of what he must prepare to meet. It does not meet the requirements of well-settled rules or secure to him the constitutional safeguard of the right to demand the nature and cause of the charge against him.

[2] It is contended by plaintiff in error that the trial court erred in the admission of testimony as to similar transactions and statements by defendant to others. Some of these statements and transactions occurred before and some subsequent to the time the alleged false representations were made to Albaugh, to wit, March, 1907. The trial court admitted the testimony on the ground as stated in the charge; that the law of this state permits evidence of similar transactions to go to the jury for the sole purpose of throwing what light they may on the intent and knowledge of the party making the representations. We think this is correct as to those transactions which occurred prior to the one in question. In *Tarbox v. State*, 38 Ohio St. 584, the court say: "The decisions are uniform to the effect that where scienter is an element of the crime charged previous offenses necessarily involving such guilty knowledge are admissible." As to those transactions which occur subsequent to the one in question, the weight of authority and of reason is against the admissibility of the testimony. Any other rule would widen the scope of the inquiry beyond bounds within which defendant could fully prepare his defense. *State v. Letourneau*, 24 R. I. 3, 54 Atl. 1048, 96 Am. St. Rep. 696; *People v. Shulman*, 76 N. Y. 624; *Jackson v. People*, 126 Ill. 149, 18 N. E. 286.

There are some other assignments of error, but we do not find it necessary to consider them in this opinion.

The judgments below will be reversed and defendant discharged.

Judgments reversed.

DAVIS, PRICE, and DONAHUE, JJ., concur.

(84 Oh. St. 201)

FURNACE RUN SAWMILL & LUMBER CO. et al. v. HELLER BROS. CO.
(Supreme Court of Ohio. May 9, 1911.)

(Syllabus by the Court.)

1. PRINCIPAL AND AGENT (§ 97*)—AUTHORITY OF AGENT.

An instrument executed by an embarrassed debtor and his creditors for the purpose of placing his business in the hands of one named as trustee for the purpose of carrying on the business, and completing the debtor's unfinished

contracts, authorizes the person so named as trustee to bind the creditors for such purchases as he may make in carrying on the business and completing the contracts.

[Ed. Note.—For other cases, see Principal and Agent, Dec. Dig. § 97.*]

2. EVIDENCE (§ 441*)—PAROL EVIDENCE—ADMISSIBILITY.

The authority so conferred may not be contradicted by proof of a contemporaneous agreement that the creditors should not be so liable, it not being incorporated in the instrument, nor communicated to one who extends credit in reliance upon the authority with which it clothes the trustee or agent.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2030-2047; Dec. Dig. § 441.*]

Error to Circuit Court, Mahoning County.

Action by the Heller Bros. Company against the Furnace Run Sawmill & Lumber Company and others. Judgment for plaintiff was affirmed in the circuit court, and defendants bring error. Affirmed.

In January, 1905, H. O. Briggs, who was engaged in the lumber business at Youngstown, became financially embarrassed, when he entered into an arrangement with the plaintiffs in error, who were his creditors, to place his business in their charge with the view to so conducting the business and managing his assets as to discharge his obligations with the proceeds thereof. To carry that arrangement into effect they executed a contract in writing as follows: "Whereas, H. O. Briggs, of the city of Youngstown, Ohio, is engaged in the lumber business of said city, and temporarily unable to meet his obligations as they become due; whereas, the said H. O. Briggs and all the creditors of said H. O. Briggs desire to enter into an agreement temporarily deferring payment of all obligations now due or to become due; and whereas, it is the desire of all concerned to put a trustee in charge of said lumber business, the said trustee to be selected by the creditors, authorizing said trustee to continue said lumber business, and to distribute the proceeds therefrom to all creditors in proportion to the amount due them in accordance with the agreement hereinafter entered into. Now witness this article of agreement made and entered into this day by and between the said H. O. Briggs and [the plaintiffs in error]. In consideration of the presents and stipulations hereinafter set forth and especially in consideration of granting further time for the payment of bills now due and to become due, the said H. O. Briggs hereby agrees to place his business, including lumber yard, plant and all fixtures connected therewith, including books of accounts and credits of every character, at the disposal of his said creditors with a view to realizing sufficient money to pay off all his said indebtedness and until all his creditors have been fully paid. And in consideration of the presents moving from said H. O. Briggs creditors hereby agree to place in charge of

said lumber plant a competent and practical man, to be known as a trustee for all concerned, whose duty it shall be to take charge of said lumber business, complete all outstanding contracts, pay all necessary running expenses of said business, and at the end of each thirty (30) days render a statement to each and every creditor of the financial condition of said concern, and make payment on all outstanding bills in proportion to the amount thereof at the end of each thirty (30) days. That all moneys received by said trustee shall be deposited in the Dollars Savings & Trust Company Bank of Youngstown, Ohio, in the names of said trustee as trustee. That said trustee shall give surety bond, conditioned that he faithfully perform the duties herein set forth in the sum of ten thousand (\$10,000.00) dollars. Further agreed that the said J. P. Huxley shall act as trustee with duties incumbent as hereinbefore set forth. That the compensation of said trustee shall be two per cent. on all moneys received. And it is further agreed by and between the parties hereto that said trustee shall employ the said H. O. Briggs as general manager of said business, and that he shall receive as compensation for said services one hundred (\$100.00) dollars per month. And it is further agreed by and between the parties hereto, that this agreement shall continue until said creditors hereinbefore named shall be fully paid, or the majority of creditors in interest, as to the amount due, owing at a regular meeting, of which all creditors shall have notice, shall decide to discontinue to have said trustee. And it is further fully understood and agreed that no creditor of the said H. O. Briggs shall institute or prosecute any legal proceedings of any kind or character against the said H. O. Briggs during the continuance of this agreement. It is fully understood by and between the parties hereto that this agreement obligates all the parties hereto only when it is approved and signed by the creditors hereinbefore named."

Said J. P. Huxley entered upon the discharge of his duties as trustee under said arrangement, and in their prosecution in the months of March, April, and May, 1905, in the purchase of materials contracted the obligation, for whose enforcement the original suit was brought against those who had signed said contract. The answer of the Morris Hardware Company is presented in the printed record as a type of the answers of all the defendants. It consists of two defenses, the first of which is for the most part admissions of the allegations of the petition, and a denial of the construction of the contract which would make the defendants liable to the plaintiff. It admits the execution of the contract as alleged, and that Huxley entered upon the discharge of his trust with a view to realizing funds for the payment of the creditors. It denies that the defendants au-

thorized Huxley to make new contracts or held him out as having such authority.

For a second defense it is alleged that at the time of making said contract, and previous thereto, at conferences among the parties thereto, it was agreed that the creditors were not and should not be liable upon any contracts which Huxley might make. The plaintiff, replying, denies that it had any notice of the alleged agreement set out in the second defense. In the court of common pleas there was a judgment in favor of the original plaintiff for the value of the articles so purchased by Huxley, and in the circuit court that judgment was affirmed.

W. C. Carman, B. F. Wirt, and F. K. Bowman, for plaintiffs in error.

SHAUCK, J. (after stating the facts as above). The case permits the concession to the plaintiffs in error that the contract signed by them did not constitute them partners, and that it did not constitute Huxley and Briggs, or either of them, general agents with authority to bind the creditors beyond the scope of the purposes indicated by the contract. This concession includes all that can be claimed for most of the principles stated and the authorities cited in the brief of their counsel.

[1] By their exceptions to the rulings of the trial judge with respect to the instructions which should be given and refused, and with respect to the evidence which should be admitted or excluded, they have laid the foundations for two propositions, one or the other of which it is incumbent upon them to maintain. One of these is that the contract which they signed did not authorize Huxley or Briggs, or either of them, to contract obligations in the conduct of the business which might be asserted against them. That proposition regards only those terms of the contract which contemplated that the assets of Briggs were to pass into the control of the trustee to be by him converted into money to be applied to the discharge of his indebtedness to the several creditors who executed the contract. But it wholly excludes from consideration the stipulation that the trustee should "take charge of the said lumber business, complete all outstanding contracts, and pay all necessary running expenses of said business." It was in furtherance of the purpose thus expressly defined and authorized that Huxley contracted the obligation upon which the plaintiff counted in the original petition.

[2] A proposition suggested by the exceptions taken upon the trial by the plaintiffs in error, and urged in the brief of their counsel, is that if the terms of their written contract, considered alone, should be deemed sufficient to create the suggested liability for purchases made in the conduct of the business, the written terms should be treated as modified by the contemporaneous

parol understanding that the signers of the contract should not be so bound. This is said to be so because the rule that written contracts cannot be varied by parol obtains only between the parties to the instrument. Although Huxley was denominated a trustee, he was in the relation called in question here the agent of the plaintiffs in error for the conduct of the business, and the written contract was his letter of authority. It was in his possession for the purpose of obtaining credit, and it was so used by him in this instance. Certainly the plaintiffs in error are estopped to assert a limitation upon the written authority with which they clothed their agent by proof of a parol understanding, neither carried into the instrument nor communicated to one who relied upon it.

Judgment affirmed.

SPEAR, C. J., and DAVIS, PRICE, JOHNSON, and DONAHUE, JJ., concur.

(84 Oh. St. 218)

PENNSYLVANIA CO. v. O'CONNELL.
(Supreme Court of Ohio. May 9, 1911.)

(Syllabus by the Court.)

1. CARRIERS (§ 20*)—EXCESSIVE CHARGES AGAINST PASSENGERS—ACTION FOR PENALTY—VENUE.

A suit against a railroad company to recover the penalty prescribed by section 3376, Revised Statutes, for demanding and receiving, in the sale of a ticket, a greater sum of money for the transportation of a passenger from the place of purchase to another point on the company's road than the sum allowed by law, should, by force of section 5022, Revised Statutes, be brought in the county where the purchase of the ticket was had. The court of common pleas of the county of the purchaser's destination has no jurisdiction over such action.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 20.*]

(Additional Syllabus by Editorial Staff.)

2. CARRIERS (§ 20*)—REGULATIONS—PENALTIES—"BONA FIDE CLAIMANT"—"USING."

A "bona fide claimant," within section 3376 of the Revised Statutes, prescribing a penalty for demanding and receiving on sale of a ticket a greater sum for the transportation of the passenger than that allowed by law, is one claiming in good faith. Using the road of such company implies an intention to use it. It does not imply a contract personally to use it.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 20.*]

For other definitions, see Words and Phrases, vol. 1, p. 822; vol. 8, pp. 7228-7237, 7825.]

Error to Circuit Court, Seneca County.

Action by Dan. B. O'Connell against the Pennsylvania Company. Judgment for plaintiff was affirmed in the circuit court, and defendant brings error. Reversed.

The action below was by Dan. B. O'Connell, defendant in error, against the Pennsylvania Company, plaintiff in error, instituted Janua-

ry 26, 1906, in the court of common pleas of Seneca county, to recover \$150 as penalty for an alleged overcharge in selling at Sandusky, Erie county, a ticket entitling the purchaser to ride upon a train of the company from Sandusky, Erie county, to Tiffin, in Seneca county; the company at that time, May 4, 1905, operating a steam railway between the points named. The answer of the company, admitting the corporate capacity, contained a general denial, and interposed other special defenses not important to be here repeated. The cause was tried to the court, a jury having been waived, and resulted in a judgment against the company for \$150, interest, and costs. This judgment was affirmed by the circuit court. Reversal of both judgments is asked by the plaintiff in error.

Marshall & Fraser and Royer & Spitler, for plaintiff in error. Willis Bacon, for defendant in error.

SPEAR, C. J. (after stating the facts as above). [1] Two questions are argued. One relates to the jurisdiction of the court of common pleas over the action; the other, to whether or not there was an overcharge. The plaintiff in error contends that the court of common pleas of Seneca had no jurisdiction because the cause of action arose in Erie county. The defendant in error contends that the cause arose at least in part in Seneca, and hence the court of that county had jurisdiction.

Section 3376 of the Revised Statutes, which affords the right of action in cases of this kind, among other things, provides that any company which demands or receives a greater sum of money for the transportation of passengers than the sum allowed by law shall pay to the party aggrieved for every such overcharge a sum equal to double the amount of the overcharge, but in no case shall the amount be less than \$150 to any bona fide claimant using the road of such company. It is not doubted that this action is one for the recovery of a penalty. Such actions to recover penalties must, by force of section 5022, Revised Statutes, be brought in the county where the cause of action, or some part thereof, arose. We are of opinion that, upon the sale and delivery by a railroad ticket agent to the purchaser of a ticket entitling such purchaser to travel on the cars of the company between the points designated in the ticket, a contract evidenced by such ticket has been entered into between the company and such purchaser, good in the hands of any bona fide holder of it for transportation between the points named, and if such contract is in violation of law, and involves a penalty in such sort as to entitle the purchaser to institute an action to recover such penalty, the cause of action, and the whole of it, arose then and there.

[2] It is insisted, however, that unless the purchaser had ridden upon the ticket no cause of action could arise; that riding upon the ticket was a part of the contract necessary to be done, and such act of riding would necessarily bring a part of the offense and the act within the county of Seneca, and so the Seneca county court would have jurisdiction of such action. We do not give the words "bona fide claimant using the road of such company" any such extended meaning. A bona fide claimant "is one claiming in good faith." Using the road of such company implies an intention to use it. It does not imply a contract personally to use it. A railway ticket, if unlimited as to the person entitled to use it, and almost universally they are so unlimited, is good in the hands of any person who may present it on the cars of the company, and if bought in good faith, and not for the mere purpose of speculation, or of obtaining evidence to support a contemplated lawsuit, is complete evidence of a contract, and the holder, whose right is not otherwise impugned, is not required to himself ride over the route in order to justify the bringing of an action. The requirement that the purchaser shall himself ride would destroy the transferability of the contract, and materially detract from its value in the hands of the purchaser.

It is insisted that the term "or some part of it arose," to be found in section 5022, *supra*, implies that the cause of action for the penalty may be divided. Yes, where division is practicable and is required. But how can that apply to an action to recover this kind of a penalty? It is conceded that some part of the cause of action arose in Erie county. But it is urged that the riding in Seneca county in the cars of the defendant below would give to the court of that county jurisdiction, because a part of the penalty was thereby and therein incurred. What part? The demanding and receiving, which the statute penalizes, all occurred in Erie county. In other words, if the cause be divisible, what portion of the sum recovered would belong to one part of the transaction and what to the other? If the purchase of the ticket and the ride on it in Seneca county should happen to be some months apart, and the plea of the limitation statute of one year should be interposed, good as against the first date, though not as against the later date, it would be, if the cause of action be divisible, absolutely necessary to divide the penalty, allowing it in part and denying it in part; else the statute could have no application. Manifestly this would be wholly impracticable. Besides, it would overturn that provision of the statute that "in no case shall the amount to be paid be less than one hundred and fifty dollars." Obviously the cause of

action is an entire cause, and is not divisible.

It seems clear that the contract of purchase (which involves demanding and receiving) was concluded when the ticket was sold and delivered at Sandusky. It was one contract, and its legal effect is to be determined by the condition of things between the parties at that time. The company, by its agent, had demanded and had received, if in fact there was an overcharge, a greater sum of money than the sum allowed by law. It is this action, the demanding and receiving a sum greater than the sum allowed by law, which is penalized, and this incurring of the penalty is the result of such action by the company at that time, and not at some future time, and depending upon some future event. We are not required to state, or to hold, in disposing of this case, just what is involved in the phrase of the statute "or some part thereof." It is enough to know that the phrase is not applicable to the facts of this case.

Attention is called by counsel for defendant in error to some comment in the opinion in *Railroad Co. v. Hollenberger*, 76 Ohio St. 177, 81 N. E. 184, referring to the fact that no part of the road was located in the county in which the action was brought, which counsel conceives aids his contention. The observation referred to was introduced as an additional fact justifying the general conclusion in disposing of the case, but is not the ground of it; hence it is without application to this case. We therefore conclude that the court of common pleas of Seneca county was without jurisdiction in the case.

This conclusion makes it unnecessary to pass upon the other question argued, and, inasmuch as the members of the court are not in entire accord respecting it, the question is not determined.

The judgments of the courts below will be reversed, and judgment entered dismissing the petition.

Judgments reversed.

DAVIS, SHAUCK, PRICE, JOHNSON,
and DONAHUE, JJ., concur.

(84 Oh. St. 272)

DUNLAP v. MC CLOUD et al.
(Supreme Court of Ohio. May 31, 1911.)

(Syllabus by the Court.)

1. WILLS (§ 683*) — CONSTRUCTION — DEVISES IN TRUST.

Where a testator devises all of his real estate to certain individuals in trust and afterwards by codicils devises a part of the same real estate to another person for and during his natural life, such life estate is thereby, *ex vi termini*, withdrawn from the operation of the trust during the life of the life tenant.

[Ed. Note.—For other cases, see *Wills*, Cent. Dig. §§ 1603-1606; Dec. Dig. § 683.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes

2. WILLS (§ 802*)—ELECTION OF WIDOW—EFFECT AS TO OTHER DEVISEES.

Where the widow in such case elects not to take under the will and demands assignment of her dower as of all the lands of which the testator died seised, and it appears that there is land enough to set off the dower without interfering with land specifically devised for life, it should be so done; and it is error to direct that the dower be set off in part in the lands so specifically devised for life.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 2091-2098; Dec. Dig. § 802.*]

3. WILLS (§ 802*)—ELECTION OF WIDOW—COMPENSATION OF DEVISEES.

While in such case the devisees who are prejudiced by the widow's election to be endowed of the lands of her husband are equitably entitled to compensation out of the rejected provisions made for her in the will, yet, where the rejected provisions do not fully compensate, the resulting uncompensated loss should fall upon the residuary estate in preference to the specific devisees, unless a contrary intention appears from the will.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 2091-2098; Dec. Dig. § 802.*]

Error to Circuit Court, Pickaway County.

Action between Mary E. Dunlap and Richard H. McCloud and others. Decree in Common Pleas modified in the Circuit Court, and plaintiff brings error. Reversed.

Abernethy & Folsom and M. B. Earnhart, for plaintiff in error. Clarence Curtain, for defendants in error Flora E. Timmons and Scott W. Timmons. McCloud & Lincoln, for defendants in error the trustees under the will of William Heath.

DAVIS, J. William Heath, late of Madison county, died March 28, 1907, seised of about 950 acres of land situate in the counties of Madison and Pickaway, together with some real estate in the village of Mt. Sterling, in Madison county, Ohio. He also was possessed of personal property amounting to about \$42,000. He left a will, which was executed August 11, 1904, by which, after several minor bequests and directions, he bequeaths and devises all the residue of his property, real and personal, to certain persons in trust that they should manage and control the same, and out of the income thereof from time to time pay over to his wife Mary (now Mary E. Dunlap, the plaintiff in error) and his only child, Flora E. Alkire (now Flora E. Timmons), and his grandson, William A. Alkire, during each of their natural lives, and in the order named, "a sufficient amount of money as their necessities require for each of them to live comfortable and have all the necessaries of life, but not to live extravagantly." He also expressed it to be his intention in so doing to provide "as far as I am able against any contingency and from even their own weakness or improvidence." He further directed that, in case his wife should elect not to take under the will, the trust should continue for the benefit of his said daughter and grandson, and that his

wife should not in any way participate in the trust property, but take only what she would be entitled to under the law. He also directed that, in case his wife did not take under the will, the trust should terminate on the death of his daughter Flora and his grandson William A. Alkire, and, "upon the final termination of this trust, I will and direct that all the trust property and estate shall go to and vest in fee simple in the children or their representatives of my grandson William A. Alkire, per stirpes, and in default of such children or their representatives, then the same is to go to and vest in the Defiance Christian College of Defiance, Ohio, and the Marion Christian College of Marion, Indiana, share and share alike."

[1] The testator's scheme of devolution as thus declared was to provide a comfortable support for his wife, daughter, and grandson, and that at their death "all the trust property and estate" should go to the children of the grandson or their representatives, and in default of such heirs to the charities named. This was the sole purpose and the whole extent of the trust. This scheme was afterwards materially modified from time to time, through three codicils to the will. In the first codicil he bequeaths to his wife \$5,000, and directs that she be permitted to reside upon any of the real estate of which he may die seised in addition to the provision for her in the will; and he bequeaths to his daughter Flora (now Flora Timmons) \$5,000 and devises to her about 263 acres of land for her natural life, "the same to be in addition to" the support provided in the will. It is evident that the land devised to Flora for her life must be withdrawn from the trust by the codicil, because the enjoyment of the life estate is inconsistent with title in, and management and control by, the trustees. The second codicil gives to Flora 73 acres more for her life and after her death to her husband for his life, "the same to be in addition" to what he had already given in the will and first codicil. By the second codicil he devises to his wife all of his real estate in the village of Mt. Sterling for her life, the same to be in addition to what he had already given in the will and first codicil. In the third codicil the only change material in the present controversy is in the residuary clause, which is made to read as follows: "Upon the final termination of the trust I will and direct that all the trust property and estate shall go to and vest in fee simple in the children or the representatives of my grandson William A. Alkire, per stirpes, and in default of said children or their representatives, then and in that case one thousand dollars shall be paid to the Defiance Christian College of Defiance, Ohio, and the balance of the trust property and estate shall go to my legal heirs."

It is apparent from the will and codicils

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes

thereto, as they stood at the testator's death, that his intention was that after the payment of debts and legacies the personal property should remain in the hands of the trustees, to be administered according to the trusts declared in the will; and that all of the testator's real estate, except the Mt. Sterling property, devised to his wife, and the lands devised to his daughter, Flora, for her life, should vest, for the purpose of the trust only, in the trustees; and that upon the termination of the trust, namely, upon the death of the testator's wife and daughter and his grandson, William A. Alkire, "all the trust property and estate shall go to and vest in fee simple in the children or their representatives of my grandson William A. Alkire," etc. This seems to us to be clear beyond reasonable dispute.

[2] Now the widow declined to take under the will and elected to take under the law. There was no "disappointment" in that. She only declined to surrender what the law gave her for what the testator offered her, so that her life support, her life estate in the Mt. Sterling property, and the \$5,000 legacy remained in the hands of the trustees. She demanded the assignment of her dower in the lands of which her husband, the testator, died seised, and the court of common pleas directed that her dower be set off in that portion of the real estate of the testator not specifically devised to his daughter Flora, and to her and her husband, Scott W. Timmons; and this was accordingly done. The trustees appealed from the decree of the common pleas court to the circuit court; and the latter court ordered "that the said plaintiff be endowed of one full equal one-third of the premises described in the petition, in the following manner: First, by giving to plaintiff all the real estate situate in the village of Mt. Sterling, Ohio, as described in the petition as part thereof, and after deducting the value of said Mt. Sterling property that the balance of her full one-third part of said premises shall be proportioned between the lands held by the said defendant Flora E. Timmons and the defendants R. H. Schryver, T. E. Riddle, J. N. Waldo, and Richard H. McCloud, as trustees under the will of William Heath, deceased." The circuit court found as its conclusions of law as follows: "That the said Mary E. Heath (now Dunlap), as the widow of said William Heath, having elected not to take the provisions of said will of William Heath, therein provided for her, the said property in Mt. Sterling, Ohio, became and is rejected property, and that under the proper construction of said will the same should be assigned and set off to her as part of her said dower, and that the residue of her dower should be assigned and set off to her, in the said lands devised to Flora E. Timmons, his daughter, and in the said lands devised to said trustees in trust, in equal proportions."

As it has been intimated already, we regard this judgment of the circuit court as both erroneous and inequitable; but an attempt is made to justify it, apparently on the ground of some supposed application of the doctrine of election and compensation to disappointed donees. The rule was clearly stated a long time ago in the often quoted note to *Gretton v. Haward*, 1 Swanston R. 441, 443, note a, as follows: "In the event of an election against the instrument, courts of equity assume jurisdiction to sequester the benefit intended for the refractory donee, in order to secure compensation to those whom his election disappoints." The same rule was recognized and applied in *Jennings v. Jennings et al.*, 21 Ohio St. 56. The error of the circuit court was not in sequestering the property rejected by the widow when she elected not to take under the will, but in not stopping with that. The court went beyond the rule and sequestered not only the rejected property, but also a portion of the specific devise of land to Flora Timmons for her life, thereby itself creating the only disappointment or prejudice, in law or equity, which has arisen in this estate, or which by any fair construction of the will, as we conceive, could arise. There appears to be property enough remaining, after awarding to the widow her rights under the statutes, to satisfy all of the remaining legacies and devises in the order of precedence and as directed in the will and codicils.

[3] Doubtless the amount of the residuum of the estate would be reduced by the election of the widow to take under the statute and the payment to her of her distributive share of the personalty; but that is where the uncompensated loss ultimately should fall, unless it is otherwise indicated in the will. *Estate of James M. Vance, Deceased*, 141 Pa. 201, 21 Atl. 643, 12 L. R. A. 227, 23 Am. St. Rep. 267; *Trustees of Church Home v. Morris*, 18 Ky. Law Rep. 384, 36 S. W. 2; *Treasy v. Treasy*, 18 Ky. Law Rep. 387, 36 S. W. 3; *Chamberlain v. Berry's Ex'r*, 22 Ky. Law Rep. 44, 56 S. W. 659. But there is no indication of such an intention here. The testator has provided that the trust shall not terminate until the three persons who are the objects of his especial solicitude are all dead, and that then all the trust property and all of his estate shall vest as provided in the residuary clause. Until that time residuary legatees and devisees have no claim on the property, but when that time comes all the dower land of the wife, all the life estate of the daughter, and all the trust property, real and personal, will have become integral parts of the residuary estate which shall vest as the testator has directed.

Our view is that the dower of the plaintiff in error should, as near as practicable and as may seem to be consistent with the rights of all the parties interested, be set off to her in one body and without disturbing or inter-

fering with any of the land devised to Flora E. Timmons for her life or for her life and that of her husband; and therefore the order and judgment of the circuit court is reversed.

SPEAR, C. J., and SHAUCK, PRICE, JOHNSON, and DONAHUE, JJ., concur.

(84 Oh. St. 184)

HAMILTON MACH. TOOL CO. v. MEMPHIS NAT. BANK.

(Supreme Court of Ohio. May 9, 1911.)

(Syllabus by the Court.)

BILLS AND NOTES (§ 356*)—RIGHT OF INDORSEER—BONA FIDE PURCHASER.

On the 12th day of November, 1904, the H. M. T. Co., of Hamilton, Ohio, executed its note for the sum of \$948.15, payable to the order of Y. & L., of Knoxville, Tenn., in four months after date, and sent it by mail to Y. & L., requesting them to procure its discount and remit the proceeds to the maker of the note. On the 14th day of November, 1904, Y. & L., being indebted to the Memphis National Bank on overdraft in the sum of \$436.55, sent said note indorsed in blank to that bank, with which they had an account, requesting it to discount it and place the proceeds to their account, all of which was done; the bank having no knowledge of the instructions by the maker to Y. & L., thus extinguishing the overdraft and leaving a credit balance of \$491.85 in favor of Y. & L.

On the 17th day of November, 1904, Y. & L. drew their check against the credit balance for the sum of \$500, which was honored by the bank, leaving their account overdrawn in the sum of \$8.15, and shortly thereafter the account was closed, and Y. & L. ceased business with the bank. The note was not paid at maturity, and the bank brought suit thereon against the maker, who claimed in partial defense that the amount of said overdraft of \$436.55, extinguished by the proceeds of the discounted note, should be deducted, because such overdraft was a pre-existing debt.

Held, that the bank, having no knowledge of the instructions sent by the maker to Y. & L., and believing the note belonged to them, purchased it in good faith before maturity, and it is entitled to recover on the same without deduction of the amount of such overdraft.

[*Ed. Note.*—For other cases, see *Bills and Notes*, Cent. Dig. § 908; Dec. Dig. § 356.*]

Error to Circuit Court, Butler County.

Action by the Memphis National Bank against the Hamilton Machine Tool Company. From a judgment for plaintiff, defendant brings error. Affirmed.

The plaintiff in error was defendant in the court of common pleas, in an action brought against it by the defendant in error, the Memphis National Bank, in which action the issues were joined by the petition, answer, and reply.

The petition filed by the bank is the following:

"Plaintiff says that it is a national bank, duly organized, with powers to sue and be sued in its corporate name by virtue of the laws and a certificate issued to it by the United States. Plaintiff says that on the

12th day of November, 1904, the defendant (the Hamilton Machine & Tool Company) made and executed a certain promissory note on that date in the favor of Young & Lane for the sum of nine hundred and forty-eight dollars and fifteen cents (\$948.15), due in four months after said date. A copy of said note made and delivered to Young & Lane reads as follows, together with all the indorsements thereon: '\$948.15. Hamilton, Ohio, Nov. 12, 1904. Four months after date we promise to pay to the order of Young & Lane nine hundred and forty-eight 15/100 dollars, at Union Savings Bank & Trust Co., Cincinnati, Ohio. Value received. No Due The Hamilton Machine Tool Co. Chas. F. Hilker, Prest.' On the back of said note appears indorsement: 'Young & Lane, Frank Lane.' 'Notes protested for nonpayment March 13, 1905.' Plaintiff says that on or about November 17, 1904, said Young & Lane for a valuable consideration transferred and delivered said note to said Memphis National Bank at said date, which said bank then became owner and holder of said note for full value. And that said Memphis National Bank from said time became the bona fide owner and holder of said note, and are still the bona fide owner and holder of said note. And that said note became due and payable and was then presented to the Union Savings & Trust Co. Bank of Cincinnati, Ohio; the same was then protested for nonpayment of interest. Young & Lane had due notice. Wherefore a right of action has now accrued to the plaintiff for the reasons hereinbefore stated, and that there is now due to it from the defendants (the Hamilton Machine & Tool Company) the sum of \$948.15, with interest thereon 6 per cent. from the 13th day of March, 1905, and that no payments have been made thereon; that entire amount is now due and unpaid. Wherefore plaintiff now asks judgment against defendants (The Hamilton Machine & Tool Company) for the sum of \$948.15, together with 6 per cent. interest thereon from March 13, 1905, and costs of suit and other relief."

To this petition the defendant below filed the following answer: "Now comes defendant, the Hamilton Machine Tool Company, a corporation under the laws of Ohio, and by way of answer to plaintiff's petition herein admits that it executed the note described in the petition herein, but denies that plaintiff paid any consideration for the said note. Further answering this defendant says that on or about the 14th day of October, 1904, it delivered said note to Frank Lane, doing business under the firm name of Young & Lane, at Knoxville, Tenn., under an agreement with said Frank Lane that he should procure the discount of said note and remit the net proceeds of same to this defendant, the Hamilton Machine Tool Company. This defendant further says that it is informed,

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

and believes, and so charges as a fact, that said Frank Lane sent said note to the bank of the plaintiff for discount; that at that time the said Frank Lane was indebted to the plaintiff in a sum greatly in excess of the amount named in said note, and when it discounted said note, instead of paying same to said Frank Lane, without the knowledge or consent of this defendant or of Frank Lane, it applied the net proceeds of said note to the reduction of the indebtedness of said Frank Lane, so that the said Frank Lane could not and in fact did not remit to this defendant the net proceeds of said note, as under his agreement with this defendant he was bound to do. This defendant further avers that the action of plaintiff in using the proceeds of its note to the extinguishment or reduction of the debt due to it from Frank Lane was without warrant or law, and wholly unauthorized, and when this defendant learned of the action of the plaintiff it notified plaintiff that its action was unauthorized and illegal, and demanded of plaintiff the return of said note, which plaintiff refused and still refuses to do. Wherefore this defendant prays that plaintiff may be ordered to surrender said note to it; that the petition be dismissed and the defendant recover its costs herein expended, and for all other and proper relief."

The following is the reply to the above answer: "And now comes the plaintiff and for its reply to defendant's answer says: The plaintiff says it paid a valuable consideration for said note, all of which it is ready and willing to make appear. The plaintiff says by way of further reply it has no knowledge or information as to any private agreement between Frank Lane and the defendant touching the proceeds of said note, or the agreement on the part of Frank Lane to remit the same to the defendant at the time mentioned in said answer, and therefore this plaintiff denies the same. The plaintiff for further reply says at the time said Frank Lane procured the discount of said note by the plaintiff at the time mentioned in the petition, about the ——— day of November, 1904, and long before said note became due and payable, the said plaintiff paid the said Frank Lane, or the firm of Young & Lane, the full value of said note in money and funds belonging to said plaintiff, save and except about \$200 of an overdraft of the said Young & Lane, or Frank Lane. All of which was at the time consented to by said Frank Lane and Young & Lane. There was paid at the time about \$700 in money and perhaps about \$200 credited for the overdraft of Frank Lane and the firm of Young & Lane, all of which was agreed to at the time. This plaintiff denies that it had any knowledge of any private agreement between Frank Lane, or Young & Lane, at the time mentioned, or is bound by the same in any way. This plaintiff denies all the other affirmative

allegations in defendant's answer, and prays for judgment for the whole amount of said note and interest as it prayed for in the petition, and other relief."

On the issues thus made up, the cause by agreement was tried to the court, a jury being waived, and after hearing the evidence and arguments of counsel the court found in favor of the bank for the amount of the note and interest, in the sum of \$1,127.01, and judgment was rendered on the finding. A motion for new trial was overruled; a bill of exceptions containing all the evidence, with a petition in error, was filed in the circuit court, where the judgment was affirmed. The case is here for review on a petition in error. The facts are stated in the opinion.

Oscar W. Kuhn, for plaintiff in error.
Stephen Crane and E. A. Belden, for defendant in error.

PRICE, J. (after stating the facts as above). The facts disclosed at the trial are not in dispute, as counsel for defendant in error state in their brief and in oral argument that the brief for plaintiff in error correctly states the facts, and we are therefore authorized to adopt such statement, rather than search the record and restate them in another form. We add other facts contained in the record. Counsel differ mainly as to the conclusions which should be drawn from all the facts.

On the 12th day of November, 1904, the Hamilton Machine Tool Company sent to Young & Lane, at Knoxville, Tenn., a promissory note, made payable to the order of Young & Lane, in the sum of \$948.15, in four months after its date, with 6 per cent. interest per annum, requesting them to procure its discount, and remit the proceeds of same to the Hamilton Machine Tool Company.

This note, with another not involved in this case, was inclosed in a letter of which the following is a copy: "11—12—04. Messrs. Young & Lane, Knoxville, Tenn.—Gentlemen: In accordance with Mr. Hilker's understanding with you yesterday, we herewith inclose our two notes as follows: Nov. 12th, payable Feb. 23rd, 1905—\$920.80. Nov. 12th, at 4 months—\$948.15. These notes you are to discount and send us proceeds together with your check for the difference to take up our note due December 10th for \$2,683.47." The Hilker mentioned in the above letter was president of the tool company, plaintiff in error.

The note in this controversy was executed by the Hamilton Machine Tool Company, at Hamilton, Ohio, payable to the order of Young & Lane, and made payable at the Union Savings Bank & Trust Company, Cincinnati, Ohio. On the 14th day of November, 1904, Young & Lane sent this note, with the other, in a letter to the Memphis National Bank, at Memphis, Tenn., requesting the

bank to "place the proceeds of same to their credit on the books of the bank." This is the letter referred to: "Knoxville, Tennessee, Nov. 14, 1904. Memphis National Bank, Memphis, Tenn.—Dear Sirs: Our records show our line of discounts with you reduced about \$2,000 this month, and we will be accommodated by your placing the inclosed to our credit, namely, Hamilton Machine Tool Co. \$948.15, due March 12. * * * Yours truly, Young & Lane, Frank Lane." On the back of said note appears the indorsement, "Young & Lane, Frank Lane." The bank received this paper so indorsed, discounted it, and placed the proceeds, amounting to \$928.40, to the credit of Young & Lane, as requested by them.

On November 5, 1904, 10 days before the bank received this note and discounted it, the account of Young & Lane was overdrawn to the extent of \$436.55, and it remained thus overdrawn up to the time the note was so received. When the note was discounted and its proceeds credited to the account, this overdraft of \$436.55, was charged off, leaving to the credit of Young & Lane the sum of \$491.85. On the 17th day of November, a check for \$500 was drawn by Young & Lane against this credit, which was honored by the bank and charged to the account, leaving it again overdrawn to the extent of \$8.15. No part of the proceeds of the note mentioned was ever received by the Hamilton Machine Tool Company. The note was not paid at maturity; the bank brought suit upon it, and recovered, as appears in our first statement.

The following concession appears in the brief for plaintiff in error: "The plaintiff in error concedes that it is liable for the \$491.85, which Young & Lane withdrew from the bank on their check of November 17, 1904, but not for the \$436.55, which the bank applied toward the satisfaction of Young & Lane's overdraft draft, and it is for the purpose of having the judgment in this case reduced by the amount of this \$436.55 that this proceeding is brought here."

This concession means that the Memphis Bank was not at fault in recognizing as valid the check of Young & Lane for \$500, drawn November 17, 1904, and charging it against the proceeds of the note, the maker of the note discounted by the bank admitting, as it does, "that when the bank discounted the note it was not aware of these facts." The facts referred to of which the bank was not aware were that the note "was not the property of Young & Lane, but of the Hamilton Machine Tool Company; Young & Lane being simply the agents of the Hamilton Machine Tool Company for the special purpose of procuring its discount and remitting the net proceeds of same to Hamilton Machine Tool Company." The foregoing confession is no more than the facts compel, and tends to an easy solution of the contention that the bank was not justified in ap-

plying proceeds of the discount to extinguish the overdraft of \$436.55.

We find that the note in question was payable to order of Young & Lane—negotiable in form—and the bank purchased it from the payees in the usual course of business, who indorsed it in blank, thus vesting the legal title in the bank. Instead of paying the proceeds to Young & Lane over the counter, the bank, at their request, placed the same to their credit. It appears that Young & Lane had discounted other paper at this bank, not only on this occasion, but had been transacting business with it previously, so that a regular account current existed between it and Young & Lane when this purchase was made. It so happened that they owed the bank \$436.55 as an overdraft on their account, and all the proceeds were placed to their credit, and after extinguishing or satisfying such overdraft the bank owed Young & Lane on the account \$491.85, or, in other words, they had a credit balance of that amount. As before stated, by the check of November 17th, for \$500 drawn on and honored by this bank, they exhausted the credit balance, which left the account again overdrawn in the sum of \$8.15.

It being conceded that the bank was justified in honoring this check, because it had no knowledge of the mere agency of Young & Lane, and no knowledge of any relations they sustained to the Hamilton Machine Tool Company, maker of the note, except that shown by the note itself, it must also be conceded that the bank acted in good faith, for it appears in the evidence of its cashier, and not controverted, that Young & Lane, in the course of their dealings with the bank, on previous occasions had overdrawn their account, which they subsequently made good, as they did in the discounting of this note—ostensibly their own note—and the bank acted upon it as their note.

In respect to extinguishing the overdraft, it is urged that, while the bank was ignorant of the agency of Young & Lane for the maker of the note, it used the proceeds of the discount in satisfying a pre-existing debt, which they could not do with funds actually belonging to the principal—the maker of the note. Is this position sound? It is entirely clear, and we think it cannot be controverted, that in discounting the note for Young & Lane, the bank became its absolute owner, and that, too, in good faith. It was sent from Hamilton, Ohio, to Young & Lane, at Knoxville, Tenn., that they might get it discounted. To get it discounted would, or might, necessitate its sale. They were intrusted with such use of the note as would bring about its discount, of course for the benefit of the maker, but of the latter it is conceded the bank had no knowledge, and there was nothing on the face of the note, or in the negotiation, to excite suspicion or put the bank on inquiry. Therefore Young & Lane were authorized to hold themselves

out to any one who would discount the paper as its absolute owners, as they were the payees named therein.

But it was urged in argument that as to this overdraft the bank would not be the loser, if the court should credit its amount on the judgment in this case, for the reason that it has recourse on Young & Lane for that overdraft. The facts are against this claim. E. B. McHenry, who was cashier of the Memphis bank, testified to his acquaintance with Young & Lane, especially Lane, and that "In May—I think it was the 24th or 25th of May, perhaps—1904, the firm of Young & Lane opened an account with the bank and did business there; was there for some time afterwards, making deposits and having notes discounted, and checking on their account, just as an ordinary customer would do." He also states that this bank had previously discounted two or three notes made payable to Young & Lane by the Hamilton Machine Tool Company, and that they were made payable at the same bank in Cincinnati mentioned in note referred to in this case. The rate of discount was 6 per cent., and he states that the bank paid full value, less this discount.

Another important fact in the record is that but little, if any, business was transacted with this bank by Young & Lane after the purchase of the note, and certainly none after the bank became aware that anything was wrong or irregular between them and their principal. This concern, Young & Lane, resided at Knoxville, Tenn., and sent the note with letter to the bank, with instructions quoted above. After this purchase, and in January, 1905, after they had overdrawn their account by the check of November 17, 1904, business between them and the bank ceased. It has not been pointed out by counsel, and we do not know, how the bank could open up its account with Young & Lane, restore the charge of \$436.55 overdraft, and pursue them for that amount. It had been paid and so entered on its books, and the account closed, so far as business was concerned. By application of part of the proceeds to extinguishing the overdraft, the bank necessarily changed its position from that of a creditor to that of a debtor for the credit balance. This was wiped out by check later, which admittedly was properly honored by the bank. The bank had a claim for \$8.15 overdraft, and that was all. The former overdraft had been paid and defense of payment could have been sustained, had the bank sued for it. It had no right of action against them.

We are convinced that the bank believed and had a right to believe the note belonged to Young & Lane, having purchased it before maturity and in good faith, and it should not suffer because the apparent owners used part of the proceeds to pay their

debt to the bank. Neither fair play nor any maxim of equity requires such result.

The authorities relied on by counsel for the parties are collected in the briefs, and we have attempted to state the legal conclusion that should be drawn from undisputed facts, and we therefore affirm the judgment. Judgment affirmed.

DAVIS, SHAUCK, JOHNSON, and DONAHUE, JJ., concur.

(84 Oh. St. 88)

STATE ex rel. CONRAD v. PATTERSON.
(Supreme Court of Ohio. April 18, 1911.)

(Syllabus by the Court.)

1. QUO WARRANTO (§ 3*)—EXISTENCE OF OTHER REMEDY.

Where there is no adequate provision made by statute for the contest of the election of township officers, the remedy afforded by section 2968—39, Revised Statutes, now section 5090 of the General Code, is not exclusive, but quo warranto is a proper remedy for determining the legality of an election of township trustee.

[Ed. Note.—For other cases, see Quo Warranto, Cent. Dig. § 4; Dec. Dig. § 3.*]

2. ELECTIONS (§ 293*)—PROCEEDINGS—EVIDENCE.

At an election legally held for the election of township officers, there were two rival candidates for the office of township trustee, and during the course of reading and counting the ballots cast for that office disputes arose as to whether certain marked ballots should be counted for the respective candidates, and the judges of the election rejected all such marked ballots, and the count so made resulted in the election of one of the candidates. The disputed ballots were not sealed up and returned to proper authority, as provided in said section, and none of the ballots were burned, but were strung with all the other ballots, and locked up in the ballot box at the close of the election, which box containing all ballots cast was delivered to the township clerk as required by law. In an action in quo warranto brought by the defeated to contest the election of the successful candidate, the township clerk, still having custody of the ballot box, was called as a witness to testify, and produced said ballot box in open court. It was shown that the ballots so locked up in the box had not been changed, marked, or altered in any manner at any time after the box came into his custody. The court refused permission for the clerk to open said ballot box and exhibit to the court the ballots that had been marked and cast, and which had been in dispute before the judges of the election. These ballots were offered in evidence to prove, and accompanied with the statement that they would prove, that relator had received a substantial majority of the votes cast for trustee at said election. The evidence was excluded, and the court also excluded parol evidence offered to show how said disputed ballots had been marked for relator, and thereupon dismissed his petition.

Held, it was error to exclude the ballots tendered, and, having so ruled, it was error to exclude the parol evidence offered.

[Ed. Note.—For other cases, see Elections, Cent. Dig. §§ 288—296; Dec. Dig. § 293.*]

Error to Circuit Court, Jackson County.

Petition by Charles Conrad for quo warranto against Thomas W. Patterson. From

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes

a judgment dismissing the petition, relator brings error. Reversed and remanded for new trial.

On the 29th day of March, 1910, the plaintiff in error filed in the circuit court of Jackson county the following petition in quo warranto against defendant in error.

"For cause of action plaintiff says: That at all the times hereinafter mentioned he was and is a resident of, citizen of, and qualified voter in, Coal township, Jackson county, Ohio, and was at all times duly qualified to be voted for for any of the various township offices, and was and is duly qualified to hold the office of township trustee; that the defendant, Thomas W. Patterson, is and was at all said times also a resident, citizen of, and qualified voter in, said Coal township, and qualified under the laws to hold the office of township trustee; that at the township election holden on the 2d day of November, 1909, in said Coal township, Jackson county, Ohio, the relator was a candidate for the office of township trustee of said township on the Democratic ticket, it being regularly printed on the regular ballot; that the said Thomas W. Patterson was a candidate for the same office at the same election, his name being on the regular Republican ticket and in proper form; that there were besides relator as candidates for trustee upon the Democratic ticket the names of Joseph Genicks and Levi Wickline, their names appearing in the following order:

"Charles Conrad.

"Joseph Genicks.

"Levi Wickline.

"And that the Democratic ticket was the first ticket on the ballot. There were besides the defendant, Thomas W. Patterson, the following Republican candidates on the Republican ticket, to wit, H. A. Kisor and Joseph Rice; the names of the said Republican candidates appeared in the following order:

"H. A. Kisor.

"Thomas W. Patterson.

"Joseph Rice.

"That the judges, clerks, and proper officers of said election, after counting the ballots, found that Charles Conrad had received 307 votes, Joseph Genicks 320 votes, H. A. Kisor 333 votes, Thomas W. Patterson 309 votes, Levi Wickline 293 votes, and Joseph Rice 302 votes; that about 20 ballots, the exact number of which relator is unable to state, were designated and marked by the voters in the following way: An X was marked in the circle under the eagle of the Republican emblem in proper form, and on the same ballot an X was marked in the proper place in the square to the left of the name of Charles Conrad in all of said ballots, and no other X or other mark was made on said ballots in relation to voting for trustees, and said judges and clerks of election and election officers should have counted in favor of said Charles Conrad one vote on

each of the ballots marked as herein stated, but the said election officers failed and refused to credit the said Charles Conrad with any vote on any of the said ballots, and thereby deprived him in the count of at least 20 ballots, and the count thereby resulted in favor of said defendant, Thomas W. Patterson, instead of in favor of this relator. Under the premises this relator was the duly elected trustee of said township, and the defendant, Thomas W. Patterson, was defeated as trustee at said election, but the said election officers awarded the certificate of election to the said Thomas W. Patterson, who, on the first Monday in January, 1910, assumed the possession of said office of trustee and now holds the same, such possession and holding being both unlawful, and without any title or right thereto, and has usurped and is usurping the said office of trustee of said Coal township, and has usurped and is usurping the rights, privileges and functions of said office, to the prejudice and damage of the state of Ohio, Coal township, and the relator.

"Wherefore the relator prays the advice and judgment of the court in the premises, and due process of law against the said defendant; relator prays that the defendant be required to answer to the state of Ohio by what warrant he claims to have, use, and enjoy the liberties, privileges, and prerogatives, as aforesaid, of trustee of the township of Coal, and the relator prays that the said defendant may be ousted from said office of trustee, that he be declared to be the properly elected trustee, and that an order issue to said election officers of Coal township, Jackson county, Ohio, directing them to properly count said votes according to the order of the court, and declare the said relator duly elected as such trustee, and issue certificate of election therefor, and for all other relief to which the latter is entitled.

"Charles Conrad.

"By Joseph McGhee.

"Timothy S. Hogan."

The respondent filed the following answer: "Now comes the defendant, Thomas W. Patterson, and for answer to the petition of plaintiff says that he denies that there were 20 ballots, or any other number, that were marked as described in the said petition by the voters at said election, which were not properly counted by the said election officers, and denies that any such ballots so described were not counted for the said relator. He further denies that said Charles Conrad was or is the duly elected trustee of said township of Coal, or that this defendant in any way usurps said office of township trustee, and further denies that he, the said defendant, was defeated for the office of trustee at said election. He further says that if it should be true that such votes were cast and not counted for the said Charles Conrad, as alleged, that at said election there were as many votes cast for him

with the cross under the Democratic emblem and a cross made before his name on the Republican ticket, with no other mark or designation thereon with reference to the office of township trustee that were not counted for him by said board, as there were cast and not counted for said Charles Conrad, and that such votes should have been counted for him by said election officers. Wherefore defendant prays that the petition of the plaintiff may be dismissed, and for his costs." The reply denies all the affirmative allegations of the answer.

The case was heard on the issues joined, and the circuit court excluded nearly all the important evidence offered by the relator, and on the evidence admitted found against him and dismissed his petition. Motion for new trial was overruled. A bill of exceptions was prepared and allowed, which contains the questions which arose on the introduction and competency of the evidence, and it, with a petition in error, is filed in this court for review. The questions involving the competency of evidence offered are stated fully in the opinion.

Joseph McGhee and T. S. Hogan, Atty. Gen., for plaintiff in error. E. C. Powell and A. E. Jacobs, for defendant in error.

PRICE, J. (after stating the facts as above). As a summary of the facts alleged in the petition, it may be stated that at the election held on the 2d day of November, 1909, in Coal township, Jackson county, the relator, Charles Conrad, was a candidate for the office of trustee of said township on the Democratic ticket, and the respondent, Thomas W. Patterson, was a candidate for same office on the Republican ticket. The proper officers holding the election counted the ballots, and found by their method of counting that Conrad had received 307 votes for trustee, and Patterson 309 votes.

It is alleged that about 20 ballots were designated and marked by the voters in the following way: An X was marked in the circle under the eagle, the Republican emblem, in proper form, and on the same ballot (Australian) an X was marked in the proper place in the square to the left of the name of Charles Conrad, on all of said 20 ballots or more, and no other X or other mark was made on said ballots in relation to township trustee, and that the judges and clerks of the election should have counted in favor of Conrad one vote on each of said ballots so marked, but the election officers failed and refused to credit or count for him any vote on said 20 ballots, and thereby deprived him of at least 20 votes, and thereby the count resulted in favor of respondent, Patterson, and the certificate of election was awarded him. He assumed possession of the office of trustee and held the same when the petition was filed in the circuit court.

The respondent denies the above claim, and avers that if it be true that said votes

were cast and not counted for Conrad as alleged that at said election there were as many votes cast for him with the cross under the Democratic emblem, and a cross placed before his name, that were not counted for him by said election officers, as there were cast and not counted for Conrad, which votes should have been counted for respondent. The relator replies that not over five ballots of the kind mentioned in the answer were cast for Patterson and not counted in his favor.

One of the judges of election, Mr. Griffith, testified at the hearing in circuit court that during election day at the polls there was dispute and discussion between members of the board over counting of ballots for Mr. Conrad and Mr. Patterson, and when asked if the ballots in dispute were preserved said they were all preserved, but that he had requested the presiding judge to burn them, but it was not done; that Mr. Shook, one of the election officers, had the string of all ballots and threw them in the ballot box and locked them up. This box was left in the townhouse that night. The relator, Conrad, was not satisfied with the proceedings concerning disputed ballots, and asked this election judge the privilege of an inspection of them, and in company of the witness, one of the judges at that election, a day or two after the election, they repaired to the townhouse, opened the box, and made partial inspection of the ballots; that no changes were made of the same to knowledge of witness. Witness was then asked if he made any changes. The defendant objected, and the objection was sustained. The evidence offered was to prove by the witness that he made no change in any ballot, and saw none made by Conrad. Exception was taken to the ruling of the court.

Thurman McGhee was called as a witness, who testified that he was an inspector of ballots at said election for the Democratic party; that he was present election night, when the ballots were counted by the clerks and judges; that disputes arose as to how certain ballots should be counted in relation to Conrad and also in relation to Patterson. The question first arose as to the claims for Conrad. Witness was asked how the ballots were marked that Conrad claimed. Objection was made and sustained. The evidence offered was to prove by the witness that from 15 to 20 were marked as claimed in the petition, and were not counted for Conrad, and that not to exceed 5 were cast for Patterson, as described in his answer, that were not counted for him, and that all other ballots were counted as cast without any dispute.

The relator, Conrad, was also a witness, and testified that he was a candidate for trustee, and that he with witness Griffith, one of the election judges, saw the election box the next morning after the election when it was opened—was asked how many of the

ballots he handled. He was not permitted to answer, and the evidence desired was that he had his hand on only one ballot. He was next asked if he made any change in any of the ballots, by mark or alteration. The objection to this question was sustained. The proof offered was that witness had made no changes or alterations in any ballot. He then testified that the box was then locked up and turned over to Mr. Jenkins, the clerk.

Conrad further testified that he was present when the count was made, and that disputes arose over how certain ballots should be counted as to himself and Patterson; that there were 20 votes for him they did not count. He was then asked how these 20 ballots were designated. Objection sustained and exception. The proof offered was that they were marked with the X in the circle under the eagle, and the X in the proper place to the left of his own name. And witness was not permitted to say whether the 20 ballots were counted in his favor or ruled out.

Thomas Jenkins testified he was not a member of the election board, but was township clerk, and, as such, custodian of the ballot box, which was left in the office of the township house and the key delivered to him. This election box came to his care the evening of the election. The ballot box was locked and the building locked. He had custody of the box always after that time, and had it in court during the trial. It was still locked and the key in his possession. Counsel for relator then asked the court that witness be permitted to open the box and produce the marked ballots in reference to Conrad and Patterson. Objection was made by counsel for Patterson, and it was sustained.

The proof offered was stated as follows: "We wish the record to show that the ballot box which the witness has had possession of is the ballot box that was used at this election, and that it contains the official ballots. It is admitted that they were all counted ballots, and the record will show that it contains ballots as to candidates other than the relator and defendant, and that there are from 15 to 20 ballots in the box that are marked with the X in the circle under the eagle, with the X at the left of the name of Conrad in the proper place, and that there are not to exceed five of the ballots in the box with the X in the circle under the rooster, with the X at the proper place at the left of the name of the defendant, Mr. Patterson; and we desire to offer all the ballots separately—the ballots that are marked as alleged in the petition, and that if permitted the party would show that Conrad should have been credited with 15 more votes, and Patterson not to exceed 5." Objection to this tendered evidence was sustained, to which relator excepted.

The above is the material evidence introduced on the trial, and a statement of what

was excluded by the court; and hence the case turns on the competency of the offered evidence which was excluded. It is evident that if the excluded evidence should have been received Conrad had a majority of the votes cast for trustee as between him and Patterson, and should have the certificate to that effect.

The Australian ballot law has been a boon to the state, in that it has provided many safeguards for the rights of the electors, in having a secret ballot, intended to be free from interference, persuasion, or intimidation by bystanders or other persons, as well as protection against any influence which any officer of the election board might desire to exert. For many years this law has been in force, which, with some amendments since its adoption in this state, has acceptably served our people and afforded a peaceable and orderly method of conducting our state, county, township, and municipal elections.

[1] As to contesting elections, statutory means of making such contest are provided as to the election of state, county, and congressional officers, but we find none prescribing the mode of contest of township trustees, and therefore the remedy by quo warranto is proper and appropriate in the present case.

[2] The evidence discloses that the election officers did not follow the directions of section 2966—39, Revised Statutes (section 5090, General Code), and burn the ballots read and counted, but all were preserved, including disputed ballots, and they were placed in the election box, which was locked, and, with the key, delivered to its proper custodian, the township clerk, who had charge of it and brought it into court on the trial of the case in the court below. The ballots it contained were offered in evidence, but excluded. The evidence tends to prove that the box had not been opened, after being locked and delivered by the election officers to the township clerk election night, save when it was opened the next morning by one of the election judges in the presence of one of the election inspectors and the relator, and that no changes, marks, or alterations were made on the ballots by any one, and, while the proceeding was irregular and perhaps illegal, it is not claimed that any change in the ballot had been accomplished or attempted. We therefore assume that the ballots in the box placed in custody of the township clerk election night were the same that it contained when brought into court.

It is said that the lower court held that, while the election officers did not burn the ballots, they were legally dead—legally destroyed, because they should have been destroyed. But they had no right to burn ballots that were in contest or disputed, if the judges entertained any doubt as to their legality. If such doubt was entertained, it was their duty under the section above indicated to seal them up and return them to the proper au-

thority. If they had no such doubt, but assigned them to the flames, what then? The aggrieved candidate would have to resort to parol evidence to establish his right to the office. However, we need not pursue this thought.

This box contained the original ballots—all of them, disputed and undisputed. They were the best evidence of how the electors had voted—the very best, where it is shown, as in this case, that they had not been tampered with. If they were to be considered as legally dead, then it was error to exclude the parol evidence as to the contents of the disputed ballots. The electors are not to be deprived of the fruits of their votes, when lawfully cast, if the secondary evidence can establish their rights. But were these ballots legally dead, or legally burned? They were dead as to use for voting purposes, but they were alive as to evidence of what they contained when the voters cast them. Surely the disputed or contested ballots should not be considered dead, because the judges of election had no doubt, or difference of opinion, as to their legality. The judges had no right to legally extinguish such ballots, merely because they were unanimous in opinion that they ought not be counted. These ballots were dead in the sense that they could not be voted again, but they were *alive* to be counted, if the judges wrongfully rejected them. A corpse is a proper subject of an inquest and a post mortem examination of the dead body frequently furnishes most valuable testimony. So, here, a post mortem examination of these ballots might have clearly established relator's title to the office. If actually destroyed, parol evidence is competent to show how they should be counted when a contest is on in a court of law.

It is suggested that the remedy in cases like this is provided by said section 2966—39, Revised Statutes, now section 5090 of the General Code. We have just left a consideration of that section. According to its last paragraph, when the count of ballots is completed and the result proclaimed, it is said: "When all these requirements are complied with the judges shall, in the presence of the clerks and inspectors, destroy by burning the ballots so read and counted; provided, however, if there are any ballots cast and counted or left uncounted concerning the legality of which there is any doubt or difference of opinion in the minds of the judges of election, said ballots shall not be destroyed, but sealed up and returned to the deputy state supervisor with the returns of the election, for such judicial or other investigation as may be necessary, with a true statement as to whether they have or have not been counted, and if counted, what part and for whom." We are of opinion this so-called remedy is not *exclusive*, and should not be, because of the very incomplete showing or

statement required, and it cannot apply here, because the disputed ballots were not sealed up and returned to any one. On the contrary, they were strung and put in the ballot box with the other ballots, as already stated.

In rejecting the evidence offered by the relator, the circuit court erred. If it had been admitted and possessed the probative force claimed in the offer of proof, the relator was elected to the office of trustee, and the proper order of ouster and induction into the office would have followed.

The judgment of the circuit court is reversed, and cause remanded for new trial and further proceedings according to law.

Judgment reversed.

SPEAR, C. J., and DAVIS, SHAUCK, JOHNSON, and DONAHUE, JJ., concur.

(200 Mass. 319)

BATT et al. v. STEVENS et al.

(Supreme Judicial Court of Massachusetts.
Suffolk. June 20, 1911.)

JUDGMENT (§ 688*)—PERSONS CONCLUDED—
"INCORPORATED WITHIN THE COMMON-
WEALTH."

The case of a bill by executors for instructions, alleging that Bowdoin College was a corporation created by the commonwealth of Massachusetts by act of 1794 (St. 1794, c. 12), and that it was an educational and charitable institution, which should be exempt from taxation under St. 1891, c. 425 (Rev. Laws, c. 15), having involved the question whether a legacy given by a resident of such commonwealth to such college in Maine was exempt from taxation under such statute, the decision therein, holding a tax was due, necessarily decided that the college was not an institution "incorporated within this commonwealth," within the meaning of the statute, and so is decisive of the question in a subsequent such case, to which the college is a party, as it was not in the first case.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1211; Dec. Dig. § 688.*]

Case Reserved from Supreme Judicial Court, Suffolk County.

Petition of Charles R. Batt and others, executors of John C. Coombs, deceased, against Elmer A. Stevens, Treasurer and Receiver General of the commonwealth, Bowdoin College, and Viola V. Coombs, for instructions relative to payment of a legacy tax. The case was appealed, from the decree of the probate court in favor of the tax, to the Supreme Judicial Court, which reserved it for the full court. Affirmed.

Edw. P. Payson, for petitioners. James M. Swift, Atty. Gen., and Fred T. Field, Asst. Atty. Gen., for respondent Treasurer and Receiver General. Hiram Tuell, for respondent Coombs. William P. Thompson, for respondent Bowdoin College.

MORTON, J. We do not see why, notwithstanding the elaborate arguments that have been addressed to us by the executors and

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

by Bowdoin College, the case of *Rice v. Bradford*, 180 Mass. 545, 63 N. E. 7, is not decisive of the case at bar. It is true that Bowdoin College was not a party to that suit and that the effect of the words "incorporated within this commonwealth" in R. L. c. 12, § 5, cl. 3, was not the subject of extended examination in the opinion that was rendered. But the case itself involved the precise question now presented, namely, whether a legacy, given by a resident of this state to the President and Fellows of Bowdoin College in the state of Maine, was exempt from taxation under St. 1891, c. 425, now embodied in R. L. c. 15. It was a case of a bill for instructions by the executor of the will, and the bill alleged that Bowdoin College was a corporation created by this commonwealth, by the act of June 24, 1794 (St. 1794, c. 12), and that it was an educational and charitable institution which should be exempt from taxation under St. 1891, c. 425. The Treasurer and Receiver General answered, claiming that a tax was due and the court so held. Manifestly if the college was an institution incorporated within this commonwealth within the meaning of the statute the legacy was exempt from taxation, otherwise not, and it necessarily must have been decided in that case, in order to render the legacy taxable, that the college was not an institution incorporated within this commonwealth within the meaning of the statute. If the question were an open one we should have no doubt that the legacy in question was subject to a tax, and that although the college was incorporated by this commonwealth before the passage of the separation act, so called (St. 1819, c. 36), and its charter cannot be modified or changed by the state of Maine, nevertheless after the passage of the act it ceased to be an institution incorporated within this commonwealth within the meaning of R. S. 1836, c. 7, § 5, cl. 2, and its subsequent reenactments. It is not necessary however to go into the consideration of that question now, and what we have said is more for the purpose of preventing a possible implication that if it were not for the case of *Rice v. Bradford*, supra, there might have been some doubt about the tax.

Decree affirmed.

(209 Mass. 270)

McKAHAN et al. v. AMERICAN EXPRESS CO.

(Supreme Judicial Court of Massachusetts.
Suffolk. June 19, 1911.)

1. CARRIERS (§ 156*)—CARRIAGE OF GOODS—DEVIATION—LIMITATION OF LIABILITY.

Deviation by a carrier from the route described in the contract of shipment makes him liable as an insurer of the goods shipped, though the contract of shipment exempts him from lia-

bility under the circumstances under which the goods were lost or damaged.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. § 700½; Dec. Dig. § 156.*]

2. CARRIERS (§ 156*)—CARRIAGE OF GOODS—BREACH OF CONTRACT.

Where a carrier departs from the method or manner of transportation agreed upon in the contract of shipment, it becomes liable as an insurer, though the contract may exempt it from liability under circumstances under which the goods were actually injured.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 697-719; Dec. Dig. § 156.*]

3. CARRIERS (§ 218*)—CARRIAGE OF LIVE STOCK—CONTRACT—DEVIATION—MANNER OF SHIPPING.

Where a contract for shipment of horses limited the value of the horses to \$75 each, in consideration for choice of alternative rates, and the carrier agreed to certain conditions, including carriage of necessary attendants to accompany the animals, but had the car load of horses transferred to a train on which the attendant could not accompany them, the shipper was entitled to rescind the contract and recover damages independently thereon.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 940-949; Dec. Dig. § 218.*]

4. CARRIERS (§ 229*)—DAMAGE TO LIVE STOCK.

Where a carrier departs from the method of shipment of live stock specified in the contract, and the shipper seeks to recover damages done to the horses, and not the value of them, even if trover is the only remedy, the amount recoverable is the value of the horses when converted, less their value when redelivered to plaintiff.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. § 964; Dec. Dig. § 229.*]

Report from Superior Court, Suffolk County; Robert O. Harris, Judge.

Action by Frank McKahan and others against the American Express Company. Reported from the superior court. Judgment for plaintiff.

Hale & Dickerman and E. R. Anderson, for plaintiffs. A. M. Pinkham, for defendant.

LORING, J. This is an action for damages to horses carried by the defendant from La Fontaine, Ind., to Boston in this commonwealth. The plaintiff had signed an agreement extending to 36 hours the time during which the horses could be carried without unloading. But they were carried for 44 hours and the damage done to them was caused by that. The defendant admitted its liability and defended on the ground that by the terms of its contract with the plaintiff it was liable for \$12.50 only.

It is stated on the face of the contract that the shipper was offered alternative rates to be charged for the carriage of the horses proportioned to their value (such value to be fixed and declared by the shipper), which rates were stated in the tariff also stated on the face of the contract. It is further stated on the face of the contract that for the purpose of availing himself of the alternative rates to be charged for the

carriage of the horses here in question the plaintiff had declared the value of them to be \$75 each. Not only did it appear that the rate was based on each horse being valued at \$75, but in addition the following clause was contained in the agreement: "The shipper hereby releases and discharges the express company from all liability for delay, injuries to or loss of said animals from any cause whatever, unless such delay, injury or loss shall be caused by the negligence of the agents or employees of the express company, and in such event the express company shall be liable only to the extent of actual damage to the animal or animals injured, which shall in no event exceed the sum herein declared by the shipper to be the value thereof; and for the purpose of ascertaining or assessing such damage, whether the same be a total or a partial loss, the value of said animals as herein declared by the shipper shall be conclusively deemed to be the true value thereof." It was provided by the contract that "the shipper agrees * * * to cause the necessary attendants to accompany and take charge of said animals, the express company furnishing free transportation for the attendants who have signed the attendant's contract appended hereto."

When the car containing the horses in question arrived at Buffalo the agent of the express company told the attendant that the train on which the horses naturally would go to Albany was "heavily loaded," and that they wished to put the car on the "Limited" which was "running light that day." The defendant's agent also told the attendant that if that was done he, the attendant, would have to pay a fare to Albany and that at Albany the car containing the horses would be put on the usual train for Boston. The attendant said that he would not pay the extra fare and insisted upon the car going on the usual train. Against his protest and without his knowledge the car was put on the "Limited" train and he took the usual train. The usual train was late in getting into Albany and had not arrived when the time came for the train from Albany to Boston to start. Although the attendant had not arrived the horses were sent forward on the usual train to Boston and arrived at Boston in the night at an hour not stated in the report. The attendant arrived in Boston at about 5 o'clock in the morning and found the horses still in the car. He succeeded in having them unloaded between 7 and 8 o'clock. Although the report does not state the hour when the horses arrived, it does appear that they were unloaded 8 hours after the expiration of the 36 hours to which the plaintiff had extended the time for their carriage without unloading. The plaintiffs' evidence showed "that the cause of the injury to the horses was their detention in the cars without being fed or watered from the time they left La Fontaine,

Ind., between 11 and 12 o'clock on Saturday until the following Monday morning," and this must be taken to have been admitted by the defendant's admission of its liability.

[1] It is settled as matter of authority that a deviation by a carrier from the route described in a contract of shipment makes him liable as an insurer of the goods shipped although the contract of shipment exempts him from liability under the circumstances (apart from the deviation) under which the goods were lost or damaged. *Waltham Manuf. Co. v. New York & Texas Steamship Co.*, 204 Mass. 253, 90 N. E. 550; *Davis v. Garrett*, 6 Bing. 716; *Joseph Thorley Co., Ltd. v. Orchis Steamship Co., Ltd.* [1907] 1 K. B. 660; *Hosetter v. Park*, 137 U. S. 30, 40, 11 Sup. Ct. 1, 34 L. Ed. 568; *Constable v. National Steamship Co.*, 154 U. S. 51, 66, 14 Sup. Ct. 1062, 38 L. Ed. 903; *Maghee v. Camden & Amboy R. R.*, 45 N. Y. 514, 6 Am. Rep. 124; *Hand v. Baynes*, 4 Whart. (Pa.) 204, 33 Am. Dec. 54; *Crosby v. Fitch*, 12 Conn. 410, 31 Am. Dec. 745; *Georgia R. R. v. Cole*, 68 Ga. 623; *Phillips v. Brigham*, 26 Ga. 617, 71 Am. Dec. 237.

[2] It is further settled as matter of authority that the same is true where there has been a departure from the method (including mode and manner) of transportation agreed upon. In *Goodrich v. Thompson*, 44 N. Y. 324, another steamship was substituted for the one agreed upon. See, also, in this connection, *Robertson v. National Steamship Co.*, 139 N. Y. 416, 419, 84 N. E. 1053; *Dunseth v. Wade*, 2 Scam. (Ill.) 285, 289. The goods in question in *Robinson v. Merchants' Despatch Transportation Co.*, 45 Iowa, 470, and in *Stewart v. Merchants' Despatch Transportation Co.*, 47, Iowa, 229, 29 Am. Rep. 476, were shipped to be carried through in the same car, but were unloaded and put into a warehouse during transit and there burned. The carrier was held liable although by the contract he was exempt from loss by fire. *Galveston, etc., Ry. v. Allison*, 59 Tex. 193, was the case of a similar shipment. There the goods shipped were melons injured by heat and decay from which the contract exempted the carrier from liability. But the melons had been transferred into other cars, and for that reason the carrier was held liable. In *Merrick v. Webster*, 3 Mich. 268, the goods were shipped to be carried "by sail on the lake," under a contract which exempted the carrier from loss from all dangers of the lakes. The goods were carried on a steamship, were lost in a collision and the carrier was held liable. In *Hunnewell v. Taber*, 2 Spr. 1, Fed. Cas. No. 6,880, the goods shipped consisted of oil in casks. The carrier agreed that the oil was "to be wet twice a week," and the shipper agreed that the carrier should "not [be] accountable for leakage." The oil not having been wet it was held

that he was liable. For a similar case see *Grand Trunk Ry. v. Fitzgerald*, 5 Canada, S. C. 208. And see in this connection *Hastings v. Pepper*, 11 Pick. (Mass.) 41.

This principle has been applied in England in two cases (*Sleat v. Flagg*, 5 B. & Ald. 342; *Balian v. Joly, Victoria & Co.*, 6 T. L. R. 345) to make a carrier liable for the actual value of the goods shipped in spite of a stipulation in his contract with the shipper that the value should not be taken to exceed a sum therein named. *Sleat v. Flagg* was a case where the goods were shipped to go by one mail coach and in fact were sent by another. *Balian v. Joly, Victoria & Co.* was a case where goods shipped for carriage from Lagos in Thessaly to London in the *Mabel* were in fact carried to Smyrna in the *Mabel*, there transferred to a Cunard steamship, carried in her to Liverpool and from Liverpool to London by rail.

The simplest class of cases in which it has been held that a deviation from route or a departure from method of transportation prevents the carrier from setting up a clause in the contract between him and the shipper exempting him from liability under the circumstances under which the goods were lost or damaged, are those where the deviation or departure was the proximate cause of the loss. Such was the case in *Hand v. Baynes*, 4 Whart. (Pa.) 204, 33 Am. Dec. 54, where the goods were shipped from Philadelphia to Baltimore by canal and were lost at sea outside the Capes; and in *Hunnewell v. Taber*, 2 Sprague, 1, Fed. Cas. No. 6,880, where the casks of oil leaked because not wet down as agreed. The principle has also been applied in cases where it was not possible to say that the deviation or departure was the proximate cause of the loss but the loss occurred during the continuance of the deviation or departure. *Sleat v. Flagg*, 5 B. & Ald. 342, is an example of a case of this class. But the principle was applied in *Joseph Thorley Co. v. Orchis Steamship Co.*, [1907] 1 K. B. 660, in a case where the deviation was not the proximate cause of the damage done to the goods shipped and where it did not occur while the deviation was in effect. In that case the deviation had come to an end before the damage was done and there was no connection between the deviation and the damage. The goods in question in *Joseph Thorley Co. v. Orchis Steamship Co.* were locust beans carried in the defendant's steamer from Limassol to London. While the beans were being unloaded in London they were damaged by being mixed with a poisonous earth, called "terra umber," which had been carried in the steamship as ballast. By the terms of the bill of lading the defendant was exempted from all liability for negligence (*inter alia*) in unloading the beans. England is a jurisdiction in which such a contract is valid, and it was assumed that the contract in question in that case was valid. But the defendant was held lia-

ble because in proceeding from Limassol to London there had been a deviation from the route described in the bill of lading. The route described was "from Limassol to London, while the steamship in fact proceeded from Limassol to a port in Asia Minor, thence to a place in Palestine, thence to Malta, and from there to London. The case was decided on the principle suggested by the Master of the Rolls (Lord Esher) in *Balian v. Joly, Victoria & Co.*, 6 T. L. R. 345. In that case Lord Esher, after stating that it was not necessary to lay down all the consequences of a deviation by a carrier from the voyage contracted for, said: "It might be that the true view was that the deviation made the voyage actually carried out a different voyage from beginning to end from that to which the bill of lading applied, and that therefore the whole bill of lading was gone. If that was so it might be that the fact of shipment would give certain rights to the shipowner and to the shipper. It might be that what was agreed upon before the bill of lading would remain. Therefore the freight would remain. The shipowner as a carrier would have a lien for the freight. It was not necessary, however, to say whether that was so, though he inclined to take that view." *Joseph Thorley Co. v. Orchis Steamship Co.* was decided on the principle established by the case of *Balian v. Joly, Victoria & Co.*, 6 T. L. R. 345. It is not altogether clear from the judgments delivered in that case by Collins, M. R., and Fletcher Moulton, L. J., whether they intended to hold that the deviation had the effect of displacing the whole contract or that the carrier had incapacitated himself from setting up the exemption clause because the duty not to deviate was a condition precedent to that clause as a contract by the shipper. The latter view is supported by the decision in *Pavitt v. Lehigh Valley Railroad*, 153 Pa. 302, 25 Atl. 1107. In that case it was held that the carrier could set up a failure by the plaintiff to make a claim within the time specified in the bill of lading, although there had been a deviation.

[3] But we are of opinion that the principle put forward by Lord Esher in *Balian v. Joly, Victoria & Co.* is the true one and that the effect of a deviation is to do away with the express contract altogether—at least at the election of the shipper. In other words the breach of the express contract of shipment (which takes place when there is a deviation from route or departure from mode, method or manner of transportation) is such a breach on the part of the carrier that the shipper can rescind the express contract of shipment on the principle acted upon in *Amos v. Oakley*, 131 Mass. 413, *Brown v. Woodbury*, 183 Mass. 279, 67 N. E. 327, and *Long v. Athol*, 196 Mass. 497, 82 N. E. 665, 17 L. R. A. (N. S.) 96.

It is not necessary to decide in the case

at bar on what ground the shipper is to recover when the express contract has been thus wholly displaced. It was suggested by Lord Esher in *Balian v. Joly, Victoria & Co.* that in such a case the shipper recovered on an implied contract arising out of the fact of shipment. On the other hand it was suggested by Holroyd, J., in *Sleat v. Flagg*, 5 B. & Ald. 342, 349, that in such a case the carrier had been guilty of a conversion of the goods and was liable in trover, but that that was not his only remedy. Decisions to the effect that in such a case the carrier is liable in trover for a conversion were made in *Georgia Railroad v. Cole*, 68 Ga. 623, and *Phillips v. Brigham*, 26 Ga. 617, 71 Am. Dec. 237. The decision in the last case was put on the authority of *Wheelock v. Wheelwright*, 5 Mass. 104, where it was held that if the defendant hires a horse to go to A. and drives him to B., he is guilty of conversion. The defendant has not put forward the claim that if the whole original contract in the case at bar was displaced by the departure from the method of transportation agreed upon, the plaintiff ought to pay the full rate and not the alternative rate based upon each horse being valued at \$75. Therefore it is not necessary to decide this question.

In the case at bar the shipper's agreement that the horses were to be valued at \$75 each was plainly based upon the risks incident to the transportation agreed upon, namely, transportation of the horses in care of an attendant. The breach by the carrier of its agreement to transport the horses in the care of an attendant was the proximate cause of the loss which occurred; and this case could be decided on the ground that it could not have been the intention of the parties to the original contract of shipment that the shipper should be held to his agreement as to the sum at which the horses were to be taken in case the carrier did not transport them in care of an attendant. But we are of opinion that the rule as to deviation from route and departure from method of transportation rests upon the broader ground that in such case the original contract is wholly displaced, at least at the election of the shipper, and we prefer to place our decision on that doctrine.

[4] We construe the report to submit the question to us without regard to the pleadings. The plaintiff seeks to recover damage done to the horses and not the value of them. Even if trover is the shipper's only remedy the amount which the plaintiff would be entitled to in the case at bar is the value of the horses when converted less their value when redelivered to the plaintiff; and the same result is reached if a new contract is brought into being implied from the fact of shipment.

By the terms of the report the entry must be: Judgment for the plaintiff for \$501, with interest from the date of the writ.

So ordered.

HALL v. HALL et al.

(Supreme Judicial Court of Massachusetts.
Suffolk June 21, 1911.)

1. WILLS (§ 440*)—CONSTRUCTION—INTENTION OF TESTATOR.

The cardinal rule for the construction of wills, and to which all other rules are subsidiary, is to determine testator's intent from the language used.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 956; Dec. Dig. § 440.*]

2. WILLS (§ 458*)—MEANING OF WORDS.

Words of the same general significance used in a will are commonly used in the same rather than in a varying sense.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 977; Dec. Dig. § 458.*]

3. WILLS (§ 450*)—CONSTRUCTION—EFFECT OF LANGUAGE.

The court, in construing a will, should adopt the construction which gives effect to all the language of the will, instead of one which treats some language as superfluous.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 966; Dec. Dig. § 450.*]

4. WILLS (§ 524*)—CONSTRUCTION—TIME OF ASCERTAINMENT OF CLASS—"THEN LIVING"—"THEN REMAINING"—"PREVIOUS DECEASE."

Testatrix devised a residuary estate in trust to pay the income to her brothers for life and survivor, with remainder to the issue of one of them, and provided that, on the death of the brothers leaving no issue "then living," the "then remaining" property should be divided into three parts, one part to be divided equally between three cousins, the children of an uncle, one part to be divided equally between two cousins, the children of an aunt, and one part to an uncle, and, in case of the "previous decease" of either of the cousins or of the uncle leaving issue, the share of the deceased should be paid to such issue by right of representation, and, if there were no issue "then living," the share should be divided equally among the survivors of the cousins and the uncle, or the whole to the survivor of them. The last surviving brother, both of whom died without issue, survived a cousin, a child of the aunt, who died leaving no issue, and the uncle leaving two daughters. Held, that the words "then living," "then remaining," and "previous decease" referred to the period of distribution, and testatrix intended that the survivors should be ascertained at the period of distribution, and the share of the deceased cousin must be divided equally between the four surviving cousins, to the exclusion of the children of the deceased uncle.

[Ed. Note.—For other cases, see Wills, Cent. Dig. 1116-1127; Dec. Dig. § 524.*]

For other definitions, see Words and Phrases, vol. 8, pp. 6941-6946, 7815.]

Report from Supreme Judicial Court, Suffolk County.

Suit by William S. Hall, trustee of Anna H. Parker, deceased, against Joseph B. Hall and others, for the construction of the will of deceased. The court reported the case for the consideration and decision of the full court. Decree entered.

F. Rackemann, for J. B. Hall and others.
John Abbott, for Minna B. Hall and others.

RUGG, J. The testatrix, a spinster, by her will gave the residue of her estate in

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

rust to pay the income to her brothers for life and the survivor with remainder to the issue of one of them. Both have died without issue. The clause of her will operative in this contingency is: "Upon the death of both of my said brothers and the said J. Brooks leaving no issue then living, I give, devise and bequeath all the remaining trust property and estate with any accumulations in three equal portions, one portion to be divided equally between my cousins Joseph B., Maria H., and Susan B. Hall, children of my uncle Wm. P. Hall, one portion to be divided equally between my cousins, Herbert H. and George Dexter Eustis, children of my aunt, Carolina B. Eustis, and one portion to my uncle, the said Thomas B. Hall, and to them, their heirs and assigns respectively forever. In case of the previous decease of either of my said cousins, or of my uncle Thomas B. Hall leaving issue then living, I direct that the share of such deceased cousin, or of my said deceased uncle, be paid over in equal portions, by right of representation, to such issue. If there be no such issue then living, such share shall be divided equally among the survivors of my said cousins and said uncle or the whole to be paid over to the survivor of them."

The last surviving brother died in 1910. The cousin, Herbert H. Eustis, died in February, 1903, leaving no issue, and all the other cousins named were alive at the termination of the life estates. The uncle, Thomas B. Hall, died in March, 1903, leaving two daughters who are still living, and who were in mature years when the will was executed. The question is as to the disposition of the share, to which the cousin, Herbert H. Eustis, would have been entitled, had he lived till after the death of the brothers. The conflicting contentions are on the one side that it is to be divided into fourths among the surviving cousins named in the will, and on the other side that it is to be divided into fifths, and one fifth given to each of the cousins, and the other fifth to the two daughters of the deceased uncle, Thomas B. Hall. The controversy relates wholly to the point of time when the gift over on the decease of a cousin takes effect, whether at the death of the cousin or at the termination of the life estates.

[1] It is urged in favor of the division into fifths that upon the other contention circumstances are conceivable which might have resulted in partial intestacy (though this is a remote contingency in view of the number and age of the cousins), and that it is a general rule that the law favors the vesting of interests at the earliest moment possible. It is also said that the daughters of the deceased uncle bore the same degree of relationship to the testatrix as the other secondary beneficiaries aside from the uncle, and it would be natural in the absence of a contrary intention to put cousins on an

equal footing. These suggestions are all entitled to weight. But as has been said repeatedly the cardinal rule for the interpretation of wills, to which all others are subsidiary, is to determine from all the language used by the testator what is the intent expressed. We proceed to examine the decisive language chosen by this testatrix.

[2-4] The words "then living," applied to the issue of the brother, J. Brooks, in the first sentence of the clause quoted, must refer to the termination of the life estate, as do also the words "then remaining" in the same sentence. The words "previous decease" in the second sentence mean a decease occurring previous to the termination of the life estate. About these there can be no dispute. Thus, three times by three different phrases reference is made to a single point of time, which is the period of distribution. It is natural that the words "then living" which follow immediately touching the issue of a deceased cousin or uncle should refer to the same point of time rather than to a different one. Words of the same general significance are commonly used in the same rather than in a varying sense in the same instrument. Moreover, the words are tautological and have no force unless they refer to the period of distribution. One cannot die leaving issue unless such issue is then living. A construction which gives effect to all the language used is preferred to one which treats some as superfluous. The final sentence quoted provides for the contingency of the decease of one or more of the beneficiaries named without issue. In this event she gives the share to the survivors or the whole to the survivor. The whole of the residuum could hardly go to one survivor if the share of each as they severally deceased should vest from time to time in all the survivors. This language bears a slight indication that the words "survivors" and "survivor" refer to the period of distribution, and not to that of each decease. Then too there is an omission in this sentence of the provision found in the preceding one that the issue shall take by right of representation. This is a further circumstance looking to the same result. There are also no words of present gift to the survivors or survivor, which has been regarded sometimes as indicative of an intent that the interest should not vest until the period of distribution arrives. No one of these considerations standing alone would be decisive, but combined they appear to overbalance the arguments to the contrary, and by a slight preponderance they lead to the conclusion that the point of time intended by the testatrix as that when the survivors or survivor should be ascertained was the period of distribution.

A decree should be entered directing the trustees to divide the share which would have fallen to Herbert H. Eustis equally be-

tween Joseph B. Hall, Maria H. Hall, Susan B. Horton and George D. Eustis.

So ordered.

(209 Mass. 295)

ROBINSON et al. v. RICHARDS.

(Supreme Judicial Court of Massachusetts.
Suffolk. June 19, 1911.)

DEEDS (§ 70*)—VALIDITY—FRAUD.

Where a grantor's deed was executed in reliance on the false representations of an agent that he was interested in the matter solely for a certain party, for whom he was acting, when in fact he was acting for himself and a different party, in whose name the deed was taken, this constitutes such a fraud upon the grantor as to entitle him to avoid the deed.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 165-182; Dec. Dig. § 70.*]

Exceptions from Land Court, Suffolk County.

Petition by James E. Robinson and another to register title to land, contested by Agnes F. Richards. There was a decision in favor of respondent, and petitioners excepted. Exceptions overruled.

C. W. Cushing, for petitioners. Edward J. Fegan, for respondent.

MORTON, J. This is a petition brought in the land court to register the title to a parcel of land in Dorchester formerly belonging to one Agnes F. Richards, who died during the pendency of the proceedings, and whose daughter, her only heir at law, was thereupon made party respondent in her place. The daughter also died, and was succeeded by her husband as her statutory heir, and he is now the party defending. We shall speak of Mrs. Richards as the respondent. The answer set up title in the respondent, and also alleged that a deed from her to the petitioner Robinson, which was relied on, had been procured from her by fraud and deceit on the part of Stark, the other petitioner, and asked to have it declared null and void. The land court found in favor of the petitioner. The respondent appealed to the superior court. Issues, in the form of questions, were framed in the land court and were submitted to a jury in the superior court. The jury answered the questions in favor of the respondent. Thereupon the issues, with the answers thereto, were returned into the land court, and upon a further hearing that court ruled that upon the uncontroverted facts found by it at the previous hearing and upon the facts found by the jury the respondent was entitled to have the deed avoided on the ground that it was procured by false representations, and ordered the petition to be dismissed. The petitioners duly excepted to the ruling and the exception thus taken presents the only question that is before us in relation to the case. We think that the ruling was right.

There was no dispute that the title was originally in Mrs. Richards. In 1875 she had executed a mortgage on it to one Wall for \$1,000, and in 1882 he assigned the mortgage to one Perry. Mrs. Richards never made any use of the land, and never paid any taxes on it and never paid anything on the mortgage, principal or interest. The mortgage never was foreclosed, and so far as appears no steps ever were taken to collect either principal or interest. From 1886 to 1895, inclusive, the land was assessed to "Owners unknown, Agnes F. Richards probable owner, Francis A. Perry probable mortgagee." In October, 1895, it was sold for nonpayment of taxes to one Frothingham who shortly after assigned his tax title to one Wyzanski, who took possession of the land under his tax deed, let it and paid the taxes on it till 1906, when Stark, acting for the petitioner Robinson, claimed the right to redeem by virtue of the title acquired by Robinson from Mrs. Richards. Wyzanski at first objected, but finally admitted Robinson's right to redeem under R. L. c. 13, § 58, par. 1, and Robinson thereupon redeemed. Stark then went to Perry the mortgagee, and by various representations tending to show that it was of no value, procured from him a release and discharge of the mortgage. Thereupon Robinson and Stark divided the land between them. So far as appears Mrs. Richards did not know that the land had been taxed until informed of the tax sale by Stark in 1906. It was not taxed until 1885, and then it was taxed because Stark called the attention of the assessors to it and procured it to be assessed with the intention of acquiring title to it by means of a sale of it for nonpayment of taxes. Shortly before Stark procured the deed in question from Mrs. Richards to Robinson the Savin Hill Yacht Club had acquired land adjoining that of Mrs. Richards, and the result of the answers of the jury and of the facts found by the land court at the previous hearing was to show that Stark falsely represented to her that he was interested in the matter solely for that club and was acting for it in asking her to release her interest in the land, and that she relied upon such representations in making the deed, whereas in truth and in fact he was acting for himself and the petitioner Robinson. This of itself constituted such a fraud upon her as to entitle her to avoid the deed. *Thompson v. Barry*, 184 Mass. 429, 68 N. E. 674; *Stewart v. Joyce*, 201 Mass. 301, 87 N. E. 613. In addition to this it would seem that he made statements to her intentionally misleading, if not actually false, to the effect that she had no title to the land by reason of the tax sale and the expiration of the time for redemption, and also by reason of the Perry mortgage, and in regard to the extent to which Robinson's title to land adjoining her land on the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes

side opposite to that belonging to the Yacht Club conflicted with her title. Taking the case as a whole it is plain, we think, that the ruling was right and that the petition was properly dismissed.

Exceptions overruled.

(209 Mass. 354)

MALDEN & MELROSE GASLIGHT CO. v. CHANDLER (two cases).

(Supreme Judicial Court of Massachusetts. Middlesex. June 22, 1911.)

1. CORPORATIONS (§ 314*)—OFFICERS—BREACH OF DUTY.

An officer of a corporation, appointed to purchase property for it, must purchase on the best terms, and he may not, directly or indirectly, make a profit for himself; and where he purchases for less than the sum he represents to the corporation, he is accountable to it for the money which it paid him in ignorance of the deception.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1393, 1398; Dec. Dig. § 314.*]

2. APPEAL AND ERROR (§ 1011*)—FINDINGS—REVIEW.

The credibility of the witnesses is for the presiding judge, and the court on exceptions must assume that the evidence, which is conflicting, justifies the finding.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3963-3989; Dec. Dig. § 1011.*]

3. APPEAL AND ERROR (§ 1009*)—CASE ON EXCEPTIONS—QUESTIONS REVIEWABLE.

A bill of exceptions in a suit in equity presents for review only questions of law, and the court cannot review the refusal of the trial judge to make requested findings of fact, nor the general finding in favor of the successful party.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3970-3978; Dec. Dig. § 1009.*]

4. EQUITY (§§ 141, 326*)—PLEADING—BILL IN EQUITY.

A bill in equity should contain a clear and accurate statement of the facts on which plaintiff rests his case, and he can introduce evidence only tending to support the averments.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 323-330, 648-650; Dec. Dig. §§ 141, 326.*]

5. CORPORATIONS (§ 319*)—MISCONDUCT OF OFFICERS—BILL IN EQUITY—REQUISITES.

A bill by a corporation against an officer for an accounting, based on his act in purchasing land for the corporation and charging an excessive price therefor, need only allege generally that the officer, as agent, bought for a specified price, and that he obtained unlawfully from the corporation a larger amount, and that he is chargeable for the overpayment, and it need not state minutely the circumstances which are properly matters of evidence.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 319.*]

6. CORPORATIONS (§ 319*)—ACTIONS—PLEADING—VARIANCE.

Where a bill by a corporation against its officer for an accounting, based on his act in purchasing land for the corporation and charging an excessive price therefor, sets forth in detail the transaction, and charges as the foundation of the right of recovery that the officer

bought for a specified price and falsely represented to the corporation an excessive price, and that he wrongfully obtained the excessive price, the court is not restricted to the actual price paid to the vendor; but it may find the facts, and determine the amount that the officer wrongfully received, and grant relief therefor, without objection on the ground of variance.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 319.*]

Exceptions from Superior Court, Middlesex County; William F. Dana, Judge.

Two bills in equity by the Malden & Melrose Gaslight Company against Frank E. Chandler for an accounting from defendant, an officer of plaintiff, who had purchased land for plaintiff and charged an excessive price therefor. There was a finding for plaintiff in each case, and defendant brings exceptions. Overruled.

Sherman L. Whipple and Johnson, Clapp & Underwood, for plaintiff. Nason & Proctor and S. R. Wrightington, for defendant.

BRALEY, J. The plaintiff desired to enlarge its works, and the board of directors voted that the defendant, who was the president of the company, be appointed with the vice president as a committee "with authority to purchase such additional land for the management of the company's business as in their judgment was advisable." The defendant, acting under the vote, appears to have conducted the negotiations which resulted in a sale and transfer of title to the plaintiff of the parcels of land described in the bills of complaint.

[1] It is settled that, in the exercise of the authority conferred upon him, the defendant could not enrich himself at the expense of his principal, by charging and receiving a larger price than that for which he actually bought the property. Having been appointed to act in the plaintiff's interest, he was bound to buy on the best possible terms, and he could not directly or indirectly make a profit for himself. If, as alleged, he bought for much less than the price he represented to the plaintiff, he would be accountable for the money which the company paid him in ignorance of the deception. *Greenfield Sav. Bank v. Simons*, 133 Mass. 415; *Quinn v. Burton*, 195 Mass. 277, 279, 81 N. E. 257; *Kilbourn v. Sunderland*, 130 U. S. 505, 9 Sup. Ct. 594, 32 L. Ed. 1005. The evidence at the trial as to the terms of sale was contradictory. But if the defendant's testimony was accepted, the payments received by him did not exceed the price for which each estate had been purchased, while the evidence of the plaintiff tended to support its contention that it had been deliberately defrauded.

[2, 3] The credibility of the witnesses was for the presiding judge to determine, and it must be assumed that the evidence, which is fully recited, justified the finding that the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

money had been converted. But, the cases being before us on exceptions, the refusal of the judge to make certain findings of fact requested by the defendant and the general finding of conversion cannot be reviewed, as only questions of law are open. *Kennedy v. Welch*, 196 Mass. 592, 83 N. E. 11. The findings upon which the judge decided that there had been a conversion, and the facts upon which he refused the defendant's second request were not stated. It only appears that certain facts were found which rendered these requests inapplicable. The findings manifestly must have been adverse, and if the defendant desired further information as to what they were, he should have applied for and obtained them. If he deemed the conclusions to have been wholly unwarranted, he fails to show that he has been aggrieved, for we do not understand him to contend, nor did he ask for a ruling, that upon all the evidence, independently of the pleadings, the judge could not find that the defendant acted dishonestly, and accordingly have ordered a decree for the plaintiff. *National Mahaiwe Bank v. Barry*, 125 Mass. 20. But as to the first requests, the judge, on the assumption that unless he found the facts to be as therein set forth the plaintiff could not recover, refused to give them.

[4, 5] The defendant in support of his exceptions relies on the familiar rule of equity pleading that the bill should contain a clear and accurate statement of the facts upon which the plaintiff rests his case for relief, and that he can introduce evidence only which tends to support the averments. It is then pressed that the facts recited in the requests are the essential allegations which the plaintiff was required to prove, and unless the court found that they had been proved a decree for the plaintiff could not be supported. It undoubtedly would have been enough to have alleged generally that the defendant as its agent bought for a certain price the lands in question, and having obtained unlawfully from it a larger amount, he was chargeable with the overpayment, and it would be unnecessary to state minutely all the circumstances, which properly are matters of evidence. *Rogers v. Ward*, 8 Allen, 387, 85 Am. Dec. 710; *Lovell v. Farrington*, 50 Me. 239; *Grove v. Rentch*, 26 Md. 367, 377; *Rev. Laws*, c. 159, § 12. And if the action had been at law, a count for money had and received would have been sufficient.

Cole v. Bates, 186 Mass. 584, 586, 72 N. E. 333; *Foot v. Cotting*, 195 Mass. 55, 63, 80 N. E. 600, 15 L. R. A. (N. S.) 693, 122 Am. St. Rep. 257.

[6] The stating part of the bills set forth with much particularity the details of the transaction, but even if there may have been unnecessary amplification, the material facts on which it relied for relief are stated with certainty, and if proved they were sufficient to support the decree. The allegation recurs, throughout the stating part, that the defendant bought for a specific price. It is then charged, as the foundation of the right of recovery, that when the plan to defraud had been perfected, the wrong was finally consummated by obtaining from the plaintiff by false representations amounts very largely in excess of the amount he actually had contracted to pay. The essential averment following the details of the scheme was that the money had been obtained wrongfully, and the finding of a conversion must have rested on this ground. If the plaintiff was confined to this averment, and where there is a variance, recovery can be had only on the case stated in the bill, and not upon the case made out by the evidence, the judge was not restricted to the actual price paid to the vendors. *Gurney v. Ford*, 2 Allen, 576; *Drew v. Beard*, 107 Mass. 64, 73; *Harding v. Handy*, 11 Wheat. 103, 6 L. Ed. 429; *Crocket v. Lee*, 7 Wheat. 523, 525, 5 L. Ed. 513. It might have fallen below or exceeded the amount stated and in either instance there would not have been a variance, if he found that the plaintiff had been defrauded and then determined the amount the defendant wrongfully received. The ruling refusing the requests should not be interpreted as meaning that if the evidence justified recovery the plaintiff could prevail even if the proof did not correspond with the averments. It was refused, and properly refused, because it omitted all reference to the fundamental allegation of liability which the judge was satisfied had been established. We find no error in the admission and exclusion of evidence. *Jennings v. Rooney*, 183 Mass. 577, 580, 67 N. E. 665; *Liddle v. Old Lowell Nat. Bank*, 153 Mass. 15, 32 N. E. 954; *Graham v. Middleby*, 185 Mass. 349, 353, 70 N. E. 416; *Webb Granite & Construction Co. v. Boston & Maine R. R.*, 206 Mass. 572, 578, 92 N. E. 717.

Exceptions overruled.

(200 Mass. 359)

WENZ v. PASTENE.

(Supreme Judicial Court of Massachusetts.
Suffolk. June 22, 1911.)

1. LANDLORD AND TENANT (§ 26*)—LEASES—RECORD—NECESSITY.

Under Rev. Laws, c. 127, § 4, an unrecorded lease for more than seven years is valid only as against the lessor, or his heirs and devisees, and persons having actual notice of it.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 76-79; Dec. Dig. § 26.*]

2. MORTGAGES (§ 372*)—FORECLOSURE—PURCHASERS—NOTICE.

A purchaser at foreclosure takes subject to an unrecorded lease, where he is notified thereof before full payment of the price, though the contract to buy and a partial payment were made before such notice.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. § 1105; Dec. Dig. § 372.*]

3. INJUNCTION (§ 108*)—ENJOINING EJECTMENT—RIGHTS OF LESSEE.

A lessee, suing to enjoin ejectment by a purchaser at foreclosure, the purchase having been completed with knowledge of the prior lease, is not bound to refund an initial payment made by the purchaser under his bid before receiving notice of the unrecorded lease.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 184-186; Dec. Dig. § 108.*]

Appeal from Superior Court, Suffolk County; John H. Hardy, Judge.

Bill by Henry Wenz against Jerome J. Pastene. From the decree, both parties appeal. Modified and affirmed.

Homer Albers, for plaintiff. C. F. Choate, Jr., and F. H. Nash, for defendant.

BRALEY, J. [1] The term of the plaintiff's leasehold was for more than seven years, and the lease not having been recorded was valid only as against the lessor or his heirs and devisees, and persons having actual notice of it. Rev. Laws, c. 127, § 4. If the history of the statute is examined, the provision that actual notice must be shown, or a subsequent purchaser is not affected by an unrecorded instrument, first appears in Rev. St. 1836, c. 59, § 28. But under the provisions of St. 1783, c. 37, § 4, providing that, although effective against the grantee and his heirs, a prior deed, unless recorded, should not defeat a subsequent conveyance, the second purchaser could not hold the land, if he had express notice of the prior title before the purchase was consummated by delivery of the deed. Adams v. Cuddy, 13 Pick. 460, 25 Am. Dec. 330. To permit him to do so, said Chief Justice Parsons in Farnsworth v. Childs, 4 Mass. 637, 639, 3 Am. Dec. 249, "would be to convert the statute into an engine of fraud, instead of a protection against it." The additional words, "and persons having actual notice thereof," incorporated in Rev. St. 1836, c. 59, § 28, did not change the law, but merely put in statutory form what already had been declared by judicial exposition. Lawrence v. Stratton, 60 Mass. 163;

Morse v. Curtis, 140 Mass. 112, 133, 2 N. E. 929, 54 Am. Rep. 456.

[2] The lessor mortgaged the reversion, and although the mortgage omits any reference to it, the judge found that the mortgagees at the date of the execution of the mortgage, and the defendant before delivery of the deed at the foreclosure sale, under which he asserts a paramount title to the premises, had actual notice of the existence of the plaintiff's lease. But being the highest bidder, and having entered into a contract to take the property, and made a partial payment of the purchase price before he was notified, the defendant contends that he acquired an inchoate right, which was perfected by the delivery and acceptance of the deed under the power of sale. If following the sale, and before receiving notice, the remainder of the price had been paid, and the deed delivered, the defendant would have been a purchaser in good faith for a valuable consideration, but where notice is received before the purchase price has been actually paid the completion of the purchase is held by the great weight of authority to be a fraud upon the prior holder of the title under an unrecorded deed or other instrument. Osborn v. Carr, 12 Conn. 195, 201; Grimstone v. Carter, 3 Paige (N. Y.) 421, 437, 24 Am. Dec. 230; Peabody v. Fenton, 3 Barb. Ch. (N. Y.) 451, 464; Nantz v. McPherson, 23 Ky. 597, 18 Am. Dec. 216; Goldsborough v. Turner, 67 N. C. 403; Weaver v. Barden, 49 N. Y. 286, 292; Sargent v. Eureka Bung Apparatus Co., 11 N. Y. St. Rep. 68; Haughwout v. Murphy, 22 N. J. Eq. 531; Dean v. Anderson, 84 N. J. Eq. 496; Patten v. Moore, 32 N. H. 382; Blanchard v. Tyler, 12 Mich. 339, 86 Am. Dec. 57; Dugan v. Vattler, 8 Blackf. (Ind.) 245, 25 Am. Dec. 105; Wells v. Morrow, 38 Ala. 125; Hoover v. Donally, 8 Hen. & M. (Va.) 316; Webb v. Bailey, 41 W. Va. 463, 23 S. E. 644; Everts v. Agnes, 4 Wis. 346, 65 Am. Dec. 314; Boone v. Chiles, 10 Pet. 187, 9 L. Ed. 388; Wormly v. Wormly, 8 Wheat. 421, 5 L. Ed. 651; Townsend v. Little, 109 U. S. 504, 511, 512, 3 Sup. Ct. 357, 27 L. Ed. 1012; Le Neve v. Le Neve, 3 Atkins, 646, 654; Willoughby v. Willoughby, 1 Term. R. 763, 767. See Pom. Eq. Jur. (3d Ed.) § 755, and cases cited in note 2. It is the setting up of the second conveyance, and not the bargain to buy, which operates to defeat the plaintiff's tenancy, and, under the statute, it is actual notice before the purchaser acquires title which deprives him of its protection. White v. Foster, 102 Mass. 375; Lamb v. Pierce, 113 Mass. 72, 74; Adams v. Cuddy, 13 Pick. 460, 25 Am. Dec. 330; Flynt v. Arnold, 2 Metc. 619, 623; Sibley v. Leffingwell, 8 Allen, 584, 586, 587. If by the contract of sale, and advancement of part of the consideration, the defendant may have acquired an equitable interest, it had not been clothed with the legal title, and

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes

after notice he ceased to be an innocent purchaser, and could not destroy the plaintiff's prior estate by getting a conveyance in fee. *Sibley v. Leffingwell*, 8 Allen, 584, 586, 587; *Lancaster National Bank v. Taylor*, 100 Mass. 18, 1 Am. Rep. 71, 97 Am. Dec. 70; *Suffolk Savings Bank v. Boston*, 149 Mass. 364, 367, 21 N. E. 685, 4 L. R. A. 516; *Grimstone v. Carter*, 3 Paige (N. Y.) 421; *Goshen National Bank v. Bingham*, 118 N. Y. 349, 23 N. E. 180, 7 L. R. A. 595, 16 Am. St. Rep. 765; *Vattier v. Hinde*, 7 Pet. 252, 8 L. Ed. 675; *Phillips v. Phillips*, 4 De Gex. F. & J. 208.

[3, 4] But as he who asks equity should do equity, the defendant urges that he should be reimbursed or protected to the extent of the partial payment before relief is decreed. Illustrations where the principle invoked would be applicable readily occur. If for instance the purchaser before notice, and by agreement with the vendor, discharged a mortgage or lien on the property in part payment, generally he should be allowed the amount disbursed, as the enhanced value of the estate inures to the benefit of the holder of the prior title. We do not find in the present case analogous conditions. The property to be sold was the mortgagor's title as it stood at the date of the mortgage, and included the whole estate, and not merely the equity of redemption. *Ewer v. Hobbs*, 5 Metc. 1, 3; *Hall v. Bliss*, 118 Mass. 554, 559, 19 Am. Rep. 476; *Skilton v. Roberts*, 129 Mass. 306; *Callaghan v. O'Brien*, 136 Mass. 378, 383. The defendant, even if he acted as the agent of an undisclosed principal, is the record owner of the fee, and the bill is not brought to compel him to surrender the property. By the terms of sale it was expressly provided, that if the defendant discovered a material defect he could give written notice of it to the mortgagees, who if they preferred might perfect the title, but if they did not they were obligated to return the payment. A title which appeared to the defendant to be perfect when the property was struck off had become defective, and he could have rescinded the contract, and maintained an action to recover it back if the vendors refused to return the installment which he had paid. *Callaghan v. O'Brien*, 136 Mass. 378, 383; *Burk v. Schreiber*, 183 Mass. 35, 36, 66 N. E. 411. Or if he had declined to complete the purchase, they could not have compelled specific performance. *Jeffries v. Jeffries*, 117 Mass. 184, 187. The plaintiff is not found to have been negligent in the assertion of his claim, and the right to rescind, which offered an ample opportunity to avoid being obliged to take an incumbered title, could be exercised only by the defendant. It may be, that as the lease would expire in something less than three years, while the rent reserved would be payable to the owner of the reversion, that the value of the

property with the accruing rent, would be a fair equivalent for the entire purchase price. But whatever may have been the reason, the defendant with knowledge of the incumbrance, by which, of course, his principal was bound, apparently did not desire either to receive back the money, or to obtain a clear title, and affirmed the contract. If for his principal's benefit, whom he is not shown to have consulted, or in the exercise of his own judgment as to the proper course to be taken, the defendant voluntarily went forward, and obtained the conveyance, he does not present a superior equity which entitles him to priority. *Grimstone v. Carter*, 3 Paige (N. Y.) 421, 437; *Balfour v. Hopkins*, 93 Fed. 564, 570, 35 C. C. A. 445. We are of opinion that not only is the defendant's title subordinate to the unexpired term, but under the circumstances the plaintiff should not be required to refund the payment as a condition precedent to relief.

The decree must be modified by the omission of this requirement, but in all other respects it is affirmed.

Ordered accordingly.

(209 Mass. 355)

NICKERSON v. TOWN OF HYDE PARK.

(Supreme Judicial Court of Massachusetts.
Norfolk. June 21, 1911.)

1. TAXATION (§ 679*)—SALE FOR TAXES—DISCLAIMER OF "SALE."

Rev. Laws, c. 13, § 72, provides that a collector may disclaim and release a tax title held by a city or town which he has reasonable cause to believe is invalid for error in the assessment, sale or taking. A tax deed made by defendant town to itself was declared invalid by the land court for defects therein, and thereupon a disclaimer by the town was duly executed and recorded. *Held*, that it was the intent of the statute to afford a remedy, whether the failure in the title arose from errors in the assessment or in the subsequent proceedings, that the deed was a part of the "sale," which term commonly includes the passing of title, and hence that for a defect in the deed the town had authority to disclaim.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. § 1361; Dec. Dig. § 679.*]

For other definitions, see *Words and Phrases*, vol. 7, pp. 6291, 6306; vol. 8, p. 7793.]

2. TAXATION (§ 679*)—PAYMENT—ENTRY ON COLLECTOR'S BOOKS.

Where a tax collector, after an invalid tax sale and deed, makes an entry in his cash book under the collections for that month, following the name of the owner: "Sold to Hyde Park Sept. 9, interest \$26.37, tax \$620.50. Total paid \$646.87"—this is a mere bookkeeping entry, and has no effect as a receipt of payment, so as to preclude a resale where the first sale, which was the basis of the entry was invalid.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. § 1361; Dec. Dig. § 679.*]

3. TAXATION (§ 679*)—SALE FOR TAXES—RE-SALE—STATUTES.

Rev. Laws, c. 13, §§ 70, 71, provide that a tax collector, if he has reason to believe that the title to land sold for taxes is invalid, and where the title is held by a third party, may

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

give notice to such party and take such steps as will procure a release or extinguishment of the title. Section 72 provides that, where a tax title held by a town is thought invalid, a collector may disclaim such title and reassess according to law. Defendant town held a tax title, and after it had been declared invalid for defects in the sale, executed and recorded a disclaimer of its title thereunder, and proceeded to make a resale and deed of the property to the town under the original assessment, concededly valid. *Held*, that the three sections must be construed together, and that the power to resell was not denied to towns, so that the collector had power to sell after the disclaimer, and hence that the deed was valid.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. § 1361; Dec. Dig. § 679.*]

Exceptions from Land Court, Norfolk County; C. T. Davis, Judge.

Petition by Nathan G. Nickerson, Jr., to register title to land, opposed by the Town of Hyde Park. Petitioner's exceptions to a master's report were sustained in the land court, and decree allowed for petitioner, and the defendant excepted. Exceptions sustained.

Colver J. Stone, for petitioner. John A. Keefe, for defendant.

MORTON, J. This is a petition to register the title to land in the defendant town. The defendant claims title, subject to redemption, by virtue of a tax deed dated August 12, 1909, and recorded August 20, 1909, from the collector to it pursuant to a sale August 11, 1909, for the tax of 1907. A previous deed to the town dated September 12, 1908, had been declared invalid by the land court for the reason that it recited that the property was sold for the nonpayment of taxes assessed in 1908 instead of 1907, and also because it failed to state, what was the fact, that no bid was made at the sale. Thereupon the collector believing that the incorrect recital in the deed of 1908 constituted a defect in the sale and authorized a disclaimer, and acting under the advice of counsel for the town executed and caused to be recorded pursuant to R. L. c. 13, § 72, an instrument disclaiming and releasing the title of the town under the deed of 1908 and proceeded to advertise the property again for sale, and sold and conveyed it to the town by deed dated and recorded as aforesaid.

The case was sent to a master who ruled that "the tax title created by the sale and deed (of 1909) is a valid tax title, and that if the petitioner is entitled to register his title, it should be subject to said tax title." The petitioner filed exceptions to the report, which were sustained in the land court, and a decree was ordered for the petitioner free from the lien claimed by the respondent under its deed of 1909. The case comes here on exceptions by the respondent to the refusal of the land court to confirm the master's report, and to give certain rulings requested by the respondent.

The validity of all matters up to and including the commitment of the warrant and tax list to the collector was admitted by the petitioner. After the sale in 1908 the collector entered in his cash book under the collections for September, 1908: "Nickerson & Baker, sold to Hyde Park Sept. 9, interest \$26.37, tax \$620.50. Total paid \$646.87." It is conceded that there was no alienation of the land between the assessment in 1907 and the sale in August, 1909.

The petitioner contends that the deed of 1908 did not constitute a part of the sale, and that, therefore, there was no invalidity in that sale and the collector had no authority to file a disclaimer and to sell again in 1909. If that is not so then he contends that the statute gives the collector no power to sell again after a disclaimer where the tax title is held by a city or town.

[1] The deed was the culminating act, the finishing touch, so to speak, in the sale, without which it would have been incomplete. In common acceptance a sale includes the passing of the title. The defect in the deed of 1908 constituted, therefore, we think, an invalidity in the sale, and the collector could disclaim pursuant to R. L. c. 13, § 72. The result of the petitioner's contention would be that there would be no remedy provided by statute where the invalidity in the tax title was caused by a defect in the deed. We think that the Legislature intended to afford a remedy whether the failure in the title arises from errors in the assessment, or in the subsequent proceedings and that the statute can be and should be so construed.

[2] We also think that the sale and deed of 1909 were valid. The two years during which the lien continues had not expired. The entry upon the collector's book was, as the master rightly ruled, a mere bookkeeping entry. The tax has not been paid and unless the sale and deed of 1909 are valid the town will lose the tax, which it is admitted was rightly assessed.

[3] The petitioner contends that although the last clause of R. L. c. 13, § 72, provides that the collector may disclaim and release a tax title held by a city or town which he has reasonable cause to believe is invalid by reason of any error, omission or informality in the assessment, sale or taking, there is no provision for a sale in case of such release or disclaimer, and that the provisions for reassessment and collection in sections 70, 71, and 72 apply to cases where the title is held by a third party and not by a city or town. But we think that that is too narrow a construction. The sections are to be construed together. The object of the legislation is to enable cities and towns to avoid liability or loss in regard to defective tax titles and to insure the assessment and collection of the taxes for which such titles stand. The original

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

statute was entitled, "An act in relation to the collection of taxes." St. 1878, c. 268. The collector, if he has reasonable cause to believe that the title is invalid, may, according to sections 70 and 71, where the title is held by a third party, give him notice and take such steps as will procure a release or result in an extinguishment of the title. When the title is held by a city or town, the collector, according to section 72, may disclaim or release by an instrument under his hand and seal and duly recorded in the registry of deeds. There is nothing to indicate that the effect so far as the reassessment and collection are concerned is to be any different in a case where the title is held by a city or town from what it is where the title is held by a third party, and no good reason can be given why it should be. That this was the understanding of the commissioners in consolidating and arranging the Public Statutes is entirely plain. What is now three sections in the Revised Laws was divided by them into four, numbered 70, 71, 72 and 73. The first two, 70 and 71, were substantially the same as sections with same numbers in the Revised Laws. Section 72 was the same as the concluding clause in section 72 of the Revised Laws (that is, the clause that gives to the collector the right of disclaimer where the title is in the city or town), and section 73 was the same as the first two clauses in section 72 of the Revised Laws (that is, the clauses that deal with the matters of reassessment and collection). As arranged by the commissioners it is clear the provisions as to reassessment and collection applied to cases where the title was in a city or town as well as to cases where it was in a third party. The order adopted by the commissioners was more logical and clearer, but we do not think that the inversion which took place in the final enactment was intended by the Legislature to signify or does signify a substantive change in the report of the commissioners. There is nothing in *Charland v. Home for Aged Women*, 204 Mass. 563, 91 N. E. 146, 134 Am. St. Rep. 696, which helps the petitioner.

Exceptions sustained.

(209 Mass. 388)

BROWN v. BROWN et al.

(Supreme Judicial Court of Massachusetts.
Suffolk. June 21, 1911.)

1. APPEAL AND ERROR (§ 880*)—DISMISSAL OF BILL—RIGHT OF DEFENDANT TO COMPLAIN.

A decree, which does not give any relief against a defendant, but which allows him costs, is as to him a dismissal of the bill, and he may not complain thereof on appeal by all the defendants.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3584-3590; Dec. Dig. § 880.*]

2. INSANE PERSONS (§ 61*)—VALIDITY—CAPACITY OF GRANTOR.

The deed of an insane person does not convey title, good as against himself or as against his heirs or devisees, unless it is confirmed by him when of sound mind, or by his guardian, or after his death by his heirs or devisees.

[Ed. Note.—For other cases, see Insane Persons, Cent. Dig. §§ 98-99; Dec. Dig. § 61.*]

3. DESCENT AND DISTRIBUTION (§ 45*)—RIGHTS OF HEIRS TO UNDEVISED PROPERTY.

The rights of heirs to undevise land are unaffected by the will of their ancestor.

[Ed. Note.—For other cases, see Descent and Distribution, Cent. Dig. § 123; Dec. Dig. § 45.*]

4. DESCENT AND DISTRIBUTION (§§ 90, 83*)—INCAPACITY OF GRANTOR—RIGHTS OF HEIRS.

Where a deed executed by an insane person has not been ratified by the grantor in his lifetime, his heirs may sue to avoid it after his death; and where the deed is made to one of the heirs, the coheirs, or any one or more of them, according to their respective interests, may bring such suit.

[Ed. Note.—For other cases, see Descent and Distribution, Cent. Dig. §§ 351-358, 337-345; Dec. Dig. §§ 90, 83.*]

5. EXECUTORS AND ADMINISTRATORS (§ 129*)—INCAPACITY OF GRANTOR—RATIFICATION.

An executor or administrator of a deceased grantor may not ratify the deed executed when insane, and thereby prejudice the heirs, especially where the executor or administrator is the grantee.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 533-536; Dec. Dig. § 129.*]

6. DEEDS (§ 211*)—CAPACITY OF GRANTOR—EVIDENCE.

That testator was of sufficiently sound mind to make a will is not conclusive on the issue of his capacity to execute a deed prior to the execution of the will.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 637-647; Dec. Dig. § 211.*]

7. DEEDS (§ 203*)—CAPACITY OF GRANTOR—EVIDENCE—ADMISSIBILITY.

The master, in a suit to set aside a deed on the ground of the grantor's incapacity, must fix the limits of time for evidence of the grantor's mental condition, considering the fact of passing on the possibility of a ratification of the deed.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 602-611; Dec. Dig. § 203.*]

8. APPEAL AND ERROR (§ 1048*)—HARMLESS ERROR—ERRONEOUS ALLOWANCE OF HYPOTHETICAL QUESTIONS.

Where all the facts assumed in a hypothetical question asked experts were found by the master to be true, there was no error in law in allowing a question which was needlessly long and complicated, and which might have been excluded on that ground.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4140-4145; Dec. Dig. § 1048.*]

9. TENANCY IN COMMON (§ 28*)—RENTS AND PROFITS—DISSEISIN.

A tenant, who ousts his cotenants, and who occupies the premises under a claim of right under an invalid deed, must account to the cotenants obtaining a decree setting aside the deed.

[Ed. Note.—For other cases, see Tenancy in Common, Cent. Dig. §§ 76-88; Dec. Dig. § 28.*]

Appeal from Supreme Judicial Court, Suffolk County.

Suit by James F. Brown against Mary Elizabeth Brown and another to set aside deeds executed by James Brown, deceased, in 1890, and 1893, and who in 1900 executed a will, admitted to probate in 1901 after his death in that year. From a decree for complainant, defendants appeal. Modified and affirmed.

Stephen H. Tyng, for appellants. James M. Hall, for appellee.

SHELDON, J. This appeal is without merit.

[1] 1. No relief was given against the defendant William F. Brown, but he was allowed his costs. As to him, the bill was in effect dismissed, and he has no ground of complaint.

[2-5] 2. The plaintiff can maintain the suit. All the heirs of the original owner and the executrix of his will are made parties. In her personal capacity the executrix is the sole defendant in interest. It is settled by our decisions that the deed of an insane person is ineffectual to convey a title to land which shall be good against the grantor himself or against his heirs or devisees, unless it is confirmed by the grantor, when of sound mind, or by his guardian, or after his death by his heirs or devisees. *Valpey v. Rea*, 130 Mass. 384, and cases cited; *Brigham v. Fayerweather*, 144 Mass. 48, 10 N. E. 735; *Buclere v. Reilly*, 189 Mass. 518, 75 N. E. 958. As to undivided property, the rights of heirs are not affected by a will. In such a case, if the deed has been neither ratified nor avoided in the lifetime of the grantor, his heirs may avoid it after his decease; if the invalid deed was made to one of his heirs, the other heirs or any one or more of them according to their respective interests may avoid it in like manner. *Parker v. Simpson*, 180 Mass. 334, 62 N. E. 401; *Caverly v. Simpson*, 132 Mass. 462; *Sunter v. Sunter*, 190 Mass. 449, 77 N. E. 497. See *Billings v. Mann*, 156 Mass. 205, 30 N. E. 1136. The executor of his will or the administrator of his estate has no power to ratify such a deed to the prejudice of his heirs. *Wilcox v. Forbes*, 173 Mass. 63, 53 N. E. 146. Much less can he do so to the prejudice of the other heirs if, being himself an heir, he is also the wrongful grantee named in the deed. This is not the case of the ratification of a contract relating to personal property by which an ordinary indebtedness or liability is created, to be enforced primarily against the executor himself, and against the heirs only under the provisions of R. L. c. 141, § 28, as was the case in *Bullard v. Moor*, 158 Mass. 418, 33 N. E. 928. See *Forbes v. Douglass*, 175 Mass. 191, 55 N. E. 847.

3. No question of ratification by the grantor arises in this case, for his incapacity not only continued, but increased continuously

until his decease. *Gibson v. Soper*, 6 Gray, 279, 281, 66 Am. Dec. 414.

[6] 4. The probate of the will merely shows that the testator was of sufficiently sound mind to make the will; it is not conclusive evidence on the issue in this case. *Gibson v. Soper*, 6 Gray, 279; *Sly v. Hunt*, 159 Mass. 151, 34 N. E. 187, 21 L. R. A. 680, 38 Am. St. Rep. 403.

[7, 8] 5. None of the master's findings are shown to have been plainly wrong, and we find no error in any of his reported rulings. See *Long v. Athol*, 196 Mass. 497, 508, 82 N. E. 665, 17 L. R. A. (N. S.) 96; *American Circular Loom Co. v. Wilson*, 198 Mass. 182, 203, 84 N. E. 133, 126 Am. St. Rep. 409; *Atherton v. Emerson*, 199 Mass. 199, 211, 85 N. E. 530. It was for him to fix the limits of time for evidence of the grantor's mental condition. While he might have made those limits narrower, still it must be remembered that the possibility of a ratification of the deeds was to be passed upon, and we cannot say that he went too far. See *Hardy v. Martin*, 200 Mass. 548, 86 N. E. 939; *Jenkins v. Weston*, 200 Mass. 488, 86 N. E. 955; *Howes v. Colburn*, 165 Mass. 385, 43 N. E. 125; *McCoy v. Jordan*, 184 Mass. 575, 69 N. E. 358. The hypothetical question put to the experts was needlessly long and complicated, and might have been excluded on that ground; but all the assumed facts were found by the master to be proved, and there was no error in law in admitting the question.

[9] 6. The defendants do not deny that the plaintiff, upon avoidance of the deeds, is entitled to a share of the net income received from the rented estates. *Robinson v. Robinson*, 173 Mass. 233, 239, 53 N. E. 854. But they claim that this is not so as to the Vine street property, because that has been occupied by themselves. This is on the ground that bare occupation by one tenant in common creates no liability to his cotenants. *Badger v. Holmes*, 6 Gray, 118; *Sisson v. Tate*, 114 Mass. 497, 501; *Kirchgassner v. Rodick*, 170 Mass. 543, 545, 49 N. E. 1015; *Carroll v. Carroll*, 188 Mass. 558, 74 N. E. 913. But this does not apply where one cotenant has ousted his cotenants, and compelled them to resort to the courts to establish their rights. That is this case. *Silloy v. Brown*, 12 Allen, 30, 37, 38, and cases there cited. The female defendant's liability is the same whether she occupied the property in person or received rent therefor from others, just as in *McIntyre v. Mower*, 204 Mass. 233, 237, 238, 90 N. E. 567.

7. As the defendants say in their brief that they waive none of the questions raised on the record, we have examined everything so presented; and we are clearly of opinion that there has been no error prejudicial to either defendant.

The final decree must be modified by charging each defendant with the costs of

this appeal, and by charging the female defendant with interest upon the sum ordered to be paid by her from and after the date of that decree. R. L. c. 177, § 8. So modified, that decree must be affirmed.

So ordered.

(209 Mass. 323)

POPE et al. v. HINCKLEY et al.
(Supreme Judicial Court of Massachusetts.
Norfolk. June 20, 1911.)

1. WILLS (§ 767*)—LEGACIES—ADEMPTION—DISSOLUTION OF CORPORATION.

Testator bequeathed certain shares of stock in a New Jersey corporation, which before his death passed into the hands of receivers under proceedings in that state in consequence of which another corporation was organized under the laws of Connecticut to which remaining assets were conveyed by the receivers, pursuant to an order of the New Jersey court, which entered an order dissolving the New Jersey corporation. Pending the receivership, testator and others, stockholders, deposited their stock with a trust company, which issued voting trust certificates, eventually exchanged for stock in the new corporation; testator's executors receiving that issued on the stock deposited by him. After the decree dissolving the New Jersey corporation, a decree was entered that there should be paid to persons who had not deposited their stock with the trust company a cash dividend therefor, representing its value as found by the court. *Held*, that the legacies of stock in the New Jersey corporation were not adeemed by these transactions, but took effect subject to engagements such as testator had entered into in regard to the reorganization and surrender and exchange of such stock.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1986-1989; Dec. Dig. § 767.*]

2. WILLS (§ 754*)—CONSTRUCTION—SPECIFIC LEGACIES.

Testator's desire that "the holdings of" a named "manufacturing company's securities should be continued intact so long as my sons shall be in active connection with or control of the said manufacturing company" did not tend to make them specific.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1945, 1946; Dec. Dig. § 754.*]

3. WILLS (§ 733*)—LEGACIES—PAYMENT—TIME—"WITHIN THREE YEARS."

A provision in a will that legacies shall "be paid 'within three years' from the probating of this will at the discretion of the trustees" meant that the legacies were to be paid within three years of the probate of the will, or sooner, at the discretion of the executors.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1819-1846; Dec. Dig. § 733.*]

For other definitions, see Words and Phrases, vol. 8, pp. 7497-7502.]

4. WILLS (§ 775*)—CONDITIONAL LEGACY—FAILURE.

Where a legacy is to "Parker's Boston Helping Hand Mission, not to take effect unless George W. Parker be alive and have charge of the Mission at the time of my [testator's] death," lapses where said Parker died during the testator's lifetime.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1997-2000; Dec. Dig. § 775.*]

5. WILLS (§ 515*)—CONSTRUCTION—LEGACY.

A legacy to the "Fresh Air Fund now under the charge of W." should be paid over to

the City Missionary Society of Boston, whereof the "Fresh Air Fund" is a department of which said W. is manager, to be used for that department.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1110; Dec. Dig. § 515.*]

6. WILLS (§ 515*)—LEGACIES—CONSTRUCTION.

A legacy given to "the Library Fund of the Massachusetts Commandery of the Military Order of the Loyal Legion of the United States" should be paid over to "the Commandery of Massachusetts, Military Order of the Loyal Legion of the United States," to be used and applied for library purposes.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1110; Dec. Dig. § 515.*]

Case Reserved from Supreme Judicial Court, Norfolk County.

Bill by Abby Pope and others, executors, against Freeman Hinckley and others, for instructions to the executors. Case reserved on bill, answers, and agreed facts. Decree rendered.

Charles E. Gross, for himself and associate trustees. A. S. Hall, for Berea College. W. B. Farr, for Freeman Hinckley and others.

MORTON, J. This is a bill for instructions by the executors of the will and codicil of Albert A. Pope. The case was reserved for the full court on the bill, answers, and agreed facts, such decree to be entered as justice and equity may require.

The will was dated June 16, 1905, and the codicil May 28, 1906. The testator died August 10, 1909. At the date of the will he was the owner and holder of 4,968 shares of the first preferred stock of the Pope Manufacturing Company, a New Jersey corporation with its principal office in Jersey City and its general offices in Hartford, Conn., and 16,450 shares of the second preferred stock and 64,024 shares of the common stock. At the date of the codicil his holdings of first and second preferred stock had been somewhat increased. Those of the common stock remained the same. By his will the testator gave numerous legacies of shares of the first preferred stock of that company, 480 shares in all, to various persons and corporations. In August, 1907, after the execution of the codicil and about two years before the testator's death, the corporation passed into the hands of receivers under proceedings begun, prosecuted and concluded in New Jersey. In consequence thereof another corporation was organized on or about December 12, 1908, under the laws of Connecticut, to which, after payment by the receivers of all the obligations of the New Jersey corporation and of the expenses of the receivership, the remaining assets were duly conveyed by the receivers pursuant to an order of the New Jersey court authorizing the same, dated November 19, 1908, and a decree dated December 29, 1908, was entered dissolving the corporation, and, in accordance with the statute

in New Jersey declaring its charter forfeited and void.

The Connecticut corporation was formed in the interests of the testator and of such other stockholders of the New Jersey corporation as chose to come in for the purpose of acquiring the assets and succeeding to and carrying on the business of the New Jersey corporation. Pending the receivership proceedings and for the purpose of carrying out the plans thus instituted, the testator and other stockholders in the New Jersey corporation deposited their stock with the Central Trust Company of New York, and that company issued to them negotiable voting trust certificates which were to be exchanged, and which eventually were exchanged, for stock in the new corporation at the rate of 10 shares of first preferred stock of the New Jersey corporation for $7\frac{1}{2}$ shares of the preferred stock and $8\frac{3}{10}$ shares of the common stock of the new corporation, and at the rate of 10 shares of the second preferred stock of the New Jersey corporation for 2 shares of the common stock of the new corporation. The exchange was not made by the testator during his lifetime, but was made by his executors shortly after his death, pursuant to the scheme that he and other stockholders of the New Jersey corporation had thus entered into. The number of shares in the new corporation received by the executors was $4,000\frac{1}{2}$ shares of the preferred stock and $6,458\frac{3}{10}$ shares of the common stock, and they still hold said shares with the exception of the fractions, which have been sold. Trust certificates representing 2,000 shares of the common stock of the new corporation had been sold by the conservator of the testator before his death, by order of the probate court of Norfolk county. Subsequent to the decree dissolving the New Jersey corporation a decree was entered on August 3, 1909, that there should be paid to the persons who had not deposited or should not deposit their first preferred stock with the Central Trust Company but elected to take cash therefor, a dividend of \$41.277 on each share of the first preferred stock of the New Jersey corporation, which the court found to be the value thereof based on the assets of the corporation after the payment of all its obligations and of the expenses of the receivership. Shortly afterwards, on August 10, 1909, an order was entered discharging the receivers from any further duty or responsibility in respect to their trust as receivers and thus terminating the receivership. The capital stock of the New Jersey corporation was \$22,500,000, consisting of \$2,500,000 first preferred stock, \$10,000,000 of second preferred stock, and \$10,000,000 of common stock. The capital stock of the new corporation is \$6,500,000, of which \$2,500,000 is preferred stock and \$4,000,000 is common stock.

[1] The first and principal question on which the executors desire instructions is whether the legacies of shares of the Pope

Manufacturing Company of New Jersey were adeemed by what took place during the testator's lifetime, and if they were not, in what manner and on what basis the legacies shall be satisfied.

It is obvious, we think, that what took place was in substance and effect a reorganization under the laws of Connecticut and on a somewhat different footing of the New Jersey corporation with a liquidation in favor of creditors and those stockholders who did not care to come into the reorganization scheme. It is spoken of as a reorganization in the plan that was submitted to the stockholders and in the agreements that were entered into between the reorganization committee and the stockholders and between the reorganization committee and the voting trustees. Pending the receivership and the reorganization the testator and other stockholders deposited their stock in accordance with the reorganization scheme, with the Central Trust Company of New York, receiving in return negotiable voting trust certificates. This evidently was done to secure the carrying out of the scheme if a sufficient number of stockholders assented to it, and as one step in the transmutation of stock in the old company into stock in the new. So far as the trust company acquired any right or title to the stock thus deposited it was only for the purpose of carrying out the scheme that was entered into. If the scheme failed for any reason then the stock was to be returned to the depositors. Subject to such rights therein as the trust company and other stockholders and the committees acting for them acquired by the engagements that they entered into respecting the reorganization, the right and title to the stock so deposited remained with the stockholders depositing the same. Those stockholders who had not become parties to the reorganization scheme held their stock, of course, free from any such obligations. When, therefore, the testator died and his will and codicil took effect he still held, in a sense at least, first preferred stock in the New Jersey corporation. Nothing had occurred, we think, which should be regarded as an ademption of the legacies of such stock. It is true that the New Jersey corporation had been dissolved, but it was not dissolved until after the new corporation had been organized, and the testator's rights to stock in the new corporation depended upon his continued recognition as a stockholder in the defunct corporation. The exchange by the executors of the voting trust certificates for shares in the new corporation was an exchange of something which derived its whole value and significance from the fact that it represented first preferred stock in the New Jersey corporation notwithstanding that corporation had been dissolved. We think, therefore, that the legacies of first preferred stock in the New Jersey corporation must be deemed to have taken effect subject to such engagements as the testator had en-

tered into in regard to the reorganization and in regard to the surrender and exchange of first preferred stock in the New Jersey corporation for preferred stock in the new company. When that exchange was effected by the executors the preferred stock of the Connecticut corporation stood to all intents and purposes so far as legacies of the first preferred stock in the New Jersey corporation were concerned, in the place of that stock as far as that stock went. A view similar to that which we have expressed above as to the effect of a reorganization on the rights of the original stockholders was taken in *In the Matter of the Appraisal under the Transfer Tax Act of the Estate of Lyman F. Rhoads, Deceased*, 190 N. Y. 525, 83 N. E. 1130, where an order of the Appellate Division of the Supreme Court in the First Judicial Department affirming the order of the New York County Surrogate's Court was affirmed without an opinion. It follows that the legacies in question are to be satisfied by the transfer to the various persons and corporations to whom they were given of the number of shares of preferred and common stock in the Connecticut corporation to which the testator would have been entitled by virtue of the number of first preferred shares in the New Jersey corporation named in such legacies. It follows also from what we have said that it is immaterial whether the legacies are to be regarded as general or specific. No particular shares of preferred stock are indicated in the various legacies, but only so many in each case out of the larger number belonging to the testator are given to each legatee. *Thayer v. Paulding*, 200 Mass. 98, 85 N. E. 868; *Slade v. Talbot*, 182 Mass. 256, 65 N. E. 374, 94 Am. St. Rep. 653.

[2] We do not see how the testator's expressed desire that "the holdings of the above

named Pope Manufacturing Company's securities should be continued intact so long as my sons shall be in active connection with or control of said Pope Manufacturing Company," even if construed to include the legacies in question, tends to make them specific.

[3] The testator directs that the legacies in question "together with all other bequests herein named" (i. e., in his will) shall "be paid within three (3) years from the probating of this will at the discretion of the trustees." This means, we think, that the legacies are to be paid in three years from the probate of the will or sooner at the discretion of the executors. The word "trustees" is manifestly used inadvertently for "executors."

[4] The legacy to Parker's Boston Helping Hand Mission "is not to take effect unless George W. Parker be alive and have charge of said Mission at the time of my [the testator's] death." It is stated in the petition and admitted by the answer that Mr. Parker died during the testator's lifetime. The condition on which the legacy was to take effect not having occurred, the legacy has lapsed.

[5] The legacy given to the "Fresh Air Fund now under the charge of D. W. Waldron" should be paid over, we think, to the City Missionary Society of Boston, whereof the "Fresh Air Fund," as it appears, is a department of which said D. W. Waldron is manager, to be used for that department.

[6] The legacy given to "the Library Fund of the Massachusetts Commandery of the Military Order of the Loyal Legion of the United States" should be paid over to "the Commandery of Massachusetts, Military Order of the Loyal Legion of the United States," to be used and applied for library purposes.

Decree accordingly.

(202 N. Y. 408.)

CONYES v. OCEANIC AMUSEMENT CO.
(Court of Appeals of New York. June 16, 1911.)

1. MASTER AND SERVANT (§ 105*)—APPLIANCES—EMPLOYER'S DUTY.

An employer must provide adequate and safe appliances and such as are usual in the particular occupation.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 185-191; Dec. Dig. § 105.*]

2. MASTER AND SERVANT (§§ 206, 216*)—RISKS ASSUMED.

If the employer has performed his duty to provide safe appliances, an employé assumes the risks of his employment, and of his own and his fellow servants' negligence.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 550, 567-573; Dec. Dig. §§ 206, 216.*]

3. MASTER AND SERVANT (§ 278*)—INJURY TO THEATRICAL PERFORMER—NEGLIGENCE—EVIDENCE—SUFFICIENCY.

In an action for injury to a theatrical performer caused by a rope breaking, evidence held insufficient to show that defendant failed to provide a reasonably safe rope or reasonably competent fellow employés.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 278.*]

Collin, J., dissenting.

Appeal from Supreme Court, Appellate Division, Second Department.

Action by Alfred W. Conyes against the Oceanic Amusement Company. Judgment for plaintiff (132 App. Div. 933, 116 N. Y. Supp. 611), and defendant appeals. Reversed, and new trial granted.

A. Berton Reed, for appellant. Frederick N. Van Zandt, for respondent.

CHASE, J. The plaintiff in 1904 while employed by the defendant as one of the performers in a spectacular play and realistic show known as "Fighting the Flames" at "Dreamland," Coney Island, had a fall resulting in personal injuries. While engaged as a performer in the same play in 1905 he had another fall resulting in further personal injuries. This action is brought to recover damages for such injuries.

The jury at the trial rendered a verdict in his favor stating separately his damages for the first cause of action (alleged injuries resulting from fall in 1904) and the second cause of action (alleged injuries resulting from fall in 1905). An appeal was taken from the judgment entered thereupon to the Appellate Division, where the judgment so far as it was based upon the second cause of action was reversed and a new trial granted, and the judgment so far as it was based on the first cause of action was affirmed by a divided court. An appeal is taken to this court from said judgment so far as it affirmed the judgment of the Trial Term.

The plaintiff's part in such performance required him while in the dress of a fireman to drive the horses attached to a fire engine

to a burning building, and then to go by a rear passageway to the fifth floor of such building and appear at a window, after which to throw a rope which was fastened and coiled by the window to the ground below, and after making two turns with the rope around a hook in his belt, descend on the rope until he reached a window on the fourth floor where a woman would appear, and then for the purpose of accomplishing her rescue take her across his shoulder and with such burden continue his descent on the rope to the ground. This he had done daily from 10 to 22 times each day for about 20 days until, on June 15th while on the rope with the woman a few feet below the fourth floor, the rope broke and they fell to the ground. On that day the plaintiff had descended the rope as stated five or six times during the afternoon. The accident occurred during the first performance in the evening.

The complaint alleges: "That said fall and the injuries resulting therefrom to the plaintiff were due solely to the negligence of the defendant in the care, control, maintenance and supervision of said fire show or entertainment, and in not providing plaintiff with safe and proper means to perform said rescuing act and in not providing safe and necessary apparatus, means and appliances for plaintiff's safety while performing said rescuing act."

There is a singular lack of evidence in the record from which to ascertain who are the officers and agents of the defendant corporation. It does not appear whether the defendant was solely engaged in producing "Fighting the Flames," or whether such show was one of many maintained by it. It does appear that a person named McCarthy had charge of the fire show, but that another person named Murphy had charge in part, and that one De Jaegers paid the performers. It does not appear what relation these three persons or either of them bore to the defendant as a corporation. They were apparently members of the troupe giving the show, as distinguished from the officers of the corporation. It is more apparent, or at least probable, that they were immediately connected with those engaged in giving the performance instead of with the corporation, because it appears that at some time after the accident the plaintiff, who confessedly had nothing whatever to do with the corporation, became chief of the fire show. The plaintiff testified that in 1904, after he had been employed for some time as a driver of the horses attached to the fire engine, he had a conversation with McCarthy and De Jaegers and was asked to do the part subsequently done by him in the rescuing act and was offered fifty cents for each performance. He further testified: "I was to get the best manila hemp rope to be furnished by the firm in Murray street as used to

furnish the rope for the firemen in New York." He testified that McCarthy made that statement and that he also said that the rope used was a manila hemp rope. The plaintiff testified that the rope first used by him was a hemp rope and that he knew a good rope when he saw it. The rope first used by him was continued in use for five or six days and then another kind of rope not as strong as manila hemp rope was used. A large quantity of the new rope was purchased. It was in charge of the storeroom keeper who testified: "I know the method employed to test that rope before these acts were performed. The minute the rope was put there I generally cut it up in pieces of the necessary length and put everybody on that could get hold of it—all the idle men around there, to stretch this rope * * * and put it away till it was required." He further testified: "When new it will stand a strain of one thousand pounds or more without any trouble and leave a margin of safety." The plaintiff also testified that the rope "running over this hook would wear it, burn it, dry-burn," and that he was getting a new rope every four or five days. He testified that he did not have time personally to test the rope, but during the time he was engaged as a performer in the rescue act he saw the rope tested six times by several men putting their weight on the rope as it hung from the window.

The plaintiff could not have had more than about 4 or 5 different ropes during the 20 days in which he was engaged in the performance. He had been engaged as a fireman and as a performer in fire shows for years, and knew a manila hemp rope when he saw it. He continued giving the performance for 150 to 330 times with ropes that he must have known were not manila hemp ropes, and thereby acquiesced in the use of such ropes. Even if manila hemp rope had at all times been used, it, like other rope, would soon become unsafe. The continued safety of the plaintiff depended more upon care and judgment in determining when the rope used had been so worn or dry-burned as to make it unsafe, than upon the kind or quality of rope used. So far as appears from the record, except in the one instance when the accident occurred, the rope in use at that time lasted as well as manila hemp rope. The plaintiff's safety in descending the rope, so far as it depended upon the rope itself, rested in the vigilance of the plaintiff's coemployees and fellow servants. He testified that there were 34 men working there, and that any of them might change the rope. This action is not brought under the employer's liability act, but rests wholly upon the common law. We repeat that it does not appear that McCarthy or either of the other persons mentioned in the record was an officer or unqualified representative of the defendant.

[1] The principle upon which actions are

allowed against a master by his servant is the obligation resting upon the former to provide adequate and safe appliances, and such as are usual in the particular business in which the servant is employed. That is a duty implied from their contract, and the failure of the master in that duty leaves him responsible to the servant for injuries accruing.

[2] But if the master has performed his duty in that respect the servant takes all the risks involved in the work in which he is engaged, and of his own and his fellow servant's negligence. *Hudson v. Ocean Steamship Co.*, 110 N. Y. 625, 17 N. E. 342.

This court, in the opinion in *Vogel v. American Bridge Company*, 180 N. Y. 373, 375, 376, 73 N. E. 1, 270 L. R. A. 725, referring to the facts in that case, say: "The foreman, or 'boss of the job,' as he is called, was one McMahon, a competent man, and the workmen were under his directions. His authority comprehended the management of the work and the employment, or discharge, of the workmen on the job. At the time the accident occurred, the men were engaged in raising one of the trusses to an upright position; in order thereafter to raise it into its place in the roof. This was effected by a rope attached to the peak of the truss, which ran to the block and tackle of a pole, or derrick. A rope, which lay upon the ground, being examined by some of the men, was rejected by them, as not being strong enough. They proceeded to the tool-house to get another rope and, having been asked by the foreman their purpose, were told by him to go back and use the one they had; saying: 'It is strong enough.' They did so and made the rope fast. Before the truss was raised into position, the rope broke and the truss fell upon the plaintiff and broke his leg." The court in that opinion further say: "Under the rule, as settled in this court in a number of cases, more or less similar to this in the cardinal facts, the servant, in the work upon which the master employs him, assumes as part of the ordinary risks attendant upon, or implied from the nature of, the work, such as arise from the possible negligence of competent fellow servants. *Quigley v. Levering*, 167 N. Y. 58 [60 N. E. 276, 54 L. R. A. 62]." *McConnell v. Morse I. W. & D. D. Co.*, 187 N. Y. 341, 346, 80 N. E. 190, 10 L. R. A. (N. S.) 419.

In this case the rope, regardless of quality, would sooner or later, become unsafe for plaintiff's use. The amount of wear or dry-burning of the rope depended upon the condition of the atmosphere and the way the rope was wound about the hook and used by the plaintiff in descending thereon. No one knew this better than the plaintiff. There was in the storeroom at all times a quantity of new rope cut in the right lengths for use. It was the duty of those engaged in the show as the plaintiff's fellow servants and coemployees to maintain such an

inspection of the rope in use from time to time as to prevent its use after it had become unsafe. The negligence, if any, was in their failure to perform that duty.

[3] It does not appear that the defendant failed to provide the plaintiff with reasonably safe and proper means to perform his rescuing act, or with reasonably competent fellow employes and performers.

The judgment should be reversed and a new trial granted, with costs to abide the event.

CULLEN, C. J., and GRAY, VANN, WIL-LARD BARTLETT, and HISCOCK, JJ., concur. COLLIN, J., dissents.

Judgment reversed, etc.

(202 N. Y. 414.)

CARSON v. VILLAGE OF DRESDEN.

(Court of Appeals of New York. June 16, 1911.)

1. MUNICIPAL CORPORATIONS (§ 812*)—TORTS—PRESENTATION OF CLAIM.

Under Village Law (Laws 1897, c. 414) § 322, providing that no action shall be maintained against a village for damages for personal injuries unless a verified statement of the nature of the claim and the time and place at which such injury is alleged to have been received shall have been filed, a statement of claim which merely recited plaintiff was injured upon a certain street, which was over three-fourths of a mile long, but did not state at what point thereon, was insufficient.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1701, 1702; Dec. Dig. § 812.*]

2. TRIAL (§ 35*)—ADMISSIONS—ADMISSIONS OF ATTORNEYS—EFFECT.

In an action against a village for personal injuries received from a defective sidewalk, the oral admission by the defendant's counsel that the statement of claim was filed and served as alleged in the complaint is not an admission of the sufficiency of the statement.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 88; Dec. Dig. § 35.*]

3. MUNICIPAL CORPORATIONS (§ 812*)—TORTS—STATEMENTS OF CLAIM—NECESSITY.

Under Village Law (Laws 1897, c. 414) § 322, providing that no action for personal injuries shall be maintained unless a verified statement shall have been filed, proof of the filing of such statement is a condition precedent to recovery.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1697; Dec. Dig. § 812.*]

Appeal from Supreme Court, Appellate Division, Fourth Department.

Action by Flora Carson against the Village of Dresden. From a judgment of the Appellate Division (137 App. Div. 927, 122 N. Y. Supp. 1123), sustaining a judgment for plaintiff, defendant appeals. Reversed and remanded.

W. Smith O'Brien, for appellant. M. A. Leary, for respondent.

GRAY, J. [1] The plaintiff brought this action against the defendant to recover damages; claiming to have sustained personal injuries in falling upon a defective sidewalk. She had a verdict in her favor, and the judgment entered thereon has been affirmed by the Appellate Division (137 App. Div. 927, 122 N. Y. Supp. 1123). Upon the defendant's appeal to this court, several questions have been presented; but the only one which demands consideration relates to the sufficiency of the statement of the plaintiff's claim filed with the village clerk. The statute (Village Law, § 322, L. 1897, c. 414) provides that "no action shall be maintained against the village for damages for a personal injury

• • • unless a written verified statement of the nature of the claim and of the time and place at which such injury is alleged to have been received shall have been filed," etc. The plaintiff alleged in the complaint that such a statement, following the language of the statute, was filed. The defendant's answer admitted that "a statement of plaintiff's alleged claim against defendant was filed"; but denied "that such statement was sufficient under the statute." On the trial, the plaintiff did not offer in evidence the statement; but the defendant, at the conclusion of the plaintiff's case, put it in evidence and based a motion for a nonsuit upon its inadequacy under the requirements of the village law. The motion was denied, and the ruling was excepted to. The statement was addressed to the trustees and village clerk and read as follows: "I claim a cause of action against said village of Dresden for \$5,000, by reason of defects in a sidewalk in said village on Seneca street, and the following is a statement of such cause of action: On the 12th day of January, 1907, I was walking along said street and stepped upon a plank which was loose, and my feet went into a hole;" continuing by stating the nature of her fall and consequent injury. This statement of the plaintiff's claim was not a compliance with the provision of the village law; for it failed to give any description of the place where the accident happened. Seneca street is three-quarters of a mile in length, and this notice does not give the slightest indication upon which side of the street, or in what part of it, the plaintiff fell. As we held in the case of Purdy v. City of New York, 193 N. Y. 521, 523, 86 N. E. 560, 561, the statute requires "such a statement as will enable the municipal authorities to locate the place and fix the time of an accident." In that case a notice was held to be fatally defective, which stated: "Whilst walking along the sidewalk on Milford street, borough of Brooklyn, in the nighttime, I was caused to fall into an opening, gully, or trench running across said sidewalk," etc. There was even an attempt at greater par-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes

ticularity than in this case, in referring to the trench; but it was held that, with a street a mile in length, such a statement, not fixing the side of it, or a point in it, had failed to comply with the law. The statute was not intended to make difficult the recovery of any just claim for damages; it was intended to protect the municipality, as far as reasonably possible, by requiring that a notice of the claim be given, which shall apprise it sufficiently for the purposes of an investigation by its officials into the merits. There was no reason for the plaintiff's failure to comply, at least substantially, with the statute and for her filing so vague a statement of the occurrence.

[2] It is contended, however, by the plaintiff that the defendant had stipulated away its right to object to the sufficiency of the statement of her claim. Upon the opening of the trial this took place: The plaintiff's counsel "offered in evidence the following admission and stipulation (sic) from the record made upon the trial of this action when it was tried the first time, in the following words: Mr. Leary: Will it be admitted that a written verified statement of the nature of the claim in suit, and the time when and the place where the injury was received, was filed with the village clerk as required by statute within six months after the cause of action had accrued, and that the action was not commenced until after the expiration of thirty days after the claim was filed, but was commenced within a year after the cause of action had accrued? Mr. O'Brien: We admit the filing and service of the notice as alleged in the complaint, and that the action was commenced within the time stated therein." Thereupon the defendant's counsel stated that he did "not admit the notice was a compliance with the statute." The trial court held with the plaintiff, that the stipulation was, and remained, effective as a waiver. In so holding the court erred. I think that the admission of defendant's counsel, relied upon, was no broader than a concession as to the filing and service of the statement, as the complaint had alleged, and that was not a waiver of the right to object to its sufficiency under the statute. The filing of the statement was a condition precedent to the maintenance of the action. "No action shall be maintained * * * unless a written verified statement * * * shall have been filed," is the language of section 322 of the village law, and that makes it essential to the cause of action that the statement, as prescribed, be alleged and proved.

[3] The provision is prohibitive of a recovery until performance be shown. *Winter v. City of Niagara Falls*, 190 N. Y. 198, 82 N. E. 1101, 123 Am. St. Rep. 540; *Curry v. City of Buffalo*, 135 N. Y. 366, 32 N. E. 80; *Reining v. City of Buffalo*, 102 N. Y. 308, 6

N. E. 792. If we might assume that the defendant's counsel could waive the requirement of the statute, as to which I have grave doubts, there still remains the insuperable difficulty that the admission of "filing and service of the notice as alleged in the complaint" was not effective for anything, if the statement itself was insufficient in law. That is to say, the admission left it still to be determined as a question of law whether the statement alleged in the complaint to have been filed was a sufficient compliance with the statute.

I advise that the judgment of the Appellate Division and of the Trial Term should be reversed, and that a new trial be ordered, with costs to abide the event.

CULLEN, C. J., and HAIGHT, VANN, WERNER, HISCOCK, and COLLIN, JJ., concur.

Judgment reversed, etc.

(203 N. Y. 602)

In re EDELMUTH.

EDELMUTH v. PRENDERGAST, Comptroller.

(Court of Appeals of New York. June 13, 1911.)

1. EMINENT DOMAIN (§ 247*)—DAMAGES—INTEREST—DEMAND.

An award of damages for closing a street does not bear interest until after demand for payment.

[Ed. Note.—For other cases, see *Eminent Domain*, Cent. Dig. § 640; Dec. Dig. § 247.*]

2. EMINENT DOMAIN (§ 247*)—DAMAGES—ALLOWANCE OF INTEREST—DEMAND.

An appeal from an order of confirmation of an award does not stay the right to demand payment of the award so as to make it bear interest from demand.

[Ed. Note.—For other cases, see *Eminent Domain*, Cent. Dig. § 641; Dec. Dig. § 247.*]

Appeal from Supreme Court, Appellate Division, First Department.

Application by Henry Edelmuth, as executor of Adolph Edelmuth, deceased, for a peremptory writ of mandamus to William A. Prendergast, as Comptroller of the City of New York. From an order of the Appellate Division (142 App. Div. 785, 127 N. Y. Supp. 445) reversing an order directing the issuance of a peremptory writ, the applicant appeals. Order of Appellate Division reversed, and order of Special Term modified.

See, also, 128 N. Y. Supp. 1121.

Benjamin Trapnell, for appellant. Archibald H. Watson, Corp. Counsel (Joel J. Squier, of counsel), for respondent.

PER CURIAM. [1] The award to the relator did not bear interest until after a demand made on the comptroller for its payment.

[2] The appeal from the order of confirmation did not stay relator's right to make such demand, but the demand made on July 10, 1910, was in our opinion sufficient. Therefore the relator is entitled to interest on the award from 30 days after that date until the award be paid.

The order of the Appellate Division should be reversed and that of Special Term modified, so as to direct that a peremptory writ of mandamus issue directed to the respondent, commanding him to pay the award made to the relator, with interest from August 10, 1910, until the date of payment thereof, without costs to either party in any court.

CULLEN, C. J., and GRAY, HAIGHT, WERNER, WILLARD BARTLETT, CHASE and COLLIN, JJ., concur.

Ordered accordingly.

(202 N. Y. 342)

GORHAM CO. v. UNITED ENGINEERING & CONTRACTING CO.

(Court of Appeals of New York. June 13, 1911.)

1. APPEAL AND ERROR (§ 1057*)—HARMLESS ERROR—EXCLUSION OF EVIDENCE.

In suit for breaking a contract to construct a foundation, any error in permitting plaintiff to show that the contractor who did the work refused to reduce his bid was harmless, where there was competent evidence that the work was worth that amount.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 1057.*]

2. DAMAGES (§ 175*)—EVIDENCE.

In a suit for breaking a contract to construct a foundation, it was improper to receive evidence of a bid for the work materially exceeding the price at which it was actually done to show the reasonable price; the accuracy and the reasonableness of the bid not being verified by other evidence.

[Ed. Note.—For other cases, see Damages, Dec. Dig. § 175.*]

3. CONTRACTS (§ 349*)—JUDICIAL PROCEEDINGS—ADMISSIBILITY.

In a suit for breaking a contract to construct a foundation under an existing building, evidence of proceedings by the city against the owners to compel the work was inadmissible against the contractor to show that safety of the building would be promoted by the foundation; he not being a party to such proceedings.

[Ed. Note.—For other cases, see Contracts, Dec. Dig. § 349.*]

4. ACTION (§ 16*)—"IN REM."

A proceeding "in rem" is prosecuted against a "thing," instead of a person. The court acquires jurisdiction by possession of the subject-matter, rather than by service of process on some person.

[Ed. Note.—For other cases, see Action, Dec. Dig. § 16.*]

For other definitions, see Words and Phrases, vol. 4, pp. 3481-3483; vol. 8, p. 7684.]

5. HEALTH (§ 32*)—BUILDINGS—PROCEEDINGS TO MAKE SAFE—NATURE.

A proceeding by a city to compel owners of a lot and a building thereon to make the latter safe is not in rem.

[Ed. Note.—For other cases, see Health, Dec. Dig. § 32.*]

6. APPEAL AND ERROR (§ 1057*)—HARMLESS ERROR—EXCLUSION OF EVIDENCE.

In a suit for breaking a contract to construct a foundation under an existing building to make it safe against a nearby tunnel, defendant was not prejudiced by exclusion of evidence to show that when the contract was made it was expected that the tunnel would be constructed by surface work, but that subsurface construction was adopted, making the foundation unnecessary, where he was permitted to fully develop a theory that the foundation was unnecessary.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4194-4199; Dec. Dig. § 1057.*]

Appeal from Supreme Court, Appellate Division, First Department.

Action by the Gorham Company against the United Engineering & Contracting Company. Judgment of the First Appellate Division (136 App. Div. 938, 121 N. Y. Supp. 1132) affirming a judgment for plaintiff, and defendant appeals. Reversed, and new trial granted.

Benjamin N. Cardozo, for appellant. Peter B. Olney, for respondent.

HISCOCK, J. At the times herein involved, the respondent was the lessee of a building situate at the southwest corner of Fifth avenue and Thirty-Third street, in the city of New York, which had first been used for hotel purposes and later had been rebuilt for business uses. The appellant was a contractor which had undertaken the construction of the Manhattan crosstown tunnel of the Pennsylvania, New York & Long Island Railroad Company, the route of which lay through Thirty-Third street. Originally it seems to have been expected that this tunnel, as it ran by respondent's premises, would be constructed by excavation from the surface of the street, and it was anticipated that the operation might impair the condition and safety of respondent's building. Accordingly, in January, 1907, a contract was made between the parties to this action, whereby the appellant, among other things, agreed to build a foundation wall and curtain wall under the north wall of respondent's building on Thirty-Third street. No time was fixed for the commencement or completion of the work and therefore it was ruled on the trial, without objection, that reasonable dispatch was required. The appellant so failed to perform or commence its work under said contract that in July, 1907, this action was brought for its alleged default, and in January, 1908, a new contract was made by respondent with another contractor for the performance of the work.

Respondent sought by the action, amongst other things, to recover for damage to its building because of appellant's failure to fulfill its contract seasonably, and also the reasonable cost of doing the work which the latter had contracted to do. On the trial

three issues, amongst others, were sharply contested and submitted to the jury. These were: First, whether certain injuries to respondent's building resulted from appellant's failure, with reasonable diligence, to perform its contract, or were the result of other causes; second, whether all of the work done by respondent on account of appellant's alleged default was necessary, and therefore chargeable in any event to the latter; third, the reasonable cost and value of the work which respondent did in making up for appellant's default.

Three lines of evidence were introduced by respondent and received to sustain its contention on one or more of these issues, all of which were objected to and are now seriously criticized by the appellant.

[1] The respondent on the appellant's alleged default did not make a general advertisement for bids to do the work which the latter had agreed to do, but requested two contractors to submit bids. One of these was a man named Brown, who subsequently did the work. One of respondent's officers was allowed to testify in substance that after Brown had made his bid he was invited to respondent's office, and there the officer in question attempted to persuade him to reduce the amount of his bid; that Brown declined to do this, except by a small sum, on the ground that he could not afford to do the work for less, and that thereupon the bid was accepted. Appellant insists that this was an objectionable method of showing that the work was worth the sum charged by the contractor, and for which recovery was subsequently had in this action. Personally, I do not think that this evidence was of sufficient importance to call for a reversal, even though it be assumed that it was objectionable. In the course of the trial, Brown and others gave evidence tending to show that the work was worth the amount charged in the bid and for which the respondent had recovery, and in view of this evidence it is difficult to see how the conversation in question could have produced any serious result.

[2] The other persons who submitted a bid were a firm named Fountain & Choate. Their bid was offered in response to a letter written by respondent's attorneys, and they proposed to do the work for \$55,350, which was nearly \$10,000 in excess of the Brown bid. This bid was received in evidence "only for the purpose of going to the question of what was a reasonable price for the work that thereafter was alleged to have been done," and it is insisted that it was improper for that purpose. I agree with this contention. The accuracy of the bid and the reasonableness of the amount for which these bidders proposed to do the work involved in this litigation were not verified by any other evidence on the trial, and the ruling, therefore, amounted to this: That an unverified bid was received as some proof of

what it was reasonably worth to do the work with which the appellant was being charged. Not only was the accuracy of the bid not directly verified by the examination of any witnesses on the trial, but there was an entire absence of evidence showing circumstances which might create an inference that it was a reliable test and measure, of values. It was not the result of open and competitive bidding on very precise specifications, but was given in response to a private invitation, which was somewhat general in its description of the work to be done. Aside from the fact that the bidders' letter head describes them as "Builders," I do not find any evidence which showed that they were engaged in this kind of work. Certainly there is no evidence showing that they were customarily engaged in doing it, or were advantageously equipped for completing at a reasonable price such a contract as this. There may have been many reasons which made them unwilling or unable to accept the work at a price which would be regarded as reasonable by those desiring and prepared to do such work. The very fact that on a contract of this size their bid was nearly 25 per cent. higher than that of Brown, who conceded that he made a handsome profit, would seem to indicate that their judgment was not very reliable. In short, there is nothing to bring this evidence within those rules which in exceptional cases do allow the price bid or paid for an article to stand as some evidence of its value, or to free it from those objections which ordinarily apply to hearsay testimony.

[3] Respondent was allowed to introduce evidence of a certain proceeding instituted by the superintendent of buildings of the city of New York, addressed to respondent as owner of the building and to one Astor as owner of the ground, requiring certain things to be done to make the building safe, and to which appellant was in no manner a party. This proceeding was begun by a notice served after commencement of this action, stating that the building was unsafe, and that a survey would be made for the purpose of ascertaining this fact. This survey was made by an inspector and two architects, one of whom was selected by the respondent, and reported in substance, amongst other things, that the premises had been made "unsafe and dangerous in the following respects, to wit: In that, by reason of the excavation of the tunnel in 33rd St., the walls were unsafe, and that the premises "should be immediately made safe by * * * underpinning the said westerly portion of the northerly wall and portions of the adjacent cross walls to solid bottom." On subsequent application on notice to the Supreme Court for the issue of a precept, findings were made of the dangerous condition of the premises, as stated in the above survey, and commanding the superintendent

of buildings to render them safe by doing, amongst other things, the underpinning in said survey mentioned, and which corresponded with part of the construction for which respondent recovered in this action. On application by respondent, it was permitted to do the work in question if commenced within 48 hours, failing to do which the bureau of buildings would do the work, and the expense incurred become a lien on the building. All of this evidence was sufficiently objected to, and its reception is now alleged as serious error.

It is hardly necessary to discuss the proposition that this evidence must have been greatly prejudicial to the appellant. This proceeding instituted by the public authorities of the city of New York alleged and adjudicated two of the important facts which respondent was endeavoring to establish, namely, that the injuries to this building were caused by the excavation of the tunnel, and that the safety of the building would be promoted by doing part of the work which appellant had undertaken to do. It is difficult to see how any class of evidence could have been more potential than this was in convincing the jury that respondent was right upon at least two of the important issues involved in its controversy with the appellant. The only question which affords any opportunity for debate is the one whether the evidence was competent, and the decision of that one does not seem to me to be involved in any considerable doubt.

The counsel for the respondent attempts to maintain the competency of the evidence by the argument that the proceeding was one in rem, and therefore binding on the appellant, although not in any manner a party thereto, but in my opinion this theory cannot be sustained.

[4] The proceeding was not one in rem. It would be difficult, and it is unnecessary, to define with accurate completeness such a proceeding, but there are certain essential features thereof which we may bring to mind for the purpose of testing the proceedings which are now before us. Such a proceeding, as its name implies, is prosecuted against a "thing," instead of a person. The court acquires jurisdiction by possession of this subject-matter, rather than by a recognized and effective service of process on some person. By virtue of this possession, it determines facts whereon it pronounces judgment, which, operating upon and through the thing in its possession, is conclusive upon all persons having an interest therein, although not served with process.

"It is a distinguishing peculiarity of a proceeding in rem that the jurisdiction of the court, in the particular case, rests merely upon the seizure or attachment of the property. No personal notice to any individual is required. The res, being brought within the jurisdiction of the court, becomes subject to its adjudication, and all parties interested

are supposed to be duly apprised of the proceedings by the mere taking of the property, or by the usual proclamation or published notice. This jurisdiction empowers the court to adjudicate upon the status of the res, or to order it to be disposed of in a given way, according to the object of the action." Black on Judgments, § 794.

If the proceeding before us were of the character thus described, it naturally would have been prosecuted by taking possession of the property in question, and this seizure would have been followed by an adjudication that the property was unsafe, with directions for its demolition or repair, and no personal service of notice of the various steps, including application for judgment, would have been required or considered appropriate.

[5] As a matter of fact, the proceeding was entirely different from such an one as has been outlined. It was entitled "In the Matter of the Application of the City of New York against the Unsafe Building Number 334 Fifth Avenue, John Jacob Astor, Owner of Ground, Gorham Manufacturing Company, Owner of Building." No possession was taken of the building. Instead thereof, the proceedings were commenced with a notice indorsed "Notice of Survey and Summons," directed to "the above-named persons," which was personally served, and "required" them to do certain things. As has already been stated, this notice was followed by a survey in which the defendant parties participated. Thereafter personal notice was given to the parties interested of an application on this survey to a term of the Supreme Court for a precept. On the return of this notice, the parties appeared, "and, the issues raised by said report or survey having been tried," the court made findings and directed that a precept should issue, directing certain things to be done for the purpose of making the building safe, and, in case of default of the owner or lessee to act, the public authorities were authorized to take the necessary steps; the building becoming subject to a lien for the expenses.

Without going further into the details of the proceeding, and without dwelling longer upon those which have been stated, it seems clear that this was not a proceeding in rem. It lacked the most characteristic features of such a proceeding as they have already been defined; and, on the other hand, it was marked by those features of jurisdiction acquired by personal service of notice upon the parties interested of each step leading up to the final determination which belong to a proceeding in personam.

On proper analysis, the proceeding appears to have been one instituted under statutes founded on the police power, on notice to the parties claimed to be guilty of a violation of the law for the purpose of abating the violation, and I know of no authority which makes the record of such a proceed-

ing evidence in a private controversy between one of the parties and a stranger.

In *Beglin v. Metropolitan Life Ins. Co.*, 173 N. Y. 374, 376, 66 N. E. 102, the court had before it the question whether records of the board of health of the city of Albany, showing that the ancestor of the insured died of a certain disease, were admissible; it being relevant to prove that such ancestor did in fact die of the disease mentioned in such records. By the statute in that case, the records were expressly made prima facie evidence of the facts therein set forth, but nevertheless they were held to be incompetent as evidence; Judge Haight, for the court, saying: "This statute was a police regulation, required for public purposes, and became prima facie evidence, so far as concerns questions arising under its provisions which involve public rights. But we think it was not the intention of the Legislature to change the common-law rule of evidence in controversies of private parties growing out of contract, and that the provisions of the statute should not be construed as applicable to such cases."

[8] It is also urged by the appellant that the court erred in excluding certain evidence offered by it. As has been stated, the tunnel constructed through Thirty-Third street was built without opening the surface of the street, but by subsurface tunneling, and it was urged by the appellant that with this form of construction walls such as it agreed by its contract to build would have endangered, rather than promoted, the safety of respondent's building. In explanation of the contract which it did make for the erection of such walls, and to avoid as urged an apparent inconsistency between the contract and its defense, it endeavored to show at various points on the trial that at the time when the contract was made it was expected that the tunnel would be constructed by excavations from the surface of the street, and that under this form of construction the proposed walls would have been helpful, and it claims that it was error to exclude this evidence. I do not think, however, that these rulings involved any such degree of error as would call for a reversal of the judgment. The appellant was permitted to develop, as far as desired, its theory that with a subsurface tunnel construction the walls proposed by the contract would not have been serviceable, and I think it did sufficiently appear, for any purpose of explanation, that at the time the contract was made excavation from the surface of the street, rather than subsurface tunneling, was contemplated.

I recommend that the judgment be reversed and a new trial granted, costs to abide event.

GRAY, J. I concur with my Brother HISCOCK in the conclusion which he reaches

that there should be a new trial of this action; but it is upon the sole ground that it was error to admit in evidence the proceeding instituted by the superintendent of the building department against the plaintiff and its lessor. The proceeding was personal as against them; and the error in making it a part of the plaintiff's case cannot be said to have been without prejudice to the defendant, inasmuch as the proceeding had determined a fact of serious importance. The evidence was not necessary to make out a case under the contract sued upon. I think that the defendant is entitled to a new trial, in which the case may be submitted to the jury without this prejudicial evidence.

CULLEN, C. J., and VANN, CHASE, and COLLIN, JJ., concur with HISCOCK, J. GRAY, J., concurs in result in memorandum, with whom WILLARD BARTLETT, J., concurs.

Judgment reversed, etc.

(302 N. Y. 303)

HASBROUCK v. NEW YORK CENT. & H. R. R. CO.

(Court of Appeals of New York. June 13, 1911.)

1. CARRIERS (§ 408*)—PASSENGERS—BAGGAGE—ACTION—EVIDENCE.

Evidence, in an action for the loss of articles from a passenger's suit case, which had been delivered to defendant's trainman to help her off the train, held sufficient to sustain a finding that the trainman was acting within his duty in taking the suit case.

[Ed. Note.—For other cases, see *Carriers*, Dec. Dig. § 408.*]

2. CARRIERS (§§ 287, 303*)—PASSENGERS—TAKING UP PASSENGERS.

The duty to assist passengers boarding or alighting from trains carries with it as an incident, under reasonable circumstances, the duty to assist a lady traveling with heavy hand baggage.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 1157, 1158, 1232; Dec. Dig. §§ 287, 303.*]

3. CARRIERS (§ 403*)—PASSENGERS—BAGGAGE—ACTIONS—CONTRIBUTORY NEGLIGENCE OF PASSENGER.

A woman passenger, who has delivered a suit case to a trainman to assist her from the train on his assurance that the train was about to stop at her station, is not guilty of contributory negligence if after about 15 minutes has passed and the train has not stopped she does not seek out the trainman and retake the suit case, and keep it until the train reaches the station.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 1536, 1537; Dec. Dig. § 403.*]

4. CARRIERS (§ 401*)—PASSENGERS' EFFECTS—CARRIER AS BAILEE.

Where a trainman, acting in the scope of his employment, takes a passenger's suit case, which had not been checked as baggage, for the special purpose of assisting the passenger off the train, his possession is that of the carrier, but the carrier's liability is only that of a bailee

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

and not that of an insurer, but for a theft by the employé the carrier is liable.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 1529; Dec. Dig. § 401.*]

5. CARRIERS (§ 408*)—LOSS OF BAGGAGE—NEGLIGENCE—EVIDENCE.

The unexplained failure of a carrier, holding goods delivered by a passenger and liable for loss only in case of negligence, to deliver the goods on demand, is prima facie evidence of negligence.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 408.*]

6. CARRIERS (§ 408*)—LOSS OF BAGGAGE—CONDITION OF PROPERTY—NEGLIGENCE OF OWNER.

A passenger, prima facie entitled to recover of a carrier for loss of property contained in a suit case delivered to the carrier's employé, is not precluded by the fact that the suit case was neither locked nor fastened except by the catches when delivered to the employé, since contributory negligence in its ordinary sense has no application where the plaintiff shows delivery to defendant and failure to redeliver, and no explanation or excuse is given by the carrier, since it is only as a part of the explanation required of the bailee that it becomes material: the presumption being, in the absence of any explanation, that the property is still in the carrier's possession, or that it has converted it to its own use.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 408.*]

7. CARRIERS (§ 405*)—LOSS OF BAGGAGE—LIMITATION OF LIABILITY.

A provision in a passenger's ticket that the company assumes no risk on baggage except for wearing apparel, and limits its responsibility to \$100 in value, and that all baggage exceeding that value is at the owner's risk unless taken by a special contract, applies only to baggage that is regularly checked, and not to hand baggage retained in the possession of the passenger, except temporarily in getting on and off of trains.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 405.*]

8. CARRIERS (§ 405*)—PASSENGERS—LOSS OF EFFECTS—WHAT LAW GOVERNS.

Public Service Commissions Law (Laws 1907, c. 429) § 38, exempting a carrier from damages to property in transit in excess of \$150, only applies where the loss occurs in this state, and though the ticket was issued therein, a liability for loss occurring in Massachusetts must be controlled by the laws of that state.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 405.*]

9. CARRIERS (§ 391*)—PASSENGER'S EFFECTS—BAGGAGE.

Plaintiff, a passenger on defendant's railroad, carried in her card case in the bottom of a suit case, which was not checked, three rings, worth \$1,500, for her personal wear at a reception she intended to attend at her destination, and which were adapted to her tastes, habits, and social standing, and \$20 for use in emergency, which was found to be a reasonable sum, and the money and rings were missing from the suit case when it was returned by the trainman who had taken it to assist plaintiff off the train. *Held*, that the suit case and contents were baggage, which is whatever the passenger takes with him for his personal use or convenience, according to the habits or wants of the particular class to which he belongs, either with reference to the immediate necessities or the ultimate purpose of the journey, and that the carrier, in the absence of any limitation by statute, regu-

lation of the road, or inquiry as to value, was liable for the money and articles lost.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1520-1528; Dec. Dig. § 391.*]

For other definitions, see Words and Phrases, vol. 1, pp. 663-670; vol. 8, p. 7586.]

10. CARRIERS (§ 387*)—PASSENGERS—EFFECTS—DUTY OF CARRIER TO TRANSPORT.

The contract to transport a passenger carries with it the duty of transporting a reasonable amount of hand baggage, such as is commonly taken by travelers for their personal use; the quantity and value depending upon the passenger's station in life, the object of the journey, and other considerations.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1505-1518; Dec. Dig. § 387.*]

Appeal from Supreme Court, Appellate Division, Third Department.

Action by Julia M. Hasbrouck against the New York Central & Hudson River Railroad Company, as lessee of the Boston & Albany Railroad. A judgment for plaintiff (64 Misc. Rep. 478, 118 N. Y. Supp. 735) was affirmed by the Appellate Division (137 App. Div. 532, 122 N. Y. Supp. 123), and defendant appeals. Affirmed.

This action was brought to recover the sum of \$1,500 as damages for the conversion by the defendant of three finger rings and two \$10 bills belonging to the plaintiff, while she was a passenger on the Boston & Albany railroad, leased and operated by the defendant. She also alleged in the same count that said property was lost through the negligence of the defendant. The defendant by its answer admitted that on the occasion in question the plaintiff was a passenger on one of its trains, but denied the remaining allegations of the complaint. There was no plea of contributory negligence, but there was a denial of the allegation in the complaint of due care on the part of the plaintiff. Upon the trial the plaintiff was the only witness sworn except as to the question of value, the custom of the road, and the like. The defendant called no witness and furnished no evidence, but rested on its motion to nonsuit. By consent the jury was discharged, and it was stipulated that the court should pass upon all questions of law and fact. Elaborate findings were made and an opinion written by the trial justice, who directed judgment in favor of the plaintiff for the amount claimed. Upon appeal the Appellate Division affirmed, one of the justices dissenting. 64 Misc. Rep. 478, 118 N. Y. Supp. 735; 137 App. Div. 532, 122 N. Y. Supp. 123. The defendant appealed to this court.

Amos Van Etten, for appellant. G. D. B. Hasbrouck, for respondent.

VANN, J. (after stating the facts as above).

[1] The plaintiff is a married woman about 40 years of age, accustomed to traveling, and residing in the city of Kingston. On the morning of May 23, 1908, she went to

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

the city of New York on her way to Natick, Mass., where she had a daughter at school, intending to attend a reception there in the evening. She packed the necessary wardrobe in a suit case, and placed at the bottom beneath the clothing a card case containing four finger rings and \$25 in currency. The money was in three bills, two for \$10 each and one for \$5, and she wrapped them around the rings before placing them in the card case. The suit case was not locked during her journey to Natick, as the lock was out of order, but there was a catch on either side of the lock. There were no straps or other fastenings. She preferred to carry her suit case, although as packed it was very heavy, rather than check it, and subject it to the danger of scratching and other injuries. On reaching New York she stored the suit case in the baggage room of the Grand Central Depot, and went out to make some purchases. When she returned in an hour or two she took the suit case from the baggage room, went directly to the ladies' room, placed the suit case on a seat, and opened it far enough to get hold of the card case, take out the \$5 bill, and replace the package where it was before. She also put the purchases she had made in the suit case. She did not take the card case out of the suit case, but held the latter open in such a way as to enable her to take hold of the card case and remove the bill, which she needed to pay her fare on the railroad. While there were ladies in the room, no one was near her when she opened the suit case and took out the money. After replacing the card case with the jewelry and the rest of the money therein beneath the clothing as she had before, she went at once to the ticket office, purchased a ticket to Natick, keeping the suit case by her as she did so and until the train was announced, when she carried it on board, and kept it by her side until near Worcester, Mass. At this time the conductor came through her car, and she asked him to send some one to take her suit case off at Worcester, where she was to take another train for Natick. About 10 minutes later a trainman wearing the usual badge of his position on his cap came to her, and asked if she was the lady who had requested the conductor to have some one help her off with her baggage at Worcester. He also asked if she was through with her suit case, and in answer to her inquiry, "Is this Worcester?" he said, "Yes; if you are through with your suit case I will take it." The plaintiff, believing that the train was about to stop at Worcester, let the trainman take her bag, which he carried to the rear of the car, as she was facing toward the front. Soon after she saw him pass through to the front of the car, lock the door of the toilet room, and walk back again to the rear. During this time the train was in motion, and 10 or 15 minutes elapsed between the delivery of the suit case and the arrival of the train at Worcester. When the train

stopped the trainman stood at the foot of the step at the rear of the car, which was not a Pullman, but an ordinary coach. He did not help her off, but handing her the suit case, said: "Here's your grip." She gave him a little change as a gratuity, and asked: "Where does the Natick train come in?" He pointed to another track near by, dropped the suit case, and hurried up the steps into his car without saying anything further. Not long after boarding the train for Natick the plaintiff opened her suit case, found the clothing somewhat disturbed, and the card case soiled about the edges where it had been fresh and clean before. On opening the card case she found only the least valuable of the four rings, the other three and the money being gone. Nothing else was missing, although there were three valuable pearl combs in the suit case. She complained to the conductor but he could do nothing. She testified positively that her suit case was not out of her sight nor opened from the time she took the \$5 bill out of it at the Grand Central Depot until she intrusted it to the trainman, and that she knew that all the jewelry was in it at that time. She was a lady of prominence, the rings were adapted to her social position, and she was in the habit of wearing them at parties and receptions. While she had some money in a handbag carried on her arm, she took the bills in the card case for use as "extra money," if occasion required. Her ticket stated that it was issued by the New York, New Haven & Hartford Railroad Company, and that it entitled the bearer to first class passage from New York to Natick, Mass. It also stated that "in selling this ticket for passage over other roads, this company acts only as agent, and assumes no responsibility beyond its own line. This company assumes no risk on baggage except for wearing apparel, and limits its responsibility to one hundred dollars in value; all baggage exceeding that value will be at the risk of the owner unless taken by special contract." Attached to the ticket were two coupons, one from "New York to Springfield," and the other from "Springfield to Natick."

Certain rules of the defendant were read in evidence, and those governing conductors provided that "passenger conductors will be responsible for the movement, safety, and care of the train and for the vigilance and conduct of the men employed thereon, and must report any misconduct or neglect of duty. The reputation of a railroad depends greatly upon the attention and courtesy shown to its patrons. * * * See that trainmen assist passengers on and off trains." The rules governing trainmen provided, among other things, as follows: "Passenger trainmen report to and receive their instructions from the trainmaster, and while on trains are subject to the orders of the conductor. * * * Take position at the car steps to assist passengers on and off the train and to inform passengers getting on

the train as to its destination and where it is scheduled to stop. * * * The proper place for the rear trainman while the train is in motion is on the rear car. Other trainmen will pass through the train at intervals to look after the comfort of the passengers and for the safety of the train."

A man who had acted as trainman for eleven years on the Boston & Albany Railroad, and was so employed in May, 1908, on a train between Springfield and Worcester, testified: "While on the train I am subject to the orders of the conductor while on duty. I had to see that the cars were properly ventilated, and pass through the cars at certain different times to see that the people were comfortable in different ways, * * * to open windows and close windows, whatever they may ask of me, and take care of the ventilators, etc." He also testified that he took other care of the passengers, assisting them on and off the train; that if passengers were overloaded with baggage, it was his duty to assist them in getting on and also to help them in getting off, with their baggage, and he habitually did so; that during the year 1908, while acting as trainman on the Boston & Albany Railroad, he frequently assisted passengers on and off trains with their baggage, and that it was the custom of trainmen on that road at that time to assist passengers on and off the cars with their baggage; that some cars on that road had baggage racks for hand baggage while others had not. It was admitted that the value of the lost rings was the sum of \$1,500. The plaintiff testified that she did not read her ticket, or notice "there was any printing inside of that black space. The letters were very small letters. I can read it now by examining more closely."

At the close of the evidence the defendant moved for a nonsuit upon the ground that the defendant did not undertake to care for the valuables in the suit case; that it was not paid any consideration therefor, and that the fact that they were carried in a suit case negatives the idea that they were carried for the comfort, appearance, and adornment of the plaintiff. There was no motion to dismiss on the ground that the evidence did not warrant the inference that the defendant was guilty of negligence, or that the trainman was not acting within the line of his duty when he took charge of the plaintiff's property, or that she was guilty of contributory negligence.

The court found the facts in accordance with the testimony of the plaintiff, and among other things found specifically: "That prior to and on May 23d, 1908, it was the custom of the defendant, its servants and trainmen, to assist passengers with baggage on and off its trains and cars; that the defendant's trainman in assisting plaintiff with her baggage upon and off defendant's train and car near and at Worcester, in the state of Massachusetts, was discharging a duty

of the defendant to the plaintiff, and was not plaintiff's servant. The payment of a fee to the trainman was not intended by the plaintiff to be a payment to or for the defendant." It was further found that the property in question was "delivered to the defendant, its servant and trainman," and that, "notwithstanding the duty of the defendant to deliver said suit case and its contents to the plaintiff when she alighted from the defendant's train," it failed to deliver to her "said three rings and her two ten-dollar bills." It was also found that the defendant negligently cared for the suit case and its contents; that the property was lost without any negligence on the part of the plaintiff, and that the value of the property was neither asked nor stated when it was delivered to the trainman.

The conclusion of the trial court that the trainman was acting within the line of his duty when he took the suit case of the plaintiff in order to help her off the train was warranted by the evidence. The rules and the custom of the defendant sustain the finding.

[2] The duty to help "passengers on and off trains" carries with it as an incident, under reasonable circumstances, the duty to assist a lady traveling with heavy hand baggage, and it was the established custom of the defendant's trainmen to do so. Moreover, the trainman was subject to the orders of the conductor, and acted under his direction. Granting that he might refuse to carry off hand baggage if there were many applications, or he was otherwise engaged, in fact he did not refuse, but took possession of the plaintiff's suit case. In furnishing the assistance which he assumed to afford to the passenger, he was obliged only to discharge that duty so as not to conflict with a similar obligation to other passengers, and if for that reason he could not have given the suit case undivided attention, and it had been rifled without any negligence on his part, the defendant would not have been liable; but in this case there is no explanation afforded whatever of how the loss occurred. There is nothing to show what care the trainman bestowed upon the suit case, and, in the absence of any proof on the subject, the trial court or the jury would be allowed to infer that it had been occasioned by negligence.

[3] While it was not shown that it was the custom of trainmen to keep baggage in their custody for so long a period as the trainman in question kept that of the plaintiff, still she was not responsible for the length of time that elapsed. When she let him have her baggage, pursuant to the previous arrangement with the conductor, she believed that the train had reached Worcester. She had the right to so believe, for the trainman said, "Yes" in response to her question, "Is this Worcester?" Acting on that belief it was not her duty, as matter of law, after a few minutes had passed and

the train did not stop, to seek out the trainman, take back her baggage, and keep it until the train actually reached the place where he said it already was. The delay in stopping was not long enough to require such a precaution, for the law is satisfied if her action was reasonable under all the circumstances, and that was a question of fact.

[4] As the trainman was acting within the scope of his employment when he took the suit case, in legal effect it was the same as if the defendant, personified, had taken it. *Bunnell v. Stern*, 122 N. Y. 539, 543, 25 N. E. 910, 10 L. R. A. 481, 19 Am. St. Rep. 519. Therefore, the plaintiff's property was lawfully in the possession of the defendant, and the question arises what was its duty in reference thereto. Its possession was not that of a carrier, because the suit case had not been checked as baggage nor intrusted to it for the journey, but only for the special purpose of aiding a lady passenger in getting off the train, in accordance with a custom established by itself, and hence it was not not liable as an insurer. Its possession was that of a bailee, and the law of bailments measures its obligation to the plaintiff in regard to her property. Whether it was a bailee for hire in performing a service incidental to her carriage as a passenger with the obligation of ordinary care, or a gratuitous bailee with the obligation of slight care, the result is the same. In either event, as we held in the case cited, some care was required, yet none was shown. The law required the defendant to return all the property intact, or to explain its loss in some satisfactory way, but it did neither. It did not deliver the rings or money on the implied demand of the plaintiff as she got off the train, and when confronted by proof of the facts in court it called no witness and gave no explanation. If the rings were stolen from its trainman, it should have proved the fact, and if the trainman himself stole them, it would have been no defense, because the defendant was bound to employ faithful servants. 4 *Elliott on Railroads*, § 1623.

[5] The obligation to deliver or to make an explanation sufficient in law rested on the defendant under all the circumstances, and it did not discharge the obligation. As was said by Judge Houghton for the Appellate Division: "There being no explanation respecting the loss of the goods or endeavor to account for their nondelivery, * * * the plaintiff made a prima facie case of negligence. *Fairfax v. N. Y. C. & H. R. R. Co.*, 67 N. Y. 11." In the *Fairfax* Case Judge Rapallo said: "When the plaintiff demanded the article, it had disappeared, and no account is given of the cause of disappearance. This is prima facie evidence of negligence. *Steers v. Liv.*, N. Y. & P. Sts. Co. 57 N. Y. 1, 14 [15 Am. Rep. 453]." In *Clafin v. Meyer*, 75 N. Y. 260, 262, 31 Am. Rep. 467, the court said: "The cases agree that where a bailee of goods, although liable to

their owner for their loss only in case of negligence, fails, nevertheless, upon their being demanded, to deliver them or account for such nondelivery, or, to use the language of *Sutherland, J.*, in *Schmidt v. Blood*, where 'there is a total default in delivering or accounting for the goods' (9 Wend. 268 [24 Am. Dec. 143]), this is to be treated as prima facie evidence of negligence. *Fairfax v. N. Y. C. & H. R. R. Co.*, 67 N. Y. 11; *Steers v. Liverpool, N. Y. & P. Steamship Co.*, 57 N. Y. 1 [15 Am. Rep. 453]; *Burnell v. N. Y. C. R. R. Co.*, 45 N. Y. 184 [6 Am. Rep. 61]. This rule proceeds either from the assumed necessity of the case, it being presumed that the bailee has exclusive knowledge of the facts, and that he is able to give the reason for his nondelivery, if any exist, other than his own act or fault, or from a presumption that he actually retains the goods, and by his refusal converts them."

In a recent case, where the luggage of the plaintiff was delivered to the baggagemaster of a steamship to be carried on board, Chief Judge Cullen said: "The loss of the suit cases unexplained established a prima facie case of negligence, and no explanation was given. The service thus rendered was not a voluntary one on the part of the employé outside of the scope of his duty, for it is the common custom of the stewards and other employés of an ocean steamer to carry the cabin baggage of the passengers on and off the boat." *Holmes v. North German Lloyd S. S. Co.*, 184 N. Y. 280, 285, 77 N. E. 21, 22 (5 L. R. A. [N. S.] 650).

[6] Although the question was not raised during the trial, it is suggested that the plaintiff was guilty of contributory negligence in delivering her suit case when it was neither locked nor fastened except by the catches. Contributory negligence, however, in its ordinary sense, has no application to a bailment made under the circumstances of this case, because the plaintiff proved delivery to the defendant and failure on its part to redeliver to her on demand. That made out a prima facie case, as we have held, and called on the defendant to explain why it did not restore the property. So far as appears, it may still have the articles in its possession, and it cannot justify detention because when received they were not securely locked in the suit case. It is its duty to restore them if it still has them, regardless of the condition they were in when received. If it had proved by way of explanation that the articles were stolen from the trainman while he was attending to other duties, and had shown that they could not have been thus stolen if the suit case had been locked, a very different question would have been presented. It is only as part of the explanation required from the defendant that contributory negligence becomes material. That subject formed no part of the plaintiff's case, although it might have formed a vital part of the defendant's case

if it had seen fit to make an explanation. It is said that the trainman was in court at the trial, but whether he was or not, the defendant neither called him nor gave any excuse for not calling him, such as death or absence beyond the reach of a subpoena. The presumption from the evidence is that the defendant still has the articles in its possession, or that it has converted them to its own use, and while the presumption could have been rebutted by a proper explanation, none was given or attempted.

The law does not require a bailor in an action against a bailee to answer a possible explanation of the latter in advance of its being made, and which in fact might never be made. Such an action rests on the presumption arising from delivery, demand, and refusal, without affirmative proof of negligence in any respect. On the other hand, in an action for negligence resulting in personal injury, there must be affirmative evidence that the injury was caused solely by the negligence of the defendant, which includes proof that the plaintiff did not contribute to the accident by his own act or default. The distinction between the two classes of actions is very clear, and the reason for shifting the burden of proof as to contributory negligence so obvious as to require no further discussion.

[7] The defendant insists that, even if the plaintiff is entitled to recover, she should be limited to the sum of \$100, as provided in the ticket purchased by her. That restriction, however, applies only to baggage that is regularly checked and not to hand baggage retained in the possession of the passenger, except temporarily in getting on and off of trains. This question is settled by a case already cited, in which the chief judge said: "We are of opinion that the provisions of the passage ticket did not apply to baggage intended to be taken by the passenger to her stateroom for use during the voyage, but only to such as might be delivered to the defendant to remain in its possession until the termination of the voyage." After reviewing the authorities, he continued: "We think that the agreement contained in the passage ticket was not intended to relieve the defendant from liability for baggage of this character." *Holmes v. North German Lloyd S. S. Co.*, 184 N. Y. 280, 283, 284, 77 N. E. 21, 22 (5 L. R. A. [N. S.] 650). While the circumstances of that case were somewhat different, the principle announced applies to both cases, and must control our decision.

[8] The claim of exemption from all damages in excess of \$150, made under the public service commissions law, cannot be sustained, because, if for no other reason, that statute applies only to losses sustained in this state. *Laws 1907, c. 429, § 38*. The ticket of the plaintiff called for transportation in part in the state of Massachusetts, the suit case was delivered to the defendant's trainman in that state, the implied demand for redelivery was

made there, and the loss occurred there. Hence, the laws of Massachusetts, which in the absence of proof are presumed to be the common law of the land, must control the amount of damages. *Curtis v. D., L. & W. R. R. Co.*, 74 N. Y. 116 [30 Am. Rep. 271].

[9] The plaintiff took the articles in question with her for personal use at a reception to be held at the end of her journey, and a small amount of money for use in case of emergency. The jewelry was adapted to her tastes, habits, and standing, as the court found upon sufficient evidence, and the amount of money was no greater than was found to be reasonable and prudent. Under the facts as thus settled, we think that the suit case and contents were baggage such as is frequently called luggage; and that in the absence of any limitation by statute, regulation of the road, or inquiry as to value, the defendant was liable for the reasonable value of what was lost.

[10] The contract to transport the plaintiff carried with it the duty of transporting a reasonable amount of hand baggage, such as is commonly taken by travelers for their personal use; the quantity and value depending upon station in life, object of the journey, and other considerations. *Merrill v. Grinnell*, 30 N. Y. 594; *Carlson v. Oceanic Steam Navigation Co.*, 109 N. Y. 359, 16 N. E. 546; *Railroad Co. v. Fraloff*, 100 U. S. 24, 29, 25 L. Ed. 531; *Ray on Negligence of Imposed Duties*, 561, 564; 4 *Elliot on Railroads*, 2604, 2605. As was said by Chief Justice Cockburn in *Macrow v. Great Western Railway Co.*, *Law Rep.* [6 Q. B.] 121: "Whatever the passenger takes with him for his personal use or convenience, according to the habits or wants of the particular class to which he belongs, either with reference to the immediate necessities or to the ultimate purpose of the journey, must be considered as personal luggage."

No other question requires discussion, and in affirming the judgment appealed from we intend to decide simply the case before us, where there was no conflict in the evidence. We appreciate the danger that fraud may be practiced upon railroad companies by unscrupulous passengers, and the necessity for clear proof and conservative action by the courts. This action stands by itself, however, because the credibility of the plaintiff was conceded, and no witness was called by the defendant. According to the facts found on undisputed evidence, we think the defendant has properly been held liable for the loss of the property in question.

The judgment should be affirmed, with costs.

CULLEN, C. J., and GRAY, WILLARD BARTLETT, HISCOCK, and CHASE, JJ., concur; COLLIN, J., not voting.

Judgment affirmed.

(202 N. Y. 599)

PEOPLE ex rel. MERCHANTS' NAT. BANK v. PURDY et al., Tax Com'rs.

(Court of Appeals of New York. June 13, 1911.)

TAXATION (§ 496*)—REVIEW BY COURTS—CERTIORARI—TIME FOR TAKING PROCEEDINGS—DISCRETION OF LOWER COURT.

Tax Law (Consol. Laws 1909, c. 60) § 251, which requires an application for certiorari to review an assessment to be made within 15 days after the completion and filing of the assessment roll and the first posting and publication of the notice of filing, was not superseded by Laws 1909, c. 74, § 1, which authorizes the review of assessments by certiorari provided the writ is applied for by a specified date, and, no notice having been given, so that the 15-day limitation to apply for certiorari was never started to run, the remedy by certiorari might have been invoked at any time to review taxes irregularly assessed from 1901 to 1907, but the Supreme Court, in the exercise of its discretion, may dismiss a writ when there has been a long delay in applying therefor; and where a writ has been so dismissed at Special Term, and the order of Special Term has been reversed by the Appellate Division, the Court of Appeals is without power to disturb either judgment, and must affirm the order appealed from.

[Ed. Note.—For other cases, see *Taxation*, Dec. Dig. § 496.*]

Appeal from Supreme Court, Appellate Division, First Department.

Certiorari on the relation of the Merchants' National Bank against Lawson Purdy and others, as Commissioners of Taxes and Assessments of the City of New York, to review a determination of the Board of Commissioners. Relator's appeal from a final order dismissing the writ was reversed (143 App. Div. 277, 128 N. Y. Supp. 119) and respondents appeal. Affirmed.

Archibald R. Watson, Corp. Counsel (William H. King, of counsel), for appellants. J. Culbert Palmer, for respondent.

PER CURIAM. The history of the taxation out of which this proceeding arises is fully set forth in *People ex rel. Bridgeport Savings Bank v. Feitner*, 191 N. Y. 88, 83 N. E. 592, *People ex rel. Am. Ex. Nat. Bank v. Purdy*, 196 N. Y. 270, 89 N. E. 838, and *People ex rel. Am. Ex. Nat. Bank v. Purdy*, 199 N. Y. 51, 92 N. E. 232, and for present purposes we need only refer to such of its phases as are specially pertinent to the proceeding at bar.

In the *Bridgeport Case* we held that the taxing statute was valid, but that the assessing officers had not complied with it because they had given no notice of hearing and had refused to hear complaints based upon alleged grievances. This was an irregularity which affected all taxes upon the stock of the national banks levied in the city of New York in the years 1901 to 1907, inclusive. That case was decided in January, 1908. In 1909 the Legislature passed a curative act known as chapter 74, which became a law February 27, 1909. This statute provided for

the notice and hearing which had been omitted in the years referred to, and for a review by certiorari if instituted on or before October 31, 1909.

In the case of *People ex rel. Am. Ex. Nat. Bank v. Purdy*, 196 N. Y. 270, 89 N. E. 838, it was held that the statute of 1909 was valid except in so far as it purported to deprive the courts of jurisdiction or power to give relief in proceedings pending when the act went into effect. It was further held in that case that, although the period of limitation prescribed by the tax law (Consol. Laws 1909, c. 60) within which applications must be made for writs of certiorari was not set in motion until notice had been given by posting and publication that the completed tax roll had been filed, the Supreme Court might in the exercise of its discretion in cases of long delay dismiss such writs on account of laches. For the purpose of emphasizing that feature of our decision, we write this short memorandum. Every other question involved in the proceeding at bar has been disposed of in *People ex rel. Am. Ex. Nat. Bank v. Purdy*, 199 N. Y. 51, 92 N. E. 232.

In the case last cited we held that under our previous decisions the relator would logically be entitled to recover back the taxes irregularly assessed against it for the years 1901 to 1907, inclusive, together with interest, but since the irregularities in the assessment had been cured by the proceedings taken under the statute of 1909, and the amount of the taxes had not been changed, it was further held that actual repayment of the taxes would result in unnecessary circumlocution, because the same amounts could again at once be collected from the relator. In this situation it was deemed best to leave the taxes where they were, and remit the relator to its remedy for the recovery simply of the interest. It is for the recovery of this interest that the present proceeding was instituted. At Special Term the Supreme Court affirmed the action of the tax commissioners in refusing to cancel the assessments for the years 1901 to 1907, inclusive, and the writ was dismissed upon the ground "that the relator is precluded by its laches in falling in due time to institute certiorari proceedings to review the assessments made in 1901 to 1907, inclusive, from obtaining any relief as to those assessments." Had the learned Appellate Division taken the same view and affirmed the order of the Special Term, we would have had no right to disturb its decision. We are equally without power to disturb the decision of the Appellate Division to the contrary, for the discretion to pass upon the question of laches rests in both branches of the Supreme Court. We must therefore affirm the order herein, but in doing so we call attention to the fact that, notwithstanding the act of 1909, the relator, and all others

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

similarly situated, might have invoked the usual common-law certiorari at any time from the period of 1901 to 1907, and thus have obtained the necessary relief. The statute of 1909, in which there is a provision for what may be called a statutory certiorari, in no way affects any pre-existing right to the so-called common-law writ in behalf of any party aggrieved by the taxation above mentioned.

CULLEN, C. J., and GRAY, HAIGHT, WERNER, WILLARD BARTLETT, COLLIN, and CHASE, JJ., concur.

Order affirmed, with costs.

(202 N. Y. 402)

LEVIS v. POPE MOTOR CAR CO.

(Court of Appeals of New York. June 16, 1911.)

1. SALES (§ 246*) — COMPLETENESS — WARRANTY.

The completeness of a sale of an automobile, as concerns enforceability of a warranty, is not affected because the buyer is given the right to exchange the car if it failed to comply with the warranty.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 706; Dec. Dig. § 246.*]

2. PRINCIPAL AND AGENT (§ 123*) — SALES AGENT — AUTHORITY — EVIDENCE — SUFFICIENCY.

Evidence held sufficient to go to the jury on an issue whether an automobile sales agent was authorized to warrant a car sold plaintiff.

[Ed. Note.—For other cases, see Principal and Agent, Dec. Dig. § 123.*]

Appeal from Supreme Court, Appellate Division, Fourth Department.

Action by Thomas R. Levis against the Pope Motor Car Company. Judgment dismissing the complaint (129 App. Div. 937, 115 N. Y. Supp. 1128), and plaintiff appeals. Reversed, and new trial granted.

Elbridge L. Adams, for appellant. Lewis H. Freedman, for respondent.

COLLIN, J. The action is to recover from the respondent and a codefendant, Robert Thompson Company, the sum of the damages sustained by plaintiff through the alleged breach of a contract of sale to him of an automobile or motor car, and of the express warranties collateral thereto. At the trial the court at the close of plaintiff's case dismissed the complaint as to the respondent upon two grounds: (1) There was no proof that the respondent was the principal in the transaction through which the car was sold by the Thompson Company to the plaintiff; (2) the contract which the plaintiff made with the Thompson Company was, if the car did not prove to be equal to what they expected of it, the Thompson Company should, in the place of being liable for damages, replace that car with a car of the next year's

make of larger power, and plaintiff's only right of action is for the breach thereof; and granted the request of the counsel for plaintiff that a juror be withdrawn and the trial discontinued as to the Thompson Company. The exceptions of the plaintiff, ordered to be heard, in the first instance, by the Appellate Division, have been overruled.

The trial court erred, under the evidence, in its ruling. The respondent as well as the appellant correctly assumed in presenting the case to us that the evidence established warranties on the part of the Thompson Company collateral to the contract made between it and the plaintiff, the reliance of plaintiff upon them and their nonfulfillment. The prominent issue between them is: Is the respondent obligated by the warranties? The jury, determining all conflicting facts in favor of the appellant, and evoking from the evidence the inferences most favorable to him, might have found the following: During the year 1905 the respondent was a manufacturer of automobiles at Toledo, Ohio, and made the automobile sold to the appellant. The Robert Thompson Company, of which Robert Thompson was the president, sold, at Rochester, N. Y., automobiles made by the respondent, and in August, 1905, Robert Thompson requested appellant to purchase an automobile of respondent's manufacture. Upon this or a subsequent occasion in the negotiations which took place between them prior to the sale, Thompson was accompanied by a traveling representative of the respondent. Throughout the negotiations the Thompson Company did not have and appellant did not see the automobile in question, but Thompson had and showed to appellant a picture of and printed specifications and literature concerning it. Of that literature was a printed circular of two parts, the first of which was descriptive of the car as a whole, and stated "such information as is not given herewith will be gladly furnished on request," and the second of which was a "brief of specifications." Several of the statements therein were in import and effect similar and equivalent to the warranties made by the Thompson Company. At the end of each part of it was in print the subscription: "Pope Motor Car Co., Toledo, Ohio. Members A. L. A. M." During the negotiations Thompson told the appellant that if the automobile did not fulfill the alleged warranties he might return it in the spring of 1906, pay an additional \$400 and have a larger one of the 1906 model delivered to him. The appellant relied on the statements of Thompson and the literature shown him. Several weeks after the contract was concluded the automobile was delivered to and paid for by the appellant. During the months from September, 1905, to June, 1906, through which appellant was operating the car, an employé of the re-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

spondent came to Rochester at three different times, at the solicitation of the Thompson Company, to examine and repair or remove its defects or deficiencies. On September 5, 1906, the appellant addressed and sent to the respondent a letter in which he said: "Last fall I bought from the Robert Thompson Company, your agents here, Type 10, Pope Toledo Car, for which I paid him, with top \$3,050. This car has never been right, has never run three days in succession, and I don't believe there is a man living who can make it run. It is up to you or Mr. Thompson to give me a car that will run, or my money. * * * Before proceeding any further in this matter, I would like to hear from you." He received from the respondent a reply, dated September 8, 1906, as follows: "Sales Department. Dear Sir: Your trouble with Type X 'Pope-Toledo' is very much regretted by this company, and it is positive the machine can be made to run satisfactory to you. A man will, within a few days, stop at your place and go over your machine thoroughly, putting same in A-1 condition. He is now in the East and will be returning to the factory. After his visit we should be glad to have your opinion relative to the running of your car, at which time, if you are not satisfied, further steps will be taken to that end. This is in reply to yours of September 5th." Subsequently an employé of the respondent came to Rochester and examined the car, and did not put it in workable condition. Those facts and the evidence in behalf of the appellant would have permitted the jury to find that the delivery of the automobile was absolute and the sale thereof consummated.

[1] While a rule of law is that there cannot be the incident of a warranty unless there is a completed sale and absolute delivery, the completeness of the sale in this case was not destroyed by the fact, if it existed, that a part of the contract was that appellant might exchange the car, in case it did not fulfill the warranties. No condition had to be accomplished before the title passed. The return and exchange, if made, would simply divest the title which had vested under the contract. The jury would have been permitted to find also that the Thompson Company, as the agent of the respondent, made the sale and the accompanying warranties to the appellant.

[2] Without intending to analyze the evidence, or allot to any item thereof its due proportion of weight or persuasiveness, we state that the jury might have reasonably inferred the authorization to the Thompson Company, if respondent's agent, to make the warranties, from the fact, considered with the other evidence, that the circular hereinbefore referred to contained statements which were the equivalents of the warranties. The circular permitted the inference

that the respondent deemed it necessary or useful that the affirmations of quality which it contained should be made in accomplishing the sales of cars of the type of which it spoke, and expected and authorized its agent to do that which it thus indicated to be essential to the fulfillment of the object of the agency.

The evidence entitled the plaintiff to have the issues submitted to the jury, and the order of the Appellate Division and the judgment entered thereon should be reversed and a new trial granted, costs to abide the event.

CULLEN, C. J., and HAIGHT, WERNER, WILLARD BARTLETT, and HISCOCK, JJ., concur. CHASE, J., absent.

Judgment reversed, etc.

(202 N. Y. 352)

STONE et al. v. CLEVELAND, C., C. & ST. L. RY. CO. et al.

(Court of Appeals of New York. June 13, 1911.)

1. RAILROADS (§ 16*)—CONTROLLING ROADS—LIABILITY.

One railroad corporation is not liable for the ordinary daily operations of another, such as carriage of live stock, though the first owns the majority of the capital stock of the latter and thereby controls its corporate organization, though it has assembled the latter road with others into a transportation system—advertised and known by its name, where the subordinate road maintains its corporate identity, making its own contracts, keeping its own accounts, etc.

[Ed. Note.—For other cases, see Railroads, Dec. Dig. § 16.*]

2. CORPORATIONS (§ 215*)—MAJORITY STOCKHOLDERS—LIABILITY.

A majority stockholder is not responsible for corporate transactions.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 215.*]

Vann, J., dissenting.

Appeal from Supreme Court, Appellate Division, Fourth Department.

Action by Henry M. Stone and another against the Cleveland, Cincinnati, Chicago & St. Louis Railway Company and another. Judgment of the Fourth Appellate Division (136 App. Div. 907, 120 N. Y. Supp. 1147) affirming a judgment for plaintiffs, and the named defendant appeals. Reversed, and new trial granted.

Thomas D. Powell, for appellant. Irving W. Cole, for respondents.

HISCOCK, J. Plaintiffs undertook to ship a car load of horses from Van Wert, Ohio, to Buffalo. Some of the horses, being injured in transit, they recovered a verdict for damages against the appellant. It will be assumed without consideration that there was sufficient evidence on which to rest a verdict against some carrier. The only question which I shall consider is whether there

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

was any proof establishing liability on the part of the appellant.

The point of shipment was situated on the Cincinnati Northern Railroad, and at the end of its line the horses were to be delivered to the New York, Chicago & St. Louis Railroad, which would carry them to the point of destination. The horses were received by, and the contract of shipment expressly and exclusively made with, the former company. No part of appellant's railroad proper was within the shipping route, and it did not directly or in name have anything to do with the shipment or become a party to the contract therefor. It is, however, claimed that indirectly it so controlled and operated the Cincinnati Northern Road as to be responsible for its transgressions, if there were any.

This claim, thus far approved of by the courts, rests on three lines of evidence, the important portions of which will be summarized.

Concededly the appellant owned a majority of the capital stock of the shipping road. By this stock of course it controlled the selection of directors, a minority of whom were directors of its own road. This board of directors selected the executive officers, several of whom respectively held corresponding or other places in the organization of the appellant. Such executive officers at some points occupied offices situate in the same building, and in one case in the same suite of rooms, with those maintained by the appellant. In various reports made, both by the appellant and the Cincinnati Northern, to public officials of the state of Ohio, it was stated in substance that the appellant "controlled" the latter road, but in each case such reports by other information made it plain that the control there spoken of had reference to the ownership of a controlling amount of stock.

In the second place, a "folder" and pages from a railroad guide were introduced which, amongst other things, advertised "New York Central Lines," and in connection therewith a "Big Four Route" (appellant being known as the Big Four Railroad), and stated the aggregate "mileage of the Big Four Route as operated under the following divisions," one of which was the Cincinnati Northern Railroad. In addition, one of appellant's officials who was called as a witness stated that for advertising purposes the Cincinnati Northern Railroad was known as part of the "Big Four" route or system.

Lastly, a livery stable keeper called by the plaintiffs and who had never been connected with the operation of either road swore in terms that the Cincinnati Northern was operated by the appellant. However, this testimony by which he essayed with considerable confidence to settle the legal relationship of two important railroad corporations, when stripped of what were mere conclu-

sions, shrank to a statement that he had at times seen rolling stock of the appellant, like that of many other roads, pass over the Cincinnati Northern. We are so thoroughly agreed on the inconclusive character of this testimony that it may be eliminated from further discussion.

[1] Doing this, the question substantially becomes whether evidence makes one railroad corporation responsible for the ordinary daily operations of another, when it discloses that the first owns a majority of the capital stock of the latter and thereby controls its corporate organization, which, however, remains legally distinct and separate, and by reason of such stock control or other influence has assembled the latter road with others into a transportation "route" or system which is advertised and known by its name. I do not think that it does, and certainly, in my opinion, it does not warrant such a conclusion when, in addition to the facts thus summarized, it further appears, as in this case, that the subordinate railroad in all respects maintains its corporate identity, makes its own contracts, keeps its own accounts, collects its own revenues, and pays its own operating expenses, and that the only financial interest of the controlling road is by way of dividends on its stock.

[2] It is well established that the ownership of a majority of the stock of a corporation, while it gives a certain control of the corporation, does not give that control of corporate transactions which makes the holder of the stock responsible for the latter. This question was recently settled in *Senior v. N. Y. City Ry. Co.*, 111 App. Div. 39, 97 N. Y. Supp. 645; affirmed, without opinion, 187 N. Y. 559, 80 N. E. 1120. In that case it appeared that the defendant owned more than 90 per cent. of the capital stock of the Forty-Second Street Railroad Company, and operated a railroad intersecting the same. It was sought to hold it responsible for a penalty under a statute (Laws 1890, c. 565, § 101, amended by Laws 1897, c. 688, § 1), which provided that no corporation "constructing and operating a railroad" should charge any passenger more than five cents for one continuous ride, etc. The defendant, subject to the general provisions of law, absolutely controlled the organization and thus indirectly the operations of the Forty-Second street line, but it was pointed out in the opinion of the Appellate Division that mere control of a corporation operating a railroad did not mean in a legal sense control of the operation of the road, and that a person could not be said to be in control of the management of the property of a corporation simply because he owned a majority of the latter's stock.

In *Pullman Palace Car Co. v. Missouri Pac. Ry. Co.*, 115 U. S. 587, 596, 6 Sup. Ct. 194, 198 (29 L. Ed. 499), the plaintiff, under a contract whereby the defendant agreed to

use the former's cars on "its own line of road and all roads which it now controls or may hereafter control," etc., sought to compel the use of its cars on the St. Louis & Iron Mountain Railway on the ground that the defendant controlled the latter company. The court dismissed the bill, saying: "Confessedly the St. Louis, Iron Mountain & Southern Company keeps up its own corporate organization. It operates its own road. It has its own officers, and makes its own bargains. The Missouri Pacific owns all, or nearly all, its stock, and in that way can determine who shall constitute its board of directors, but there the power of that company over the management stops. The board when elected has controlling authority, and for its doings it is not necessarily answerable to the Missouri Pacific Company. The two roads are substantially owned by the same persons and operated in the same interest, but that of the St. Louis, Iron Mountain & Southern Company is in no legal sense controlled by the Missouri Pacific. * * * The Missouri Pacific Company has bought the stock of the St. Louis, Iron Mountain & Southern Company, and has effected a satisfactory election of directors, but this is all. It has all the advantages of a control of the road, but that is not in law the control itself. Practically it may control the company, but the company alone controls its road. In a sense, the stockholders of a corporation own its property, but they are not the managers of its business or in the immediate control of its affairs. Ordinarily they elect the governing body of the corporation, and that body controls its property. Such is the case here. * * * It (the defendant) is not the corporation, in the sense of that term as applied to the management of the corporate business or the control of the corporate property."

Evidence that a railroad corporation, by reason of stock ownership in one or more other similar corporations, has been influential in bringing them into a connected system or route advertised or known under its name seems similarly deficient in establishing actual operation by the former of all the others, where each of the latter maintains its corporate identity and its individual operating organization. The organization of such a route or system does not fairly imply such operation by the one of all the others. In the absence of further proof, it rather implies that several lines of road have been brought into an harmonious operation to secure convenience to passengers and shippers, and for the purpose, so far as possible, of keeping the traffic which originates on one road of the system on the other connecting roads thereof.

I suppose that plaintiff's evidence in respect to the "Big Four Route," as indicating operation by appellant of the road by which they shipped their horses, possesses no special potency because it relates to rail-

roads. And yet, if the attempt were made to apply their theory on equivalent evidence to other transactions, it seems to me that it would not be seriously considered. It has of recent times become somewhat common to organize what is known as a chain of banks. We may easily assume that an individual or corporation residing or located in New York City might obtain control of a majority of the capital stock in each of several banks located throughout the state, and thereby control the corporate organization of each one. It may be further assumed that vanity would lead the controlling power to give its name to this line of institutions, and that its wishes would be a powerful influence operating on the corporate organization of each in the conduct of its daily business. Nevertheless, I believe that, if a person making a deposit in a bank of distinct corporate identity located in Rochester or Buffalo, and accepting its passbook or certificate of deposit as exclusive proof of his contract, should bring an action against the promoting and stock-controlling individual or corporation in New York City for his deposit, he would meet with prompt and unquestionable defeat.

The facts making up this branch of plaintiff's evidence are in important particulars similar to those dealt with in *Pennsylvania R. R. Co. v. Jones*, 155 U. S. 333, 15 Sup. Ct. 136, 39 L. Ed. 176, and *Peterson v. Chicago, Rock Island & Pacific R. Co.*, 205 U. S. 364, 27 Sup. Ct. 513, 51 L. Ed. 841, and some of the views expressed in each of those cases strongly support the ones here adopted.

In the former case it was sought to hold the plaintiff in error responsible for an accident caused in part by a train of the Alexandria & Fredericksburg R. R. Company. In addition to a stock ownership by the Pennsylvania Railroad Company therein, advertisements were proved of a "Pennsylvania Route," which included the Alexandria Road, and it was shown that certain traffic officers of the Pennsylvania Railroad Company occupied similar positions in the organization of the other road. The court commenting on these and other facts said: "Taking the plaintiffs' evidence as a whole, and supplementing it with such facts, favorable to them, as appear in the defendant's evidence, we are unable to see that a case was made out as against the Pennsylvania Railroad Company. That the Pennsylvania Railroad Company owned stock and bonds of some of the other companies defendant did not tend to show a partnership or agreement to run the roads of the latter on common account. * * * That the Pennsylvania Railroad Company advertised that it ran trains, or connected with trains of other companies, so as to form through lines, without breaking bulk or transferring passengers, did not tend to show any contract or agreement between the companies to share profits and losses. Nor was there evidence, in the present case,

that there was any actual participation by the Pennsylvania Railroad Company in the earnings of the other companies which used the road between the cities of Alexandria and Washington." Page 344 of 155 U. S., page 140 of 15 Sup. Ct.

Peterson v. Chicago, Rock Island & Pacific R. Company involved a question of jurisdiction. An attempt was made to serve process on the defendant road in the state of Texas by delivery to an officer of another corporation controlled by it through stock ownership, on the ground that through the latter corporation it was doing business in said state. Amongst other things, it appeared that the defendant owned practically all of the capital stock of the local road, and that the latter belonged to and was advertised by the former as part of the "Rock Island System." Nevertheless, the court overruled the plaintiff's contention, saying, "It is a fact that both companies had common agents and employes to a certain extent, but the record shows that such employes were paid in proportion to the business done for each company. And that while in the service of the companies, respectively, they were under the exclusive management and control of the company in whose service they were engaged, with no power to discharge or employ the one company for the other; and that, although the service was in a sense common, it was kept distinct and separate in the control and payment of the employes while in the separate service of the respective companies. It is true that the Pacific Company practically owns the controlling stock in the Gulf Company, and that both companies constitute elements of the Rock Island system. But the holding of the majority interest in the stock does not mean the control of the active officers and agents of the local company doing business in Texas. That fact gave the Pacific Company the power to control the road by the election of the directors of the Gulf Company, who could in turn elect officers or remove them from the places already held; but this power does not make it the company transacting the local business." Page 390 of 205 U. S., page 522 of 27 Sup. Ct.

Three cases are cited by respondent as especially sustaining his recovery: *L. V. R. R. Co. v. Dupont*, 128 Fed. 840, 64 C. C. A. 478; *L. V. R. R. Co. v. Delachesa*, 145 Fed. 617, 76 C. C. A. 307; *Penn. R. R. Co. v. Rossett*, 116 Ill. App. 342. In each of these cases a recovery was allowed against the defendant for an accident occurring on or in connection with a railroad immediately owned by another corporation. It is not practicable here to analyze all of the facts appearing in each of those cases for the purpose of showing, as I think clearly to be the fact, at least in the first two, that they were stronger for the plaintiff than in this action. In the first one, amongst other things, it ap-

peared that the injured person was a passenger traveling on a ticket issued solely by the defendant carrying him over the road where he was injured, and which was indirectly owned by it as stockholder. The court held that thereby the defendant assumed "all the ordinary obligations of a passenger carrier during the transit." The second case involved the same roads as the first one, and was largely decided upon its authority as controlling. The person here injured was a workman of another company. The cars and engine in connection with which he was working belonged to the defendant, and it was held that there was sufficient evidence to permit the jury to find that the men whose negligence caused the injury were temporarily employes of the defendant.

In the third case the question was whether defendant was managing and operating a road, the legal title to which rested in another corporation, whose stock was directly or indirectly owned by the defendant. I judge from the somewhat incomplete report that there was evidence which, from our standpoint, permitted a decision of the question in favor of plaintiff. If there was not, I should be unwilling to follow the decision.

Some suggestion is made that the appellant should be held responsible in this case by reason of its folder and time-table already referred to, whereby respondents were led to rely on its control of and responsibility for the operations of the Cincinnati Northern Railroad. The evidence as a whole, and especially the contract made with the latter road, thoroughly rebuts any idea that the respondents were misled or were relying on any responsibility of the appellant in their shipment.

In my opinion, the judgment appealed from should be reversed and a new trial granted, costs to abide event.

CULLEN, C. J., and GRAY, WILLARD BARTLETT, CHASE, and COLLIN, JJ., concur. VANN, J., dissents.

Judgment reversed, etc.

(202 N. Y. 379)

LAFAYETTE ST. CHURCH SOCIETY OF
BUFFALO v. NORTON.

(Court of Appeals of New York. June 13, 1911.)

1. TRUSTS (§§ 17, 18*)—ABSOLUTE CONVEYANCES—PAROL TRUST.

The trustees of a church conveyed property not used for church purposes by deed absolute in form. It was not the understanding of the trustees that the transfer should deprive the church of its real ownership, but it was understood that the property should be held by the grantee for the church and leased for a theater to conceal that fact from the church members. Held that, under the rule that parol evidence is inadmissible to limit the effect the law attrib-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

utes to the delivery of a deed to a grantee, no trust in favor of the church was created, even though the grantee orally promised to hold the property in trust for the church.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 15-24; Dec. Dig. §§ 17, 18.*]

2. TRUSTS (§ 35*)—ABSOLUTE CONVEYANCES—PAROL TRUST—EVIDENCE.

The trustees of a church sold property not used for church purposes to a brother and law partner of a trustee, taking back a mortgage for the price. The trustees at the same time authorized an agreement which provided for a reconveyance of the property and discharge of the mortgage in case a proposed lease should not be executed, and that the grantee should safeguard not only the mortgagee but himself by seeing that the lessees paid for the improvements they might make on the property, and that the grantee would collect the rents under the lease as they became due and pay them over to the church, in lieu of interest on his mortgage to secure the price. The trustees were informed prior to the conveyance that the grantee had no money to invest in the property, and could not pay anything for carrying it during the leasehold period. *Held* that, though the grantee could not retain any advantage he might gain over the church by virtue of his relation to a trustee, the relation did not preclude him from becoming a purchaser, and the facts did not establish a trust in favor of the church.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 45-50; Dec. Dig. § 35.*]

3. TRIAL (§ 398*)—FINDINGS—INCONSISTENCIES—EFFECT.

Where there is an inconsistency between the findings of the trial court, appellant is entitled to the benefit of the findings most favorable to him.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 946, 947; Dec. Dig. § 398.*]

4. RELIGIOUS SOCIETIES (§ 20*)—CONVEYANCE OF CHURCH PROPERTY—RATIFICATION.

The trustees of a church, empowered by its members to sell property not used for church purposes, sold the property to a grantee, who assumed a mortgage on the property, and executed a mortgage for the price and leased the property for a specified period. Shortly before the expiration of the lease, the grantee offered to the trustees to pay a part of the mortgage, and to pay a specified sum each year on the principal. The offer was accepted and the money was paid. *Held* that, though no new consideration was advanced by the grantee, the receipt of the payment was an acknowledgment by the church that the deed passed the title to the grantee freed from any trust in its favor.

[Ed. Note.—For other cases, see Religious Societies, Cent. Dig. §§ 180-143; Dec. Dig. § 20.*]

5. TRUSTS (§ 95*)—CONSTRUCTIVE TRUSTS—FRAUD.

The members of a church empowered its trustees to sell property not used for church purposes. The property produced no income, and carrying it was a burden on the church. The trustees sold the property to a purchaser, who was a brother and law partner of a trustee, and who assumed a mortgage on the property and agreed to pay a specified sum and executed a mortgage to secure it. The price for which the property was sold was a reasonable one, and the church only lost the chance of an appreciation in the value of the property. No fraud was practiced on the church. *Held*, that the transaction was not so unconscionable on the part of the grantee or so prejudicial to the church as to justify the raising of a trust in favor of the church, though the grantee in about five years

sold the property for a sum largely in excess of that received by the church.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 145-147; Dec. Dig. § 95.*]

Gray, Vann, and Chase, JJ., dissenting.

Appeal from Supreme Court, Appellate Division, Fourth Department.

Action by the Lafayette Street Church Society of Buffalo against Herbert F. J. Norton. From a judgment of the Appellate Division (134 App. Div. 994, 119 N. Y. Supp. 1132) affirming a judgment for plaintiff, defendant appeals. Reversed, and new trial granted.

This action was brought to impress a trust in favor of the plaintiff upon a mortgage for \$52,000 held by the defendant, to compel the transfer thereof to the plaintiff, with an accounting for all moneys paid thereon, and to enjoin the defendant from assigning or encumbering said mortgage during the pendency of the action. The answer, after admitting certain allegations of the complaint, denied the remainder, and pleaded the statute of limitations for the period of six years. After a trial at Special Term, judgment was rendered in favor of the plaintiff, substantially in accordance with its prayer for relief, as to an undivided half of the mortgage held by the defendant when the action was commenced; the other half having been previously assigned to a bona fide purchaser. The Appellate Division unanimously affirmed, and the defendant appealed to this court.

The facts found, some details being omitted, are substantially as follows: The plaintiff is a religious corporation, and the defendant is a practicing lawyer, the brother and law partner of Nathaniel W. Norton, who was one of the trustees of the church, and had been for a long time prior to the transaction in question. In January, 1901, the plaintiff owned two church structures, one known as the "Old Church Property," which was no longer used for religious worship, and the other with a new and valuable edifice thereon; which was in constant use for church purposes. The society was heavily in debt, and the expense of holding the "Old Church Property" was so great that "it was imperatively necessary" to lease or sell it "in order to secure present revenue." It was subject to a mortgage for \$60,000, and, while the carrying charges for interest and taxes amounted to a large sum annually, the income was but nominal. For a long time efforts had been made to sell it without success, and it was impossible to lease it at a satisfactory rental, except for use as a theater, and some of the members of the congregation were unwilling that it should be leased for that purpose. At the annual meeting held on the 8th of January, 1901, a resolution was passed authorizing the trustees to sell, lease, or otherwise dispose of it, and

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

to execute the necessary instruments to carry the resolution into effect. Thereafter at a meeting of the board of trustees the defendant's brother, one of their number, stated that after various negotiations, "in view of the difficulty of making a lease direct because of the opposition of the people in the church to its leasing, an arrangement was proposed by which the property should be transferred at a price stated to some person who should take the property subject to the present Erie County Bank mortgage, and himself give back a mortgage upon the property for the balance of the purchase price, as agreed upon. If such price could be agreed upon with such person, then that person to whom the property was transferred would be at liberty to enter into a lease with the party." Thereupon a resolution was adopted directing application to be made to the court for authority to sell the property for a sum not less than \$120,000, of which \$60,000 was to be represented by the old mortgage and the balance by a new mortgage upon such terms and conditions as should be agreed upon. The application was accordingly made, and leave was granted by the court authorizing the sale on the terms specified. Thereafter a deed of the property was made to the defendant for the sum of \$120,000, which the trial court found was the full value of the property, and a mortgage executed by him to the plaintiff for the sum of \$60,000, but without any bond or personal obligation for the payment of said sum, and a lease was made by the defendant to the theater people for the term of five years. Just before the expiration of the demised term, in April, 1906, the defendant wrote to the plaintiff offering to pay \$20,000 on his mortgage then past due, and asking for an extension of time for the payment of the balance. The request was granted, and the defendant paid to the plaintiff the sum of \$20,000 on account of the mortgage. Thereupon the defendant sold and conveyed the premises for the sum of \$172,000. Subsequently the plaintiff brought this action claiming that the defendant held the property conveyed to it as its trustee and for its benefit, and asking judgment that he account for what he had received on the sale.

Moses Shire, for appellant. George Clinton, for respondent.

CULLEN, C. J. (after stating the facts as above). I am of opinion that the facts found by the trial court do not support the judgment. The foundation of the plaintiff's right to relief are the two findings: "That it was not the understanding of the trustees that the transfer to a third person should deprive the plaintiff of its real ownership of the property. That it was the understanding and intent of the trustees that the property should be conveyed to a third person to hold for the church and lease to the theater people, in order to cover up and

conceal from the church members the fact that it was in reality leasing to them." There is no finding that the defendant ever agreed to hold the lands conveyed to him in trust for the plaintiff, and, on the contrary, there is an express finding, to which I shall hereafter allude, which negatives any such promise or agreement. And even had such a promise been made, it not being in writing, the promise with the two findings I have quoted would be insufficient to establish the trust and entitle the plaintiff to relief. *Wood v. Rabe*, 96 N. Y. 414, 48 Am. Rep. 640.

[1] It is the settled law of this state that parol evidence is inadmissible to limit the effect the law attributes to the delivery of a deed to a grantee. *Hamlin v. Hamlin*, 192 N. Y. 164, 168, 84 N. E. 805, 806, was an action by the wife to set aside a deed made by her to her husband on the claim that she delivered the deeds "simply to help him temporarily, in case he needed the money for his business." This court said, through Gray, J.: "If we should give full effect to the plaintiff's claim, it would be to hold the delivery by her of the deeds to have been conditional and not absolute; but that would be violative of the settled rule in this state that a delivery cannot be made to the grantee conditionally. Any oral condition accompanying the delivery in such case would be repugnant to the terms of the deed, and parol evidence to prove that there was such a condition attached to the delivery is inadmissible"—citing *Souverby v. Arden*, 1 Johns. Ch. 240; *Worrall v. Munn*, 5 N. Y. 229, 55 Am. Dec. 330; *Wallace v. Berdell*, 97 N. Y. 13; *Blewitt v. Boorum*, 142 N. Y. 357, 37 N. E. 119, 40 Am. St. Rep. 600. There can be no distinction as to this element between the case at bar and that cited. There it was attempted to show the title was to pass to the husband by the deed merely temporarily; here, that it was not to pass at all. As to such a claim it is said in *Wallace v. Berdell*, supra: "The General Term in their opinion say that they are of the opinion that the evidence leads to but one conclusion, namely, that the trust deed was made for a temporary purpose only. * * * If this be the correct view of the facts, the conclusion that the deed was invalid is clearly erroneous. * * * The delivery having been to the grantee himself, neither party would have been permitted to show, for the purpose of defeating the rights of the cestuis que trustent, that the delivery was with intent that the deed should not take effect, or that it should not take effect unless again delivered, or unless the grantor should afterward determine that it should take effect, or upon any other contingency whatever, contrary to the terms of the instrument." 97 N. Y. 24. Therefore, to uphold the judgment below some other element must be established than those I have referred to. [2] Doubtless, a relation of confidence between the

parties would be sufficient had the defendant made a promise to hold the lands in trust (Wood v. Rabe, supra), and it is claimed that such relation was established by the fact that the defendant was the law partner of his brother, Nathaniel W. Norton, who was one of the trustees. Now, while the defendant could not retain any advantage he might gain over the plaintiff by virtue of this relation, still the relation did not necessarily preclude him from becoming a purchaser of the property, and so the trial court found. At the time the trustees of the plaintiff voted to sell and convey the property to the defendant, they also authorized the execution of an agreement with the defendant as to his responsibilities. The agreement recited the conveyance for the sum of \$120,000, represented by a mortgage of \$80,000 then on the property, and a further mortgage of \$60,000 to be given to the plaintiff; that there was a proposition from one Kernan and others to take a lease of the property for the period of five years, and to pay as rent \$4,000 a year quarterly, in advance, as well as all taxes and assessments, and to keep the buildings insured for a sum not less than \$25,000, loss payable to mortgagee; that the lessees proposed to make certain improvements upon the property. It then contained an agreement by the defendant that he would, so far as he was able, safeguard "himself and mortgagees" by seeing to it that the contracts for such improvements were carried out, and that the improvements were paid for by the lessees; that the work done in improvements should not interfere with the building laws of the city, and that the property should not be wasted or made of less value by reason of any improvements being begun and then abandoned, which should be provided for either by giving a bond or deposit by James L. Kernan and others to the extent of the costs of the proposed improvements or in some other manner. It further provided that if the lease contemplated should not be made the defendant should reconvey the property to the plaintiff, and take a discharge of his mortgage. Lastly, the defendant agreed to collect the rents under the lease as the same should become due, and immediately pay over the same to the plaintiff, "to the extent of \$4,000 yearly," which rent should be in lieu of interest upon the mortgage debt upon said property; and the defendant was not to be personally obligated to pay more moneys than he had received. As to this agreement, the Special Term expressly found "that at the meeting of the trustees held on the 26th of January, 1901, Nathaniel W. Norton informed the trustees that his brother would take the property on the terms mentioned in said contract and upon no other terms; that he had no money to invest in the property, and could not pay anything for carrying it during the leasehold period." This finding of the trial court necessarily excludes any

promise, agreement, or assent on the part of the defendant to anything except that which is provided for in the written agreement. He distinctly defines his position and the terms on which he would accept the conveyance to the trustees of the plaintiff, and with full knowledge of those terms and conditions the trustees directed the conveyance to him, and entered into the agreement the defendant proposed. It is to be noted that the agreement in one contingency, and only in one contingency, provides for a reconveyance of the property, that is, in case the proposed lease should not be executed, and the agreement also provides that the defendant shall safeguard not only the plaintiff but himself, by seeing that the lessees pay for the improvements they may make in the property. In the face of this agreement and the findings of the court as to it, it seems to me idle to claim that the property was impressed in the hands of the defendant with any trust in favor of the plaintiff, or that the defendant's obligations and relations to the property were anywise different from those expressed in the conveyance and agreement. [3] If there is any inconsistency between the finding quoted and the other findings made by the trial court, the appellant is, under the settled rules of practice, entitled to the benefit of the one most favorable to him.

[4] I think also that the plaintiff, by its subsequent conduct, ratified and confirmed the conveyance to the defendant. The trial court found that in April, 1906, five years after the transaction, and within a few days before the expiration of the lease to the theater company, the defendant wrote to the trustees of the plaintiff, offering to pay \$20,000 on the plaintiff's mortgage, and asking, in consideration thereof, that the remainder be allowed to stand for four years, \$5,000 to be paid each year on the principal, together with interest; that the trustees adopted a resolution that the request of the defendant be complied with, and thereupon the defendant paid to the plaintiff the sum of \$20,000. It is very probably true that, no new consideration being advanced, the payment by the defendant of \$20,000, already due on the mortgage, was not a sufficient consideration for its extension, and the plaintiff might have insisted on the immediate payment of the balance due on the mortgage, despite of its receipt of the \$20,000 on the condition stated. But the receipt of the money seems to me plainly an acknowledgment that the deed given by the plaintiff was effective to pass the title to the defendant, and that the title was then in him. On no other possible theory could the plaintiff, under the facts then known to it, have been entitled to the money. If the defendant held title simply as the trustee or dummy of the plaintiff, it was not entitled to money from him unless under its instructions he had sold the property on its behalf, of which there

is no finding, and, on the contrary, the plaintiff claims to have been ignorant at the time of any sale.

[5] Nor am I disposed to look upon the transaction as so unconscionable on the part of the defendant or prejudicial to the plaintiff as is contended. The members of the church empowered the trustees to sell the property, the use of which the church no longer required. No fraud was practiced upon them. The trustees had made diligent effort in that behalf and failed. The property was producing no income, and carrying it was a severe burden upon the resources of the church. Proposals were made to lease it for the purpose of a theater, but the trustees, while they were not unwilling that it should be occupied for that purpose, were unwilling that the church should lease it for such a use, fearing dissatisfaction on the part of some of the church members. Thereupon the scheme was planned which was subsequently carried through, and which resulted in the property being used as a theater. In the adoption of this plan the trustees exhibited some moral cowardice, but committed no fraud. The plan was to convey the property to some one who would take it at its full value, the purchase money to be secured by a mortgage on the land, but without personal liability of the grantee. He was to make the lease to the theater. If the negotiations for the lease failed, the property was to be reconveyed to the church. If the lease was made, the grantee was to pay, on account of the interest on the mortgage, only the amount of rent he might receive. By this arrangement the plaintiff was no worse off than it was before, for if there was no lease the property was reconveyed. If there was a lease the plaintiff would get just what it was willing to receive, had the trustees had the moral courage to rent the property for a theater. The defendant became personally liable for the rent he might receive, and, if he failed to pay it, the mortgage to the plaintiff, which ran only for a year, could be immediately foreclosed. What the plaintiff undoubtedly did lose was the chance of the appreciation in the value of the property. On the other hand, the plaintiff got the defendant's obligation to collect the rent, look after the property, to care and superintend the improvements, and so arrange that there should be no charge against the property for the cost of such improvements by the failure of the lessees themselves to pay therefor. For these services the defendant could not recover any compensation from the plaintiff. The only inducement for him to do this work and assume the obligations was the chance that he might make a profit on the sale of the property, and it was doubtless due to the efforts of himself and Luther, with whom the court found he agreed to divide the profits, that a profit was finally realized. Often an

option is given on real estate for a nominal consideration, on the belief or hope that the party to whom it is given may be able to effect a sale where the owner had been unable to do so. I am by no means certain that, taking the transaction between the parties solely as it appears on the face of the instruments executed by them, the transaction was not a beneficial one to the plaintiff, and enabled it to make a sale that by its own efforts it would have been unable to effect.

The judgment should be reversed, and new trial granted; costs to abide event.

GRAY, J. (dissenting). I vote for the affirmation of the judgment. The case differs from that of *Hamlin v. Hamlin*, 192 N. Y. 164, 84 N. E. 805, where it was sought to prove that a deed had been conditionally delivered. Here, that the delivery of the deed was absolute is not disputed. The claim of the plaintiff is that the conveyance was upon trust, and that the defendant must account for his acts as its trustee. It was found "that the defendant knew that the plaintiff's trustees in conveying the property to him did so simply for the purpose that he might hold the same for plaintiff's benefit and lease it to the theater people." This finding has been unanimously affirmed, and is conclusive as to the nature of the defendant's title.

HAIGHT, WILLARD BARTLETT, and WERNER, JJ., concur with CULLEN, C. J.; VANN and CHASE, JJ., concur with GRAY, J.

Judgment reversed, etc.

(202 N. Y. 610)

HEILBRUNN v. GERMAN ALLIANCE INS. CO. OF NEW YORK.

(Court of Appeals of New York. June 16, 1911.)

INSURANCE (§ 622*)—FIRE INSURANCE—MORTGAGE CLAUSE—CONSTRUCTION.

As the stipulations and conditions of the standard fire policy which relate to the proceedings after the liability of the company has accrued in terms relate to the mortgagor only, all or none of such terms must be held to apply to the mortgagee, and, as many of them are inapplicable, none apply.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1544-1550; Dec. Dig. § 622.*]

Appeal from Supreme Court, Appellate Division, First Department.

Action by Simon Heilbrunn against the German Alliance Insurance Company of New York. From the judgment of the Appellate Division (140 App. Div. 557, 125 N. Y. Supp. 374), reversing an order sustaining a demurrer to the complaint, defendant appeals. Affirmed.

See, also, 126 N. Y. Supp. 1131.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Alton B. Parker and Leo Levy, for appellant. Jacob R. Schiff, for respondent.

COLLIN, J. The nature of the action and the facts, so far as material, are stated in the opinion of Scott, J., below. *Heilbrunn v. German Alliance Ins. Co.*, 140 App. Div. 557, 125 N. Y. Supp. 374.

We admit that insurance companies ought to have more protection in the matter of the time within which actions upon their policies must be brought, and possibly in other respects, than has been afforded them under the decision of the Appellate Division in this case; but the difficulty is that the language of those stipulations or conditions of the policy which relate to the proceedings after the liability of the company has accrued through the fire, does not enable or permit us to apply them to the mortgagee in such part only as may be practicable or expedient. We must hold (unless our decision is to be wholly arbitrary) that all those stipulations, which in terms relate to the mortgagor only, apply equally to the mortgagor and mortgagee, or we must hold that none of them do. The former dictates that which is impossible of performance. The remedy of the companies is to apply to the Legislature for leave to modify, as to the matters indicated, the standard fire insurance policy of the state of New York.

On the merits we concur with the opinion of Scott, J., below.

The order of the Appellate Division in this case should, therefore, be affirmed, with costs, and the question certified answered in the affirmative.

CULLEN, C. J., and GRAY, HAIGHT, VANN, WERNER, and HISCOCK, JJ., concur.

Order affirmed.

(84 Ohio St. 477)

KILBOURNE v. STATE.

(Supreme Court of Ohio. May 31, 1911.)

(Syllabus by the Court.)

CRIMINAL LAW (§ 13*)—CONSTITUTIONAL LAW—INTENT—KNOWLEDGE.

That part of an act entitled, "An act to protect railway property and guard against personal injuries," passed May 9, 1908 (99 O. L. 465), which provides that "whoever buys, receives, or unlawfully has in his possession any of the aforesaid articles (referring to journal brasses, nuts, bolts, etc., removed from railway cars, etc.), shall upon conviction thereof be imprisoned, * * * is constitutionally invalid.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 13, 14; Dec. Dig. § 13.*]

Error to Circuit Court, Franklin County.

A. W. Kilbourne was convicted of crime, and brings error. Reversed.

At the September term of the court of common pleas of Franklin county for the year

1909, the grand jury presented an indictment against the plaintiff in error charging "that A. W. Kilbourne, late of said county, on or about the twenty-sixth day of July, in the year of our Lord one thousand nine hundred and nine, within the county of Franklin aforesaid, unlawfully did buy certain journal brasses necessary in the use and operation of certain railroad cars, which said journal brasses had been theretofore unlawfully and without proper authority removed from said certain railroad cars, which said railroad cars and brasses were then and there the property of the Hocking Valley Railroad Company, a corporation, and which said removal of said journal brasses from said certain railroad cars might have endangered life, contrary to the statute in such cases made and provided and against the peace and dignity of the state of Ohio." The accused was taken into custody to answer said indictment, which was first done by filing a demurrer to the indictment, one ground of which is that the statute alleged to have been violated is unconstitutional; and on the further ground that such statute is in conflict with sections 6856 and 6858, Revised Statutes. The demurrer was overruled, a plea of not guilty entered, and the case tried to a jury, resulting in a verdict of guilty in the following words: "We, the jury in this case, find the defendant, A. W. Kilbourne, guilty of unlawfully buying certain journal brasses as he stands charged in the indictment with recommendation of mercy. A. L. Henderson, Foreman." A motion for new trial was overruled and the accused sentenced to pay the costs of prosecution and be imprisoned in the Columbus workhouse and kept at hard labor for the term of 90 days. On error this judgment was affirmed by the circuit court. Error is prosecuted here to reverse both judgments.

Badger & Ulrey and M. B. Earnhart, for plaintiff in error. Edward C. Turner, Pros. Atty., and H. S. Ballard, for the State.

PRICE, J. (after stating the facts as above). Numerous errors were assigned in the circuit court, and the same have been brought to this court by the petition in error. Prominent in the list is the declaration that the statute under which Kilbourne was indicted, tried, and convicted is invalid. Its constitutionality was challenged by the demurrer to the indictment which the trial court overruled, and this ruling was complained of in the circuit court, and is forcibly assailed in this court. If this statute is invalid, the indictment falls with it, as will all the subsequent proceedings—the verdict and the sentence pronounced thereon. Therefore we first address our attention to this very important question, leaving the other errors assigned to abide the result of our investigation.

The law in question was passed on May 9, 1908, and is found in 99 Ohio Laws, pp. 464,

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

485, and in section 12,561 of the General Code. The entire section is: "Whoever, without authority, unlawfully removes from any railway track, over which locomotives or cars are operated, or from any locomotive, motor, or car the bondwires, nuts, bolts, angle bars, spikes, attachments, fastenings, switch stands, locks, feed wires, trolley wires, or other appurtenances, or any part or attachment thereof, or any bonds, nuts, bolts, wires, fastenings, journal brasses, journal packing or parts thereto attached or belonging which are necessary in the use or operation of said railway tracks, locomotives, motors or cars, and the removal of which may endanger life, or *whoever buys, receives, or unlawfully has in his possession any of the aforesaid articles, shall upon conviction thereof be imprisoned in the penitentiary not more than five years or less than one year, or not more than six months in the county jail or workhouse at the discretion of the court*, which is hereby authorized to hear testimony in mitigation or aggravation of sentence." In the revision as found in the General Code the language of the penalty is transposed and the authority to hear testimony in mitigation or aggravation is omitted.

The indictment on which Kilbourne was tried charges that "on or about the twenty-sixth day of July, in the year of our Lord one thousand nine hundred and nine, within the county of Franklin aforesaid, unlawfully did buy certain journal brasses necessary in the use and operation of certain railroad cars, which said journal brasses had been theretofore unlawfully and without proper authority removed from said certain railroad cars, which said railroad cars and brasses were then and there the property of the Hocking Valley Railroad Company, a corporation, and which said removal of said journal brasses from said certain railroad cars might have endangered life, contrary to the statute," etc. He was not charged with having removed the journal brasses from the cars, or with removing any article specified in this statute from any track, locomotive, or other railroad property. His offense, if any, consists in buying journal brasses which had been unlawfully and without proper authority therefor removed by some one else. Knowledge or even suspicion on the part of the buyer that such brasses, nuts, bolts, et cetera, had been unlawfully removed from cars or other railroad property described in the statute, is not made a condition or element of the crime. In this respect the clause or part of the section on which the prosecution is founded differs from the preceding provision, for the latter aims its prohibition against the principal actor—the one who without authority unlawfully removes from a railway track, and other species of railway property mentioned, any of the articles therein named. The one who so removes has knowledge of what and from what he removes. The act of removal necessarily implies

that he knows what he is removing, and he is charged with knowledge of the relation which such articles bear to the railway property from which they are taken. Hence we assume that one who, without authority, removes any of the specified articles from railroad cars or other named railroad property, is possessed of both knowledge and intent, and therefore no constitutional objection can be made to that part of the section. But here, in the latter paragraph, is the fate of one who buys or receives, or has in his possession any of such removed articles. The buying, receiving, or having in possession is made a crime, although the buyer, receiver, or possessor has no knowledge or information that said article or articles had been removed from any railway car, or other railway property. Knowledge is not made an ingredient of the offense as defined by this branch of the statute, and knowledge on the part of the accused is not charged in the indictment.

Many of the articles named in the act are of common use—articles of common merchandise, such as nuts, bolts, angle bars, spikes, attachments, fastenings. The others are not so common, and, as their names indicate, are intended for railroad purposes, and yet their names do not make them contraband, for when worn out, or no longer fit or desired for railroad purposes, they are for sale and become legitimate subject of traffic. The trade in old or secondhand iron, and material of this and other classes, has grown to large proportions, and the dealer—the buyer of such cast-off wares—should not be condemned by mere presumption, if he unwittingly purchases an article named in the statute, where he has no knowledge or information that it had been removed from some railroad car or other railway property. We understand that even journal brasses are not limited in use to railroad cars, but are in use in many manufacturing establishments of the country. Therefore the sight of journal brasses in the hands of a party could not of itself be evidence that they had been removed from railway cars or other railway property. It is not claimed that there are any special marks or impressions on any of these goods to indicate or designate any particular former ownership.

Section 6856, Revised Statutes, defines the crime of larceny, and section 6858 provides that "whoever buys, receives or conceals anything of value which has been stolen, taken by robbers, embezzled * * * knowing the same to have been stolen, taken by robbers, embezzled * * * shall be deemed guilty of larceny. * * *" In framing the act under consideration, the Legislature omits the word "knowingly" and provides nothing in its place, enabling the state to convict without showing that the accused had knowledge of the character of property he was buying. One may be innocent of a criminal intent in buying articles named in the statute, and may have dealt with them in the usual

course of trade, and yet be convicted if it turn out that they had been at some time by some person removed from a locomotive, motor, car, or other designated railway property.

As early as *Birney v. State*, 8 Ohio, 230, guilty knowledge was held to be a necessary ingredient of crime. It is true that that case arose from the violation of a statute prohibiting the harboring or secreting a slave. There were several counts in the indictment which we need not specialize further than to say that the statute forming the basis of prosecution provided that, "if any person shall harbor or secrete any black or mulatto person, the property of another, the person so offending shall, on conviction thereof, be fined in any sum," etc. It is observed that scienter is not made part of the statutory description, and that fact was important in determining the case. On page 238, of 8 Ohio, Wood, J., speaking for the court, says: "There is no averment that the plaintiff in error knew the facts alleged, that Matilda was a slave, and the property of L. Larkin, or of any other person; and such is not the legal inference in a state whose Constitution declares that all are born free and equal. * * * On the contrary, the presumption is in favor of freedom. The scienter, or knowledge of the plaintiff in error, of this material fact, was an ingredient necessary to constitute his guilt. This knowledge should have been averred in the indictment, and proved on the trial, for without such knowledge the act charged as a crime was innocent in its character. We know of no case where positive action is held criminal, unless the intention accompanies the act, either expressly or necessarily inferred from the act itself. It is true that the statute upon which the indictment is founded omits the scienter, and the indictment avers all the facts enumerated in the statute. But this is not sufficient. It cannot be assumed that an act, which, independent of positive enactment, involves no moral wrong, nay, an act that in many cases would be highly praiseworthy, should be made grievously criminal when performed in total unconsciousness of the facts that infect it with crime. * * * We think this early pronouncement by this court is yet sound law and states a rule pertinent to the present controversy, and is as applicable to the business habits and rights of our citizens to-day as to the right of a citizen under the fugitive slave statute. The case has been approvingly noticed in *Miller et al. v. State*, 3 Ohio St. 476, under our present Constitution, and the principle distinctly reannounced in *Farrell v. State*, 32 Ohio St. 456, 30 Am. Rep. 614. The same legal light can be traced through many later cases decided by this court, which we need not cite.

If it is said that the buyer should, before buying or receiving, make inquiry as to where or how the articles were obtained, we might be at a loss to tell of whom and where the

inquiry should be made. It is not probable that the thief or party who removed the articles would inform the buyer that the property was stolen, but, on the contrary, would make such statement or give such account as would allay suspicion and indicate that the property had been honestly acquired. Had the buyer gone through the course of this precaution, and acted on the information thus given as to the history of the articles offered for sale, and believing the statement of the seller, purchased them, it would be no defense under this branch of the statute. Want of knowledge of the truth, however honestly and actively sought, furnishes no excuse, and the purchaser in good faith stands no better before this law than the thief himself. Why this drastic legislation? And as to a certain class of property? Counsel for the state answer in the language of the circuit court, where it is said: "The object of this statute is to break up any market for such commodity so removed from cars, and I might say here that is one of the strong points that no doubt influenced the Supreme Court and the circuit court in upholding the same question as made under the pure food laws—that is, the question of knowledge. If there was no market value for any such commodity, then it would reduce to a minimum the temptation and desire on the part of any parties to unlawfully remove any such material from railroad cars." But such statement does not satisfy the question we have here. Doubtless it is true that these species of railroad property are the frequent subjects of unlawful depredations, and that the thefts and removals have become a crying evil. It may be also that similar depredations are committed in the homes and other buildings owned by our citizens, from which, night and day, prowlers remove and sell valuable gas and water pipes and other valuable plumbing. When such articles are once removed, the thief will, if he can, find a market for the illegal wares. To break up the market for gas and water pipe, should the Legislature make an innocent buyer a criminal? We have already said that most of the articles mentioned in this statute do not from their nature belong exclusively to railroads or become part of the track, cars, motors, etc., of said railways. Journal brasses are not used exclusively by railroads, but they are adapted to manufacturing concerns, where such brasses are needed in the operation of machinery. And still more common are most of the other prescribed articles. What disposition do railway companies themselves make of their worn-out journal brasses, bolts, nuts, etc., when no longer safe and fit for use? Do they bury them out of sight? In the exercise of economy, they may seek and help create a market for such wares, and to destroy all market for such articles as are included in the list is an undertaking that may tax the ability of even the Legislature.

The plaintiff in error may be rather a free

buyer of secondhand iron, and what is called "junk," and on occasions may have purchased without due care for the rights of others, but, when we look into the record in this case, it is seen that he never saw the journal brasses in question. They were, by some one, placed in barrels, taken to the railroad freight-house in Columbus, and billed to a firm in Cleveland. One, Brown by name, obtained a bill of lading for the goods, and they were shipped to the Cleveland concern. In the afternoon of the day this party appeared at the office of plaintiff in error and presented the bill of lading and offered to sell the goods it represented. The plaintiff in error was not present at the time and the negotiations were with his bookkeeper. The evidence may be in conflict, but it tends to show that the bookkeeper declined to buy the goods, but consented to take the bill of lading and sell the same on commission. At all events, nothing was paid for the goods. After the party had left, plaintiff in error returned to the office and was informed by the bookkeeper of what had transpired. In the meantime the officers of the law got trace of the shipment and overtook it at Cleveland and arrest followed for Kilbourne in this case. There is nothing in the record to show that either the bookkeeper or Kilbourne ever saw these journal brasses. They never were in their possession except by token of the bill of lading. On inquiry by the bookkeeper as to nature of the goods, they were described as goods not proscribed by the statute in question. While we are not passing on the merit or weight of the evidence in the record, the above facts serve to illustrate what might be the dealings of and what might befall a perfectly honest man under similar circumstances. We do not believe the Legislature has constitutional authority to enact such legislation as the clause of the section upon which the indictment is predicated and therefore hold it invalid.

This conclusion renders consideration of other questions in the record unnecessary.

The judgments of the lower courts are reversed, the demurrer to the indictment sustained, and the plaintiff in error discharged.

Reversed.

DAVIS, SHAUCK, JOHNSON, and DON-
AHUE, JJ., concur.

(84 Oh. St. 259)

ANN ARBOR R. CO. v. ADDISON.
(Supreme Court of Ohio. May 31, 1911.)

(Syllabus by the Court.)

**RAILROADS (§ 260*)—INJURIES TO RAILROAD
EMPLOYE—CONTRACTS BETWEEN RAILROADS
—CONSTRUCTION.**

While it is competent for railroad companies, in contracts to facilitate the movements of trains in the conditions which obtain at crowded terminals, to incur liabilities for injuries to the employees of other companies, result-

ing from the negligence of their own employes, such contracts may not, by construction, be extended to movements of trains beyond the scope of their terms.

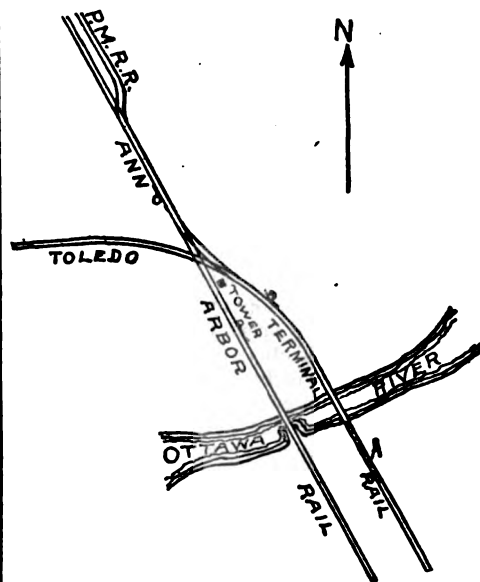
[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 817-823; Dec. Dig. § 260.*]

Error to Circuit Court, Lucas County.

Action by one Addison against the Ann Arbor Railroad Company and another. Judgment for defendant railroad was reversed by the circuit court, and it brings error. Reversed.

Addison brought suit in the court of common pleas against the Toledo Railway & Terminal Company, the Detroit & Toledo Shore Line Railroad Company, and the Ann Arbor Railroad Company, to recover on account of personal injuries sustained by him while acting as baggage man on a train of the Pere Marquette Company. At the conclusion of the evidence counsel for Addison voluntarily dismissed the action as to the Terminal Company, and the court directed a verdict in favor of the other two companies. A judgment in favor of the Ann Arbor Company on the verdict so directed was reversed by the circuit court, and this is a proceeding in error by the Ann Arbor Company for the reversal of that judgment of the circuit court.

The Pere Marquette Company is the successor of the Monroe Company. The location of the tracks and the trackage relations of the several companies, as well as the place where Addison sustained his injury, will be made clear by attention to the accompanying diagram and explanation:



The Terminal Company, as its name indicates, serves to facilitate the entrance of the trains of other roads into, and their passage around, the city of Toledo. The site is where the tracks of the other roads named, as they

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

approach Toledo from a northerly direction, reach the track of the Terminal Company. By the side of the Ann Arbor track near the crossing of the Terminal tracks is a tower, from which a towerman controls an interlocking system, by which trains on the Pere Marquette may be shunted to the track of the Terminal Company, or to the track of the Ann Arbor Company. The train on which Addison was working as a baggageman, when he received his injury, approached from the north, and was by the towerman admitted to the Ann Arbor track, and then shunted by the Y onto the track of the Terminal Company. As the train proceeded southwardly on the Terminal track, after it had crossed the Ottawa river, having passed entirely beyond the track of the Ann Arbor Company and at point A, it collided with a derelict caboose standing on the Terminal track and in the collision Addison was injured. Shortly before the approach of this train a freight train of the Shore Line Company passed northwardly on the Terminal track over the Ottawa river, and thence westerly over the Ann Arbor track, and while so passing it parted, leaving its caboose on the Terminal track at point A. The towerman failed—negligently it may be assumed—to observe the absence of the rear lights of the Shore Line train, which would have indicated a complete train, and thus thinking that the Terminal track was clear passed the Pere Marquette train upon it.

Only the liability of the Ann Arbor Company is here in question, and the allegations of the petition respecting it are, in substance, that the Ann Arbor Company maintained and operated an interlocking system, including the tower occupied by the towerman who operated the system; that it was the duty of that company and of the towerman to give signals to all the trains of the Pere Marquette Company passing over the tracks of the Ann Arbor Company and the Terminal Company at the point, and not to permit any train of the Pere Marquette to enter upon the tracks of the Terminal Company over or from the tracks of the Ann Arbor Company while the tracks of the Terminal Company were occupied; that on November 4th plaintiff being engaged in his duties as baggageman on the passenger train of the Pere Marquette road, which had left the tracks of the Pere Marquette Company and passed onto the tracks of the Ann Arbor Company and onto the tracks of the Terminal Company, the tracks of the Terminal Company ahead of the train were involved and obscured by darkness; that the towerman passed the train onto the Terminal Company's track, although a short time before a Toledo Shore Line train passing over the Terminal track had parted, leaving the rear end of the train standing on the track of the Terminal Company, whence the collision occurred; that the absence of lights on

the rear end of that part of the train which passed the tower was not noticed by the towerman; that all the train had not passed, and it was, therefore, the duty of the towerman to refuse the Pere Marquette train entrance upon the Terminal track.

The Ann Arbor Company in its answer admits that with its knowledge and consent the Pere Marquette Company was operating trains over the designated portion of its road, and that there was an interlocking system established and maintained at the intersection of its track with that of the Terminal Company, and that the towerman was employed there. It substantially denies all the other allegations of the petition.

Upon the trial a contract between the Monroe Company and the Ann Arbor Company was introduced in evidence. It provided for the passage of Pere Marquette trains over the track of the Ann Arbor Company to the local Terminal station in the city of Toledo. It defined the terms upon which the Ann Arbor track for that purpose should be occupied by trains of the Pere Marquette Company, and it defined, so far as it was deemed necessary, the relation of those two companies in such operation of the trains of the Pere Marquette Company over the Ann Arbor Company's tracks to the city of Toledo. It contained no stipulation whatever to the operation of cars or trains over the track of the Terminal Company. By the entire evidence it was shown that the train upon which Addison was injured was not operating under this contract over the track of the Ann Arbor Company to the Cherry street station, but was passing over the track of the Terminal Company to its station in Toledo, and this was under an arrangement between the Terminal Company and the Pere Marquette Company, which the record does not disclose. There is no evidence in the record showing any duty or obligation of the Ann Arbor Company with respect to the passage of the Pere Marquette Company's trains over the track of the Terminal Company.

Upon this state of the evidence, the plaintiff having voluntarily dismissed the Terminal Company from the action, the common pleas judge directed a verdict in favor of the Ann Arbor Company.

Smith & Beckwith, for plaintiff in error.
Harry Levison, for defendant in error.

SHAUCK, J. (after stating the facts as above). This case presents no material question of law with respect to which counsel differ, or with respect to which it is believed any lawyers would differ. The differences between counsel and between the courts below seem to concern only the proper statement of the case. Why the original plaintiff voluntarily dismissed from the case the Terminal Company, upon whose track the train was passing at the time he received his injury, is

left to conjecture. The only question here is whether the Ann Arbor Company is liable for that injury. There is in the record a contract under which the Pere Marquette Company might have run this train over the Ann Arbor Company's track to another station in Toledo. If it had been so operated, the construction of the contract between the Ann Arbor Company and the Pere Marquette Company might become material. But in this instance the Pere Marquette Company was not exercising the right which that contract conferred upon it. In that contract are stipulations from which the liability of the Ann Arbor Company might be inferred with respect to injuries sustained by trainmen of the Pere Marquette Company on the Ann Arbor Company's track. It contains no stipulation whatever as to a train moving on the Terminal track, nor is there any in the record, to which the Ann Arbor Company was a party to the arrangement by which the Pere Marquette Company's train was passing over the track of the Terminal Company. Not only is there an absence of such evidence, but it affirmatively appears from the evidence that the Ann Arbor Company had no relation whatever to that arrangement. When the trial judge directed a verdict in favor of the Ann Arbor Company, he obviously took account of the considerations that the train was not operated under the contract of the Ann Arbor Company for the passage of the train over its road, and that the contract of the Ann Arbor Company imposed upon it no duty whatever with respect to trains passing into the city over the track of the Terminal Company. The Y by which the train passed from the track of the Ann Arbor Company to that of the Terminal Company was constructed but a short time before this accident, and, in so passing and operating its trains, they were pursuing some arrangement between the Pere Marquette and the Terminal Companies, which does not appear of record. It is sufficient to say that the record not only negatively, but affirmatively, shows that the Ann Arbor Company was not a party to that arrangement. We assume that the view of the case which led the circuit court to reverse the judgment upon the verdict so directed was, as stated in the brief of counsel for the defendant in error, that the towerman was the servant of the Ann Arbor Company. In a general sense he was, and it may be that he acted in that relation so as to charge the Ann Arbor Company for injuries resulting from his negligence to employes on trains of the Pere Marquette Company passing over the Ann Arbor track under the contract referred to. But to that question we need give no consideration since the injury occurred to one upon a train moving upon another road, under another arrangement with another party.

Judgment of the circuit court reversed, and that of the common pleas affirmed.

Judgment reversed.

SPEAR, C. J., and DAVIS, PRICE, and JOHNSON, JJ., concur.

(84 Oh. St. 233)

ALLEN v. SMITH.

(Supreme Court of Ohio. May 31, 1911.)

(Syllabus by the Court.)

1. COURTS (§ 161*)—COURTS OF COMMON PLEAS—JURISDICTION—STATUTES.

The jurisdiction of the courts of common pleas of the state is, by force of section 4 of article 4 of the Constitution, fixed by statute.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 406, 407; Dec. Dig. § 161.*]

2. VENUE (§ 2*)—LEGISLATIVE POWERS—COURTS OF COMMON PLEAS.

In the exercise of the power of the General Assembly to confer jurisdiction on such courts, it is within the competency of that body to fix and determine the venue of civil actions. And so long as, by the exercise of that power, no party is deprived of any constitutional right, the courts will not interfere with the will of the General Assembly as thus expressed.

[Ed. Note.—For other cases, see Venue, Cent. Dig. § 1; Dec. Dig. § 2.*]

3. CONSTITUTIONAL LAW (§§ 305, 249, 328*)—VENUE (§ 3*)—DUE PROCESS OF LAW—EQUAL PROTECTION OF LAW—RIGHT TO JUSTICE—CIVIL ACTIONS.

Section 33 of the act of May 11, 1908 (99 O. L. 538), entitled, "An act to provide for the registration, identification and regulation of motor vehicles," which provides that actions for injury to person or property caused by the negligence of the owner of any automobile may be brought by the party injured against such owner in the county where such injured party resides, and that summons may issue to the sheriff of any county within the state wherein the defendant resides, to be served as in other civil actions, is a constitutional and valid exercise of legislative power.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 925-927, 710, 950-963; Dec. Dig. §§ 305, 249, 328;* Venue, Cent. Dig. § 2; Dec. Dig. § 3.*]

(Additional Syllabus by Editorial Staff.)

4. CONSTITUTIONAL LAW (§ 70*)—JUDICIAL POWERS—ENCROACHMENT ON LEGISLATURE.

The fact that the wisdom of a statute is doubtful does not warrant any judicial interference with its enforcement.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 131; Dec. Dig. § 70.*]

5. STATUTES (§ 77*)—SPECIAL LEGISLATION—REGULATION OF MOTOR VEHICLES.

Act May 11, 1908 (99 Ohio Laws, p. 538), providing for the registration, identification, and regulation of motor vehicles, is not unconstitutional as an unreasonable discrimination and an unjust classification, since automobiles, being a comparatively new machine, dangerous to other users of the highway, and their powers being a temptation to reckless drivers to operate at an excessive speed and in a careless manner, stand in a class by themselves, warranting special regulation.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 79-82; Dec. Dig. § 77.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

6. STATUTES (§ 85*)—SPECIAL LEGISLATION—REGULATION OF MOTOR VEHICLES—ACTIONS AGAINST OWNER—VENUE.

The fact that section 33 of Act May 11, 1908 (99 Ohio Laws, p. 538), regulating motor vehicles, allows actions for injuries by automobiles to be brought against owners or persons hiring them for longer than 30 days, in the county where the injured party resides, is not invalid for failure to extend the provision fixing the venue to other users than those mentioned.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 94, 95; Dec. Dig. § 85.*]

Error to Circuit Court, Fayette County.

Action by Frank M. Allen against T. Y. Smith. Judgment for defendant, following an order quashing the summons and service thereof, was affirmed by the circuit court, and plaintiff appeals. Reversed, and cause remanded to the common pleas, with directions to overrule the motion to quash.

The plaintiff in error, Frank M. Allen, filed a petition, February 5, 1910, in the court of common pleas of Fayette county, against the defendant in error, T. T. Smith, to recover damages incurred by reason of the alleged negligence of the defendant in the driving of an automobile. It was averred in the petition, in substance, that on December 2, 1909, while the plaintiff was driving his horse and buggy in a public highway in said county, the defendant, who is a resident of Highland county, Ohio, recklessly, wantonly, negligently, and unlawfully drove his automobile on the said highway in the direction of plaintiff's horse and buggy, and so near thereto as to frighten the horse and cause him to overturn the buggy, thereby inflicting serious injury upon the person of plaintiff. Thereupon summons in usual form was issued to the sheriff of Highland county, which was duly returned by the sheriff of that county with the indorsement that he had personally served the same on the defendant. On March 3d following, the defendant, appearing for the purpose of his motion only, filed a motion to quash and set aside the summons and the service and return thereof, for the reason that such part of section 33 of the act of May 11, 1908, Laws of Ohio, which authorizes the issuing of summons to the sheriff of any county, other than that in which such action is brought, is unconstitutional. On hearing, the motion being found well taken was sustained, and the summons and service thereof ordered quashed and vacated. This order and judgment was affirmed by the circuit court. Plaintiff, by this proceeding in error, seeks a reversal of the orders and judgments below.

H. H. Sanderson and John Logan, for plaintiff in error. Wilson & McBride, for defendant in error.

SPEAR, C. J. (after stating the facts as above). The ultimate question presented by the record relates to the jurisdiction of the court of common pleas of Fayette county

over the person of the defendant, Smith. This question is raised by the motion of defendant to quash the summons and service thereof, which, if properly sustained, determined effectually the question of jurisdiction and ended the case. The ground of that motion is that the act of May 11, 1908, which assumes to authorize the bringing of such action in Fayette county and the issuing of summons to Highland county and its service by the sheriff of that county, is unconstitutional.

Section 33 of the act provides: "All actions for injury to the person or property caused by the negligence of the owner of any automobile included within the provisions of this act, may be brought by the party injured against the owner of such automobile in the county wherein such injured party resides. In case such action is begun, a summons against any defendant or defendants shall be issued to the sheriff of any county within the state of Ohio, wherein such defendant or defendants reside, to be served upon such defendant or defendants, as in other civil actions, any law to the contrary providing for the service of summons in civil actions notwithstanding."

The first section of the act defines what vehicles are included within the scope of section 33 of the act and practically confines its effect to the vehicles popularly known as automobiles. The fifth section includes as owner any person renting a motor vehicle for a period greater than 30 days.

[2] The main attack upon this act made by counsel for defendant in error, when reduced to its last analysis, is based upon the proposition that a party defendant to a suit in a county of the state has a constitutional right to be sued, if sued at all, in the county of his residence. This has not been understood to be the law. The fact that some provisions of statute aim to secure this result by no means establishes that it is based upon a constitutional right. On the contrary, beginning with the first practice acts and continuing down through the Code of Civil Procedure, and followed by the numerous amendments, revisions, and codifications to this date, the General Assembly has assumed the power of legislating respecting the venue of actions and prescribing the county or counties in which certain actions may be brought, and the county or counties in which certain other actions may be brought, many of which provisions permit the bringing of actions in counties other than those of the residence of the defendant or defendants, and this legislation has been so generally acquiesced in, and so constantly recognized by the courts as valid, that it is necessary to refer only to the sections of the Revised Statutes, from 5019 to 5031, providing, "Where actions to be brought," and the decisions there cited, to make plain that a pro-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

vision of statute which permits a party plaintiff to maintain an action against his adversary in a county other than the one in which such defendant resides has not been regarded as an invasion of any constitutional right. The power to thus legislate is unquestionably lodged with the General Assembly. As held in *Handy v. Insurance Co.*, 37 Ohio St. 366: "The county in which actions are to be brought, as well as the mode of acquiring jurisdiction by notice to defendants, is regulated by statute."

[4] Whether or not this power is always wisely exercised, whether it always brings perfectly fair results, and whether such legislation is entirely reasonable, it is not important for us to inquire; once the power to legislate on the subject and determine the venue of actions is found to exist in the General Assembly, the wisdom of its exercise is not a judicial question. Of course, if in the method of its exercise that body enacts a statute which is plainly, manifestly, and beyond a reasonable doubt, obnoxious to the charge of depriving a party of any constitutional right, then the statute is to be ignored, but a mere difference of judgment between the body and the courts relating to the wisdom of its action affords no ground for interference with the enforcement of its legislative acts.

[3] The statute does not invade section 16 of the Bill of Rights, cited by counsel, which provides that all courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law, because full and adequate jurisdiction over the subject-matter is given by general legislation to all of the courts of common pleas of the state, and thus adequate remedy by due course of law is afforded. Nor, for the same reason, does the statute deprive any person of property without due process of law, or deny to him the equal protection of the laws. A fair trial in a court of competent jurisdiction is accorded to all alike who are in the same category, and having a like cause of action or defense. Hence the act does not lack uniformity of operation throughout the state. As a general rule, the statutes require that actions against individuals must be brought in the county where the defendant resides or may be personally served with process, but it does not follow that the General Assembly is without power to make exceptions. This phase of the contention seems to be entirely covered by the decision of this court in *Snell v. Cincinnati Street Railway Co.*, 60 Ohio St. 256, 54 N. E. 270, which involved the validity of section 5030, Revised Statutes, which section provides for a change of venue "when a corporation having more than fifty stockholders is a party in an action pending in any county in which the corporation keeps its principal office," etc.

The act in review in that case was, as is

the act in review in this case, assailed on the ground of unconstitutionality, because it applies an exceptional rule, a rule different from that applicable to parties in other actions, and one not equally applicable to both parties in the same action, and thus denies to such corporation the equal benefit and protection of the law, and remedy by due course of law. The court's answer to this proposition was, as is our answer to the like proposition in the case at bar: "It has never been regarded as essential to the validity of remedial procedure that it should be applicable in all of its provisions to all persons or parties alike. Different situations and conditions often render appropriate and necessary different provisions, the necessity or propriety of which rests largely in the legislative discretion. * * * Distinctions of this nature have not been infrequent since the adoption of the present Constitution. * * * Of a like nature are regulations for changes of venue. They are designed to secure to parties a fair and impartial trial of their causes, which is the ultimate and highest purpose of judicial proceedings; and the extent to which such regulations may go, for the accomplishment of that purpose, is addressed to a sound legislative discretion, in view of the nature of the case to be provided for, and the probable conditions likely to arise. * * * This statute imposes no penalty or burden upon one suitor or class of suitors from which others similarly situated are exempt, as did the statute held invalid in *Coal Co. v. Rosser*, 53 Ohio St. 12, 41 N. E. 263, 53 Am. St. Rep. 622; nor does it affect any right of property of some owners differently from others in the same situation, as did the act declared unconstitutional in *State v. Ferris*, 53 Ohio St. 314, 41 N. E. 579, 30 L. R. A. 218. In the first of those cases the act was held invalid, because it exacted an attorney's fee from a class of defendants to which parties in no other class of actions were subject; and in the other case the law failed, because it laid a burden in the nature of a tax unequally upon property."

[5] It is specially urged that the classification made by the act is unjust and unreasonable, and that this renders the act invalid. This objection, at first blush, seems plausible, but we think it is not sound. Always to be borne in mind is the fact that the discriminations of the law are made up of distinctions, oftentimes slight, sometimes nice, and yet possessed of substance. Next to an act declared by statute to be unlawful will be found one having many points of resemblance, and yet not precisely like the other, which is excluded; or an offense may be classified into grades and offenders receive punishments, but such discriminations do not render either statute unreasonable, or for any reason invalid. A familiar instance is the statute respecting larceny. If a thief

steals property of the value of one cent less than \$35, he may be imprisoned in the jail or workhouse; if the property be of the value of \$35, or over, he may be incarcerated in the penitentiary. The two acts equally involve moral turpitude, but one is a felony, while the other is but a misdemeanor. Such classes are arbitrarily formed by the General Assembly, and necessarily so. "If the Legislature has erred in not including what has been excepted from the law, it is simply an error of judgment in the exercise of its authority, and cannot be reviewed by the courts." *State v. Nelson*, 52 Ohio St. 88, 39 N. E. 22, 26 L. R. A. 317. The books are full of illustrations of this principle. See authorities cited by counsel.

The act in question partakes of a twofold nature. Some of its provisions come purely within the domain of the police power; others within the general legislative power; while others partake of both characteristics. It is a remedial act, intended, in the first instance, to regulate the use of automobiles, and to provide for the safety of others who are lawfully using the public highways. Why should they not be regulated, and why should not the old-fashioned user of the highway be protected by the law? Doesn't everybody know that the automobile is a new machine of travel; its use a new use of the highway; that it is dangerous to other travelers; that its power, its capacity for speed, the temptation it affords the reckless driver to operate it at a dangerous rate and in a careless manner, all distinguish the automobile from all other vehicles? Surely it cannot be necessary to further elaborate this fact so patent to every observing and reading person. The automobile is therefore a class by itself; the users of such machines a class by themselves; and legislation in recognition of this condition is based upon a solid, easily recognized distinction.

[6] The objection that, because section 33 (which section prescribes the venue in the present case) permits the action to run only against the owner of the automobile, it is therefore invalid seems to be wholly without force. The act might well have included in its operation more persons using automobiles than the owner or persons renting for more than 30 days, but failure to extend the class no more invalidates the provisions which take in the owner and the 30-day renter than did the failure of the act in review, in *State v. Nelson*, supra, to protect drivers of horse cars and gripmen on cable cars render the provision protecting other motormen invalid.

Nor is there any injustice inflicted on the defendant by the provision as to venue. It

is not, intrinsically, more unfair to permit a suit of the character here involved to be tried in the county where the victim of the alleged wrong resides than in the county where the alleged wrongdoer resides. The plaintiff would have just as clear a natural right to ask that the law permit a trial in his county as the defendant could have to demand that the trial shall be in his county. That the demand as to venue of the defendant is not based upon natural right is illustrated by the fact that, had the plaintiff procured personal service of summons on the defendant in Fayette county, the venue of the action would have been fixed in that county; this by reason of a statute whose validity has never been questioned. How clear is it, therefore, that the whole question is one of legislative discretion, and how idle is it to insist that the authorization of summons to go to Highland county is an invasion of any natural or constitutional right of defendant. The act, in other sections, provides that violation of certain of its requirements shall be deemed a misdemeanor, punishable by fine or imprisonment. Had the defendant been charged in a criminal complaint with a violation of any of these provisions at the time and place of the alleged accident, he would have had to answer to a court outside of his own county; this by mandate of the Constitution. Thus does the Constitution itself deny that there is any inherent right in a violator of law to be tried in the county of his residence.

As hereinbefore indicated, we are not called upon to inquire into the reasons which actuated the General Assembly in enacting section 33 of the act in question. In our judgment, abundant reasons existed, and do still exist. As applied to the present case, the common law afforded a right of action; the statute provides where that right may be pursued, and where the remedy may be enforced.

[1] The Constitution clothes the court of common pleas with capacity to receive jurisdiction; the statute provides what that jurisdiction shall be, and how and where exercised. We are of opinion that the provision is not unconstitutional nor unreasonable, and that it works no injustice.

This conclusion calls for a reversal of the judgments below. The cause will be remanded to the court of common pleas of Fayette county, with direction to overrule the motion, and for further proceedings according to law.

Reversed.

PRICE, JOHNSON, and DONAHUE, JJ., concur.

(209 Mass. 445)

JOHNSON v. NORCROSS BROS. CO.(Supreme Judicial Court of Massachusetts.
Suffolk. June 22, 1911.)**1. CUSTOMS AND USAGES (§ 17*)—EFFECT ON CONTRACTS.**

A general custom known to both parties to a contract cannot be shown to overcome an express agreement.

[Ed. Note.—For other cases, see Customs and Usages, Cent. Dig. § 84; Dec. Dig. § 17;* Evidence, Cent. Dig. §§ 1945-1952.]

2. CONTRACTS (§ 15*)—BUILDING CONTRACTS—CONTRACTOR'S LIABILITY TO SUBCONTRACTOR.

A building contractor is not liable for work performed by a subcontractor which the contractor did not order or agree to pay for.

[Ed. Note.—For other cases, see Contracts, Dec. Dig. § 15.*]

3. CONTRACTS (§ 241*)—BUILDING CONTRACTS—ARCHITECTS—AUTHORITY.

Under a subcontract to furnish plumbing, etc., for a building, limiting the architect's right to order changes to changes not increasing the cost, the contractor is not bound by an unreasonable change by the architect in specifications.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 1126; Dec. Dig. § 241.*]

4. TRIAL (§ 386*)—RULINGS—REFUSAL.

A ruling covered by one given is properly refused.

[Ed. Note.—For other cases, see Trial, Dec. Dig. § 386.*]

5. REFERENCE (§ 99*)—EFFECT OF REPORT—RIGHT TO RECOVER.

In an action by a subcontractor who furnished plumbing, etc., for a building, it was proper to refuse to rule as a matter of law that he was entitled to recover on certain items where the auditor's report was in evidence and there was no subsidiary fact found by him inconsistent with his general finding for defendant.

[Ed. Note.—For other cases, see Reference, Dec. Dig. § 99.*]

Exceptions from Superior Court, Suffolk County; John H. Hardy, Judge.

Action by William B. Johnson against the Norcross Bros. Company. Decision for defendant, and plaintiff brings exceptions. Exceptions overruled.

Tyler & Young, B. E. Eames, and C. W. Hood, for plaintiff. R. G. Dodge, for defendant.

HAMMOND, J. This was an action upon a written contract by which the plaintiff, the party of the second part, agreed with the defendant, the party of the first part, to provide all the materials and do all the work of "plumbing, gas-piping, and ice water plant piping" in a certain building, then being erected by the defendant for the owner, as set forth and explained in certain drawings and specifications prepared by the architects. The case was sent to an auditor who found for the plaintiff on the first, sixth, and seventh items of the account and for the defendant upon the others. It was then tried before a judge sitting without a jury, who

found "upon all the evidence that the auditor's report has not been overruled," and the findings of the auditor were sustained. The case is before us upon the plaintiff's exceptions to the exclusion of certain evidence and to refusals to rule as requested.

Among the provisions of the contract were the following: "In case any particular shall be deficient or not clearly expressed in said specifications and drawings, the said party of the second part will apply to the said first party for additional drawings and explanations, and will carry out the general design, as directed by the first party, in a thorough manner as part of the contract. * * * It shall be lawful for said party of the first part at all times to direct in writing, any additions to or deviations from the drawings and specifications aforesaid, without in any other respect or particular varying this agreement or impairing the force thereof; and in case of any such addition or deviation so directed in writing, such further time shall be allowed for the completion of said work as the architect shall decide to be reasonable, and such sums of money shall be added to or subtracted from the amount of the consideration hereinafter agreed to be paid, as the increase or diminution in the amount of work and materials thereby occasioned shall be fairly worth. And it is expressly agreed that no alterations or additions are to be paid for unless so directed in writing." And near the end of the contract is the general provision that "the general contractor [the Norcross Brothers Company] will pay for no extra work or material unless ordered in writing."

The purpose of the provision that the defendant shall not be held to pay anything either for changes, additions or other extra work unless ordered in writing is plain. The provision manifestly was intended to prevent any future controversy likely to arise as to the liability of the general contractor for work so done, and it is a useful and reasonable provision.

[1] The evidence offered to show a general custom known to the parties was rightly rejected. The natural meaning of the language of the contract is that the written order to do the work is to be given before the work begins, and that only such an order is intended. If that be the meaning of the contract, then the evidence was properly rejected as inconsistent with its express language. But, however that may be, the evidence so far as it was inconsistent with the contract was not admissible, and so far as, being consistent with the contract, it bore upon the question of the time when the written order should be given it was immaterial in this case because no such written order ever was given. If it be urged that in reliance upon this custom the plaintiff went ahead without

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep't Indexes

the written order expecting to get that at some time afterward, the answer is that he did so at his peril. To say that because he did so he therefore should recover without the written order, the defendant not having waived the provision or been guilty of fraud, is to annul the provision for the order. If there be such a custom as the plaintiff offered to show, then the provision of the contract read in the light of that custom would be interpreted to mean that for changes and alterations and extras there was to be no pay unless some time before the work was fully done, or after its completion, a written order was given, but it would not show that the written order was not to be given at all. Moreover, it would be immaterial when, as in this case, it is not shown that any verbal order was given by the defendant or by any one for whom it was responsible.

The plaintiff made 28 requests for findings of fact. As to these the trial judge says in his memorandum that "so far as the plaintiff's requests for findings of fact are consistent with the findings of the auditor in his report I give them. So far as they are inconsistent therewith I deny them." In other words the judge, giving due weight to the report of the auditor and to the other evidence, came to the conclusion that the auditor was right in his findings and adopted them. It cannot be said that in this there was any error in law. The evidence being conflicting his decision could not be said to be wrong in law. Nor do we understand that the plaintiff has taken any exceptions to this action of the court.

[2] The plaintiff submitted seventeen rulings, some of which were given and some refused, the latter being those numbered one, five, eight, ten, and twelve to seventeen, both inclusive. The fifth was properly refused. It would hold the defendant to pay for work though it did not order the work or in any way agree to pay for it. [3] The eighth seems to involve the assumption, contrary to fact, that the specifications gave a line for the main drain. Even if such a line had been given and afterwards was varied by the architects to an unreasonable extent, the defendant, having nothing to do with it, would not be chargeable with the cost. The parties had expressly agreed that the changes which the architect could order should be those which would not increase the cost. This request was properly refused. [4] The tenth request was rendered immaterial by the findings of the auditor affirmed by the court. There was no finding of an agreement between the plaintiff and the architect's representative and the defendant. Moreover in giving the eleventh request the court gave all of the tenth to which the plaintiff was entitled. There was no error in the refusal to give the tenth. The twelfth request becomes

immaterial in view of the finding that Colburn never authorized the work and had no authority to authorize it. The thirteenth could not have been given. It calls for an erroneous construction of the contract. And the same may be said of the fourteenth. The fifteenth, sixteenth, and seventeenth rulings were properly refused. They each contain the statement that the work referred to was done under an agreement between the plaintiff and the defendant, which statement is found not to be a fact.

[5] The first ruling requested was that upon all the evidence the plaintiff is entitled to recover. We understand this to be a request that the plaintiff could recover on all the items, not only those allowed by the court but also those disallowed. So far as respects the items allowed by the court the defendant was not prejudiced. So far as respects the items disallowed, it is sufficient to say that upon the findings the auditor's report for the defendant on these items being in evidence, and there being no subsidiary fact found by him inconsistent with his general finding for the defendant, it could not have been ruled as matter of law that the plaintiff was entitled to recover on these items.

Exceptions overruled.

(200 Mass. 316)

LEAHY v. CHARLES et al., Street Com'rs.
(Supreme Judicial Court of Massachusetts.
Suffolk. June 21, 1911.)

1. MUNICIPAL CORPORATIONS (§ 442*)—PUBLIC IMPROVEMENTS—SPECIAL ASSESSMENTS—PROPERTY LIABLE—"LAY OUT."

The city of Boston took part of lands for a short parkway, to be controlled by the park commissioners, and made a settlement with the owner, by which the city agreed to construct a roadway and walk, to which he should have perpetual access, and to assume any assessment for betterments for the construction of the park on the land not taken. Subsequently the city street commissioners laid out a street several miles long, which, where the owner's land lay, was superimposed on the parkway, and no physical change was made therein. *Held* not to preclude assessment for betterments on the owner's lands for the new street, which was a wholly new layout by the commissioners; to "lay out" meaning, in this connection, to fix the termini and prescribe the boundaries of a highway, and establish it as a public easement of travel, by official act of the proper authorities.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1062; Dec. Dig. § 442.*]

For other definitions, see Words and Phrases, vol. 5, pp. 4037-4039.]

2. MUNICIPAL CORPORATIONS (§ 495*)—PUBLIC IMPROVEMENTS—ASSESSMENTS—BENEFITS TO PROPERTY.

The opening of a new street, which embraced, but did not change, the street upon which the petitioner's property abutted, cannot be held as a matter of law not to have benefited petitioner's property, so as to pre-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

clude an assessment, even though his property be restricted to use for residential purposes.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1166; Dec. Dig. § 495.*]

3. MUNICIPAL CORPORATIONS (§ 512*)—SPECIAL ASSESSMENTS—REVIEW—SCOPE OF REMEDY.

Whether or not a special assessment of benefits in fact benefited the property of one petitioning for a writ of certiorari, to vacate the assessment is a question of fact, and does not arise as matter of law on the record, and hence cannot be determined in that proceeding.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1185-1187; Dec. Dig. § 512.*]

Case Reserved from Supreme Judicial Court, Suffolk County; James M. Morton, Judge.

Petition by John P. Leahy for writ of certiorari against Salem D. Charles and others, Street Commissioners of the City of Boston. Upon agreement of parties, case reserved. Petition dismissed.

John P. Leahy (Francis T. Leahy, of counsel), for petitioner. Thomas M. Babson, for defendants.

RUGG, J. This is a petition for a writ of certiorari to quash proceedings in assessing certain betterments for the construction of Columbia Road in the city of Boston. The general legality of assessments for Columbia Road was upheld in *Morse v. Street Com.*, 197 Mass. 292, 83 N. E. 891. The present petitioner relies for relief upon these undisputed facts: The portion of Columbia Road where his estates lie, being about 1,600 feet in length, was taken in 1892 for a public park by the park commissioners of Boston, and was laid out and constructed as a parkway and called *Dorchesterway* under an act which authorized the assessment of betterments. A settlement was made between the city and the owners at that time, whereby a gross sum was paid them, and the city agreed to construct a roadway and walk, to which the owners of the estates in perpetuity could have access, and a conveyance was made to the city upon condition that if any betterments were assessed upon their estates on account of the laying out and construction of said park they should be assumed by the city of Boston. In 1897 the street commissioners of Boston laid out Columbia Road as a highway from Franklin Park to Marine Park, a distance of about 5 miles, which so far as it affects the petitioner was superimposed upon *Dorchesterway*. All of *Dorchesterway* except 20 feet in width was designated by the order laying out Columbia Road and under the authority of the statute as being under the "charge and control" of the park commissioners as a parkway. No physical change has been made in the portion of Columbia

Road adjacent to the petitioner's estate which was formerly *Dorchesterway*.

[1] It is assumed in favor of the petitioner that this is an appropriate procedure by which to raise the questions argued. See *Weston v. Railroad Com.*, 205 Mass. 94-98, 91 N. E. 303, and cases cited. Columbia Road was laid out as a single new continuous way throughout its entire length by the action of the street commissioners. Although the words "to lay out" may be of somewhat varying significance dependent upon their context, in this connection they mean to fix the termini and prescribe the boundaries of the highway, and to establish it as a public easement of travel, with all the incidental uses thereby implied, by official act of the lawfully constituted authorities. The grade and the extent, material, manner and time of construction may also be prescribed in the order of layout, though these details are not commonly essential to the validity of an original laying out. *Como v. Worcester*, 177 Mass. 543, 59 N. E. 444; *Foster v. Park Com.*, 133 Mass. 321; *Fuller v. Springfield*, 123 Mass. 289; *Hitchcock v. Springfield*, 121 Mass. 382; *Peabody v. Boston & Providence R. R. Corp.*, 181 Mass. 76-81, 62 N. E. 1047. Because the new way happens for a comparatively short distance to be coincident with a pre-existing way does not prevent it from being a wholly new layout. The old and lesser is swallowed up in the new and larger thoroughfare. The old in this instance was not a full highway, but a parkway subject to its inherent limitations as such. The new way is public in its broad sense, and hence different in kind from that previously existing. The fact that there has been no physical change in the portion of the street upon which the petitioner's land abuts is of no significance. His land is within the territory defined by the statute as liable to a benefit. The assessment is levied not for a particular section of construction, but for the layout and construction of the road as a whole. The burden of expense is apportioned proportionately on all land within the benefited area as established by the Legislature, and not according to the expense of a special part upon adjacent land. The project was an entity, portions of which were perhaps much more expensive than others, but the benefit of being incorporated into this single street unit is assessed, even though some abutting landowners may have much preferred to have been left alone with their former facility of approach, and even though a short section may have been so wrought at an earlier time as to need no change in order to adapt it for the use in the new way.

[2, 3] It is not contended that the question of fact as to the amount of benefit received by the petitioner's estates may be inquired

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

into in this proceeding, but it is urged that it can be said as matter of law that no benefit accrued to the estates of the petitioner by reason of the new layout. This position cannot be supported. Giving full weight to the suggestions arising from the restrictions placed upon lots in the neighborhood designed to preserve them to residential uses and the advantages flowing to houses of that character from location upon a parkway, it does not follow that under no conceivable circumstances could a benefit arise from the establishment of a public way upon the locus of the parkway. It is possible that under some conditions residential estates might receive advantage from abutting upon a long public avenue rather than upon a short parkway. This is a question of fact to be tried out in appropriate proceedings, and raises no issue of law upon this record.

Petition dismissed.

(209 Mass. 329)

PHILLIPS et al. v. CITY OF BOSTON.

(Supreme Judicial Court of Massachusetts.
Suffolk. June 21, 1911.)

1. MUNICIPAL CORPORATIONS (§ 442*)—PUBLIC IMPROVEMENTS—ASSESSMENT FOR BENEFITS—STATUTORY PROVISIONS.

Where a city, after condemning part of certain property for park purposes, in the course of settlement with the owners took from them a deed containing provisions that any betterments assessed upon the land not taken would be assumed by the city, and that the city would construct along the boundary line of the park a roadway and walk, to which the owners of the land taken should have access, and that the owners would hold their remaining land subject to certain restrictions, the settlement was within the purview of St. 1884, c. 226, providing that, in settlement for land taken by a city or town, the municipality may assume any betterments assessed upon the remainder of the land.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1062; Dec. Dig. § 442.*]

2. MUNICIPAL CORPORATIONS (§ 442*)—PUBLIC IMPROVEMENTS—ASSESSMENT FOR BENEFITS—PURPOSES IN GENERAL.

A city, in laying out a park, took part of petitioners' property, and in settlement therefor accepted a deed providing that the city should assume any benefits assessed against the remaining land, and should construct a roadway to which petitioner should have access. When the land was taken it was the intention of the park commissioners to make it form a link of a system of parks throughout the city. Some years later, under a new act of the Legislature, the street commissioners were authorized to lay out a street connecting one park to another, and in doing so they appropriated one drive of this parkway. While there was little work done upon that part of the street where petitioners' property abutted, a special assessment for benefits was made against their property. Held, that they could not force the city to assume this assessment under the provisions of their original deed, for it contemplated only those assessments for betterments from the parkway, and, while it was intended that the parkway in question should be one link of a series of parks, that intention was not such an

agreement as could be specifically enforced, and the assessment in question was levied for a public improvement wholly different from any assessments that might be levied for the parkway.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1062; Dec. Dig. § 442.*]

3. MUNICIPAL CORPORATIONS (§ 495*)—PUBLIC IMPROVEMENTS—ASSESSMENT FOR BENEFITS—VACATION—BENEFITS.

Whether or not a landowner was benefited by a public improvement can be determined only in appropriate proceedings for abatement of the assessment.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1166; Dec. Dig. § 495.*]

Case Reserved from Superior Court, Suffolk County; Wm. F. Dana, Judge.

Bill in equity by John C. Phillips and others against the City of Boston. On reservation. Bill dismissed.

Tyler & Young and B. E. Eames, for complainants. Thomas M. Babson, Corp. Counsel, for city of Boston.

RUGG, J. [1] This is a suit in equity to compel the city of Boston to assume certain betterment assessments levied on account of the laying out and construction of Columbia Road, upon which the plaintiffs' land abuts. In 1890 the board of park commissioners of the city of Boston took a considerable tract of land, including some belonging to the petitioners, for park purposes. A settlement was made between the plaintiffs and the city for the damages occasioned by such taking, as a part of which a deed was executed by the plaintiffs to the defendant which contained this provision: "This conveyance is made upon the express condition that if any betterments are assessed upon the estates belonging to said minors [the plaintiffs] on account of the laying out and construction of said park said betterments shall be assumed by said city of Boston. And for the above-named consideration and the further consideration that said city of Boston shall construct along the boundary line of said park within the said parcels of land a roadway and walk to which said minors [the plaintiffs] and their heirs and assigns * * * shall have free access, with the right to use the same for the purposes of a way subject to such reasonable rules and regulations as may from time to time be made by the park commissioners of said city, we hereby * * * covenant with said city of Boston that they * * * will hold their remaining land abutting upon said park and to a distance of one hundred feet from * * * park line subject to the following restrictions," which limited the uses to which the remaining property could be put and the nature and position of buildings to be erected thereon. While this settlement perhaps did not technically follow St. 1884, c. 226 (see now R. L.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

c. 50, § 11, as amended by St. 1802, c. 503; *Atkinson v. Newton*, 169 Mass. 240, 47 N. E. 1029), it was within its general scope.

[2] Pursuant to this taking and agreement a parkway called the Strandway was constructed adjacent to the petitioners' estates. At the time of the taking by the park commissioners and the execution of the deed from the plaintiffs, it was within the contemplation of the park commissioners that a comprehensive park system should be established in the southerly portion of the city of Boston to be connected by a series of parkways, and that such a way should ultimately connect Marine Park in South Boston with Franklin Park, of which the Strandway should constitute a link. This scheme was changed, and by St. 1897, c. 894, the street commissioners of the city of Boston were authorized to lay out and construct a highway connecting these two parks. Acting under this statute the street commissioners of the city laid out Columbia Road as a public way, about five miles in length, from Franklin Park to Marine Park, a part of which was coincident with the Strandway. In accordance with the power conferred by said statute, the Strandway was designated to be under the "charge and control" of the board of park commissioners, except a part 42 feet in width on the northerly side. No change was made in the physical appearance of the Strandway so far as included within the layout of Columbia Road, and the only change wrought by the layout was to convert one of its roads or drives into a general traffic way, whereas formerly its whole width was a parkway and could be used only under the regulations of the park commissioners. A comparatively small amount of construction work was done upon the Strandway in order to adapt it for use as a part of Columbia Road.

The general validity of the assessment levied for the construction of Columbia Road was sustained in *Morse v. Street Commissioners*, 197 Mass. 292, 83 N. E. 891. It is the claim of the plaintiffs that the levying of such an assessment is in violation of the clause above quoted in their deed to the defendant. Their bill is framed on the theory that the defendant can be compelled by a proceeding in equity to comply with the terms of this deed and assume the payment of the betterments thus assessed. We assume in favor of the plaintiffs, but without deciding, that in a proper case this remedy would be open to them. See *Kelley v. Barton*, 174 Mass. 396, 54 N. E. 860; *Bartlett v. Boston*, 182 Mass. 460, 65 N. E. 827; *Bell v. Newton*, 183 Mass. 481, 67 N. E. 599; *Raymond v. Chicago Traction Co.*, 207 U. S. 20, 28 Sup. Ct. 7, 52 L. Ed. 78. The present assessment is not within the terms of the deed of the plaintiffs. The words of this deed related to a particular assessment, namely, that arising

from the laying out of the park. That was a definite act executed by a certain public board. In no proper sense can it be said that this specific proceeding had any connection, even remote, with the construction of Columbia Road. The fact that the park commissioners at that time had thought about the connection of the land conveyed by the deed in which the covenant occurs with other public parks by parkways imposed no binding obligation upon them, and conferred no legal rights upon the plaintiffs. It existed only as a project, which might be modified in the light of exigencies of administration or of increased knowledge or of a more comprehensive scheme for municipal development. It might have been wholly abandoned without incurring any liability. It is not mentioned in the deed, and the plaintiffs could have maintained no bill for the specific performance of such a plan, which of necessity must depend for its execution upon financial and administrative considerations beyond the control of the park commissioners. About six years after the execution of the deed relied upon, the Legislature interposed and conferred a power, not theretofore existing, upon an independent board of public officers. By virtue of this new authority a way different in kind from that contemplated by the deed was constructed, and incorporated within its extended boundaries was the comparatively short parkway upon which the plaintiffs' premises abut. The language of the deed does not purport to project itself against a future assessment arising out of an improvement not yet begun. This deed dealt by its express terms with an existing lien for betterments growing out of an accomplished public improvement, the amount of which alone remained to be determined, and with nothing else. The assessment, which is now complained of, was not levied by reason of the establishment of a park or a parkway, but for the benefit growing out of the layout of a thoroughfare of great length open as a public highway to all kinds of traffic, and not restricted or limited by the regulations of the park commissioners except as to portions relegated to their care. This assessment is laid, therefore, for a public improvement of a nature different from that covered by the settlement of which the deed was a part. It may be assumed that no more than a single betterment assessment can be levied upon the same estate for the same public improvement, but that is not the point here presented for decision. It is of no consequence that no substantial change was made in the physical appearance of the Strandway in front of the plaintiffs' estate, or that little work of construction was needed to fit it for use as a part of the new thoroughfare. *Leahy v. Charles*, St. Commr., 95 N. E. 834.

[3] Whether the assessment levied exceeds the benefits which accrue to the plaintiffs' es-

tates by reason of the layout of Columbia Road is a matter determinable only in appropriate proceedings for abatement.

Bill dismissed.

(209 Mass. 333)

NORTH ANSON LUMBER CO. v. SMITH.
(Supreme Judicial Court of Massachusetts.
Middlesex. June 21, 1911.)

1. CORPORATIONS (§ 189*)—LIABILITY OF STOCKHOLDERS.

A corporation cannot recover on notes paid by it, given by its stockholders before incorporation for property bought by them for the corporation, and which has passed to the company without formal transfer, if it adopted the notes as its own obligations and agreed to hold the makers harmless.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 189.*]

2. CORPORATIONS (§ 451*)—CONTRACTS—REQUISITES.

A business corporation may be bound by an implied agreement, as well as by an obligation incurred on formal vote.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1787; Dec. Dig. § 451.*]

3. CORPORATIONS (§ 189*)—ASSUMPTION OF NOTES—EVIDENCE—SUFFICIENCY.

In an action by a corporation on notes, evidence held to support a finding of a contract by the corporation, adopting the notes as its own obligations and agreeing to hold defendant harmless.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 189.*]

4. CORPORATIONS (§ 449*)—CONTRACTS—REQUISITES.

A corporate by-law, providing that no agreement involving more than a certain amount of money shall be valid without vote of the directors, does not prevent establishment of a contract by inference from corporate acts, which may be presumed to have been performed under appropriate authority.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1786; Dec. Dig. § 449.*]

Exceptions from Superior Court, Middlesex County; Edward P. Peirce, Judge.

Action by the North Anson Lumber Company against Herbert L. Smith, administrator. Verdict for plaintiff, and defendant brings exceptions. Exceptions sustained.

Chas. F. Choate, Jr., and John H. Stone, for plaintiff. Stover & Sweetser and Homer Albers, for defendant.

RUGG, J. This is an action to recover one-half the principal and interest of eight promissory notes made by the defendant's intestate jointly with James E. Freeman and Charles T. Leavitt to the order of Emery Porter & Co. At or after maturity they were indorsed in blank without recourse and delivered to the plaintiff. The circumstances of the transaction appear not to have been much in dispute, and might have been found to be these: Emery Porter & Co. owned a sawmill in North Anson, Me., in 1905, and substantially all the capital stock of

the North Anson Water Power & Improvement Company, a corporation authorized to develop and dispose of water power, together with a large quantity of logs and timber. As a result of several agreements, Freeman, Smith and Leavitt purchased the timber and logs, and took a bond for a conveyance of the mill property and stock in the water power company, entered into possession of all the real and personal property, and started to carry on the business of sawing and selling lumber. They decided to form a corporation to be called the North Anson Lumber Company. Notes of the proposed corporation were proffered in part-payment of the real and personal property, but these were refused by the sellers, who insisted upon notes signed by the individual purchasers. In payment for the property and for starting the business, Freeman and the defendant's intestate each advanced six thousand dollars, and signed the eight notes here in suit. On April 10, 1906, the plaintiff corporation was organized by Freeman, Smith and Leavitt, who had previously to that time conducted the business under that name. Leavitt, although participating in the organization, went no further in the enterprise, furnished no money, and drops out of the case. Upon its incorporation the North Anson Lumber Company took over the business, previously conducted by Freeman, Smith and Leavitt, as a going concern, and substantially all the property bought by them of Emery Porter & Co., but no change whatever was made in the way it was carried on. There was no formal offer of sale by Freeman, Smith and Leavitt, or acceptance by the corporation, or transfer of title to property, but the corporation simply took possession of and used in its own business from that time on all the property purchased. The logs were sawed into lumber and sold by the plaintiff in ordinary course of trade, and the proceeds all went into its treasury. The books originally opened by Freeman, Smith and Leavitt were continued without change or interruption by the plaintiff corporation, and no distinction was made as to the business conducted before and after the date of the incorporation. The corporation entered into possession of the real estate described in the bond. The defendant's intestate was the first president of the company, but after a few months his mind failed, and a conservator was appointed who cared for his estate until his death. Freeman has always been the treasurer of the plaintiff, and, after the incapacity of the defendant's intestate, became also its president, and has been exclusively in charge of its affairs as general manager. After the incorporation certificates of stock were issued to Freeman and to the defendant's intestate for 125 shares each, although up to

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that time each had contributed only \$6,000. In January, 1906, Freeman, in whose custody the Smith certificate had been placed, mutilated it and issued a new one for 60 shares, which corresponded at par with the cash he had paid in, making an entry upon the stub in the stock book that "the balance 65 shares were never paid for." Six of the eight notes now in suit were paid on or about their maturity by the plaintiff with its own money, and were at Freeman's request surrendered to him after being indorsed without recourse by the payees. It was claimed by the plaintiff that Freeman had paid one-half these notes, and it seeks to recover from the defendant only the remaining half, this being based upon the testimony of Freeman that he and the defendant's intestate had an understanding that each was to pay one-half the notes and take stock in the corporation to an equal amount. Freeman, however, did not testify that he paid the notes or one-half of them with his own money, but that he had paid money into the treasury of the plaintiff as he was able and had taken stock for it. He was unable to point however to any specific payments to this end or to any entries upon the books of the plaintiff of money paid to it for the purpose of meeting these notes, or which corresponded to the date of the payments. The entries upon the books of the corporation show that all the notes, except the two given for the real estate and water power company stock, were paid with moneys of the corporation and entered on its note account as "notes paid." These two notes were not paid at maturity, but the sellers of the real estate, who held the notes, did not press for payment, and after the lapse of a year or more made a conveyance to the plaintiff of the real estate, and assigned to it the water power company stock, in return for which the plaintiff, consolidating the amount of these notes with the other indebtedness not connected with this action, owed by it to Emery Porter & Co., gave that firm its own new notes secured by mortgage bonds upon its real estate. This conveyance, although not a compliance with the bond given by Emery Porter & Co. to Freeman, Smith and Leavitt, was in conformity to it as to price, and allowed credit for the cash originally contributed by Freeman and Smith, and thereby Emery Porter & Co. incapacitated themselves from carrying out the terms of the agreement with the original contractors. No demand was made upon the defendant's intestate or his conservator or administrator for the payment of any part of any of these notes until a short time before this action was brought. On two occasions, when there would have been strong ground to expect Freeman to speak of the liability of the defendant's intestate on the notes if it had existed, he said nothing about it, and in one or two letters

written to the defendant, Freeman requested him to raise some money for the plaintiff for the sake of protecting his existing interest as stockholder, without referring to any indebtedness. At the conclusion of the evidence in the superior court, the jury were directed to return a verdict for the plaintiff.

[1] We are of opinion that this was error. The plaintiff could not recover if it had recognized and adopted the notes as its own obligations and had agreed to hold the defendant harmless thereon, and was not in truth a holder of them for value. This is not a case where one undertakes to recover of a corporation upon a contract fully made with some one else before the existence of the corporation for its benefit, and never afterwards assumed by it in such a way as to indicate a new contractual element arising after the incorporation. Hence the principle followed in cases like *Koppel v. Mass. Brick Co.*, 192 Mass. 223, 78 N. E. 128, *Penn Match Co. v. Hapgood*, 141 Mass. 145, 7 N. E. 22, *Abbott v. Hapgood*, 150 Mass. 248-252, 22 N. E. 907, 5 L. R. A. 536, 15 Am. St. Rep. 193, *Pennell v. Lathrop*, 191 Mass. 357, 77 N. E. 842, and *Whiting & Sons Co. v. Boston*, 204 Mass. 169, 90 N. E. 528, is not controlling. But this is a case where the defense is set up that the plaintiff corporation, after its organization, which was subsequent to the initial transaction, entered into such relations with the makers of the notes that a contract to assume the payment of their notes may be implied, and that other circumstances warrant the further inference that this implied contract has been executed. These relations are the receipt by the plaintiff of valuable property and business from the makers of the notes, for which no adequate consideration was paid, unless there was an agreement to hold the makers harmless on these notes. No claim has been or could be put forward successfully that a contract of this nature was beyond the power of the plaintiff. The property thus received was that which it needed to do business.

[2] The only question is whether there was evidence to support a finding that such a contract was made. A business corporation may be bound by inferences from facts and corporate acts, which point to the existence of an implied agreement as their rational explanation, as well as by a formal vote. In this respect it does not differ from a natural person. By accepting all the benefits of a negotiation made in its behalf and by taking advantage of arrangements which are in its interest, an implication of adoption of the incidental burdens may arise against a corporation. Failure to repudiate after knowledge may signify corporate approval or ratification. *Proprietors of Canal Bridge v. Gordon*, 1 Pick. 297, 11 Am. Dec. 170; *Beacon Trust Co. v. Souther*, 183 Mass. 413, 67 N. E. 345; *Nims v. Mt. Hermon*

School, 160 Mass. 177, 35 N. E. 776, 22 L. R. A. 364, 39 Am. St. Rep. 467.

[3] The circumstances upon which such a conclusion may be founded in the case at bar are that the plaintiff received without other consideration than such an agreement the proportional part of its original stock in trade and plant (which was by far the larger part) represented by the purchasing power of these notes, and that it paid all the notes at or after maturity, by its own checks or notes, although it was not a party to them and had in no way guaranteed their payment, and entered the transactions upon its books as "notes paid." Confirmation of this inference may be found in the fact that although stock in the plaintiff at par was issued to Freeman and Smith for the cash paid by them toward the purchase price of the property with which the plaintiff began business, no stock was issued to them for the amount of the notes. Moreover no stock of the plaintiff was reserved to be used for the purpose of being issued to the defendant, the entire capital stock having been issued. The conduct of the plaintiff and its officers as to the notes is also susceptible of the construction that it was merely paying that which was in substance as between it and the defendant, its own debt, and which thereby became extinguished, and that the indorsement was a mere form and not a transfer of an outstanding obligation.

[4] The by-law of the defendant to the effect that no agreement involving so large an amount of money should be valid without vote of the board of directors does not prevent the establishment of a contract by inference from corporate acts, which may be presumed to have been performed under appropriate authority. *Produce Exchange Trust Co. v. Bieberbach*, 176 Mass. 577, 582, 58 N. E. 162.

In view of all the evidence it could not properly have been ruled as matter of law that the only rational conclusion from it possible was that the plaintiff was entitled to recover.

Exceptions sustained.

(209 Mass. 278)

KEATING v. BOSTON ELEVATED RY. CO. (two cases).

(Supreme Judicial Court of Massachusetts. Suffolk. June 19, 1911.)

1. STREET RAILROADS (§ 117*)—COLLISION OF VEHICLE—QUESTIONS FOR JURY.

Plaintiff, driving along the side of a street railway track when a wheel was caught in a rut, was too near the curbstone to pull in that direction, so turned toward the railroad track, first looking for approaching cars and seeing one on the farther track about three-fourths of a mile away. The first attempt to pull failing, he rested a moment, turned sharper toward the

tracks, and, on the horses starting the wagon, urged them forward, and was struck in crossing the farther track by the car he had seen. *Held*, that he was not negligent as a matter of law, and the court properly submitted the question to the jury.

[Ed. Note.—For other cases, see *Street Railroads*, Cent. Dig. §§ 255-257; Dec. Dig. § 117.*]

2. DAMAGES (§ 48*)—EXPENDITURES—MEDICAL SERVICES.

A father may recover doctors' bills paid and incurred by him for injuries to his minor son by the wrongful act of defendant.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. §§ 242-254; Dec. Dig. § 43.*]

3. ABATEMENT AND REVIVAL (§ 54*)—ACTION FOR INJURIES TO CHILD—EXPENSES INCURRED.

A father's action for doctors' bills paid or incurred by him for injuries to his minor son is a personal action, which did not survive at common law, nor under *Rev. Laws, c. 171, § 1*, relating to survival of actions.

[Ed. Note.—For other cases, see *Abatement and Revival*, Cent. Dig. §§ 255-278; Dec. Dig. § 54.*]

Report from Superior Court, Suffolk County.

Actions by Edward F. Keating and by Bridget Keating against the Boston Elevated Railway Company. Reported from the superior court. Judgment in the first action on the verdict for plaintiff, and in the second action judgment for defendant.

F. R. Mullin and P. S. Spain, for plaintiffs. F. M. Ives, for defendant.

LORING, J. The plaintiff in the first case was driving a two-horse covered wagon along Western avenue in Brighton, at about 8 o'clock p. m. in the month of January, when the right rear wheel "caught in a cradle hole or rut about two inches deep." His right wheels were about three feet from the curb on the right side of the street and his left wheels were within three feet of the southerly rail of the inbound track of the defendant corporation. To the left of the inbound track there was an outbound track. The plaintiff found that he was too near the curbstone to pull out to the right, so he turned his horses to the left to pull the wagon out of the hole or rut. Just before he turned them to the left he looked both ways for an approaching car or cars. He saw none coming on the inbound track but he did see on the outbound track the headlight of the car which finally ran him down, about 1,000 yards or three-quarters of a mile away. When he first turned the horses to the left they were at an angle of 45 degrees to the wagon, and they were on the inbound track. He then urged them forward, but they did not pull the wagon out of the rut. Then he rested them for a minute or so. Then he turned them still more to the left so that they made an angle of 90 degrees to the wagon, and that brought the horses across the inbound

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep's Indexes

track. He then "stood up and urged and 'chased them' forward" and "the horses moved ahead across the outbound track, straightening the team out after them, and when the four wheels of the wagon were in the middle of the outbound track" "he looked and saw the car 18 feet away." He did not have time to jump, but he succeeded in pulling the horses out of the way and the car struck the right forward wheel of the wagon, throwing him to the ground. He testified that he thought four or five minutes elapsed between the time when he looked the first time and the time when he was struck, or when he looked just before he was struck. The only direct evidence as to the speed of the car showed that it was going at the rate of 14 miles an hour.

In *Seele v. Boston & Northern St. Ry. Co.*, 187 Mass. 248, 72 N. E. 971, it was held that a plaintiff was guilty of contributory negligence who drove for three-quarters of a mile alongside of the defendant's tracks after looking to see if a car was coming and then turned and drove across them without looking again. And the same result was reached in *Tognazzi v. Milford & Uxbridge St. Ry.*, 201 Mass. 7, 86 N. E. 799, 21 L. R. A. (N. S.) 309, where the plaintiff looked to see if a car was coming. Seeing none he drove for 300 feet alongside the tracks, and then turned and drove across them without looking again. In that case there was evidence that there was a clear view of the track for "several hundred feet."

[1] In our opinion the case at bar is taken out of those decisions by the fact that the plaintiff here saw the car and that the car was then 1,000 yards to three-quarters of a mile away. After seeing that the car was then at that distance away, the plaintiff concentrated his attention upon extricating his wagon from the rut in which it was stalled for a period of time which he testified was four or five minutes. The jury would be warranted in not taking his testimony as to the intervening time literally, in inferring that he originally thought that he had time to extricate the wagon from the rut and get across before the car reached him and in finding that he became so engrossed in what he was doing that without being guilty of negligence he kept on with those endeavors without looking again until just before he was struck. We are therefore of opinion that the presiding judge was right in submitting the first case to the jury. See in this connection *McCrohan v. Davison*, 187 Mass. 466, 73 N. E. 553; *Murphy v. Boston Elevated Ry.*, 204 Mass. 229, 90 N. E. 398; *O'Brien v. Lexington & Boston St. Ry.*, 205 Mass. 182, 91 N. E. 204; *Hatch v. Boston & Northern St. Ry.*, 205 Mass. 410, 91 N. E. 523.

[2, 3] The second action was for loss of services and for doctors' bills incurred by the father of the plaintiff in the first action. A father still has an action for doctors' bills

paid or incurred by him for the injuries done to his minor son by the tortious act of the defendant. But such an action is a personal action, which did not survive at common law. See note to *Wheatley v. Lane*, 1 Saund. 216; *Kearney v. Boston & Worcester R. R.*, 9 Cush. (Mass.) 108, 109; *Norton v. Sewall*, 106 Mass. 143, 144, 8 Am. Rep. 298. And it does not survive under our statute as to the survival of actions. R. L. c. 171, § 1. It is not an action "of tort * * * for damage to the person." That is confined to damage to the person of the plaintiff and does not include damage to the pocket of the plaintiff because of damage to the person of another. See *Hey v. Prime*, 197 Mass. 474, 84 N. E. 141, 17 L. R. A. (N. S.) 570, and cases cited, although a broader construction was given in *Mulvey v. Boston*, 197 Mass. 178, 83 N. E. 402, to similar words in a statute of limitations. Nor is it an action "for damage to * * * personal property." That "does not apply to mere impoverishing of a man's estate generally, but requires that damage to some specific property be alleged and proved." *Cutter v. Hamlen*, 147 Mass. 471, 472, 18 N. E. 397, 1 L. R. A. 429.

The result is that by the terms of the report the entry in the first action must be judgment on the verdict, and in the second action judgment for the defendant.

So ordered.

(209 Mass. 339)

BANGS v. FARR (two cases).

(Supreme Judicial Court of Massachusetts.
Suffolk. June 21, 1911.)

1. APPEAL AND ERROR (§ 1010*)—FINDINGS—CONCLUSIVENESS.

The findings of the trial court stand as the verdict of a jury, and can only be set aside when they are without any foundation in the evidence, and a finding resting on conjecture cannot stand.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3979-3982; Dec. Dig. § 1010.*]

2. MASTER AND SERVANT (§ 65*)—BREACH OF CONTRACT—EVIDENCE—SUFFICIENCY.

In an action for breach of contract, evidence held not to justify a finding that defendant failed to devote his entire time to the work called for.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 73; Dec. Dig. § 65.*]

3. MASTER AND SERVANT (§ 68*)—COMPENSATION.

The exclusive agent of an automobile manufacturer for the sale of automobiles, with power to establish subagencies, contracted with a third person whereby the agent agreed to sell to the third person cars at a discount from the list prices, and whereby the third person agreed to devote his entire time to sell cars, and to have no business transactions with the manufacturer, except through the agent, and not to transact any business for the agent. The third person sold cars by procuring orders directed to the agent, and a deposit of a part of the price was equally divided between the agent and the third person. Customers, failing to obtain

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

the cars through the fault of the manufacturer, collected from the agent the entire deposit and compelled him either to pay cash or to deposit collateral therefor. *Held*, that the third person could receive compensation only by making actual sales, and the agent could recover from the third person the part of the deposits delivered to him in cases where customers recovered from the agent the amount of the deposits or obtained security therefor.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 77; Dec. Dig. § 68.*]

4. APPEAL AND ERROR (§§ 694, 1011*)—FINDINGS—REVIEW.

A finding on conflicting or unreported evidence will not be disturbed.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 2910, 3983; Dec. Dig. §§ 694, 1011.*]

5. CONTRACTS (§ 247*)—ACTIONS—DEFENSES.

The defense that a written contract between the parties has been waived and that a new relation has been created is an affirmative defense, and the burden of proving it rests on the party asserting it.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. § 1139; Dec. Dig. § 247.*]

6. TRIAL (§ 386*)—TRIAL BY COURT WITHOUT JURY—INSTRUCTIONS.

A party in an action at law tried without a jury has a right, by seasonable presentation of appropriate requests for rulings, to know the principles of law which guide the presiding justice, and where requests are sound in law, pertinent to the issues, and applicable to the evidence, the court must grant them and follow them in reaching his decision.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 901, 902; Dec. Dig. § 386.*]

7. TRIAL (§ 386*)—TRIAL BY COURT WITHOUT JURY—INSTRUCTIONS.

A party in an action at law, who does not present requests for rulings, may not complain because the adverse party presented prayers and then withdrew them without judicial action.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 901, 902; Dec. Dig. § 386.*]

Exceptions from Superior Court, Suffolk County; Franklin G. Fessenden, Judge.

Actions by H. A. Bangs (alias) against F. J. Farr (alias). There were verdicts for plaintiff in each action, and defendant brings exceptions. Exceptions in first action sustained, and in second overruled.

H. W. Ogden and W. H. Rand, Jr., for plaintiff. W. Orison Underwood and S. R. Wrightington, for defendant.

RUGG, J. These are two actions, by which the plaintiff seeks to recover damages for breaches of a written contract. The plaintiff was the exclusive agent of the manufacturer for the sale of certain automobiles in New England, and was authorized to establish subagencies. He made a contract with the defendant, which was in terms an agreement by the plaintiff to sell to the defendant automobiles at a discount of 10 per cent. from the list prices, and by which among other matters the latter agreed to devote his entire time between January 1 and September 30, 1906, to selling automobiles and to have no business transactions with the manufacturer

except through the plaintiff, "nor to transact any business * * * in any way, shape or manner" for the plaintiff. The causes were tried without a jury by a justice of the superior court, who made findings of fact, which so far as material were that the written contract between the plaintiff and defendant continued in force without variation or waiver, and that the relation of principal and agent did not exist between them. The defendant sold 23 cars, the course of business being for him to procure to be signed by the customer an order directed to the plaintiff and a deposit of 20 per cent. of the cost price, which was equally divided between plaintiff and defendant. Although the plaintiff remonstrated with defendant about promising early deliveries and about orders being made out in this form, he accepted all orders presented. By reason of failure to deliver automobiles to customers at times stipulated, due chiefly to the impossibility of getting them from the manufacturer, several customers demanded and in most instances collected from the plaintiff the entire deposit.

The first action is to recover damages arising from the failure of the defendant to devote all his time to the sales business and from his endeavoring to procure an agency contract directly from the manufacturer, contrary to the contract. The superior court found that the defendant had broken the contract in both these respects, and that if he had devoted his entire time "he could have sold more cars" and for this particular breach he assessed substantial damages. It has not been argued that the finding of a breach of the contract in trying to procure an agency directly from the manufacturer was not warranted but no damages were assessed for this breach. All the evidence as to the other breach and the damages has been reported, and it is urged that these are not supported by evidence.

[1, 2] The findings of fact made by a trial court stand upon the same ground as the verdict of a jury. They cannot be revised or reviewed, and can only be set aside when they are without any foundation in the evidence. *Wylie v. Cotter*, 170 Mass. 356, 49 N. E. 746, 64 Am. St. Rep. 305; *Schendel v. Stevenson*, 153 Mass. 351-354, 26 N. E. 689. A careful study of this record brings us to the conclusion that there is no evidence to warrant a finding that the defendant did not devote his time according to the terms of the contract. It is urged that this may be inferred from the circumstance that before May 16th he had secured orders for 23 automobiles, and did not get one thereafter. But this might have arisen from many different causes. Indeed, frankness of statement as to the delays already experienced in deliveries from the manufacturer would have been very likely to prevent orders. Testimony

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

that in April the defendant said, "What cars I cannot get by the 1st of May I don't want at all," is also relied upon. But that was made long before it is claimed that he ceased work and in connection with time of deliveries of cars. It fails to show that he did not in fact work months later. Late in August three automobiles reached Boston from the manufacturer, which were proffered by plaintiff's agent to defendant upon condition that he would pay for them. Some persons who had ordered automobiles were present, and the defendant asked if certified checks of the customers would be accepted, and was told they would. It does not appear whether or not the defendant took the cars nor whether his refusal, if he did refuse, was not based on the inability of the customers to pay cash or to their dissatisfaction. These are the only bits of testimony to which the plaintiff has pointed as supporting this finding. Collectively they fail to support it. The defendant was called as a witness, but it does not appear that his examination elicited anything to show a failure to perform his contract in this regard. He visited the factory of the manufacturers in Ohio after the plaintiff had left the commonwealth for the season, but this seems to have been a necessary incident in his work. The testimony of the agents of the plaintiff constantly associated with the defendant does not disclose any lack of energy on his part. The finding of this breach of the contract so far as anything appears upon the printed record rests upon conjecture and hence cannot stand.

It becomes unnecessary to determine whether the assessment of any damages in this action was too speculative in view of the newness of the venture, its dependence upon the temperament, energy and perseverance of the defendant, the absence of any evidence as to prospective customers, the performance by the plaintiff of his contract with the manufacturer and the latter's inability or indisposition to fill orders promptly. See *Noble v. Hand*, 163 Mass. 289, 39 N. E. 1020; *Todd v. Keene*, 167 Mass. 157, 45 N. E. 81.

[3, 4] In the second action it was ruled correctly by the superior court that as the orders of the customers for automobiles secured by the defendant were directed to and accepted by the plaintiff and were signed only by the customer, the latter could enforce from the plaintiff return of the deposit money on failure to deliver as required by the orders. In substance this was a ruling that there was a contract directly between the several customers and the plaintiff. It is strongly argued by the defendant that it was wholly inconsistent with this ruling for the court to find that the written contract between the plaintiff and defendant was in its practical effect an agreement to purchase the same automobiles, and was in full force and effect. It is further argued that a find-

ing that the contract continued to subsist in face of acceptances by the plaintiff of orders addressed to himself signed by the customer and not by the defendant was likewise inconsistent. There is cogency in this criticism, yet it does not quite go to the extent of requiring us to set aside the finding. It was an implied condition of the contract between the plaintiff and defendant that they should be able to procure from the manufacturers automobiles which were to come under its operation. The discount from the list price to be allowed to the defendant on sales could not become his absolutely unless and until there was a sale. If there was an advance payment made to him out of a deposit it must or might have been found to have been conditioned upon the ultimate consummation of the sale. If the sale failed through no fault of the customer so that the initial deposit had to be returned, then the defendant had no right as against the plaintiff to keep his share of this deposit. It cannot be said that there is incompatibility in law between a finding that the contract of the plaintiff with the defendant was not changed and the further finding that it applied to circumstances not within its strict letter, but within its general purview. The substance of the relation between the plaintiff and defendant had to do with the sale of automobiles by the latter. The only way the defendant was to receive any money out of the relation was by getting ten per cent. of the list price on actual sales. Although their conduct toward customers was such that the latter had a right to treat the plaintiff as the one solely responsible to them, the written agreement between the plaintiff and defendant might still subsist to the effect that the defendant was to receive something, which they called a discount on sales. If this was so, then it would be unjust to permit the defendant to keep his share of a deposit made in contemplation of a sale when the sale was not completed, and the plaintiff was compelled by reason of conditions, which they both knew about and may have been found to contemplate, to return the whole deposit. By virtue of the relation established between the parties under their contract, it became the duty of the defendant to return to the plaintiff the part of the deposit he had retained. This is the way we interpret the findings and rulings of the superior court. This being so, all the prayers presented by the defendant were either inapplicable or contrary to findings of fact made upon conflicting or unreported evidence, and hence not to be disturbed.

[5] The defendant has argued that the evidence required a finding that the written contract between the plaintiff and defendant was waived, and that of principal and agent substituted. This was an affirmative defense, the burden of proving which rested on the defendant. *Sayles v. Quinn*, 196

Mass. 492-495, 82 N. E. 713. It can be ruled as matter of law upon evidence partly oral that an affirmative issue is made out only in rare instances, of which this is not one.

The defendant has urged also that because the plaintiff has not paid in cash the full amount of the deposit in one instance he cannot recover. There is nothing in this. His liability has been fixed, and he has arranged by deposit of collateral or pledge for its extinguishment.

[8, 7] The plaintiff presented certain prayers which were not passed upon, and were ultimately withdrawn. The defendant has no right to complain of this. It is true that in the trial of an action at law before a court without a jury, a party has a right, by the seasonable presentation of appropriate requests for rulings, to know the principles of law which guide the presiding justice in reaching his conclusions. If requests for rulings are presented which are sound in law, pertinent to the issues, and applicable to the evidence, it is the duty of the court to grant them and follow them in reaching his decision. Failure to do so is ground for a good exception. *Jaquith v. Davenport*, 191 Mass. 415, 418, 78 N. E. 93. See *Clarke v. Second Nat. Bank*, 177 Mass. 257, 59 N. E. 121. But the defendant does not bring himself within this rule. He did not present the prayers which he seeks to argue, but relies upon some presented and subsequently withdrawn without judicial action by the other party to the action. So long as the court and the party presenting them were content with this course, no one else can complain. No error is shown in this regard.

Exceptions in the first case sustained.

Exceptions in the second case overruled.

(209 Mass. 442)

HINDS v. STEERE.

(Supreme Judicial Court of Massachusetts. Suffolk. June 22, 1911.)

CARRIERS (§ 295*)—PASSENGER AUTOMOBILES—DEGREE OF CARE.

Defendant owned an automobile carrying about 25 persons, with which three regular trips were made around the city, starting each time at the same place in the city. Defendant placed tickets for these trips on sale at different hotels in the city, and they were also sold by the chauffeur. The trips were sight seeing trips, and the automobile made no stops on any of the trips. Plaintiff, while a passenger on one of these trips, was injured by a collision between the automobile and a street car. Held that, whether or not defendant was in the technical sense a common carrier, she was bound to use reasonable care according to the nature of the contract, and this reasonable care was the greatest care consistent with the proper transaction of the business, and an instruction that the chauffeur should have exercised a high degree of care to his passengers, and, where the care was with reference to a collision in which the danger and damage might be very great, it was a degree of care in view of the danger and of the injury that might be caused

by any want of care, was sufficiently favorable to defendant.

[Ed. Note.—For other cases, see *Carriera*, Cent. Dig. §§ 1191-1220; Dec. Dig. § 295.*]

Exceptions from Superior Court, Suffolk County; Edward P. Pierce, Judge.

Action by Crosby A. Hinds against Emma I. Steere. Judgment for plaintiff, and defendant brings exceptions. Exceptions overruled.

Powers & Hall, for plaintiff. David T. Montague, Wade Keyes, and Malcolm E. Sturtevant, for defendant.

HAMMOND, J. This was an action of tort for personal injuries suffered by the plaintiff in a collision on the highway between a "sight seeing automobile" owned by the defendant, in which the plaintiff was riding as a passenger, and an electric car operated by the Boston Elevated Railway Company. The plaintiff brought a suit also against the railway company. The two suits were tried together before a jury and in each a verdict was rendered for the plaintiff.

Upon the question of the care required of the defendant the judge charged as follows: "With reference to the chauffeur of the automobile, the care is a little different than it is with reference to the motorman of the car. I have said to you before that a common carrier has to exercise a high degree of care with reference to passengers, and in this case the chauffeur was exercising the care—should have exercised a care with reference to passengers, because these two plaintiffs were passengers on his vehicle, and for the purposes of this case, he should have exercised the high degree of care with reference to their safety, and where the care was with reference to a collision, where the danger and the damage might be very great, it is a degree of care in view of the danger, and of the injury that might be caused by any want of care. Now, if he did not exercise that high degree of care, then, so far as Mr. Hinds' case is concerned, you will find for the plaintiff against the owner of the automobile, Mrs. Steere. If he did exercise the high degree of care, then you will find for the defendant in the case against her."

To this part of the charge the defendant excepted, and the case is before us on this exception. The contention of the defendant is expressed in her brief as follows: "In that portion of the charge to the jury excepted to by the defendant, the presiding judge instructed the jury that the driver of the automobile was obliged to exercise the high degree of care required of a common carrier with reference to passengers and that if the jury found that the driver of the automobile did not exercise that high degree of care required of a common carrier of passengers, they should find for the plaintiff; or in other

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

words, that the owner of the automobile was a common carrier of passengers. The defendant contends that she was not a common carrier of passengers within the legal meaning of that term, but was a private carrier only."

It appeared that the automobile was a five-ton truck about twenty-five feet in length and ten feet in width; that there were six seats running crosswise, holding about four to five people each, the whole automobile being designed to carry about twenty-five persons; that the motive power was electricity; that through the spring and summer and early fall of 1907, preceding the accident, which took place on September 26, 1907, the automobile had a regular stand or starting place on Dartmouth street opposite the public library in the city of Boston; that from this stand or starting place the automobile usually made three trips daily on pleasant days, taking persons at a stated price for each trip, the general routes of these trips being announced to prospective patrons; that tickets were sold by the chauffeur in the employ of the defendant Steere, and also, at different hotels in the city of Boston, one of which was the Hotel Bellevue, the tickets, at that hotel being sold at the newspaper stand; that in pleasant weather the automobile, from the stand on Dartmouth street, usually made a trip at a given hour in the morning over a certain general route, covering points of interest in Boston; a second trip at two in the afternoon over another general route, covering various points of interest in Cambridge; and a third trip at four in the afternoon over another general route, through the Back Bay and the Fens in Boston; and that other and different trips sometimes were made; that the plaintiff on the day of the accident had purchased tickets for himself and his wife for the trip to Cambridge, and on the return of the automobile from that trip decided to remain on it for the trip to the Back Bay and the Fens; that he therefore paid his fare for his wife and himself for this trip and was riding on the automobile, as a passenger, at the time of the accident, which occurred about 5:30 p. m. on the return of the automobile from this trip. It further appeared that these trips were sight seeing trips, and it did not appear that the automobile made any stops on any of its trips.

It thus appears that the business in which the defendant was engaged was that of carrying passengers for hire; that she had been engaged in it constantly for several months; that she had a regular stand from which the automobile started and regular routes over which it ran; that by placing the tickets for sale at different hotels she publicly advertised this business and she must be held to have contracted to carry any person who should present himself with a ticket, provided there

was no valid objection. The fact that no stops were made on the way and that the passengers were led by motives of pleasure, curiosity or a desire for information on matters connected with the local, state or national history rather than by any private business exigency or convenience is of no consequence. The automobile was large, carried many passengers and was wholly within the control of the driver.

It is apparent that this business much more resembled a public than a private carriage of passengers, and, whether in a strictly technical sense the defendant could be regarded as a common carrier of passengers or not, we are of opinion that she was bound to use reasonable care according to the nature of the contract, and that in view of the nature of the business and the peril to life and limb of the passengers likely to arise from an accident, this reasonable care should be defined as the highest degree of care consistent with the proper transaction of the business. See the discussion of reasonable care by Sheldon, J., in *Gardner v. Boston Elev.*, 204 Mass. 213, 216, 90 N. E. 534, and cases cited; also, *Galligan v. Old Colony St. Ry.*, 182 Mass. 211, 65 N. E. 43, and *Warren v. Fitchburg Ry.*, 3 Allen, 227, 233, 85 Am. Dec. 700. The language of the presiding justice was sufficiently favorable to the defendant.

Exceptions overruled.

(290 Mass. 232)

WELLS v. WELLS (two cases).

(Supreme Judicial Court of Massachusetts.
Suffolk. June 10, 1911.)

1. DIVORCE (§ 331*)—ACTIONS ON FOREIGN JUDGMENTS—FINALITY.

Prima facie a decree for payment of a fixed sum of money found to be already due and payable to a wife for past support of herself and children is to be regarded as a final decree, entitled to full faith and credit, and supporting an action in another jurisdiction, although an order for future payments as a provision for future support, being ordinarily liable to modification at any time, is not a final order for the payment of a fixed sum.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 841, 842; Dec. Dig. § 331.*]

2. APPEAL AND ERROR (§ 842*)—QUESTIONS OF FACT—FINDINGS BY COURT—CONCLUSIVENESS.

Where, in an action on decrees rendered in another state in divorce proceedings, the defendant raises the question of the finality of such decrees, and each party put in evidence certain statutes and decisions of the Supreme Court of that state, and there was testimony of a qualified expert, the question of finality was one of fact, and a finding thereon, being warranted, would not be revised on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3316-3330; Dec. Dig. § 842.*]

3. DIVORCE (§ 271*)—PROCEEDINGS FOR ALIMONY DUE—NOTICE—NECESSITY.

Where a divorce was granted, subsequent petitions for money due the wife under the decree for support of herself and child were not

new or independent proceedings, but merely incidental to the original suit, such as were authorized and contemplated by statute, and it was not necessary that personal service be made on the defendant, unless required by the statute.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. § 744; Dec. Dig. § 271.*]

4. EVIDENCE (§ 347*)—FOREIGN JUDGMENT—ADMISSIBILITY OF RECORD.

Where, in an action on decrees rendered in another state, the record thereof was duly attested and authenticated, the certificate stating that "the writings annexed are true copies of originals on file and of record" and that said originals together constitute the record of the proceedings, it was properly admitted in evidence as against the objection that the copies contained in the record did not include certain papers which appeared by the "calendar entries" to have been filed in the case.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1361–1383; Dec. Dig. § 347.*]

5. EVIDENCE (§ 347*)—ACTION ON FOREIGN JUDGMENT—RECORD—CLERICAL ERROR.

Where, in an action on two decrees of another state, that the certified copy of the record offered in evidence contained a clerical error in the second decree, by misreciting the date of the decree declared on in the first case, was immaterial, as affecting its admissibility in evidence.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1361–1383; Dec. Dig. § 347.*]

6. DIVORCE (§ 331*)—ACTION ON FOREIGN JUDGMENT—FINALITY OF DECREE.

Where the duly attested and authenticated record of decrees rendered in another state was properly admitted in evidence, showing that after the rendition of a decree for divorce containing provision for payment of certain sums to the wife for support of herself and child the defendant had failed to make payments, and that on two petitions at different times the court had rendered decrees against defendant for the amounts adjudged due, it was properly ruled that these decrees were entitled to full faith and credit.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 841, 842; Dec. Dig. § 331.*]

7. APPEAL AND ERROR (§ 108*)—DECISIONS REVIEWABLE—REFUSAL TO MAKE FINDINGS.

The refusal to make specific findings of fact was not the subject of exception.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 588, 740; Dec. Dig. § 108.*]

8. APPEAL AND ERROR (§ 106*)—DECISIONS REVIEWABLE—REOPENING CASE.

A judge's decision to reopen the case to allow further evidence to be taken is not subject of exception.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 724–734; Dec. Dig. § 106.*]

Exceptions from Superior Court, Suffolk County.

Actions by Maude M. Wells against Percy D. Wells. Judgments for plaintiff, and defendant excepts. Exceptions overruled.

These are two actions of contract, the first being upon an alleged decree of the circuit court for the county of Wayne, in the state of Michigan, rendered in divorce proceedings between the parties on April 20, 1908,

and the second being upon a like decree rendered by the same court on February 23, 1909.

The alleged copy of the petition and the alleged copy of a decree of April 20, 1908, were (in part) as follows:

"State of Michigan. The Circuit Court for the County of Wayne in Chancery.

"Maude M. Wells, Complainant, v. Percy D. Wells, Defendant.

"Your petitioner shows that she is the complainant in the above entitled cause.

"That on the eleventh day of October, 1905, your petitioner was awarded a decree of divorce by this court from the above named defendant. In said decree this court made the following order with reference to alimony and the care, custody, and support of the minor child Gwendolyn, to wit: * * *

"It is further ordered that the said defendant, Percy D. Wells, as permanent alimony, shall pay to the said complainant, Maude M. Wells, the sum of thirty-five (\$35.00) dollars per month beginning November 9, 1905, payable at the end of each month thereafter, monthly, for five years from and after October 9, 1905, the payment of such alimony to be in full of all interest in defendant's property, and all dower interest. * * *

"In case of the marriage of said complainant, the said payment of thirty-five (\$35.00) dollars per month shall cease and the said defendant shall be released from all further payments which would become due after the happening of such event.

"The provisions with respect to the said child shall remain in force until the said child shall obtain the age of fourteen years or until the further order of this court. * * *

"Your petitioner further shows that it was contemplated in such decree that the said defendant should stand the expense and support of such child for nine months in the year and that he now absolutely refuses to pay or stand any part of the support or expenses of such child. * * *

"That the said defendant is now in arrears in the payment of the permanent alimony ordered and fixed by this court in the original decree of divorce, in the sum of \$335.00, on the 9th of April inst., which sum the said defendant has neglected and refused to pay, though abundantly able so to do. * * *

"The motion of the said complainant to determine the amount of permanent alimony now due her from the said defendant and to determine the amount the said defendant should pay for the past care and support of the child of said parties, and to determine the cost of its future care, having come on to be heard, this court doth order, adjudge, and decree as follows: That on the 9th of

April, 1908, there was due, and is still due, to the above named complainant from said defendant the sum of \$335 heretofore ordered paid to her by this court as permanent alimony. That she be and is hereby allowed the sum of (\$250) for schooling and medical attendance upon said child of said parties to this time, which said sum shall be paid by said defendant to the said complainant forthwith. It is further ordered that execution issue from this court for the said sum of \$335 and \$250, a total of \$585, in favor of complainant and against said defendant."

The alleged copies of the petition of January 25, 1909, and of the decree of February 23, 1909, were (in part) as follows:

"Your petitioner shows that under a decree of this court dated April 20, 1908, your petitioner was allowed two hundred fifty dollars for the schooling and medical attendance of said child up to that time and your petitioner was further allowed a set sum of \$335 as permanent alimony under said original divorce decree, the said sum being payment up to April 9, 1908. In said decree it was further ordered that execution issue for the said sum of \$335 and the said sum of \$250 in favor of complainant and against said defendant. Your petitioner further shows that no part of said sums have been paid by defendant.

"Your petitioner further shows that said defendant is now further in arrears in the payment of permanent alimony ordered as aforesaid by this court in the original decree of divorce, in the sum of \$245, being the rate of \$35 per month from April 9th to November 9th last, which said sum defendant has neglected and refused to pay though abundantly able to do so. * * *"

"The motion of the said complainant to determine the amount of permanent alimony now due her from the said defendant and to determine the amount the said defendant should pay for the past care and support of the child of said parties, and to determine the cost of its future care, having come on to be heard, this court doth order, adjudge and decree as follows: That on the 9th of January, 1909, there was due and is still due to the above named complainant from said defendant the sum of \$245 heretofore ordered paid to her by this court as permanent alimony. That she be and is hereby allowed the sum of \$130 for schooling and keeping said child of said parties from April 20, 1908, to this time, which said sum shall be paid by said defendant to the said complainant forthwith. It is further ordered that execution issue from this court for the said sum of \$245 and \$130, a total of \$375, in favor of complainant and against said defendant, this allowance being to Jan'y 9, 1909, and is in addition to the \$585 found due this complainant on February 20, 1908, which order and decree is hereby ratified. It is ordered that execution issue therefor."

Brown, Field & Murray, for plaintiff. E. V. Grabill, for defendant.

SHELDON, J. [1] 1. The fundamental question in these cases is whether an action can be maintained in this commonwealth upon the decrees of the circuit court of Michigan which are declared on. If they are final decrees for the payment of ascertained sums of money constituting a debt of record, they are entitled to full faith and credit in every state and may be enforced by suit in the same way as any other judgments or decrees. And while there has been some difference in the decisions we regard it as now settled that *prima facie* at least a decree for the payment of a fixed sum of money found to be already due and payable to a wife for the past support of herself and her children is to be regarded as a final decree, although an order for future payments as a provision for future support, being ordinarily liable to modification at any time, is subject to the control of the court which made the order, and so is not a final order for the payment of a fixed sum. That was the conclusion reached by this court in a carefully considered opinion. *Page v. Page*, 189 Mass. 85, 75 N. E. 92. It is supported by other decisions. *Purdon v. Blinn*, 192 Mass. 387, 78 N. E. 462, and cases cited; *Knapp v. Knapp*, 134 Mass. 353; *McIlroy v. McIlroy*, 208 Mass. 458, 94 N. E. 696; *Mayer v. Mayer*, 154 Mich. 386, 117 N. W. 890, 19 L. R. A. (N. S.) 245, 129 Am. St. Rep. 477; *Trowbridge v. Spinning*, 23 Wash. 48, 62 Pac. 125, 54 L. R. A. 204, 83 Am. St. Rep. 806; *Lynde v. Lynde*, 181 U. S. 183, 21 Sup. Ct. 555, 45 L. Ed. 810, and 162 N. Y. 405, 56 N. E. 979, 48 L. R. A. 679, 76 Am. St. Rep. 332. The defendant contends, however, that under the law of Michigan these decrees were not final, because under the statutes of that state they might at any time, upon the petition of either party, be revised and altered. 3 Comp. Laws Mich. 1897, §§ 8630-8641. Upon this question at the trial each party put in evidence, besides these statutes, certain decisions of the Supreme Court of Michigan and there was testimony of a qualified expert. Among these decisions were the following: In *Nixon v. Wright*, 146 Mich. 231, 109 N. W. 274, it was held that an order for alimony in a decree for divorce, being subject to modification at any time by the court which made it (section 8641, *ubi supra*), and that court having full power to enforce it, it is not such a judgment for money that an action at law can be maintained upon it. The point decided went no further than our decision in *Allen v. Allen*, 100 Mass. 373, and does not settle the question before us. But the language of the opinion tends to sustain the defendant's contention. In *Jordan v. Westerman*, 62 Mich. 170, 28 N. W. 826, 4 Am. St. Rep. 836, there is a dictum that a decree for alimony vests in a wife no absolute right thereto. In *Perkins v. Perkins*, 10

Mich. 425, there is a similar dictum, and it was held that an order of the circuit court, opening an order for alimony and ordering a reference to a commissioner to hear evidence and make report to the court, was not a final decree from which an appeal could be taken to the Supreme Court. But it seems to be implied in the opinion that an order for past alimony made upon the coming in of the report would be such a final decree. In *Mayer v. Mayer*, 154 Mich. 386, 117 N. W. 890, 19 L. R. A. (N. S.) 245, 129 Am. St. Rep. 477, an action was sustained for arrears of payments ordered by an Oklahoma court to be made to a wife in a divorce case for her own support, but she was not allowed to recover arrears of payments, which the defendant had been ordered to make to her for the support of their children on the ground that these were subject to revision at any time by the Oklahoma court. This refusal was on the same reason as our decision in *Page v. Page*, 189 Mass. 85, 75 N. E. 92, and scarcely helps the defendant. But in *Martin v. Thlson's Estate*, 153 Mich. 516, 116 N. W. 1013, 18 L. R. A. (N. S.) 257, 126 Am. St. Rep. 537, it was held that an award of alimony to a divorced wife is a valid claim against the estate of her deceased husband. This agrees with our decision in *Knapp v. Knapp*, 134 Mass. 353. And in *Ulman v. Ulman*, 148 Mich. 353, 111 N. W. 1072, a bill was maintained to collect out of land in one county a fixed amount which had been decreed for alimony in a suit for divorce in another county. It was decided also that the order for alimony was none the less a final decree because it might be modified by the court which had entered it. The court said: "Authorities are abundant which hold that such a decree, for a fixed sum, is a judgment of record, and will be received by other courts as such. And such a decree rendered in any state of the United States will be carried into judgment in any other state. *Lynde v. Lynde*, 162 N. Y. 405 [56 N. E. 979, 48 L. R. A. 679, 76 Am. St. Rep. 332], affirmed 181 U. S. 183 [21 Sup. Ct. 555, 45 L. Ed. 810]; *Barber v. Barber*, 21 How. 582 [16 L. Ed. 226]. * * * It is urged that the statute (section 8641, 3 Comp. Laws) gives to the court which renders the decree creating the lien power to modify its decree, and thereby destroys its character as a final decree enforceable in any other forum. We do not agree with this contention"—citing *Trowbridge v. Spinning*, 23 Wash. 48, 62 Pac. 125, 54 L. R. A. 204, 83 Am. St. Rep. 806, to the same effect.

[2] Upon this evidence, with the oral testimony of Baldwin and the other evidence stated in the exceptions, the judge had a right to find, and it now must be taken that he finally did find, that these decrees were final adjudications which might have been appealed from. As this was a question of fact and there was evidence which warranted the finding, we cannot revise it.

[3] 2. The defendant contends that these decrees were entered without any proper or sufficient notice to him, and so that they are not binding upon him. In our opinion, these petitions were not new or independent proceedings, but were merely incidental to the original suit, of which he had had due notice and in which he had entered an appearance. The court doubtless would take care that proper steps were taken to give him knowledge of these proceedings, but it was not necessary that personal service should be made upon him as if new actions had been instituted, unless the laws of Michigan so required. The petitions asked only for further proceedings in the original action, proceedings which were authorized and contemplated by the terms of the statute under which the original action had been brought. The general rule is that in such a case no new personal service is needed. *Nations v. Johnson*, 24 How. 195, 16 L. Ed. 628; *Fitzsimmons v. Johnson*, 90 Tenn. 416, 17 S. W. 100, cited with approval in *Pennoyer v. Neff*, 95 U. S. 714, 734, 24 L. Ed. 565; *Laing v. Rigney*, 160 U. S. 531, 16 Sup. Ct. 366, 40 L. Ed. 525; 2 *Freeman on Judgments*, § 569; 2 *Black on Judgments*, § 912. In *Lynde v. Lynde*, 162 N. Y. 405, 56 N. E. 979, 48 L. R. A. 679, 76 Am. St. Rep. 332, and 181 U. S. 183, 21 Sup. Ct. 555, 45 L. Ed. 810, the decree for past alimony which was sustained was entered upon the same kind of notice to the defendant that was given to this defendant upon the petition on which the second decree here was entered. Upon the Michigan statutes and decisions and rules of court and the oral evidence before him the judge was well warranted in finding that this general rule was recognized in Michigan and governed the proceedings that had been taken. It followed that the defendant had sufficient notice of both the petitions upon which the decrees sued on were made.

[4, 5] 3. The record offered in evidence was rightly admitted. It was not denied that it was duly attested and authenticated. It came fully within the rules of *Brainard v. Fowler*, 119 Mass. 262, and *Knapp v. Abell*, 10 Allen, 485. The objection is that the copies contained in the record did not include certain papers which appeared by the "calendar entries" to have been filed in the case. But the certificate was that "the writings annexed are true copies of originals on file and of record * * * and that said originals together constitute the record of the proceedings" of the court. We cannot say against this certificate that the missing papers were part of the record. Every paper put on the files is not necessarily a part of the record. As to what was apparently a clerical error in the second decree sued on, by misreciting the date of the decree declared on in the first case, that does not seem to us important or material.

[6, 7] 4. Under these circumstances the ruling that upon the uncontroverted evidence

the decrees of the Michigan court were entitled to full faith and credit was not erroneous. Nor do we find any material error in the rulings or refusals to rule which were excepted to. We need not consider whether the defendant's fifth request was correct as an abstract proposition. The refusal to make specific findings of fact was not the subject of exception. *Jacquith v. Morrill*, 204 Mass. 181, 90 N. E. 556.

[8] 5. It was for the judge to decide whether he would reopen the case to allow further evidence to be taken. His conclusion is not the subject of exception. *Watts v. Stevenson*, 165 Mass. 518, 43 N. E. 497. There was no error of law, after the reopening, in admitting Golden's deposition, and the interrogatories therein specifically objected to were not objectionable.

In each case the exceptions must be overruled.

So ordered.

(209 Mass. 421)

BARNETT v. ROSENBERG et al.

(Supreme Judicial Court of Massachusetts.
Suffolk. June 22, 1911.)

1. EQUITY (§ 412*)—MASTER'S REPORT—RECOMMITTAL.

The recommitment of a master's report rests in the discretion of the trial court, and will not be ordered, in the absence of a special reason.

[Ed. Note.—For other cases, see *Equity*, Cent. Dig. §§ 924-926; Dec. Dig. § 412.*]

2. APPEAL AND ERROR (§ 518*)—RECORD—PLEADING.

The original complaint, after an amendment, constitutes no part of the record proper, even though remaining in the files.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 2342-2355; Dec. Dig. § 518.*]

3. EQUITY (§ 408*)—MASTER'S REPORT OF EVIDENCE—REQUESTS.

A request that a master report on portions of the evidence is properly refused.

[Ed. Note.—For other cases, see *Equity*, Cent. Dig. §§ 901, 902; Dec. Dig. § 408.*]

4. FRAUDS, STATUTE OF (§ 32*)—PROMISE TO PAY THE DEBT OF ANOTHER—NOVATION.

Where there was a complete novation of parties, the promise of one person to pay for work done at the instance of or upon the property of a third person is not within the statute of frauds.

[Ed. Note.—For other cases, see *Frauds, Statute of*, Cent. Dig. § 49; Dec. Dig. § 32.*]

Appeal from Superior Court, Suffolk County.

Action by Benjamin Barnett against Philip Rosenberg and others. From an order overruling their motion to recommit the report to the master, and a decree for plaintiff, defendants appeal. Affirmed.

Max Fischacher, for appellants. Jos. Michelman and Sawyer, Hardy & Stone. (Edwd. C. Stone, of counsel), for appellee.

HAMMOND, J. This case is before us upon the defendant's appeal from the order

overruling the motion to recommit the report to the master in order that he may report the evidence, from the order overruling the defendant's exceptions to the master's report and from the final decree.

[1] The motion to recommit is addressed to the discretion of the court, and ordinarily will not be granted in the absence of a special reason for it. *Henderson v. Foster*, 182 Mass. 447, 65 N. E. 810. Nothing appears in the present case to show that the court improperly exercised its discretion in disallowing the motion.

[2] Eight exceptions were taken to the master's report. They will be considered in their logical rather than their numerical order. The third, fifth, sixth and seventh exceptions relate solely to questions of evidence and are overruled. The fifth, sixth and seventh concern matters within the discretion of the master, and no error is shown in his action in this respect. The third exception relates to the exclusion of the original complaint which with the jurat attached was offered by the defendant "as bearing upon the genuineness of the plaintiff's claim" and also as contradictory to his testimony. It was excluded.

The original complaint is not before us, and having been superseded by the final bill of complaint upon which alone the case was tried, although among the files, its office as a part of the pleadings is defunct. There is no copy of it in the record before us, nor any statement of its contents, nor does it appear in what way it was contradictory either to the claim made on the amended bill or to the testimony of the plaintiff. For aught that appears it may have been excluded by the master upon the ground that the variances and contradictions were so far immaterial upon the real questions before him as to render him no assistance. But however that may be the exception is too indefinite, and we are of opinion that it does not appear that the defendant might or could have been harmed by its exclusion.

[3] The eighth exception concerns the "statements, rulings, refusals to rule and refusals to report evidence and findings" contained in the report of the master under the head of "Defendant's requests of the master on various matters relating to the report in the foregoing case." There are 36 different requests set out under this heading. Some of them, like the fifth and ninth, call for portions of the evidence, and are properly refused on that account; some, like the first and fifteenth, ask for findings upon the evidence and cannot be considered by us because the evidence is not reported; some, like the third and seventeenth, are granted in part and in part refused; and in some, such as the second, the master has complied with the defendant's request. It is unnecessary to state in detail our conclusions upon these 36 re-

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quests. We have carefully examined them all, and as to all but the last, the thirty-sixth, which will be considered in connection with the first general exception, we find no error in law in the manner in which the master has dealt with them.

[4] The fourth general exception sets up the statute of frauds as to that part of the plaintiff's claim for work done for Greenberg and Rosenberg for which they owed him. But we think it sufficiently appears that there was a novation. This exception was therefore properly overruled. *Ellis v. Felt*, 206 Mass. 472, 92 N. E. 702, and cases cited.

The second exception deals with a matter of fact dependent upon the evidence and was properly refused.

Upon the facts found by the master the contract was upon a valuable consideration, was not within the statute of frauds, and the defendant has failed to pay the plaintiff in accordance with the terms of the contract. The first general request and the thirty-sixth request contained in the "statement" alluded to in the eighth general request were properly overruled. The orders overruling the motion to recommit, and overruling the exceptions to the master's report are affirmed, as is also the final decree.

So ordered.

(209 Mass. 416)

**EQUITABLE TRUST CO. OF NEW YORK
v. KELSEY et al.**

(Supreme Judicial Court of Massachusetts.
Suffolk. June 22, 1911.)

1. TAXATION (§ 57*)—PERSONAL LIABILITY.

Where a tax was assessed against the owner of land, he is primarily liable, even though there be a lien upon the land.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. § 139; Dec. Dig. § 57.*]

2. TAXATION (§ 531*)—PAYMENT—SUBROGATION.

A mortgage provided that the mortgagor should pay the taxes on the mortgaged property. The mortgagor was a corporation, and after going into the hands of a receiver it failed to pay certain taxes. Under Rev. Laws, c. 150, § 29, the tax collector is entitled to collect his taxes by proving it as a preferred claim against the funds held by the receiver. *Held*, that the mortgagee, having paid these taxes, is entitled to be subrogated to all the rights of the tax collector, both as to the lien upon the land and the right to collect the taxes, by proving it as a preferred claim against the funds held by the receiver of the corporation, and this is not changed by St. 1909, c. 490, pt. 2, § 64, giving the tax collector the right to collect such taxes from the mortgagee.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. §§ 986, 987; Dec. Dig. § 531.*]

Report from Supreme Judicial Court, Suffolk County.

Suit by the Equitable Trust Company of New York, as trustee, against Clarence H. Kelsey, as receiver of the Standard Cordage Company, and another. A demurrer was sustained pro forma, and the case reported to the full bench. Demurrer overruled.

Warren, Hoague, James & Bigelow, for plaintiff. A. S. Hall, for defendant Kelsey.

HAMMOND, J. [1] The tax was assessed to the Cordage Company, hereinafter called the company; and although there was a lien upon the land the primary liability was upon the company. *Webber Lumber Co. v. Shaw*, 189 Mass. 366, 75 N. E. 640. [2] By the terms of the mortgage, as between the company and the plaintiff, it is the duty of the company to pay the tax. The tax collector can collect the tax by proving it as a preferred claim against the fund held by the receiver in this commonwealth (R. L. c. 150, § 29), or by taking means to enforce the lien upon the land. He threatens to take the latter course. The plaintiff therefore in order to protect its own property from an incumbrance which it is the duty of the company, as between it and the plaintiff to pay, is compelled to pay a debt of the latter. Upon the payment of the tax the plaintiff is clearly entitled to be subrogated to the rights of the tax payer so far as respects the lien upon the land. *Eagle Ins. Co. v. Pell*, 2 Edw. Ch. (N. Y.) 631, 634; *Farmer v. Ward*, 75 N. J. Eq. 83, 71 Atl. 401; *Jones on Mortgages* (6th Ed.) § 358. And to render complete justice he is also entitled to the rights of the tax collector against the fund held by the receiver in this commonwealth. In re *Moller*, 8 Ben. 526, Fed. Cas. No. 9,699. As bearing upon the general principle see In re *Lord Churchill*, L. R. 39 Ch. D. 174; *Orem v. Wrightson*, 51 Md. 34, 34 Am. Rep. 286; *Zell's Appeal*, 111 Pa. 532, 6 Atl. 107. The fact that the tax collector may under St. 1909, c. 490, pt. 2, § 64, collect the tax by a suit against the plaintiff is immaterial. The company is still liable as is the fund in the receiver's hands.

There is nothing in this conclusion inconsistent with *Swan v. Emerson*, 129 Mass. 289, upon which the receiver relies. It is apparent in that case that the purchaser at the foreclosure sale bought subject to the taxes and the person to whom the tax was assessed owed to the purchaser no duty in the matter.

Demurrer overruled.

(309 Mass. 419)

**DWYER v. NEW YORK, N. H. & H. R. R.
et al.**

(Supreme Judicial Court of Massachusetts.
Suffolk. June 22, 1911.)

1. NAVIGABLE WATERS (§ 26*)—ARTIFICIAL CONDUITS—ACTION BY PRIVATE INDIVIDUAL—SPECIAL DAMAGES.

A bill by plaintiff to restrain a railroad company from constructing a conduit affecting the flow of waters over a creek, which alleges that the land of plaintiff has been used for the storage of boats, that through a bridge there was ample space for the passage of boats to and from the stream to the premises, that by

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

the construction of the conduit, as permitted by a decree of court, the passage of such boats would be rendered impossible, because the waters would ebb and flow so as to render them useless for the storing of boats, does not allege that the individual will sustain peculiar damages; and he may not maintain a suit to enjoin the public nuisance complained of.

[Ed. Note.—For other cases, see *Navigable Waters*, Cent. Dig. §§ 133-166; Dec. Dig. § 26.*]

2. RAILROADS (§ 99*)—ABOLITION OF GRADE CROSSINGS—RIGHT OF INDIVIDUALS.

An individual sustaining no peculiar damages may not be heard in proceedings for the abolition of grade crossings, nor may he enforce an abolition decree.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. § 300; Dec. Dig. § 99.*]

Appeal from Supreme Judicial Court, Suffolk County.

Suit by William Dwyer against the New York, New Haven & Hartford Railroad and another. From a decree for defendants, plaintiff appeals. Affirmed.

The bill by plaintiff alleged proceedings for the abolition of crossings in the city of Boston.

Stephen H. Tyng and Richard J. Dwyer, for appellant. Frederick H. Nash, for appellees.

HAMMOND, J. The eighth paragraph of the bill is as follows:

"The plaintiff's said parcel of land has for a long time past been used for the storage of row boats, sail boats, and motor boats during all the months of the year, and the said parcel of land affords a safe and secure refuge for all such boats during the entire year. During the period antecedent to the filing of the petitions first hereinbefore mentioned, and so consolidated as aforesaid, and through the bridge then existing there was ample space for the passage of all boats entering to and from said Tenean creek to the plaintiff's premises. By virtue of the authority vested in the defendant corporations by the decree of the said superior court, and the construction of the bridge therein contemplated, there would also be ample opportunity for said passage; but by the construction of a conduit such as is proposed by the said petition of the New York, New Haven & Hartford Railroad Company (in which the Old Colony Railroad Company did not join) the passage of such boats would be rendered impossible, or largely impracticable, by reason of the fact that the convergence of the waters, in connection with the width and by reason of said conduit, and the said waters would ebb and flow upon the plaintiff's premises in such a way as to render them useless for the purpose of storing boats thereon and allowing the same to enter and depart from said premises, especially in respect to rowing, steering, or navigating said boats through said conduit; and said conduit, if at all,

could only be used for said purposes during a very limited period of the tides."

[1] These allegations do not go to the extent of averring that by reason of the conduit tide water is excluded from the plaintiff's land, but simply that access thereto is impaired. The words "and the said waters would ebb and flow upon the plaintiff's premises in such a way as to render them useless for the purpose of storing boats thereon," upon which the plaintiff relies as an allegation of damage to a private right or of peculiar damage to him arising from a public nuisance, are, when taken in connection with their setting altogether too vague and indefinite for that purpose. The act of which the plaintiff complains is a public nuisance and he alleges no such peculiar damage as will entitle him to maintain a private action. *Blackwell v. Old Colony R. R.*, 122 Mass. 1; *Robinson v. Brown*, 182 Mass. 268, 65 N. E. 377, and cases therein cited.

[2] For a similar reason he was not entitled to be heard in the abolition proceedings and has no standing to enforce the abolition decree. *Norwood*, Petitioner, 161 Mass. 259, 87 N. E. 199.
Decree affirmed.

(399 Mass. 373)

STATE STREET TRUST CO. v. STEVENS, Treasurer and Receiver General.

SAME v. FRIEBE et al.

(Supreme Judicial Court of Massachusetts.
Suffolk. June 22, 1911.)

1. TAXATION (§ 879*)—SUCCESSION TAX—TIME OF TRANSFER—DEATH OF GRANTOR.

The succession tax imposed by St. 1909, c. 490, pt. 4, § 1, is not on the property itself, though its value is the basis of taxation, but on the right of transmission, where, under the deed, grant, or gift, the property is not to vest until after the death of the grantor, or, if not expressed, such intention is found.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. § 1702; Dec. Dig. § 879.*]

2. TAXATION (§ 879*)—SUCCESSION TAX—TIME OF TRANSFER—DEATH OF GRANTOR.

The test as to whether property is exempt from the succession tax imposed by St. 1909, c. 490, pt. 4, § 1, by virtue of a transfer having been made in the lifetime of the donor, does not depend on whether a power to revoke was inserted, but on the passing of the property, with all the attributes of ownership, independently of the death of the transferor.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. § 1702; Dec. Dig. § 879.*]

3. TAXATION (§ 879*)—SUCCESSION TAX—TIME OF TRANSFER—DEATH OF GRANTOR.

Beneficiaries claiming property exempt from the succession tax imposed by St. 1909, c. 490, pt. 4, § 1, by transfer during the life of the grantor, were to receive the income of the bonds in equal shares, and neither they nor their respective donees, if power of appointment was exercised, nor their next of kin, if power was not exercised, were to receive the principal until the death of the grantor. *Held*, that the intention of the grantor was that the principal, even if vested in title, was not to vest in possession

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and enjoyment during her life, and the beneficiaries were not entitled to the exemption.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. § 1702; Dec. Dig. § 879.*]

4. TAXATION (§ 881*)—SUCCESSION TAX—INTENTION TO EVADE—EFFECT.

A transfer or conveyance showing an intention to evade or defeat the succession tax is not invalid on that account, nor the tax defeated thereby.

[Ed. Note.—For other cases, see *Taxation*, Dec. Dig. § 881.*]

5. TAXATION (§ 878*)—SUCCESSION TAX—EXEMPTIONS—CONSIDERATION FOR TRANSFER.

St. 1909, c. 490, pt. 4, § 1, providing that, where a transfer is a bona fide purchase for full consideration in money or money's worth, the succession tax shall not be levied, is not complied with unless the consideration, whatever its form, is not only valuable, but full, by covering the value in money or the equivalent in money of the property transferred; and, if services rendered constitute the consideration, their value may be inquired into, and, if they fall below full value, there is no provision for reduction.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. § 1700; Dec. Dig. § 878.*]

Case Reserved from Supreme Judicial Court, Suffolk County.

Bills by the State Street Trust Company against Elmer A. Stevens, Treasurer and Receiver General of the Commonwealth, and against Edward Friebe and another. On appeal from the probate court, reserved for consideration of the full court on petition, answers, decrees, claims of appeal, objections to decrees and an agreed statement of facts. Affirmed in part, and reversed in part.

J. Grant Forbes and Stimson, Stockton, Livermore & Forbes, for appellants. James M. Swift, Atty. Gen., and Fred T. Field, Asst. Atty. Gen., for Treasurer and Receiver General.

BRALEY, J. [1] The question presented by these cross-appeals, is whether the bonds held in trust by the petitioner are subject to a succession tax under St. 1907, c. 563, § 1, now by codification St. 1909, c. 490, pt. 4, § 1. The tax imposed is not upon the property itself, although its value is made the basis of taxation, but on the right of transmission, where under the deed, grant or gift the property is not to vest in possession or enjoyment until after the death of the grantor, donor or settlor, or if not expressed such intention is found. *Emmons v. Shaw*, 171 Mass. 410, 413, 50 N. E. 1033; St. 1909, c. 490, pt. 4, § 1. It is the first contention of the appellants in the second appeal, who are the beneficiaries under the trust, that they are exempt as the transfer of the property in question became complete in the lifetime of the donor or settlor. By the terms of the instrument creating the trust no power of revocation is reserved. [2] The test, however, by which the exemption is to be ascertained does not depend upon whether a power to revoke has or has

not been inserted, but upon the passing of the property with all the attributes of ownership independently of the death of the transferor. It is the absence of the power of control with the unrestricted right of the recipient to dispose of the property, and to receive and use the proceeds, which by the express language of the statute subjects it to the tax. *Crocker v. Shaw*, 174 Mass. 266, 268, 54 N. E. 549; *New England Trust Co. v. Abbott*, 205 Mass. 279, 282, 91 N. E. 379, 137 Am. St. Rep. 437; *Matter of Brandreth*, 169 N. Y. 437, 62 N. E. 563, 58 L. R. A. 148, 442; *Vanderbilt v. Eldman*, 196 U. S. 490, 493, 25 Sup. Ct. 331, 49 L. Ed. 563.

[3] The appellants were to receive the income of the bonds in equal shares, and neither they nor their respective donees, if the power of appointment was exercised, nor their respective next of kin, if it was not exercised, were to receive the principal until the death of the settlor. If the income was payable to them, the intention of the settlor is plain, that the principal even if it vested in title, was not to vest in possession and enjoyment during her life, and the appellants have failed to bring themselves within this exception. *Crocker v. Shaw*, 174 Mass. 266, 54 N. E. 549; *New England Trust Co. v. Abbott*, 205 Mass. 279, 91 N. E. 379, 137 Am. St. Rep. 437. The declaration of trust makes no reference to any consideration, and on its face the transfer was a gift. But from the agreed facts it appears, that the settlement was made because the settlor, Annie Preston Lincoln, who was advanced in years, and in feeble health, desired to secure during her life the services and companionship of the appellant, Edward Friebe. In performance of the contract he resigned a lucrative position to enter her service, and removed with his wife, Abby F. Friebe, to her residence where they continued to reside and care for her until her death. It is because of the consideration thus furnished, that they also rely upon the further provision, that where the transfer is "a bona fide purchase for full consideration in money or money's worth," a tax shall not be levied. To have the benefit of the exemption they must bring themselves within its terms. St. 1909, c. 490, pt. 4, § 1; *Brooks v. West Springfield*, 193 Mass. 190, 192, 79 N. E. 337. The policy of the law is, that the owner of property shall not defeat or evade the tax by any form of conveyance or transfer, where after death the income, profit or enjoyment enures to the benefit of those who are not exempted. *Minot v. Winthrop*, 162 Mass. 113, 38 N. E. 512, 26 L. R. A. 259; *Emmons v. Shaw*, 171 Mass. 410, 412, 50 N. E. 1033. The intention to evade may be apparent in the instrument of transfer, or it may be found when all the circumstances attending the transaction are disclosed, yet from whichever

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source the proof may be derived, when the evasion is established the transfer is not "bona fide" as required by the statute.

[4] The transfer or conveyance, however, would not be invalidated, or the tax defeated, as the fund or property would be liable to taxation in the possession of the grantee, donee, or transferee. *Tritt v. Crozier*, 13 Pa. 451. The statute also requires that the consideration must be for the full value of the property whether paid in money, or the acceptance by the transferee of property or services, or some benefit of an equivalent pecuniary measurement, and the appellants strongly urge that the principle which obtains between vendor and purchaser, or where prior equities between purchasers of the same estate, or the rights of creditors are to be ascertained, should be applied. To sustain a right to specific performance, of an unexecuted contract or the rights of an innocent purchaser for value and without notice, it is not necessary that the consideration should be adequate, although it must be valuable. *Somes v. Brewer*, 2 Pick. 184, 13 Am. Dec. 406; *Lee v. Kirby*, 104 Mass. 420, 428; *Wood v. Chapin*, 13 N. Y. 509, 67 Am. Dec. 62; *Borell v. Dann*, 2 Hare, 440, 450; *Basset v. Norworthy*, 2 White & T. L. C. in Eq. 1. But under the construction contended for, only conveyances or transfers founded on a good or meritorious, as distinguished from a valuable consideration would be included. See *Kent, Com.* (14th Ed.) 464, 466, and *Floyer v. Bankes*, 3 De G., J. & S. 306. It also places within the power of the parties the right to agree upon a price in money, or on some right, interest or benefit accruing to one party or the other as a basis of transference, which while recognized as being valuable might be wholly inadequate when compared with the fair market value of the property. It furthermore would substitute their judgment, although honestly exercised, for the approval of the tax commissioner, who by section 20 alone is empowered to determine the valuation. The legislative purpose has been expressed in plain, unambiguous words, and a construction should not be adopted by reading into the statute a qualification which deprives them of their ordinary and natural import.

[5] It is within the power of the Legislature to enlarge the exemption, but until this is done, the statute is not complied with unless the consideration, whatever form it may assume, is not only valuable, but full, by covering the value in money, or the equivalent in money of the property transferred. *United States v. Hart* (C. C.) 4 Fed. 293; *United States v. Banks* (D. C.) 17 Fed. 322, 323. If services rendered, or to be rendered, constitute the consideration as in the present case, their value may be inquired into and ascertained, and where in "money's

worth" they equal or exceed the fair value of the property at the death of the transferor no tax can be imposed. If they fall below such value, there is no provision for a reduction, leaving the excess only to be taxed as a gratuity. The services to be rendered by Edward Friebe when viewed from the situation in which he and Mrs. Lincoln were placed, even if estimated on the basis of his salary, and earnings received in the position he left, and then capitalized on his expectation of life, exclusive of the contingency, that if he had continued in his former employment, he might have been discharged, or have become incapacitated, are insufficient in amount to equal one-half of the cash value at her death of the bonds as stated in the petition, and admitted by the appellants.

We are therefore of opinion, that while their appeal cannot be sustained, so much of the decree of the probate court which held that the bonds were not subject to taxation must be reversed under the first appeal, but in all other respects it is affirmed.

Decree accordingly.

(200 Mass. 464)

DOWD v. TIGHE

(Supreme Judicial Court of Massachusetts.
Suffolk. June 30, 1911.)

1. MUNICIPAL CORPORATIONS (§ 705*)—USE OF STREETS—NEGLIGENCE.

The driver of a wagon, who knew that children were around it, was bound to use ordinary care not to endanger them.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1515; Dec. Dig. § 705.*]

2. MUNICIPAL CORPORATIONS (§ 706*)—INJURY—JURY QUESTION.

Plaintiff, a child 8 years and 8 months old, was injured by a wagon backing over her while standing back of it crying for a toy thrown under it. Defendant's driver knew of the presence of the children around the wagon, and, had he looked carefully, could have seen that plaintiff joined them, and before he got on his wagon he ordered the children off, and without looking to the rear backed it partly around and over plaintiff. *Held*, that the question of negligence in an action for resulting injuries was for the jury.

[Ed. Note.—For other cases, see *Municipal Corporations*, Dec. Dig. § 706.*]

3. MUNICIPAL CORPORATIONS (§ 705*)—USE OF STREET—CONTRIBUTORY NEGLIGENCE—CARE REQUIRED—CHILDREN.

The care required of a 8½ year old child, alone in the street was that of a reasonably careful child of her age.

[Ed. Note.—For other cases, see *Municipal Corporations*, Dec. Dig. § 705.*]

4. MUNICIPAL CORPORATIONS (§ 706*)—USE OF STREET—CONTRIBUTORY NEGLIGENCE.

It cannot be said as a matter of law that a child 8 years and 8 months old, who stood behind a wagon in the street crying for a toy thrown under it, should have anticipated that the team might be backed against her, so as

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

to be guilty of contributory negligence, barring recovery for such negligence.

[Ed. Note.—For other cases, see *Municipal Corporations*, Dec. Dig. § 706.*]

Exceptions from Superior Court, Suffolk County; Jas. B. Richardson, Judge.

Action by Mary A. Dowd against Thomas A. Tighe. Verdict for defendant, and plaintiff excepts. Exceptions sustained.

S. A. Fuller and J. L. Keogh, for plaintiff. John & Jas. A. Lowell, for defendant.

BRALEY, J. [1] The defendant having obtained a verdict by order of the trial court at the close of the plaintiff's evidence, the questions presented by the exceptions are whether there was any evidence for the jury of the defendant's negligence, or of her due care. The accident happened on a public way, while the defendant's servant in charge of a team loaded with material to be delivered in an adjoining lot, was waiting for an opportunity to drive through a passageway on to the lot and unload. While the evidence for the plaintiff is meager and somewhat contradictory, the jury could have found that he knew of the presence of children who were at play around or near the wagon upon which some of them had climbed and that if he had looked carefully before backing around he would have seen that the plaintiff had joined or was near the group. The team ahead of him having passed in, unloaded, and returned, the exceptions state that "before he got on his team" he ordered the children off, and the jury further could have found that without looking to the rear, he then backed the wagon partly around for the purpose of turning into the passageway or lot, and ran over the plaintiff. It is no defence as between the parties, that the plaintiff was not a traveller, and knowing of the presence of children, the driver, in making the movement, was called upon to use ordinary care not to endanger the plaintiff.

[2-4] In the opinion of a majority of the court, the question of the defendant's negligence was for the jury. *Slattery v. Lawrence Ice Co.*, 190 Mass. 79, 76 N. E. 459; *Jaehnig v. J. G. & B. S. Ferguson Co.*, 197 Mass. 364, 83 N. E. 868. If the jury were satisfied, that the plaintiff, who was 3 years and 8 months old when injured, was capable of going upon the street unattended, the degree of care required of her was that of a reasonably careful and prudent child of her age. It could not have been ruled as matter of law, that she should have anticipated, that the team might be backed against her, as she stood in the street crying for a toy shovel which a playmate had taken from her, and thrown under the wagon. *Sullivan v. Boston Elevated Ry.*, 192 Mass. 37, 44, 78 N. E. 382, and cases there collected. If they determined that she was incapable of prop-

erly caring for herself, then the question of her sister's negligence, in whose care she had been placed temporarily by their mother, also was a question of fact, for reasons so fully stated in *Butler v. New York, New Haven & Hartford R. R.*, 177 Mass. 191, 58 N. E. 592, and *Sullivan v. Boston Elevated Ry.*, 192 Mass. 37, 78 N. E. 382, that it is unnecessary to repeat them, or to recite the evidence from which they would have been justified in finding, that her sister had not been unfaithful.

Exceptions sustained.

(209 Mass. 459)

BAXTER v. STEVENS.

(Supreme Judicial Court of Massachusetts. Suffolk. June 27, 1911.)

1. WILLS (§ 212*)—COMPROMISE OF WILL CONTEST.

Before the enactment of St. 1864, c. 173, §§ 1-4, now Rev. Laws, c. 148, §§ 15-17, relating to the compromise of will contests, a contest over the probate of a will could be settled by the parties interested as well as any other suit, provided they were all of age and sui juris; and since the statute a will contest may be settled by the parties, when all are competent to contract, without the aid of the statutes, in the same manner as before.

[Ed. Note.—For other cases, see *Wills*, Cent. Dig. § 519; Dec. Dig. § 212.*]

2. WILLS (§ 340*)—PROBATE AND CONTEST—DECREE.

Under Rev. Laws, c. 148, §§ 15-17, providing for a compromise between the contestants of a will and its confirmation by the probate court with binding effect, the court does not admit to probate a part only of a will, but the whole will is admitted, and the concessions made are made binding on the parties by the decree, and such concessions and the rights of the parties take effect under the agreement and the decree confirming it, and are not testamentary rights, or a modification of the will.

[Ed. Note.—For other cases, see *Wills*, Dec. Dig. § 340.*]

3. WILLS (§ 212*)—AGREEMENT IN SETTLEMENT OF WILL CONTEST—ENFORCEMENT.

An agreement between legatees and a contestant of a will that the latter shall have a certain sum is enforceable by action at law to recover such sum.

[Ed. Note.—For other cases, see *Wills*, Cent. Dig. § 519; Dec. Dig. § 212.*]

4. SPECIFIC PERFORMANCE (§ 62*)—CONTRACTS ENFORCEABLE—AGREEMENT IN SETTLEMENT OF WILL CONTEST.

An agreement between legatees and a contestant of a will that the latter shall have a certain specific share of the estate is enforceable by suit for specific performance.

[Ed. Note.—For other cases, see *Specific Performance*, Dec. Dig. § 62.*]

5. TAXATION (§ 878*)—SUCCESSION TAX—VALUATION—"PASS BY WILL."

Laws 1909, c. 490, pt. 4, § 1, provides that a succession tax shall be imposed upon all property which shall "pass by will." A will leaving practically all of the property of the testator to her two nephews was contested by a sister of the testator and an heir at law, and the parties therein made an agreement by which the sister was to have one-half of the estate and each of the two nephews was to have one-quar-

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ter, which agreement was confirmed by the probate court and a decree entered thereon under Rev. Laws, c. 148, §§ 15-17. *Held*, that the phrase "pass by will" describes only property that passes by the terms of the will as written, and not as changed by an agreement for compromise, and the amount of the tax was to be determined in accordance with the terms of the will.

[Ed. Note.—For other cases, see *Taxation*, Dec. Dig. § 878.*]

Case Reserved from Probate Court, Suffolk County; Robert Grant, Judge.

In the matter of the estate of Helen F. Baxter, deceased. From a decree of the probate court, fixing the amount of the succession tax payable by the legatees, Elmer A. Stevens, Treasurer and Receiver General, appeals. Case reserved. Decree reversed.

James M. Swift, Atty. Gen., and Fred T. Field, Asst. Atty. Gen., for appellant. Irish & George, for appellee.

HAMMOND, J. Helen F. Baxter, a single woman, died in October, 1909, leaving a will giving practically all her property to her nephews Carlton W. Baxter and Lawrence M. Baxter. Florence I. Neale, a sister of the testator and an heir at law, contested the probate of the will, and finally an agreement of compromise was made by which the sister was to have one half of the estate and the two nephews were to have each a quarter. This agreement of compromise was confirmed by the probate court and a decree entered thereon under Rev. Laws, c. 148, §§ 15-17. The object of this suit is to ascertain the rule regulating the assessment of the succession tax.

St. 1907, c. 563, § 1 (now St. 1909, c. 490, pt. 4, § 1), provides, with some exceptions not here material, that a succession tax shall be imposed upon all property within the jurisdiction of this commonwealth "which shall pass by will, or by the laws regulating intestate succession," provided the amount so passing shall exceed \$1,000 in value.

The present case raises the general question whether the amount of a tax assessed under this statute shall be determined in accordance with the provisions of a will as written, or in accordance with the result of the will and compromise agreement made by the parties and approved by the court.

[1] It becomes necessary to look into the legislation leading up to Rev. Laws, c. 148, §§ 15-17, and to determine the real nature of the statute. It first appears as St. 1864, c. 173, and has remained substantially the same ever since. Before the passage of this earlier statute a contest over the probate of a will could be settled by the parties interested as well as any other suit, provided they were all of age and sui juris; and the courts looked with favor upon such settlements and by proceedings in equity enforced the specific performance of them. *Leach v. Fobes*, 11

Gray, 506, 71 Am. Dec. 732. But it frequently happened that possible future contingent interests, especially of persons not in being, stood in the way of a settlement because no one was empowered to represent them. There was also some uncertainty about carrying out the settlement even when made by persons competent to contract. If the contestant agreed to withdraw from the contest and allowed the will to be probated upon a promise by the legatees to pay him something, then it might happen that in a suit to enforce the promise the promisee for some reason might fail to maintain his case even when the promise was in writing. In *Leach v. Fobes*, ubi supra, which was a suit in equity to enforce such a promise, the defense was that it had been fraudulently obtained. In *Seaman v. Colley*, 178 Mass. 478, 59 N. E. 1017, which was an action at law to recover a sum of money alleged by the plaintiff to have been promised him by the defendant in consideration that the plaintiff should withdraw his objections to the allowance of a certain codicil, the defense was a general denial and that the promise was void as against public policy. In *Blount v. Wheeler*, 199 Mass. 330, 85 N. E. 477, 17 L. R. A. (N. S.) 1036, the defense denied the promise and set up lack of consideration. It is true that the two cases last above cited were since 1864, and there was no confirmation of the settlement by the court, but they illustrate the dangers liable to be met by the promisee in attempting to enforce the promise when there is no statute like the one in question, or where, such a statute existing, the settlement is not confirmed by the court under it. Again the promise was a simple personal undertaking of the promisor, who might prove financially unable to respond.

[2] In this state of the law St. 1864, c. 173, was passed. It did at least three important things. First, it provided the machinery by which any will contest might be settled no matter how complicated might be the provisions of the will as to any possible future contingent interests; second, it made the contract a matter of record, the decree admitting the will to probate specifically stating the terms of the agreement under which the contestants have withdrawn their opposition, thus conclusively establishing both the form and validity of the agreement; and third, it provided that the terms of the agreement should be carried out, not by the parties themselves, but by the person who should administer the will. Under this statute the court does not undertake to admit to probate a part of the will and refuse probate as to another part. The whole will is admitted, but the concessions made by the legatees to the heirs at law or to each other are at the same time noted and made binding upon the parties. But these concessions take effect not because such is the will but because such

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is the agreement, and whoever takes anything or loses anything by such concessions or changes takes or loses, as the case may be, under the agreement and not under the will. While it is sometimes said that the whole decree works a modification of the will, yet that effect is not due to any change in the provisions of the will, as such, but to the concessions made by the legatees to the heirs at law or among themselves as to what disposition shall be made of various interests granted to them in the will. The change is worked not through the will or power of the testator who gives the property, but through the will of the legatee who receives it. The true nature of the situation is described by Loring, J., in *Hastings v. Nesmith*, 188 Mass. 190, 194, 74 N. E. 323, 325, as follows: "Such an agreement [under Rev. Laws, c. 148, §§ 15-17] never is a modification of the will; it is a compromise of the rights of the parties under the will on the one side, and of those who claim that the will is void in respect to the matters covered by the compromise, on the other side," and also by Rugg, J., in *Brandels v. Atkins*, 204 Mass. 471, 474, 90 N. E. 861, 862, 26 L. R. A. (N. S.) 230, as follows: "The agreement for compromise did not become a part of the will. Although the practice is to insert a clause in the decree to the effect that the estate shall be administered in accordance with the agreement for compromise established thereby, yet the rights of the parties growing out of the agreement rest upon it and the decree confirming it, and are not testamentary rights."

[3, 4] Since the statute a will contest may be settled by the parties when all are competent to contract, without the aid and entirely outside of the statute, in the same manner as before. This settlement may be effected by an agreement between the legatees and the contestant that the latter shall have a certain sum or a certain specific share of the estate, and the agreement may be enforced in the former case by an action at law to recover such certain sum or in the latter by proceedings in equity for specific performance. *Seaman v. Colley*, 178 Mass. 478, 59 N. E. 1017; *Blount v. Wheeler*, 199 Mass. 380, 85 N. E. 477, 17 L. R. A. (N. S.) 1036. Indeed in this case now before us the parties were all competent to contract and there was no absolute need of a resort under the statute for a confirmation of the compromise agreement.

[5] It is important that in the assessment of this tax there should be a plain, simple rule. The property upon which the tax is to be assessed is that which passes by will or by the laws regulating intestate succession. When there is a will, whether or not it disposes of the whole estate of the testator, whatever does pass by it passes to the legatees therein named, and by force of the will passes to no other person.

In view of the nature and office of the compromise statute, and of the language of the tax statute, the most reasonable interpretation of the phrase "which shall pass by will" in the tax statute is that it describes only property that passes by the terms of the will as written and not as changed by any agreement for compromise made within or without the statute. Any other interpretation would make the amount to be assessed hinge on the manner in which the agreement was to be carried out. In the case before us there can be no doubt if the will had been admitted to probate without a record of the agreement the tax would have been assessed in accordance with the terms of the will, although the agreement as to the division of the estate would have been perfectly valid. For reasons hereinbefore stated the amount of the tax is not changed by the fact that the agreement was approved by the court and made a part of the decree.

For decisions in other states to the same general effect see *In re Estate of Graves*, 242 Ill. 212, 89 N. E. 978. In *re Estate of Wells*, 142 Iowa, 255, 120 N. W. 713, and *Matter of Cook*, 187 N. Y. 253, 79 N. E. 991. So far as the cases of *Pepper's Estate*, 159 Pa. 508, 28 Atl. 353, and *Kerr's Estate*, 159 Pa. 512, 28 Atl. 354, are inconsistent with the conclusion to which we have come we cannot follow them.

The amount of the tax should be determined in accordance with the terms of the will.
Decree reversed.

(209 Mass. 497)

KINSLEY v. BOSTON ELEVATED RY. CO.

(Supreme Judicial Court of Massachusetts.
Middlesex. July 1, 1911.)

1. STREET RAILROADS (§ 114*)—PERSONAL INJURIES—CROSSING THE TRACK—WEIGHT OF EVIDENCE.

Where plaintiff, walking across the track behind a street car, was injured by stepping in front of another car coming in the opposite direction, evidence that he was following in the steps of another man walking 4 feet in front, who gave no indication that a car was approaching, was entitled to consideration on the question of the care exercised by plaintiff.

[Ed. Note.—For other cases, see *Street Railroads*, Dec. Dig. § 114.*]

2. STREET RAILROADS (§ 117*)—PERSONAL INJURIES—QUESTIONS FOR JURY

Where plaintiff, while a passenger in defendant's street car and approaching his destination, looked forward, but his view was obstructed by a vestibule, so that he could not determine as to the approach of a car coming in the opposite direction, and then got off the car, faced forward just after he stepped off, and looked forward, and was unable to see any car, and turned around and passed behind the car, and as he arrived at the left-hand rear corner gave a glance up the track some 30 or 40 feet, and did not see any car, and followed a person who was about 4 feet ahead of him, and who gave no indication of seeing an approaching

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car, and plaintiff, while in the middle of the track, was struck by a car coming in the opposite direction, the court could not say, as a matter of law, that he was guilty of negligence.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 248-250; Dec. Dig. § 117.*]

8. STREET RAILROADS (§ 117*)—OPERATION—PERSONAL INJURIES—RATE OF SPEED.

For a street car to proceed at the rate of 25 miles an hour while passing the car standing at a regular stopping place for the discharge of passengers, without diminution of speed or giving any warning of approach, is sufficient evidence of negligence to require submission to the jury on that question.

[Ed. Note.—For other cases, see Street Railroads, Dec. Dig. § 117.*]

Exceptions from Superior Court, Middlesex County; Wm. Cushing Wait, Judge.

Action by Henry Kinsley against the Boston Elevated Railway Company for personal injuries. Rule that plaintiff could not recover, a verdict ordered for defendant, which was rendered, and plaintiff excepted. Exceptions sustained.

Henry G. Long, for plaintiff. Hugh D. McLellan, for defendant.

RUGG, J. The plaintiff's testimony was that while a passenger inside a car of the defendant and approaching his destination he looked forward, but his view was "troubled" by the vestibule so that he could not determine as to the approach of a car. He then got off the car, and to quote the exceptions "faced forward just after he stepped off the car about a foot or so from the edge of the step and looked forward * * * and was unable to see any car from that direction because the car from which he had alighted obstructed the view and he heard no car. He turned around and passed behind the car and just as he arrived at the left-hand rear corner of the car he gave a glance up the track some 30 or 40 feet and did not see any car and heard none though he knew that cars were accustomed to run from the direction in which he looked. Mr. Johnson was about 4 feet ahead of him, and Mr. Johnson did not show any signs of an approaching car. * * * He assumed then it was safe for him to cross and he did so. He did not look any more after passing the corner of the car." As he was in the middle of the tracks he was struck by an oncoming car and injured. There was evidence tending to show that the speed of the moving car was 25 miles per hour, which did not slacken until after the accident, and that no gong was sounded.

This is not a case where a pedestrian crossing a street close behind a stationary car emerges upon a parallel track without taking any heed to see whether another car may be coming. The plaintiff had looked before, both while in the car and on alighting, under conditions which as the event proved did not

give him much if any information, but he testified that on reaching the corner of the car he had left he looked up the track 30 or 40 feet and saw no car. This was evidence of some care. Nor is this a case where the conclusion from known facts is irresistible, no matter what the oral testimony may be, either that the plaintiff failed to look at all or looked negligently under circumstances where reasonable care demanded observation. There was testimony that the oncoming car was going at the rate of 25 miles an hour. If so, it might have covered the distance of 40 feet in the time required by the plaintiff to go from the place where he looked to the point where he was struck. Hence it may have been found that he did look a distance of 40 feet up the track without seeing the car. Therefore the principle of cases like *Fitzgerald v. Boston Elevated Railway Co.*, 194 Mass. 242, 80 N. E. 224, and *Haynes v. Boston Elevated Rly. Co.*, 204 Mass. 249, 90 N. E. 419, is not applicable.

[1] There was evidence that the plaintiff was following in the steps of another man walking 4 feet in front, who gave no indication by his manner or voice that a car was approaching. The conduct of others traveling in company under similar conditions has been held often to be material as bearing upon the due care of children (*Beale v. Old Colony St. Rly. Co.*, 186 Mass. 119-124, 81 N. E. 867, and cases cited), and, while of less weight in the case of adults, is entitled to consideration (*Plummer v. Boston Elevated Rly. Co.*, 198 Mass. 499, 508, 84 N. E. 849; *Anshen v. Boston Elevated Rly. Co.*, 205 Mass. 32, 91 N. E. 157; *Brislin v. Boston Elevated Rly. Co.*, 207 Mass. 553-557, 93 N. E. 572).

[2] As has been repeated many times all travelers have equal rights upon the street, and, except in respects not here significant, those in control of street cars stand upon the same footing as others, and each when in the exercise of care may trust to a certain extent to others exercising some care to avoid collision. We cannot say as matter of law that this plaintiff may not have been found to have been reasonably prudent in view of the distance he actually looked in the direction from which the car came, and the extent of reliance he might place upon the conduct of the man just in front of him, and the fact that he heard no gong or noise of an approaching car.

[3] A speed of 25 miles an hour while passing a car standing at a regular stopping place for the discharge of passengers without diminution of speed or giving any warning of approach might have been found to be negligent on the part of the defendant's motorman in charge of the car which injured the plaintiff. *Hatch v. Boston & Northern Street Railway Co.*, 205 Mass. 410, 91 N. E. 523.

Exceptions sustained.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

(209 Mass. 370)

WALL v. KELLY.(Supreme Judicial Court of Massachusetts.
Suffolk. June 22, 1911.)**1. ATTACHMENT (§ 263*)—DISSOLUTION ON BOND—SUFFICIENCY OF BOND—ACCEPTANCE.**

Though a bond given to dissolve an attachment was not conditioned to pay to plaintiff, within 30 days after the recovery of a special or final judgment, the value of the property released, which should be described in the bond, as required by Rev. Laws, c. 167, § 121, but the condition was to pay unconditionally the amount of any final or special judgment, and the penal sum was not double the amount of the damages demanded in the writ, the creditor could consent to accept it as security and dissolve the attachment, and, having done so, the money attached in the hands of the sheriff should have been surrendered by him to the debtor or his assignee.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. §§ 933-938; Dec. Dig. § 263.*]

2. ATTACHMENT (§ 263*)—DISSOLUTION ON BOND—ACCEPTANCE OF BOND.

Where a bond given to dissolve an attachment on money in a sheriff's hands was not conditioned to meet the requirements of Rev. Laws, c. 167, § 121, but was exhibited to counsel for the creditor, who examined the sureties before the master and made no objections, and the master approved the sureties and the bond was filed, and there was evidence from which the jury might have found that the creditor knew the condition of the obligation, but did not care to object, and on interpleader by defendant, brought after the bond was given, to have the court determine to whom the money attached belonged, the answer of the creditor expressly admitted that the attachment had been dissolved by virtue of said bond, and that the debtor had become entitled to recover the money attached, which was a deposit in lieu of property first attached, there was an acceptance of the bond given, and the attachment was dissolved.

[Ed. Note.—For other cases, see Attachment, Dec. Dig. § 263.*]

3. APPEAL AND ERROR (§ 928*)—PRESUMPTIONS—INSTRUCTIONS.

It will be assumed, where the exceptions do not state the contrary, that appropriate instructions were given.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3749-3754; Dec. Dig. § 928.*]

Exceptions from Superior Court, Suffolk County; John H. Hardy, Judge.

Action by Joseph J. Wall against John F. Kelly. Verdict for plaintiff, and defendant excepted. Exceptions overruled.

Action of contract or tort against defendant, a deputy sheriff for Suffolk county. One count of the declaration was for the conversion of \$800; the other, for money had and received. At the close of the evidence the plaintiff elected, on the suggestion of the court, to rely on the count for money had and received. In the superior court, John H. Hardy, Judge, refused to order a verdict for defendant, and ruled that a bond given by plaintiff on May 11, 1906, dissolved the attachment on the cash in defendant's hands.

E. W. Philbrick, for plaintiff. Arthur Benson, Bernard Berenson, and Francis P. Garland, for defendant.

BRALEY, J. The real estate of the plaintiff's assignor having been attached by the defendant as a deputy sheriff, the debtor desired to release the attachment, and offered in substitution a sum of money somewhat in excess of the debt demanded. By agreement of parties supplementary process issued under Rev. Laws, c. 167, § 80, and the amount agreed upon having been deposited with the defendant, he attached it, and the plaintiff's counsel then released the attachment on the real estate. The debtor subsequently sought to dissolve the attachment on the money, and gave a bond on which the present plaintiff became surety, and made an assignment of the deposit to him as security. It is, however, unnecessary to consider the effect of this bond, for the defendant having refused to surrender the money, a second bond was given on which the plaintiff relies as having worked a dissolution of the attachment. By Rev. Laws, c. 167, § 121, the condition of the bond should be to pay to the plaintiff within 30 days after the recovery of a special or final judgment, the value of the property released which should be described in the bond. If this requirement had been complied with, the attachment would have been dissolved by force of the statute without the creditor's consent, as the sureties were duly approved by a master in chancery, and the bond had been filed with the clerk of the court from which the writ issued. Rev. Laws, c. 167, §§ 119, 121; *O'Hare v. Downing*, 130 Mass. 16.

[1] But as the condition inserted was to pay unconditionally the amount of any final or special judgment, and the penal sum not having been double the amount of the damages demanded in the writ, the defendant contends, that the bond was invalid. The creditor, however, voluntarily could consent upon tender of the bond to accept it as security for his debt, and dissolve the attachment which covered only the money in the hands of the officer. If he consented, the bond having been delivered to the officer and retained, was enforceable at common law, and the money should have been surrendered to the debtor, or the plaintiff as his assignee. *Mosher v. Murphy*, 121 Mass. 276; *Smith v. Meegan*, 122 Mass. 6; *Central Mills v. Stewart*, 133 Mass. 461; *Farr v. Rouillard*, 172 Mass. 303, 52 N. E. 443. See *Berry v. Wasserman*, 179 Mass. 537, 540, 61 N. E. 228. It is unnecessary that his consent should be shown by proof of an express acquiescence and acceptance, but it may be implied from either the declarations and conduct of himself or his counsel who had authority to release the attachment. *Marble v. Somerville Mfg. Co.*, 163 Mass. 171, 39 N. E. 998.

[2] The first bond with a similar condition

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

had been objected to and refused solely because the penal sum was less than the amount named in the special process, and the second bond was given to correct the error. It was exhibited to counsel for the creditor, who examined the sureties before the master, and made no objections to the terms of the instrument. The jury on the evidence could find that he knew the purpose for which both bonds were offered, and the condition of the obligation, but did not care to object to the form of the second bond, which rectified the error, if the sureties were found by the master to be sufficient. The answer of the creditor to the bill of interpleader, brought by the defendant after the bond was given, to have the court determine to whom the money belonged, which was introduced in evidence is confirmatory proof, that this was the understanding. It is there expressly admitted, that the attachment had been dissolved "by virtue of said bonds," and that the debtor had become entitled to recover the deposit.

[3] It is to be assumed as the exceptions do not state to the contrary, that appropriate instructions were given, and if the jury took this view of the testimony they were warranted in finding, that the bond had been accepted. See *Marr v. Washburn & Moen Mfg. Co.*, 167 Mass. 35, 44 N. E. 1062. A verdict for the defendant, therefore, could not have been ordered, and the instructions, that the bond dissolved the attachment were correct. Exceptions overruled.

(200 Mass. 426)

GATELY v. KAPPLER (two cases).

(Supreme Judicial Court of Massachusetts. Middlesex. June 22, 1911.)

1. FRAUDULENT CONVEYANCES (§ 69*)—INTENT—TRANSACTIONS CONSTITUTING.

That a transfer is made to one's wife to avoid liability of the property for any future debts is insufficient to show fraud; it being essential that at the time of the conveyance he intended to contract debts and avoid their payment through such conveyance.

[Ed. Note.—For other cases, see *Fraudulent Conveyances*, Cent. Dig. §§ 178-180; Dec. Dig. § 69.*]

2. FRAUDULENT CONVEYANCES (§ 295*)—EVIDENCE—SUFFICIENCY.

Evidence held to warrant a finding that conveyances were made to defraud future creditors.

[Ed. Note.—For other cases, see *Fraudulent Conveyances*, Cent. Dig. §§ 867-875; Dec. Dig. § 295.*]

3. APPEAL AND ERROR (§ 1017*)—REVIEW—FINDINGS—CONCLUSIVENESS.

A master's finding is conclusive on appeal, where the evidence on which it was based is not in the record.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3996-4006; Dec. Dig. § 1017.*]

4. FRAUDULENT CONVEYANCES (§ 159*)—JOINT FRAUD.

Both parties to fraudulent conveyances having participated in the fraud, the conveyances

are void, whether voluntary or for a valuable consideration.

[Ed. Note.—For other cases, see *Fraudulent Conveyances*, Cent. Dig. §§ 506-517; Dec. Dig. § 159.*]

Appeal from Superior Court, Middlesex County; Robert O. Harris, Judge.

Bills by Bernard F. Gately against Sarah Kappler. Decree for defendant, and plaintiff appeals. Reversed.

J. F. Owens and M. G. Rogers, for appellant. S. S. Taft, J. P. Farley, and E. J. Tierney, for appellee.

HAMMOND, J. These are two bills in equity brought by the trustee in bankruptcy of the individual and partnership estates of William T. True and Charles F. Kappler, to set aside as fraudulent certain conveyances made by the latter through an intermediary to the defendant his wife, the first suit relating solely to real estate and the second solely to personal property. Each is before us upon the plaintiff's appeals from the order sustaining certain exceptions to the master's report, from the findings of the superior court and the order for a decree, and from the final decree dismissing the bill with costs.

1. As to the first case. While the master has found that at the time of the conveyance of the real estate in June, 1906, there was no intention on the part of Charles F. Kappler or the defendant to hinder, delay or defraud his then existing creditors, he has made a different finding as to his future creditors. As to the latter his finding is that these conveyances from Kappler through Miss Hutchins to the defendant "were made by him with intent to hinder, delay and defraud his future creditors." This finding must stand unless shown to be wrong or inconsistent with some other finding by the master.

It is strongly insisted that the finding is not warranted by the subsidiary findings.

[1] It is doubtless, true, as contended by the defendant, that a finding of fraud as to subsequent creditors would not be warranted by the simple proof that the transfer was made with a design to settle the property upon the defendant so that it should not be exposed to the hazards of his future business or liable for any future debts which he might contract. *Winchester v. Charter*, 12 Allen, 606, 611; *Mowry v. Reed*, 187 Mass. 174, 177, 72 N. E. 936, and cases cited. It must further appear that at the time of the conveyance he had an actual intent to contract debts and a purpose to avoid by the conveyance the payment of them. *Stratton v. Edwards*, 174 Mass. 374, 378, 54 N. E. 886, and cases cited; *Winchester v. Charter*, ubi supra.

[2] Some of the subsidiary findings are stated by the master as follows: "Upon all the evidence I find that on June 1, 1906, when

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Mr. Kappler conveyed all his real estate to the defendant as aforesaid, he knew or had good reason to believe and did believe that the contracts for building the houses in Hudson had already been awarded or would be awarded to the firm of True & Kappler; that the business of the firm would be conducted to a considerable extent on credit; that Mr. True did not stand in good credit with the lumber dealers in Lowell and was of little financial responsibility; and that any credit which might then or thereafter be extended to the firm by those with whom they had business dealings would in all probability be given upon the strength of his (Kappler's) being a member thereof. I further find that he intended that the Burnham & Davis Lumber Company and the Davis & Sargent Lumber Company should, and expected they would, extend credit to a considerable amount to the firm upon the strength of his representations made as heretofore set forth as to his financial ability, and in reliance upon their knowledge of and reasonable belief as to his ownership of property and financial standing from former dealings with him; that he intended that credit should, and expected that it would be given the firm by those with whom they had dealings upon the strength of his supposed ownership of property, and more particularly of real estate; that he intended and expected to contract debts as a member of the firm which he had good reason to believe in consequence of his conveyances of real estate to the defendant he might be unable to pay; and that in making said conveyances to the defendant he intended to put all his real estate out of the reach of his future creditors."

The master further found as follows: "At some time during the latter part of February or early in March, 1906, Mr. Kappler met Mr. Abbott on the street in Lowell. There was evidence and I find that in substance the following conversation ensued. Mr. Abbott stated that his company did not care to extend any further credit to the True Company unless Mr. Kappler would go good for the bills. Mr. Kappler then said he would never go good for another dollar of the True Company, that he had already formed or intended to form a copartnership with Mr. True to date from March 1, 1906, and take over the business of the True Company, that he was to do the buying, pay the bills, and keep True 'on the jobs,' that he, Kappler, had always been and was at that time 'good,' that the bills would be paid and he was the one to pay them for he had the 'stuff' to pay with. It also appeared that in answer to the direct question of Mr. Kappler whether or not Mr. Abbott would be willing to trust him, the latter replied in so many words that he would be glad to do so, for he knew that he, Kappler, had property. Subsequently, about the middle of March, 1906, Mr. Kappler met on the street in Lowell Richard W. Jewett who had general over-

sight of the books and outside collecting of the Burnham & Davis Lumber Company, and who had also known Mr. Kappler for about 15 years. There was evidence and I find that in substance the following conversation ensued. Mr. Jewett stated that the managing officials of the Burnham & Davis Lumber Company had been expecting Mr. True and Mr. Kappler to call at their office; that they wished to find out when the copartnership began. Mr. Kappler said it began on March 1st, and on being questioned by Mr. Jewett as to part he, Kappler, was to take in the business of the firm, Mr. Kappler stated that he was going to do all the 'ordering,' all the paying of bills and general 'outside hustling,' and keep True 'on the job.' In reply to a direct question whether he would be responsible for lumber ordered by Mr. True, Kappler said 'Yes, to a limited amount.' During this interview Mr. Kappler stated that he—meaning himself—was 'good' and had the 'stuff' to pay with, and further that the firm had some small contracts or jobs on hand but none of any importance."

Other findings by the master are as follows: "Between the time of his first trip to Hudson on or about May 20 and June 1, 1906, Mr. Kappler called at the office of the Davis & Sargent Lumber Company, a corporation for many years engaged in the lumber business in Lowell, where he met Frederick S. Conant, a salesman. There was evidence and I find that Mr. Kappler then said in substance to Mr. Conant that he was figuring on contracts for the construction of 20 houses in Hudson, Mass., and inquired if the Davis & Sargent Lumber Company would like to submit prices for lumber. Mr. Conant then stated that the company would give no credit at all to Mr. True if he was to have anything to do with the matter, that he recognized Mr. Kappler as a former customer of the Howe Lumber Company with which Mr. Conant was previously connected, and that he recalled the fact that Mr. Kappler was 'perfectly good' then and was given credit. Mr. Kappler replied in substance that he was still 'perfectly good.' During this conversation Mr. Conant asked Mr. Kappler who was going to pay the bills for the lumber for which he was seeking prices, and Mr. Kappler replied that he would look out and pay the bills himself. At the close of this interview he was informed by Mr. Conant that he would be very glad to let him have all the lumber he wanted."

He further finds that "although the firm of True & Kappler was formed some time in March, 1906, it did not appear upon the evidence that they actually commenced any building operations or incurred any liabilities prior to making the contract for the construction of the O'Neill houses in Hudson," and he also finds that "the debts of the firm of True & Kappler, all of which were incurred subsequent to June 1, 1906, amounted

on April 8, 1907, the date of the adjudication in bankruptcy, to about \$13,000, and the individual indebtedness of Mr. Kappler to about \$1,245. The Burnham & Davis Lumber Co. was a creditor of the firm of True & Kappler at the time of the adjudication in bankruptcy in the sum of \$2,669, being the balance for lumber and building materials sold and delivered to the firm after June 1, 1906, and the Davis & Sargent Lumber Company was a creditor of said firm at the same time for lumber and building materials sold and delivered after June 1, 1906, for use in the construction of the O'Neill houses to the amount of \$5,200. I find that the managing officials of these two lumber companies gave credit to the firm of True & Kappler in reliance upon the statements made to them by Mr. Kappler, as hereinbefore set forth, in February or March, 1906, and also in reliance upon their knowledge of and reasonable belief as to his ownership of property and financial standing derived from their previous dealings with him and upon their belief that there had been no material change in his holdings of property or in his financial condition. There was direct evidence that Mr. Abbott, president of the Burnham & Davis Lumber Company, had no actual knowledge of the said conveyances of real estate from Mr. Kappler to the defendant until some time in September, 1906, after all the indebtedness of the firm to his company had been incurred. I also find that credit was given by each of these two lumber companies without any actual knowledge on the part of their managing officials of the said conveyances of real estate from Mr. Kappler to the defendant, nor was there evidence that any of the creditors had notice of such conveyances other than the constructive notice resulting from the recording of the deeds."

These various findings, taken in connection with the undisputed facts, fully warrant, if they do not require, the general finding that these conveyances were in fraud of future creditors. Nor is it inconsistent with any special finding made by the master.

[3] The master has found that the defendant was fully cognizant of this fraudulent intent of her husband "and participated therein and accepted the said conveyances with knowledge that they were made to hinder, delay and defraud his future creditors." The evidence upon which the master reached this conclusion is not before us, and therefore the finding must stand.

[4] Both grantor and grantee having participated in the fraud, the conveyances, whether voluntary or for valuable consideration, were void as to creditors. *Wadsworth v. Williams*, 100 Mass. 126. See, also, *Bancroft v. Curtis*, 108 Mass. 47, 49. It there-

fore becomes unnecessary to consider what, if any equitable interest the wife had in the land before the conveyances. She can take nothing by the conveyances but must be relegated to such rights as she had before.

Of the 11 exceptions filed by the defendant to the master's report the fifth, seventh, eighth and ninth are overruled by the superior court as being based wholly or in part upon evidence not reported, and no appeal having been taken by the defendant they are not before us; the first and second are overruled because they have become immaterial and the third, fourth, sixth, tenth and eleventh, for reasons hereinbefore stated. The final decree is reversed. The exceptions to the master's report are overruled and the report is confirmed. There is to be a decree for the plaintiff declaring the conveyances void in accordance with this opinion.

2. In the second case, for similar reasons the same course should be taken with reference to the defendant's exceptions to the master's report and the report itself and the final decree.

There should be a decree for the plaintiff declaring the conveyance void in accordance with this opinion. In each case it is

So ordered

(209 Mass. 449)

O'BRIEN v. UNION FREIGHT R. CO.

(Supreme Judicial Court of Massachusetts.
Suffolk. June 22, 1911.)

RAILROADS (§ 274*)—CARE AS TO LICENSEE—INSTRUCTIONS.

Plaintiff, while crossing defendant's freight yard in searching for a car of goods consigned to his employer and passing by a locomotive without cars attached, was struck by ashes thrown from the locomotive by the engineer who was cleaning it. *Held*, in an action for the injury, that defendant was entitled to an instruction that, if plaintiff was a mere licensee, defendant owed him no duty except to refrain from doing him an intentional injury, and from wantonly or recklessly exposing him to danger, and that if plaintiff was a mere licensee under the evidence he had no case.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 868-872; Dec. Dig. § 274.*]

Exceptions from Superior Court, Suffolk County.

Action by Daniel F. O'Brien against the Union Freight Railroad Company. Plaintiff, while crossing defendant's yard in searching for a car of goods consigned to his employer, was struck while passing a locomotive, standing on a track without cars attached, with ashes that were thrown out of the locomotive by the engineer while cleaning it, and plaintiff brings suit for the injury. Judgment for plaintiff, and defendant brings exceptions. Exceptions sustained.

F. J. Daggett and F. P. Garland, for plaintiff. J. L. Hall, for defendant.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

HAMMOND, J. The court having ruled that if the plaintiff was a trespasser he could not recover, the case was submitted to the jury upon two possible views which they might take of the evidence, first that he was an invitee, or second that he was a licensee. It is strongly urged by the defendant that as matter of law the plaintiff was not an invitee. Upon this point the case is not very clear, but we are of opinion that upon the evidence the question whether he was an invitee was for the jury as well as were the questions whether he was in the exercise of due care and whether the act of the engineer in throwing the ashes upon him was inconsistent with any duty owed by the defendant to the plaintiff as such invitee.

But what if he was merely a licensee? There was some conflict in the evidence as to the location of the engine at the time of the accident. The evidence for the plaintiff tended to show on the one hand that the engine was then on track No. 3 adjoining the "traffic way," where it was not customary to discharge ashes and where people were permitted to go to look after their goods and to carry them away from the cars; while the evidence for the defendant on the other hand tended to show that the engine was standing on the "straight track" near the roundhouse, where it was customary to clean out the engine preparatory to putting it in the house. The distance between the two locations was nearly one hundred feet. The court ruled in substance that if the accident took place near the roundhouse as contended by the defendant, then the plaintiff was a trespasser and could not recover; but if it happened "at the other place," and "under such circumstances that you can say it was something new, unusual and different, which was actively done, and done in a negligent way," and in the "traffic way * * * to which this plaintiff had been permitted to come, had been so accustomed to come, that anybody throwing things out into that way without looking could be said to be careless in so doing," then the plaintiff, if using due care, was entitled to recover. We understand this to be a ruling that although the plaintiff was a mere licensee yet if the act complained of was done in an unusual place and in failure to take ordinary care then the plaintiff could recover.

Much of the law with reference to the duty owed to a mere licensee by the owner of land over which the licensee travels is well settled. So far as respects the condition of the land the licensee must take the land as he finds it. "Of course the landowner is liable if he does him intentional injury, or wantonly or recklessly exposes him to danger. It has sometimes been said that he is liable for a trap upon his land. We are not aware of any decision which distinctly defines the word 'trap' in this use. It would at least include any very dangerous construction or condition designedly arranged to do injury.

But we are of opinion that an owner is under no liability for an unsafe condition of his premises caused by a mere failure to use ordinary care for the safety of persons who may chance to go there by permission while he is using the place for his own proper purposes and is not intending needlessly to expose others to danger. Otherwise there would be no important distinction between his duty to licensees and his duty to invited persons." Knowlton, J., in *Moffatt v. Kenney*, 174 Mass. 311, 315, 316, 54 N. E. 850, 851. See, also, *Zoebisch v. Tarbell*, 10 Allen, 385, 87 Am. Dec. 660; *Plummer v. Dill*, 156 Mass. 426, 31 N. E. 128, 32 Am. St. Rep. 463, and cases cited. And the same principle has been applied in the case of machinery in action in the course of the licensee's business. *Balch v. Smith*, 7 H. & N. 742; *Griffiths v. London & North-Western Ry.*, 14 L. T. (N. S.) 797; *Batchelor v. Fortescue*, 11 Q. B. D. 474; *Tolhausen v. Davies*, 57 L. J. Q. B. 395; s. c., 58 L. J. Q. B. 99; *Larmore v. Crown Point Iron Co.*, 101 N. Y. 391, 4 N. E. 752, 54 Am. Rep. 718; *Weitzmann v. Barber Asphalt Co.*, 190 N. Y. 452, 83 N. E. 477, 123 Am. St. Rep. 560.

In *Batchelor v. Fortescue*, while the deceased, a mere licensee, was standing upon a bank of earth watching the movements of a crane used in excavating, the crane swung over his head and by reason of the breaking of a chain a bucket attached to the chain fell upon him. It was held that although the evidence would justify a finding of negligence of the defendant, yet there was shown no duty on the part of the defendant to take due and reasonable care of the deceased, and a verdict was ordered by the trial court for the defendant. This verdict was affirmed by the Court of Appeals.

In *Larmore v. Crown Point Iron Co.* the defendant was operating a machine for raising ore from its mine. The machine consisted of an upright or mast in which a lever was inserted, and was worked by attaching horses to the lever by means whereof a bucket was raised and lowered. At the time of the accident the bucket was being lowered, and the lever being insecurely fastened was thrown out of its socket and flying rapidly around struck the plaintiff, a mere licensee. It was held in an able and lucid opinion that the defendant owed to the plaintiff no duty to use ordinary care to see that the lever was properly fastened, and a verdict which had been rendered in the trial court for the plaintiff was set aside.

In *Weitzmann v. Barber Asphalt Co.* a boy, a licensee, was struck upon the head by a barrel which suspended by a rope was being drawn from one part of the premises to another. It was held that the defendant did not owe to the licensee the duty to take sufficient precaution to warn the plaintiff of the danger. As to trespassers and licensees the well settled rule is that the only duty of the owners or occupiers of the land is to ab-

stain from inflicting intentional or wanton or willful injuries. See, also, *Downes v. Elmira Bridge Co.*, 179 N. Y. 136, 71 N. E. 743.

The great weight of authority seems to be that as in the case of the land so in the case of appliances thereon where danger is not concealed, the owner or occupier of the premises owes no duty to a mere licensee to take proper precautions to protect him, but is answerable only for injuries inflicted wantonly or willfully. And this is so whether the licensee fall against the appliance or whether by reason of the lack of ordinary care of the owner to keep it in repair the appliance or some part of it strikes him.

But it is urged by the plaintiff that this principle is applicable only where the negligence is passive, and that where the danger is caused by an active act which is negligent the owner is answerable, or in other words that the owner or occupier owes to the licensee the duty to refrain from injuring him by an actively negligent act. If the term actively negligent act means such an act as may be regarded as wantonly, recklessly or intentionally injurious to the licensee, the proposition is true; but if it means such as is short of that and arises simply from the failure to exercise ordinary care, then the proposition is not in accordance with the law of this state, so far at least as respects acts done in the transaction of lawful business upon the premises. *Metcalfe v. Cunard Steamship Co.*, 147 Mass. 66, 16 N. E. 701; *Heinlein v. Boston & Providence Railroad*, 147 Mass. 136, 16 N. E. 698, 9 Am. St. Rep. 676; *Hanks v. Boston & Albany Railroad*, 147 Mass. 495, 18 N. E. 218; *Chenery v. Fitchburg Railroad*, 160 Mass. 211, 35 N. E. 554, 22 L. R. A. 575; *June v. Boston & Albany Railroad*, 153 Mass. 79, 26 N. E. 238; *Bowler v. Pacific Mills*, 200 Mass. 864, 86 N. E. 767, 21 L. R. A. (N. S.) 976, 128 Am. St. Rep. 432; *Myers v. Boston & Maine Railroad*, 95 N. E. 76 (Suffolk, May 18, 1911, decided since the present case was argued).

In *Metcalfe v. Cunard Steamship Co.* the licensee, while walking upon the deck of a steamship, was struck and knocked into the hold by a bag of flour which swung across the deck on its way to be lowered through the hatch. *Holmes, J.*, said: "The danger was perfectly manifest. * * * The defendant owed the plaintiff no duty to warn him against dangers of this sort."

In *Hanks v. Boston & Albany Railroad*, the plaintiff was run down by a train at a place where persons had been in the habit of crossing. The case turned in part upon the question whether the plaintiff was an invitee or licensee, this court saying that if a licensee he could not recover.

In *Chenery v. Fitchburg Railroad*, where the plaintiff was run down by a train at a private crossing, it was held that he could not recover if a trespasser or mere licensee. In the opinion is the following language: "As against a bare licensee a railroad com-

pany has a right to run its trains in the usual way without special precautions if the circumstances do not of themselves give warning of his probable presence and he is not seen until it is too late." In *June v. Boston & Albany Railroad*, where the deceased, a mere licensee, was run down by a train, it was held that he could not recover. *Holmes, J.*, in giving the opinion of the court speaks thus: "At most * * * [the plaintiff] was no more than a mere licensee. As toward him there was no negligence on the part of the defendant or its servants in not providing a signboard, gate or flagman, and there was no duty to whistle although in fact the engine was whistling. The defendant had a right as against him to run its trains upon its tracks at such speed as it found convenient, and it was for the deceased to take care that he was not hurt by their doing so. There may be cases in which even unintentional damage done to a licensee by actively bringing force to bear upon his person will stand differently from merely passively leaving land in a dangerous condition. But something more must be shown than that trains are run in the usual way upon a railroad where the place does not of itself give warning of its probable presence and where he is not seen until it is too late."

In *Bowler v. Pacific Mills*, where a licensee was run down by a freight train, *Knowlton, C. J.*, giving the opinion of the court says: "The measure of the defendant's duty to the plaintiff was to refrain from doing him an intentional injury and from wantonly or recklessly exposing him to danger. It might use the street [a private street of the defendant over which by its permission, but not by its invitation, persons passed] and carry on its business, and conduct its operations as it chose, so long as it did not transgress in this particular."

In the present case, even if it be assumed in favor of the plaintiff that the accident occurred while the engine was standing on track No. 3 near the "traffic way," it appears upon the plaintiff's own testimony that "it was standing there alone, no cars or other engines near it." It does not appear that there were near the engine any cars to be unloaded or loaded from the traffic way. It was early in the morning. There were no people near the engine. The plaintiff was not seen, nor could he be seen by the engineer standing inside the dummy engine, until the moment he was struck by the ashes. It cannot be said that as against a mere licensee the engine could not be cleaned anywhere else than at the ash heap, nor that cleaning it elsewhere was a thing so unusual as to impose upon the defendant the duty of additional or different care for his protection. The defendant at least in its own freight yard could throw its ashes where it pleased, so long as it refrained from doing the licensee an intentional injury and from

wantonly or recklessly exposing him to danger.

It is a close question whether the act of the engineer in throwing the ashes was under the circumstances even lack of ordinary care, but assuming as we do that the evidence would warrant a finding for the plaintiff on that issue it certainly falls far short of the intentionally injurious or wanton and reckless act which the plaintiff must show if he was only a licensee. Upon the evidence the plaintiff as licensee had no case, and the jury should have been so instructed. The right of the defendant to such an instruction is fairly raised upon the record.

The decision in *Corrigan v. Union Sugar Refinery*, 98 Mass. 577, 98 Am. Dec. 685, cited by the plaintiff perhaps may stand upon the ground of intentional or reckless injurious acts.

Exceptions sustained.

(209 Mass. 432)

POPE et al. v. POPE et al.

(Supreme Judicial Court of Massachusetts.
Norfolk. June 22, 1911.)

1. WILLS (§ 684*)—TRUSTS—INCOME—RIGHTS OF BENEFICIARIES.

Under Rev. Laws, c. 141, § 24, *cestuis que trust* to whom gifts of annual income are made are entitled to such income from the death of the testator.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1614-1628; Dec. Dig. § 684.*]

2. WILLS (§ 807*)—BEQUESTS IN LIEU OF DOWER—PREFERENCE RIGHT.

A widow, taking under will in lieu of dower, is entitled to receive the whole amount bequeathed in preference to other legatees, though the will does not specifically provide that the gift is in lieu of dower.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 2103; Dec. Dig. § 807.*]

3. WILLS (§ 774*)—LEGACIES—LAPSE.

A legacy payable on the legatee reaching his majority, on condition that testator should not then be alive, lapsed on testator surviving that event.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1895; Dec. Dig. § 774.*]

4. WILLS (§ 805*)—LEGACIES—INSUFFICIENT FUNDS—PRORATING.

If, after paying administration expenses and a widow's preferred legacy, insufficient funds remain to pay the other legacies in full, they must be abated pro rata.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 2101; Dec. Dig. § 805.*]

5. WILLS (§ 471*)—CONSTRUCTION—INCONSISTENT PROVISIONS.

A will gave each of several children as they should attain their majority "an annually increasing income, * * * \$3,000 a year at the age of 21 years, with an increase of \$1,000 a year thereafter for ten years. For instance, a child 21 years old * * * will receive \$3,000 * * * and so on till at the age of thirty years a child would receive the maximum income, viz., \$12,000." Held, that the latter inconsistent provision for a maximum income of \$12,000 controls the first provision, which would make the maximum \$13,000.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 989; Dec. Dig. § 471.*]

Case Reserved from Supreme Judicial Court, Norfolk County.

Petition by Albert L. Pope and others, trustees, against Abby Pope and others. Case reserved. Decree directed.

Casey & Jones for Adelaide L. Pope, and others. Hollis R. Bailey, guardian ad litem, for Harold L. Pope and unborn issue of all the testator's children. Pierpont L. Stackpole, for respondents Albert L. Pope and others. H. E. Warner, for Abby Pope.

HAMMOND, J. [1] 1. There can be no doubt that *cestuis que trust* to whom gifts of annual income are made are entitled to such income from the death of the testator. Rev. Laws, c. 141, § 24. Indeed nobody at the argument before us contended, nor does it appear by the pleadings or otherwise that any of the parties interested ever contended, to the contrary.

[2] 2. "A wife cannot be deprived of her dower except by her own consent. Therefore, when she accepts a provision in her husband's will as a substitute for this existing legal right, the law regards her as standing in the light of a purchaser for a valuable consideration, and entitled to receive the whole of the sum given by the will * * * in preference to other legatees, who, being only objects of the bounty of the testator and not having any legal claim on his estate, are regarded as volunteers, and are not allowed to take until the widow has received the full amount of the bequest to her." Bigelow, C. J., in *Pollard v. Pollard*, 1 Allen, 490, 491. In that case the will expressly stated that the bequest was in lieu of dower. But the same principle is applicable where the widow loses her dower by not waiving the provisions of the will even though the will does not specifically provide that the gift is in lieu of dower. Under our statutes, if the widow does not waive the provisions of the will she loses her right of dower unless it plainly appears by the will that the testator intended such provisions in addition to dower. If she foregoes the right to dower therefore, she takes the legacy in the character of a purchaser for valuable consideration and is entitled to a preference. *Towle v. Swasey*, 106 Mass. 100; *Richardson v. Hall*, 124 Mass. 228, 234; *Borden v. Jenks*, 140 Mass. 562, 5 N. E. 623, 54 Am. Rep. 507. It is suggested by the guardian ad litem of certain persons interested that the other provisions in the body of the will may well be taken as equivalent to a reasonable provision in lieu of dower. But that position is untenable. There is nothing in the will to show that any one bequest was intended to be in lieu of dower rather than another. Moreover, as said by Devens, J., in *Borden v. Jenks*, ubi supra (140 Mass. 564, 5 N. E. 623, 54 Am. Rep. 507), "Whether the provision be more or less so far as the

testator, the widow, and all pure beneficiaries under the will are concerned, it is the right of the testator to affix what consideration he pleases for the relinquishment of dower, and for the widow to accept or reject it." The second question must be answered in the affirmative.

[3] 3. The third question must be answered in the negative. The condition upon which the \$5,000 was to be paid to Ralph Linder Pope upon his arriving at 21 years of age was that the testator should not then be living. When Ralph arrived at that age the testator was living. The legacy never became payable nor can it ever be.

[4] 4. "If the income of the trust estate, after having paid all administrative expenses, is insufficient to make all the payments which the testator provided in his codicil should be made from such income," then the legacy to the widow, for reasons hereinbefore stated, is preferred and is entitled to be paid in full, and the other legacies are to be abated pro rata. No direction as to the legacy for the education and support of Ralph Linder Pope while a minor arises because, as before stated, he was 21 years of age before the testator died.

5. Although the record does not show that the income of the trust fund is insufficient to meet the demands upon it, yet it was stated at the argument and all parties agreed that there was such insufficiency. The question is not therefore before the trustees and may never be before them. For this reason we have no occasion to consider it.

[5] 6. The sixth question calls for an interpretation of the following paragraph (f) in what is marked as article "Eighth" in the codicil. "To each of my surviving children who shall be of age at the time of my decease, and to any child of mine who shall be a minor at the time of my decease when he shall attain his majority, an annually increasing income, the amount of which shall be dependent upon the age of such child, and shall be determined as follows, to wit: Three thousand dollars (\$3,000) a year at the age of twenty-one years, with an increase of one thousand (\$1,000) a year thereafter for ten (10) years. For instance, a child who shall be twenty-one (21) years old at the time of my decease will receive an income at the rate of three thousand dollars (\$3,000) a year, at the age of twenty-two (22) four thousand dollars (\$4,000) a year, and so on, till at the age of thirty (30) years a child would receive the maximum income, viz., twelve thousand dollars (\$12,000) a year."

What does this paragraph mean? It is argued on the one hand that the clause expressly says that the legatee at 21 years of age shall have \$3,000 a year with an increase of \$1,000 a year thereafter for ten years, and that the only possible meaning

of this is that to the \$3,000 is to be added \$1,000 ten times, and hence the maximum is \$13,000, and that the ten years does not expire until the thirty-first birthday is reached, and that this plain meaning of the language is to stand notwithstanding the subsequent language in which it is claimed that the testator made an arithmetical mistake. It is argued on the other hand that the illustration shows the maximum limit which the testator intended to fix to the legacy, namely, \$12,000, and that the time for stopping the increase would be upon the thirtieth birthday and that the mistake if any, is in the first clause and not in the second.

It is plain that there is a blunder somewhere. The clauses are irreconcilable if each is to be literally interpreted as it reads. Which shall yield? It is to be noted that this is not a case where the inconsistent clauses are independent statements having no relation to each other. On the contrary it is a case where the second clause is explanatory of the first, or in other words the second clause is the testator's own statement of what he means by the first. In that explanation of his meaning he describes \$12,000 as the maximum limit of the bequest and 30 years as the age at which the increase shall stop. In the first clause he expressly states the minimum, in the second he expressly states the maximum; in the first the age at which the legacy shall begin, in the second that at which the increase shall stop. The second clause states in the testator's own language the result he supposed he had reached by the first, and evidently the result he intended to reach, while the first clause describes the manner of reaching it. It seems to us more probable that the inconsistency is due rather to an inaccuracy in stating the details of the method of reaching the result than in the express statement of the result itself. The rule of interpretation is somewhat analogous to that which is applied in the matter of description of land, where distance and direction must yield to monuments. The result is that the first clause so far as inconsistent with the second must yield. The maximum is \$12,000 and 30 is the age beyond which there is no increase.

7. There being no excess of income there is no occasion to consider either the seventh or eighth questions.

8. It appearing by reference to the facts stated in the bill of the executors for instructions, which by the terms of the report may so far as material be regarded as a part of this case, that the stock referred to in the ninth question is not in the hands of the trustees nor obtainable in the market, this question is not answered.

There is to be a decree in accordance with the terms of this opinion, and it is

So ordered.

(209 Mass. 381)

In re DE LAS CASAS et al.

(Supreme Judicial Court of Massachusetts.
Suffolk. June 21, 1911.)**1. MUNICIPAL CORPORATIONS (§ 881*)—PARKS
—COST—APPORTIONMENT.**

Commissioners appointed under St. 1899, c. 419, to apportion among cities constituting the metropolitan park district payments required to reimburse the commonwealth for the cost and maintenance of parks, etc., have a wide judicial discretion in making the apportionment.

[Ed. Note.—For other cases, see *Municipal Corporations*, Dec. Dig. § 881.*]

**2. MUNICIPAL CORPORATIONS (§ 881*)—PARKS
—COST—APPORTIONMENT.**

Commissioners appointed under St. 1899, c. 419, to apportion among cities constituting the metropolitan park district payments required to reimburse the commonwealth for the cost and maintenance of parks, etc., act within their power in making the apportionment according to benefits.

[Ed. Note.—For other cases, see *Municipal Corporations*, Dec. Dig. § 881.*]

**3. MUNICIPAL CORPORATIONS (§ 881*)—COST
—APPORTIONMENT—TEMPORARY BRIDGES.**

Commissioners appointed under St. 1899, c. 419, to apportion among cities constituting the metropolitan park district payments required to reimburse the commonwealth for the cost and maintenance of parks, etc., properly included as part of the cost of removing a bridge and constructing a new one, the expense of a temporary bridge used during the construction.

[Ed. Note.—For other cases, see *Municipal Corporations*, Dec. Dig. § 881.*]

Appeal from Supreme Judicial Court, Suffolk County.

Petition by William B. De Las Casas and others, Commissioners under St. 1899, c. 419. From a decree, the cities of Boston and Cambridge appeal. Affirmed.

G. A. Flynn, for appellant City of Boston. J. F. Aylward, City Sol., for appellant City of Cambridge. J. M. Swift, Atty. Gen., and A. Marshall, Asst. Atty. Gen., for appellees.

RUGG, J. This is an appeal by the city of Boston and by the city of Cambridge from a decree accepting the award of commissioners appointed to determine the apportionment among the cities and towns constituting the metropolitan park district of the annual payments required to reimburse the commonwealth for the cost and maintenance of the metropolitan parks and the Charles river basin. In substance, the ground of objection by the city of Boston is that the commissioners have not proceeded according to the terms of the statutes in apportioning the annual contributions toward the cost and toward the maintenance of the Charles river basin, while the city of Cambridge objects upon the additional ground that they have wrongfully apportioned the expense of a temporary bridge. These objections depend upon certain statutes, which it becomes necessary to examine in detail. The commissioners were required by St. 1899, c. 419, §§

1, 2, to "in such manner as they deem just and equitable determine and make award of the proportions in which each of the cities and towns of the said district shall annually pay money into the treasury of the commonwealth * * * to provide the amount * * * estimated * * * to meet the interest and sinking fund requirements of the appropriations and loans authorized" for the general metropolitan park system (St. 1893, c. 407), for the construction of roadways and boulevards (St. 1894, c. 288), for the Revere beach reservation (St. 1895, c. 305), and for the Nantasket beach reservation (St. 1899, c. 464, § 4), "and the amount required to meet the expenses * * * of said board of metropolitan park commissioners and of the care, maintenance and operation * * * of the parks, reservations, boulevards and other works acquired, cared for and controlled by said board. * * *" St. 1903, c. 465, created the Charles river basin commission and charged it with the duty of constructing a dam near the mouth of the Charles river and other extensive public improvements. Upon completion, these public improvements were to be placed under the control and management of the metropolitan park commission. Section 9 of this act as amended by St. 1906, c. 402, § 2, imposed upon the commissioners, whose report is here in question, duties as to the expenses incurred by the Charles river basin commission and the maintenance of the Charles river basin in this language: "The commissioners * * * in apportioning the expense of maintaining the metropolitan park system shall include as a part thereof the expense of maintenance" of the Charles river basin. "shall also determine as they shall deem just and equitable what portion of the total amount expended for the construction" of the Charles river basin "shall be apportioned to the cities of Boston and Cambridge as the cost of the removal of Craigie bridge and the construction of a suitable bridge in place thereof, and the remainder shall be considered and treated as part of the cost of construction of the metropolitan park system; and shall also determine as they shall deem just and equitable what portion of the total amount expended for the cost of construction of the marginal conduit on the south side of the basin and of the embankment and park, provided for by this act, shall be apportioned to the city of Boston as the cost of the construction of said embankment and park and what portion shall be fixed as the cost of said marginal conduit. The cost of the construction of said embankment and park as so apportioned shall be repaid to the commonwealth by the city of Boston. * * *"

The commissioners made five different tables of apportionment. They apportioned, first, the cost and maintenance of the metropolitan parks, exclusive of the Nantasket beach reservation and the Charles river ba-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

sin, according to percentages made up of a combination of valuation and population and a partial exclusion of certain towns located upon the fringe of the district; second, the expense and maintenance of boulevards according to percentages based upon a combination of valuation and length of boulevard in the several municipalities; third, the Nantasket beach reservation expense and maintenance upon all the cities and towns including Cohasset by a percentage based upon valuation; fourth, the expense of the construction of the Charles river basin (after deducting the cost of Craigie bridge and the embankment and park as required by the statute) by assessing 50 per cent. of the cost of dredging and other improvements in Broad and Lechmere canals upon the city of Cambridge, on the ground that they found that that particular part of the Charles river basin work resulted in special and peculiar benefit to the city of Cambridge; by assessing 16½ per cent. of the amount expended for the Boston marginal conduit upon the city of Boston and the same percentage of the expense of the Cambridge marginal conduit upon the city of Cambridge, on the ground that they found that the construction of these two conduits had conferred a special advantage upon the city in which each was located, and the balance, after these deductions, upon the cities and towns of the metropolitan park district in proportion to valuation; fifth, the expense of maintaining the Charles river basin in accordance with the same principles after making the necessary deductions. The first three of these determinations are not attacked, but the broad objection is made to the findings touching the Charles river basin that, having made the deductions for the Craigie bridge and the embankment and park required by the statute, the commissioners had no authority to apportion the balance either of expense of construction or of maintenance in any other way than that in which the general expenses of the metropolitan park system were apportioned. This contention is based upon the language of the statute above quoted that the remainder "shall be considered and treated as part of the cost of construction of the metropolitan park system."

[1] The governing principles by which actions and reports of commissioners like these are to be treated have been elaborated several times, and it is not necessary to go over the ground again. *Kingman*, Petitioner, 153 Mass. 566, 27 N. E. 778, 12 L. R. A. 417; *s. c.*, 156 Mass. 361, 30 N. E. 820; *Kingman*, Petitioner, 170 Mass. 112, 48 N. E. 1075; *Adams*, Petitioner, 165 Mass. 497, 43 N. E. 682; *De Las Casas*, Petitioner, 178 Mass. 213, 59 N. E. 664; *s. c.*, 180 Mass. 471, 62 N. E. 738. Summarily stated, they are that the commissioners are clothed with a wide discretion as to the considerations which should guide them in making the apportionment. It is to be made in such a manner as they may

deem just and equitable. Their reasonable determination and not that of the court is to prevail. It is conceivable that cases might arise where such a gross miscalculation, or mistake as to facts or law, might have been made, as would require the rejection of the award. The discretion of the commissioners is not arbitrary or dictatorial, but judicial. The court is required to pass upon the report, and hence the general grounds of their judgment must be submitted as a part of their report, but the court would be slow to disturb an award except in the event of its appearing "extravagant and unreasonable," or based upon an unsound interpretation of the statutes, or an erroneous view of the law. So long as they proceed within their powers, and act reasonably and violate no constitutional guaranty, their determination will not be disturbed.

[2] The basis of the decision of these commissioners is set out at length in their report. They have endeavored to proceed according to the principles which would govern the assessment of betterments for a public improvement upon individuals within the limitations of the Constitution. They have undertaken to ascertain the extent of the special benefits which have accrued to the cities adjacent to the Charles river basin and to make apportionment of expense in proportion to this special benefit before proceeding to make the general assessment. This principle is equitable and rational, and nothing appears upon the face of the report to indicate that the commissioners have failed to accomplish in this regard that which they set out to do. It has not been and could not be contended successfully that this method of dividing the expense of a public improvement among cities and towns was unconstitutional. The limits of the constitutional powers of the Legislature to place such burdens upon municipalities has never been determined. It is not necessary to fix them in this opinion. If the same principles are applied to such subdivisions of government as could be constitutionally applied to individuals, there is no just ground for complaint. This is plainly implied by what is said in 180 Mass. at page 475, 62 N. E. 738.

The particular ground of attack however, is that the terms of the statute do not permit the commissioners to proceed in the way in which they have proceeded, and that they have no authority to apportion the balance of the Charles river basin expenses according to any other percentage than that employed for the entire district. The language of the statute relied upon when considered in connection with the other statutes governing the metropolitan parks does not require so narrow a construction. The statutes under which the several departments of the metropolitan park system have grown up have some tendency to indicate a natural classification of its financial burdens. The parks as a whole constitute one division, al-

though the authority by which they have been acquired is to be found in successive enactments. The expense of the Nantasket beach reservation is imposed by the act of the Legislature upon a territorial unit differing by the addition of one town from the metropolitan park district as constituted for other purposes. The construction and maintenance of boulevards has been found by this and preceding commissioners to stand upon a different footing as to equitable apportionment of expense, than the general park system. A special apportionment of the boulevard expense based in fact upon benefits conferred upon particular cities and towns was upheld in 180 Mass. 471, 62 N. E. 738. The Legislature itself has treated the Charles river basin as a somewhat distinct entity, having reposed the responsibility for its acquirement and construction in an independent commission, and required it to be turned over as a finished public improvement to the care of the metropolitan park commission. The Cambridge and Boston marginal conduits and the Broad and Lechmere canals seem to distinguish it by the peculiar character of the work upon them from the general characteristics inherent in park systems. These considerations point to the conclusion that the Legislature did not intend to limit the power of the commissioners in determining how the expense of the Charles river basin should be borne to the same principle of apportionment followed as to the general metropolitan park expenses. In *De Las Casas, Petitioner*, 180 Mass. 471, 62 N. E. 738, the court approved a classification of towns upon which varying percentages of expense of the general metropolitan parks were placed. The principle in the present case is not different in its essence. Instead of classifying the municipalities of which the district is made up, the general park system is divided into the several classifications of Charles river basin, boulevards, Nantasket beach, and the general metropolitan parks, and the burden of these several classes is apportioned in different percentages among the several municipalities according to a principle which the commissioners assert to be found upon the evidence before them to be in part in proportion to benefits, and to be just and equitable. There is nothing to show, and it is not claimed, that this is an extravagant or unreasonable apportionment. No objection in law appears to it as not in conformity with the statute.

[3] The city of Cambridge objects further to the confirmation of the report on the ground that the commissioners have improperly included as a part of "the cost of the removal of the Craigie bridge and the construction of a suitable bridge in place thereof" the expense of a temporary bridge used during the period of construction. The main principle followed by the Legislature respect-

ing the expenses incurred as a part of this public undertaking is that so far as they relate to the accommodation of public travel between Cambridge and Boston they should be borne by these two cities. It is a part of the necessities of public travel that temporary provision for it be made during the work of construction. It is a fair implication, from the tenor of the statute, that the expense of this temporary provision should be borne in the same way as the expense for the permanent accommodation of the traveling public. Such expense bears a more intimate connection with that branch of the work required by the statute than with the general metropolitan park system. The argument drawn from the fact that special authority for the construction of the temporary bridge was incorporated in section 8, c. 467, St. 1898, is of slight consequence. Such authority probably would be inferred from the general scope of the work. Very many statutes where presumably temporary provision for travelers was required have made no mention of it. See for example St. 1900, c. 456; St. 1901, c. 491; St. 1896, c. 483; St. 1903, c. 441; St. 1903, c. 391. No error of law appears in the award of the commissioners in this regard.

Decree affirmed.

(209 Mass. 396)

COMMONWEALTH v. PHELPS.

(Supreme Judicial Court of Massachusetts.
Franklin. June 21, 1911.)

1. ARREST (§ 63*)—WITHOUT WARRANT.

An officer can arrest without a warrant on reasonable grounds for suspecting that a felony has been committed.

[Ed. Note.—For other cases, see *Arrest*, Cent. Dig. §§ 145-156; Dec. Dig. § 63.*]

2. CRIMINAL LAW (§ 783½*)—INSTRUCTIONS.

In a trial for killing an officer who sought to arrest accused for an offense, on the district attorney withdrawing his contention that such offense was a felony, an instruction that the jury "may" disregard all evidence concerning such offense was not erroneous for using the word "may" instead of "must"; the objection not having been taken at the trial, and it appearing that the jury must have understood that they were required to disregard the evidence.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 1872-1876; Dec. Dig. § 783½.*]

3. HOMICIDE (§ 184*)—EVIDENCE—DECLARATIONS BY THIRD PERSONS.

In a trial for killing a deputy sheriff while he attempted to arrest accused without a warrant, the state could show the facts concerning the offense for which the arrest was sought to be made, as communicated to decedent by telephone by an eyewitness to such offense.

[Ed. Note.—For other cases, see *Homicide*, Cent. Dig. § 388; Dec. Dig. § 184.*]

4. ARREST (§ 68*)—RIGHT TO BREAK OPEN DOORS.

An officer who has the right to arrest without a warrant, because he suspects on reason-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

able grounds that defendant has committed a felony, has a right to break open doors.

[Ed. Note.—For other cases, see Arrest, Cent. Dig. § 169; Dec. Dig. § 68.*]

5. HOMICIDE (§ 242*)—ARREST WITHOUT WARRANT — SUSPICION — FELONY — REASONABLENESS — EVIDENCE — SUFFICIENCY.

In a trial for killing a deputy sheriff while he was attempting to arrest accused without a warrant, evidence held to warrant a finding that decedent had reasonable ground to suspect that accused had committed a felony.

[Ed. Note.—For other cases, see Homicide, Dec. Dig. § 242.*]

6. ARREST (§ 63*)—WITHOUT WARRANT—RIGHT TO MAKE.

As affecting an officer's right to arrest without a warrant, it is unnecessary that information inducing him to suspect that a felony has been committed should in terms show that fact; it being enough that the communication in its popular sense would import such a charge.

[Ed. Note.—For other cases, see Arrest, Cent. Dig. §§ 145-156; Dec. Dig. § 63.*]

7. SEARCHES AND SEIZURES (§ 7*)—ARREST WITHOUT WARRANT—CONSTITUTIONAL LAW.

An arrest without a warrant does not contravene Const. pt. 1, art. 14, regulating right of search and seizure.

[Ed. Note.—For other cases, see Searches and Seizures, Cent. Dig. § 5; Dec. Dig. § 7.*]

8. HOMICIDE (§ 298*)—MURDER—INSTRUCTIONS.

In a trial for killing a deputy sheriff while he was attempting to arrest accused, it was proper to instruct that decedent could take all measures reasonably necessary to effect the arrest, if he had the right to arrest without a warrant; that he could summon others to assist him, if he used reasonable judgment and no unnecessary violence; that what would be reasonable procedure on his part depended upon the surrounding facts, etc.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 612; Dec. Dig. § 298.*]

9. HOMICIDE (§ 20*)—MURDER IN THE FIRST DEGREE—MALICE.

If accused, without warning an officer to desist from attempting to arrest him, in cool blood, and with express malice, intentionally killed the officer, accused is guilty of murder, though the officer acted unlawfully in attempting to arrest without a warrant.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 33, 34; Dec. Dig. § 20.*]

10. CRIMINAL LAW (§ 415*)—EVIDENCE—DECLARATIONS BY DECEDENT.

In a trial for killing a deputy sheriff while attempting to arrest accused without a warrant, the commonwealth could show that before attempting the arrest the officer stated that accused was "at it again," to show the state of the officer's mind as to whether he in fact suspected accused had committed a felony.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 937-949; Dec. Dig. § 415.*]

11. WITNESSES (§ 248*)—TESTIMONY—RESPONSIVENESS TO QUESTION.

Where, in a trial for killing a deputy sheriff while attempting to arrest accused, a member of decedent's posse testified that he went to the front door of accused's house in response to a statement by decedent that "the rest of us will go" there, and witness was then asked if that was the only invitation he had, it was not error to refuse to strike his answer, as being not responsive, that decedent swore the posse in on their way to the house.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 861-863; Dec. Dig. § 248.*]

12. ARREST (§ 63*)—WITHOUT WARRANT—JUSTIFICATION.

Where a dangerous wound is inflicted, which afterwards proves fatal, a peace officer need not wait to ascertain whether the injured person dies, and if, as a reasonable man, he has a suspicion and probable cause to believe that the wound is such that a felony was likely to result from it through the injured person's death, he may be found to have had reasonable cause to believe that a felony had been committed, as affecting his right to arrest the offender without a warrant.

[Ed. Note.—For other cases, see Arrest, Cent. Dig. §§ 145-156; Dec. Dig. § 63.*]

13. ARREST (§ 63*)—WITHOUT WARRANT—SUSPICION OF FELONY—EVIDENCE—SUFFICIENCY.

That a deputy sheriff had been told that a doctor stated that a wound inflicted by accused upon another was 3 to 3½ inches deep by 1½ inches wide, that it affected breathing some, but that the doctor thought the injured person would recover, warranted the officer in suspecting that the wound was likely to cause death, as affecting his right to arrest accused without a warrant.

[Ed. Note.—For other cases, see Arrest, Cent. Dig. §§ 145-156; Dec. Dig. § 63.*]

14. CRIMINAL LAW (§ 696*)—EVIDENCE.

In a trial for killing a deputy sheriff while he attempted to arrest accused without a warrant for an assault, it was not error to refuse to strike all evidence concerning the assault, except so far as the facts appeared to have been communicated to decedent, where the evidence warranted a finding that the assault was felonious, and the request was not renewed after the district attorney elected not to insist that the assault was felonious.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 696.*]

15. HOMICIDE (§ 142*)—MURDER—EVIDENCE.

In a trial for murdering decedent while attempting to arrest accused, it was proper to show that decedent was a deputy sheriff, though the indictment did not state that fact.

[Ed. Note.—For other cases, see Homicide, Dec. Dig. § 142.*]

16. CRIMINAL LAW (§ 656*)—CONDUCT OF TRIAL JUDGE.

In a trial for killing a deputy sheriff while he attempted to arrest accused, it was not improper for the trial judge, in the course of a discussion as to the admissibility of evidence, to say, "I assume the connection is being evidence that he was called by telephone call, evidence that very soon after receiving the call he went, and the argument to the jury is that he went in obedience to the call, and as deputy sheriff," and on defendant excepting to the statement, "I do not make that as a statement, but that is the purpose; I said that is what suggested itself to me when the evidence was offered."

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 656.*]

17. JURY (§ 131*)—JURORS—EXAMINATION.

In a murder trial, it was not error for the trial judge to refuse to interrogate each juror as to his having read an article in a certain newspaper; there being no offer to show aliunde that the jurors were not indifferent.

[Ed. Note.—For other cases, see Jury, Dec. Dig. § 131.*]

18. JURY (§ 131*)—JURORS—EXAMINATION—JUDICIAL DISCRETION.

Whether any questions shall be asked jurors on their examination beyond those prescribed by Rev. Laws, c. 176, § 28, is discretionary with the trial judge.

[Ed. Note.—For other cases, see Jury, Cent. Dig. § 562; Dec. Dig. § 131.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

19. CRIMINAL LAW (§ 854*)—JURORS—SEPARATION BEFORE COMPLETION OF PANEL.

One accused of a capital offense has no right to have the jurors kept together during a recess taken before the panel is completed.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 854.*]

20. CRIMINAL LAW (§ 1043*)—REVIEW—MATTERS NOT EXCEPTED TO.

One convicted of murdering a deputy sheriff while attempting to arrest accused for an assault upon another with a knife cannot complain that the knife was sent to the jury room with the other exhibits in evidence, though after the knife was properly admitted in evidence the district attorney withdrew his contention that the assault was felonious; accused having made no other objection.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2654, 2655; Dec. Dig. § 1043.*]

Exceptions from Superior Court, Franklin County; Wm. Schofield, Judge.

Silas N. Phelps was convicted of murder in the first degree, and he brings exceptions. Exceptions overruled.

Richard W. Irwin, Dist. Atty., for the Commonwealth. W. A. Davenport and H. E. Ward, for defendant.

LORING, J. The exceptions in this case were taken during a trial which resulted in the defendant's being convicted of murder in the first degree.

The circumstances were as follows. Previous to June 11, 1910, the defendant had been employed by the Ramage Paper Company at Monroe Bridge. On coming to work on that day, between 5 and 6 o'clock in the afternoon, he found some one else in his place. Thereupon he went into the office of the company and found there one Sibley and one McIntyre. Penman, the superintendent of the Paper Company, soon after came into the office. Penman's story was: That he told the defendant that if he could not do better he had better get out and stay out. That the defendant said that no one could put him out. Whereupon he (Penman) told McIntyre to put him out and McIntyre did so peacefully and without trouble. That he (Penman) followed the defendant as he went out and the defendant, when outside the door, turned and said to him (Penman), "I will have your heart's blood before morning." That about 10 minutes after 6 o'clock Penman and McIntyre met the defendant on the highway and he (Penman) told the defendant that he had better "take a tumble to himself and straighten up," whereupon the defendant, who up to that time had had his hands in his pockets without saying anything, stabbed him with a knife "under the left shoulder." McIntyre's account did not differ in substance, but he added that the knife was open when the defendant took it from his pocket, and "drawing and striking were practically one movement." McIntyre also testified that just after the stabbing the defendant said, "I have got you."

The doctor who attended Penman testified that he found a clean cut about an inch and a quarter in length and something like 3 to 3½ inches deep, on the left side, about the seventh rib, in the axillary line, "in the juxtaposition of the heart" and "about six inches from the left nipple." There was also evidence that on the afternoon of the day that Penman was stabbed the defendant had said that "he was going down that night, and if Penman didn't set him to work he would fix that son of a bitch," meaning Penman."

McIntyre further testified that at about half past 6 or 7 he telephoned to Haskins, the deceased, who was a deputy sheriff at Charlemont, and told him that the defendant "had knifed Penman, and asked him to come and look after him—take care of him." Charlemont was some 10 miles distant, and he saw Haskins at Monroe Bridge at about 11 o'clock that same night. McIntyre then testified in these words: "I told him that Si came into the office, and Mr. Penman had fired him, discharged him, and on going up the hill, we met him again, and that Penman had asked him, putting up his hand, what he meant by this business, and that Si drew a knife and stabbed him (and illustrated by putting his hand in his pocket and the striking)." "I told him that he said, 'I have got you,' after stabbing. I told him also of seeing the doctor who attended Penman, and that the doctor had told me that the wound was 3 to 3½ inches deep, by an inch and a half wide, that it had affected the breathing some but that he thought he would recover."

The circumstances of the killing told by a number of witnesses produced by the government were in substance as follows: Haskins met McIntyre and four other men in a barn about 11:20, and arranged to go to the defendant's house with those then present and two more, and arrest him at daybreak. One of the four seems to have backed out, and at about half past 3 o'clock in the morning Haskins, McIntyre and five other men started for the defendant's house. They arrived there about 4 o'clock. The sun was due to rise on June 12th at 7 minutes after 4. When they arrived at the house Haskins rapped on the door and said in a loud voice: "I am Sheriff Haskins, come to arrest Silas Phelps for the knifing of Mr. Penman." That "he had better come quietly, and make no trouble; that would be best for all concerned." No answer being given Haskins rapped again, and again called out, stating who he was and calling upon the defendant to give himself up. There still being no answer Haskins rapped again, and again stated who he was and again called upon the defendant to give himself up. He then called on the defendant's wife to open the door and she said that she would not do so. Haskins asked if she realized that she was hindering an officer

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

in the performance of his duty. To this she gave no answer. Again Haskins rapped and asked the defendant's wife to open the door, and she said that she would not do so. Haskins then asked if the defendant was at home and she said that he was not. After posting two men at the back of the house Haskins, McIntyre and one Tower broke in the front door and went into the kitchen, and as they did so steps were heard ascending the stairs, whereupon Haskins went to the foot of the stairs "and moved his body forward into the opening of the door of the stairway," and said, "Come, Si, I see you. Come on down now," and that he was then shot down by the defendant, who stood at the top of the stairs, and died in a few seconds. Haskins was shot at the top of the breast bone in the center line. The defendant soon after appeared at a window of the house and told the posse to leave or he would begin shooting again. They left. The defendant took to the woods and was captured on the 15th, three days later.

There was also evidence that the defendant had said that Haskins "swore a false oath against" him a year before, in the "Shippee case," and "that he would shoot him [Haskins] if he ever came to arrest him again." That Haskins "swore to a damn lie when he had me to Greenfield, and he never will swear to another one, nor he never will arrest me. He will die or I shall." "I don't know whether he told him, but that is what he told me, and he told others the same thing, too, what he told me. 'Emmett, by God! you will never arrest me again. Either you will be a dead man or I will.' Emmett says, 'May be you and may be me.' He (meaning the defendant) says to Emmett, 'By God! Emmett, you never will arrest me again.' * * * Emmett says, 'It may be you and may be me,' and he (meaning the defendant) said, 'I know damned well it will be you.'" That if Haskins ever came to arrest him again "he won't take me alive."

These or similar statements had been repeated by the defendant a number of times. Further, on the night of the day Penman was stabbed the defendant said "that he was going down that night, and if Penman didn't set him to work he would fix that son of a bitch," and that on the next morning he telephoned to a cousin, who was a selectman of Monroe Bridge: "There is a corpse here for you. They came up here and smashed right in and I just stopped them." "I shot him. * * * I shot to kill."

There was a conflict in the evidence which it is not necessary to speak of in detail. It is enough to say that the defendant testified that Penman began the quarrel and he stabbed him in self-defense; that on the morning of June 12th he did not recognize Haskins' voice, and the shotgun that killed him was discharged by accident.

The commonwealth put its case on three

grounds, namely: (1) That in stabbing Penman the defendant committed a felony and therefore Haskins had a right to arrest the defendant without a warrant; (2) that on facts communicated to him by McIntyre, Haskins had reasonable ground to believe and did suspect that a felony had been committed; and (3) that the defendant shot Haskins with express malice out of hatred and for revenge. Whether a felony had or had not been committed in this case depended upon whether the defendant stabbed Penman with intent to commit murder, for that is punishable by imprisonment in the state prison (R. L. c. 207, § 15) and so is a felony (R. L. c. 215, § 1).

At the conclusion of the evidence the defendant's counsel asked the presiding judge to rule that there was no evidence that a felony had been committed. This was refused. Thereupon the case was argued and the jury were instructed on that footing. After a conference with counsel on the conclusion of the charge the presiding judge, "the district attorney consenting," charged the jury "that there was no evidence that Phelps made an assault upon Penman with intent to kill." The judge went on and instructed the jury that the commonwealth's case in regard to Haskins' proceeding without a warrant "now rests" solely upon the testimony in regard to Haskins' suspicion that a felony had been committed, and told them: "You may disregard all the evidence relative to the assault by the defendant upon Penman, except so far as it appears in evidence that facts in relation thereto were communicated to Haskins."

[1] Before taking up the several exceptions taken by the defendant we will deal with a question which is a fundamental one in this case, namely, the right of an officer to arrest on suspicion of felony. It was laid down by Chief Justice Shaw in *Commonwealth v. Carey*, 12 Cush. 246, 247, that "if he [a constable or other peace officer] arrest a person without a warrant, he is not bound to show in his justification a felony actually committed, to render the arrest lawful; but if he suspects one on his own knowledge of facts, or on facts communicated to him by others, and thereupon he has reasonable ground to believe that the accused has been guilty of felony, the arrest is lawful." If it was intended by this statement in *Commonwealth v. Carey*, to make a distinction between the fact of suspicion where the officer had reasonable ground to believe, and the fact of suspicion where he had reasonable grounds to suspect that a felony had been committed, the defendant in the case at bar had the benefit of the difference. But it was pointed out in *Jackson v. Knowlton*, 173 Mass. 94, 97, 53 N. E. 134, that the word "suspect" is ordinarily used in place of "believe" in stating what the officer must have reasonable grounds of. If, as is undoubted law, it is enough that the of-

ficer suspect that a felony has been committed, it must be enough that he had reasonable grounds to suspect. And (as stated in *Jackson v. Knowlton*) the authorities are to that effect. See *Rohan v. Sawin*, 5 Cush. 285; 5 Bac. Abr. 588; *Beckwith v. Philby*, 6 B. & C. 635; *Davis v. Russell*, 5 Bing. 354. The cases are collected in 2 Am. & Eng. Ency. of Law (2d Ed.) 870. We shall hereafter speak of the rule accordingly.

We will take up the several exceptions in the order of the defendant's brief.

[2] 1. The first thing complained of by the defendant is that when the district attorney elected to withdraw his contention that a felony had been committed the judge told the jury: "You may disregard all the evidence relative to the assault by the defendant upon Penman except so far as it appears in evidence that the facts in relation thereto were communicated to Haskins." The defendant's contention is that the judge should have told the jury that "they must," not that "they may," disregard that evidence. In our opinion there was evidence which warranted a finding that the defendant stabbed Penman with intent to commit murder. This statement of the presiding judge was not made to cure an error previously made (as was the case in *Farnum v. Farnum*, 13 Gray, 508, and *Commonwealth v. Edgerly*, 10 Allen, 184, relied on by the defendant), but to give the necessary instructions consequent on the change which had taken place in the government's case. The judge's attention was not called to the use of the word "may" in place of "must" in this part of the charge. The one exception taken to it was as to the use of the word "suspicion" in place of "belief" that a felony had been committed. But apart from that it is plain on reading the whole of this additional instruction that the word "may" was used as a word of command and not as a word of permission, and that this could not have been misunderstood by the jury.

[3] 2. The next exceptions are those taken to the communications over the telephone made by McIntyre to Haskins when he (Haskins) was at Charlemont on the afternoon of June 11th; and those made by him to Haskins in the evening of the same day, after Haskins had come to Monroe Bridge. This evidence was competent to show that facts had been communicated to Haskins on which he acted in attempting to arrest the defendant without a warrant.

3. The first, third and fifth rulings asked for could not have been given because the evidence warranted a finding that Haskins had reasonable ground to suspect and did suspect that the defendant had stabbed Penman with intent to murder. The first ruling asked for could not have been given for the additional reason that the evidence warranted a finding that the defendant killed Haskins with express malice, out of hatred and revenge. The sixth ruling asked for, if given, would have been likely to mislead.

There was evidence warranting a finding of express malice in the killing of Haskins, and the ruling requested did not cover the whole subject. The instruction given was full and accurate.¹

¹ "The killing by reason of provocation, in the attempt unlawfully to arrest, would be deemed by the law to be killing without malice aforethought. That is the rule where no other facts appear except the fact of an attempt to arrest without authority of the law, where the person making the arrest is proceeding in an orderly and proper manner, for the purpose of making the arrest, where he is resisted. In the case where the person attempting to make the arrest uses unnecessary violence, an unreasonable degree of force, that action on the part of the person attempting to make the arrest justifies on the part of the person who is sought to be arrested a right to use force to meet the unnecessary violence. But the simple rule in the case that I have stated, where a peace officer is attempting, without a warrant, and unlawfully, to arrest a person, proceeding in an orderly manner to affect [effect] the arrest, is resisted, and in the course of the resistance the person sought to be arrested kills the officer, although it is an unlawful act, no other facts appearing than those I have stated to you, the law says that it is not homicide with malice aforethought, which is necessary to constitute murder, but will, in contemplation of law, be manslaughter. Of course, in any case, other facts might appear which would show that the defendant had a right to resist on ground of self-defense or otherwise, and if acting within the right of self-defense, he proceeded to the extremity of killing, on the ground of self-defense, then there would be no criminal liability whatever. But in an unlawful arrest, where the officer or person seeking to make the arrest proceeds in the usual ordinary manner, for the purpose of taking the person sought to be arrested into custody, that is not a kind of violence, if nothing more appears, which justifies the taking of life to prevent it. Doing so is an unlawful act, nothing more appearing, but the law deems the attempt to arrest by one having no authority a provocation which, in concession to the frailty of human nature, leads to a mitigation of the offense and to the treatment of it, not as a homicide with malice aforethought, but the lesser crime, namely manslaughter.

"In this case there is testimony from several witnesses that the defendant, the prisoner at the bar, upon several occasions, spoke of the deputy sheriff and used expressions in regard to him and in regard to what would happen if the deputy sheriff should attempt to arrest him again, from which the commonwealth asks the jury to believe that this defendant, the prisoner at the bar, had towards the deputy sheriff express malice; that he had in his mind feelings of ill will or hostility toward the deputy sheriff. It is a question of fact, gentlemen, for you to decide upon the evidence in the case whether such is the truth. The instructions that I have just given in regard to the criminal responsibility of the defendant, if the deputy sheriff was killed by him in the course of affecting [effecting] an unlawful arrest, was on the assumption that no express malice was proved. I shall now instruct you upon the assumption that you do in fact find that there was express malice in the mind of this defendant, the prisoner at the bar, toward the deputy sheriff, Emmett F. Haskins.

"Express malice means an actual state of mind existing in the heart of the defendant towards the deputy sheriff of ill will, or hatred, or dislike, or kindred feelings. Where express malice is shown to exist on the part of the person sought to be arrested, against the person

[4] 4. An officer who has the right to arrest without a warrant because he suspects on reasonable grounds that the defendant has committed a felony, has a right to break open doors. That may be taken to be settled now. 4 Bl. Com. 292; 1 Hale, P. C. 588; 2 Hale, P. C. 94; Semayne's Case, 5 Co. 91b. Although, as is pointed out in 1 Hale, P. C. 588, there was formerly authority to the contrary. See, also, Foster's Crown Law, 321; 2 Hawkins, P. O. c. 14, § 7.

The defendant relies on the fact that Bigelow, J., in *McLeannon v. Richardson*, 15 Gray, 74, 77, 77 Am. Dec. 353, in enumerating the cases where a constable has authority "to break open doors and arrest without a warrant," did not include the case where there is a suspicion of felony as well as a felony. That cannot be taken (in connection with the question there under discussion) to mean that an officer who has a right to arrest without a warrant does not have a right to break open doors. The two were treated as standing on the same footing, and in the enumeration the right to arrest on suspicion of felony (that not being there in question) was omitted. The ninth, twelfth and seventeenth requests were rightly refused.

[5, 6] 5. The eleventh request was rightly refused even if there had been no reasonable ground to suspect that a felony had been committed. But the request assumes that there was not such evidence, and that question is also raised by the fourth and eighth requests for rulings. We are of opinion that there was such evidence. What Haskins was told by McIntyre was that Penman had discharged the defendant and later the defendant, on meeting Penman and McIntyre, had drawn a knife and stabbed him, "and [McIntyre] illustrated by putting his hand in his pocket and the striking." This illustration must be taken to have meant that the knife was open in the defendant's pocket and that the "drawing and striking were practically one movement," as McIntyre testified was the fact. Haskins was further told by McIntyre that immediately after stabbing Penman the defendant said, "I have got you," which the jury were warranted in finding meant, "I have killed you;" and also that he (McIntyre) had seen the doctor who said

"the wound was 8 to 8½ inches deep, by an inch and a half wide, that it had affected the breathing some, but that he thought he would recover." This authorized a finding that the defendant suspected on reasonable grounds that the defendant had stabbed Penman with intent to commit murder and so that a felony had been committed. It is to be noted that it is not necessary that the communication which induces the officer to suspect that a felony had been committed should in terms state that a felony has been committed or facts which of necessity mean that. It is enough that the communication "in its popular sense would import such a charge." *Commonwealth v. Carey*, 12 Cush. 251, 252.

[7] The further objection made by the defendant that an arrest without a warrant is in conflict with the fourteenth article of the Constitution of the commonwealth was disposed of in *Rohan v. Sawin*, 5 Cush. 281. It was there held that those provisions were in restraint of general warrants to make searches and that they do not conflict with the authority of officers or private persons under proper limitations to arrest without a warrant when authorized by the common law or by statute. To the same effect see *Wakely v. Hart*, 6 Bin. (Pa.) 316. The same is true of the fourth amendment to the Constitution of the United States.

[8] 5. The defendant took an exception to what was said in the charge as to the right of Haskins "to take all measures that are reasonably necessary to affect [effect] the arrest," if he had a right to arrest without a warrant. The presiding judge said in that connection: "He [the officer] has a right to summon others to assist him in making the arrest, subject always to the qualification that he shall use reasonable judgment and no unnecessary violence or force. What would be reasonable on the part of a peace officer in proceeding to make an arrest depends upon the fact in each particular case. It is the duty of the jury to consider all of the circumstances shown by the evidence in this case in passing judgment upon the question whether the peace officer used reasonable judgment in executing the authority which the commonwealth contends was con-

who attempted to arrest him, and where he kills the person, where he intentionally kills the person who sought to arrest him, through express malice, a different rule of criminal responsibility applies from that which exists where the killing in resistance of an unlawful arrest was without any proof or evidence of express malice. In this case, assuming now that the deputy sheriff was acting without authority of law in attempting to arrest Phelps, if Phelps knew Haskins was the man at the foot of the stairs, and also knew that Haskins intended to do no bodily harm to him or to any member of his family, or any injury to his habitation, but only to arrest and take him into custody, and if he had no apprehension or reasonable ground for apprehension of any such bodily harm or danger of harm from Haskins or those with Haskins, and if without warning or notice

to Haskins to desist, the prisoner, in cool blood, with express malice in his heart, to gratify feelings of ill will, or hatred, or any feeling which the jury find was express malice, intentionally shot and killed Haskins, you will be warranted in finding the defendant guilty of murder, even though Haskins was acting without right and unlawfully in attempting to make the arrest without a warrant. If you find further, by the degree of proof which I have referred to and shall later refer to again, if he intentionally shot, if the intentional shooting was deliberately premeditated in the sense I have explained deliberate premeditation, you will be justified in finding the defendant guilty of murder in the first degree, even though Haskins was acting without right and unlawfully in attempting to make the arrest without a warrant."

ferred upon him by law to make the arrest." There was evidence that of the six men who accompanied Haskins one had a rifle, one a shotgun, two each had a revolver and in addition Haskins had a revolver which remained in its holster until it was taken from it after his death. We see no error in this part of the charge.

[9] 6. The presiding judge instructed the jury that "if without warning or notice to Haskins to desist, the prisoner, in cool blood, with express malice in his heart, to gratify feeling of ill will, or hatred, or any feeling which the jury find was express malice, intentionally shot and killed Haskins, you will be warranted in finding the defendant guilty of murder, even though Haskins was acting without right and unlawfully in attempting to make the arrest without a warrant." To this the defendant took an exception. The whole of the charge on express malice has been stated above in full. We are of opinion that this exception also must be overruled. The only argument in support of it not already disposed of is that there was no evidence that the defendant killed Haskins for any other reason or purpose than by accident or to avoid arrest. It is enough to say without repeating the evidence already stated that there was evidence that warranted a finding that the defendant shot Haskins with express malice as defined in the charge. For similar cases see *Rafferty v. People*, 72 Ill. 37; *Muscoe v. Com.*, 86 Va. 443, 10 S. E. 534; *State v. Holcomb*, 86 Mo. 371.

[10] 7. Under the defendant's objection and exception the judge allowed the commonwealth to prove that on his arrival at Monroe Bridge Haskins said, "Si is at it again." This was admissible to prove that Haskins did suspect that the defendant had committed a crime. The judge in his charge instructed the jury that it could not be used by them to draw any inferences of fact that any act had been done by the defendant, but only to show the state of mind of Haskins at the time, with a view to any light it might throw upon his action in connection with his proceedings in making the arrest. This exception must be overruled.

[11] 8. In narrating what took place before Haskins and two of the posse broke in the front door, McIntyre testified on cross-examination that Haskins placed two men at the back door and said, "The rest of us will go to the front and break in the door." That he (McIntyre) considered himself one of "the rest of us" and went to the front door. Counsel for the defendant then asked this question, "That was the only invitation you had," to which McIntyre answered, "He swore us in on the way up, you understand." The defendant asked to have the answer stricken out as not responsive, and excepted to the ruling that it should stand, on the same ground. We are of opinion that counsel's question might have been understood to mean that this remark was the only invitation or

authority which McIntyre and others had from Haskins to act with him in making the arrest, and so was responsive to the question. This exception must be overruled.

9. The defendant excepted to the statements as to "suspicion" made in the further charge to the jury after the district attorney had consented to waive his claim that a felony had been committed. This has already been dealt with.

[12] 10. The defendant excepted to that part of the charge in which the judge instructed the jury that: "Where a dangerous wound is inflicted, which proves to be a felony through the death of the person wounded, the peace officer is not required to wait until the fact is ascertained whether the assaulted person dies or not. But if, as a reasonable man, he has a suspicion and probable cause to believe that the wound is of such a nature that a felony is likely to result from it through the death of the person wounded, then a condition exists upon which the jury, if they believe the facts, would be justified in finding the officer had probable cause to believe a felony had been committed, because if the man dies of the dangerous wound, the criminal act dates from [the] time the act was done, and the felony, if ever committed, is committed when the wound is inflicted." The defendant's first contention is that this is not correct as matter of law. It is supported by the authority of Sir Matthew Hale, who says in 2 Hale's Pleas of the Crown, 94: "If A. hath wounded B. so that he is in danger of death, and A. flies and takes his house and shuts the doors, and will not open them, the constable of the vill where it is done, or upon hue and cry, may break the doors of the house to take him, if upon demand he will not yield himself to the constable. 7 E. 3, 16, b; Barre, 291." We are of opinion that as matter of law it is correct.

[13] The defendant's second contention is that there was no evidence on which the jury could find that Haskins had been told that a dangerous wound had been inflicted. He had been told that the doctor had told McIntyre that the wound was "3 to 3½ inches deep by an inch and a half wide, that it had affected the breathing some but that he thought he would recover." Whether that was a statement that the wound was a dangerous one depends largely on the emphasis put upon the different words used. The statement was not that he would recover, but that the doctor "thought" he would recover. Again, the statement was not "and" the doctor thought he would recover. The statement was "but" the doctor thought he would recover, which well might be taken to mean "but in spite of that the doctor thought he would recover." If emphasis is put upon these two words we cannot say that the judge was wrong in allowing the jury to find that on the communication made to him Haskins was warranted in suspecting that a

wound had been inflicted which was likely to result in death. This exception must be overruled.

[14] 11. By his second request the defendant asked "that the court order all the evidence relative to the assault by Phelps upon Penman stricken from the record, except so far as it appears in evidence that the facts in relation thereto were communicated to Haskins." This request was made and the exception taken to the refusal to give it was taken before the district attorney elected not to press his contention that there was evidence that a felony had been committed. When the request was made and the exception taken, the ruling asked for was rightly refused because the evidence warranted a finding that the assault upon Penman was an assault with intent to commit murder. The request was not renewed after that change in position on the part of the district attorney. The rights of the defendant upon that change being made were fully secured to the defendant by the judge's direction to the jury to disregard all evidence relative to the assault except so far as they appear to have been communicated to Haskins, which has been already dealt with, *supra*.

12. The fifth request for a ruling could not have been given because there was evidence that the defendant suspected on reasonable grounds that a felony had been committed, and because there was evidence that in shooting Haskins the defendant acted with express malice.

[15] 13. The next exception is to the admission in evidence of the fact that Haskins was a deputy sheriff. The ground of this exception is that that fact is not alleged in the indictment. But the crime for which the defendant was indicted was murder. One way of proving that the killing amounted to murder was that Haskins was killed by the defendant while resisting arrest by Haskins, who was lawfully endeavoring to arrest him. That is matter of evidence, not of allegation. It is none the less matter of evidence and not of allegation in an indictment for the killing, because if Haskins had not been killed and Phelps had sued him in a civil suit he would have had to plead those facts as his justification. *Brown v. State*, 62 N. J. Law, 666, 42 Atl. 811; *Keady v. People*, 32 Colo. 57, 74 Pac. 892, 66 L. R. A. 353; *Wright v. State*, 18 Ga. 383; *Dilger v. Commonwealth*, 88 Ky. 550, 11 S. W. 651.

[16] 14. The defendant excepted to a statement made by the judge under the following circumstances: "Witness was asked a question, and in the course of a discussion as to its admissibility, between the court, district attorney and Mr. Davenport, the court made the following statement: '* * * I assume the connection is being evidence that he was called by telephone call, evidence that

very soon after receiving the call, he went, and the argument to the jury is that he went in obedience to the call, and went as a deputy sheriff, in the execution of his office.' On the defendant's excepting to that statement the judge added: 'I do not make that as a statement, but that is the purpose. I said that is what suggested itself to me when the evidence was offered along that line.'" All that the judge did was to explain to counsel his reason for admitting the question, and this was made plain by the explanation given by him on the defendant's taking his exception.

[17, 18] 15. The defendant's exception to the refusal of the court to interrogate each juror as to his having read an article then before the court in the Greenfield Recorder is not well taken. Whether any questions shall be put to the persons called as jurors in addition to those prescribed by R. L. c. 176, § 28, is a matter lying within the discretion of the presiding judge. *Commonwealth v. Gee*, 6 Cush. 174; *Commonwealth v. Poisson*, 157 Mass. 510, 32 N. E. 906; *Commonwealth v. Thompson*, 159 Mass. 56, 33 N. E. 1111; *Commonwealth v. Warner*, 173 Mass. 541, 64 N. E. 353. The defendant's motion was limited to a request that the jurors be interrogated on this subject. There was no offer to introduce evidence allunde that these persons did not stand indifferent. We find nothing in the cases cited by him which helps the defendant.

[19] 16. We know of no case in this commonwealth or elsewhere in which it is held that the defendant in a capital case has a right to have the jurors who have been sworn and impaneled kept together during a recess taken by the court before the impaneling of the jury is completed. For cases to the contrary, see *Toel v. Commonwealth*, 11 Leigh (Va.) 714; *Epes' Case*, 5 Grat. (Va.) 676; *State v. Burns*, 33 Mo. 483.

[20] 17. At the argument the defendant complained that the knife with which the defendant stabbed Penman was sent out with other exhibits to the jury room. It was properly admitted in evidence and marked as an exhibit before the district attorney changed his position. The only exception taken by the defendant was that then taken. This exception must be overruled. The defendant cannot complain now that since the district attorney had changed his position the knife should not have been sent into the jury room. The defendant made no objection to that at the time and cannot now complain of it.

We have discussed all exceptions argued by the defendant. In addition we have considered all taken by him but not argued, and we have found no error in them.

The entry must be:

Exceptions overruled.

(309 Mass. 489)

BERDOS v. TREMONT & SUFFOLK MILLS.

(Supreme Judicial Court of Massachusetts. Middlesex. July 24, 1911.)

1. ACTION (§ 2*)—RIGHT OF ACTION—VIOLATION OF STATUTE—PERSON ENTITLED.

Violation of a duty created by a statute, resulting in damage to one of the class for whose benefit the duty was established, confers a right of action on the injured person, but he must show that a condition to which the statute directly relates has a causal connection with his injury.

[Ed. Note.—For other cases, see Action, Cent. Dig. §§ 10-16; Dec. Dig. § 2.*]

2. MASTER AND SERVANT (§ 95*)—LIABILITY OF MASTER FOR PERSONAL INJURIES—CHILD LABOR—VIOLATION OF STATUTE.

Though St. 1909, c. 514, §§ 56, 61, prohibits employment in factory or mercantile establishment of children under 14, and imposes a heavy penalty for violation thereof, a child injured by the violation has a right of action therefor.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 160; Dec. Dig. § 95.*]

3. NEGLIGENCE (§ 85*)—CONTRIBUTORY NEGLIGENCE—CHILDREN.

Minors of tender years, though held to the same rule of law in its general statement as adults, are required to exercise only that degree of care which is naturally incident to their youth, inexperience, and immature stage of mental development.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 121-129; Dec. Dig. § 85.*]

4. NEGLIGENCE (§ 122*)—PRESUMPTIONS—CHILDREN.

There is no particular age at which a minor is presumed to be able to comprehend risks or to be capable of negligence.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 223; Dec. Dig. § 122.*]

5. NEGLIGENCE (§ 136*)—NEGLIGENCE OF CHILD—QUESTION FOR JURY.

The negligence or contributory negligence of a child is commonly a question of fact to be determined in each case, whether, considering the age, experience, intelligence, judgment, and alertness, the particular child has sufficient capacity to grasp understandingly the nature and extent of the danger in which he is placed.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 347-349; Dec. Dig. § 136.*]

6. MASTER AND SERVANT (§ 95*)—CONTRIBUTORY NEGLIGENCE—CHILDREN—EFFECT OF STATUTORY PROVISIONS.

St. 1909, c. 514, §§ 56, 61, prohibiting employment in a factory or mercantile establishment of children under 14 and imposing a heavy penalty for violation, does not alter the ordinary rules of negligence applicable to actions for injury, and a plaintiff employed in violation of its terms must prove he was in the exercise of due care.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 160; Dec. Dig. § 95.*]

7. MASTER AND SERVANT (§ 95*)—INJURY—MINORS—VIOLATION OF LAW.

A child, employed in violation of St. 1909, c. 514, §§ 56, 61, was not violating the law.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 160; Dec. Dig. § 95.*]

8. MASTER AND SERVANT (§ 289*)—QUESTION FOR JURY—CONTRIBUTORY NEGLIGENCE OF CHILD.

The question of the contributory negligence of a child, employed in violation of St.

1909, c. 514, §§ 56, 61, *held* under the evidence a question for the jury.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 289.*]

9. MASTER AND SERVANT (§ 204*)—ASSUMPTION OF RISK—VIOLATION OF STATUTES—CHILD LABOR.

St. 1909, c. 514, §§ 56, 61, forbidding the employment of children under 14 and imposing a penalty, prevents a master, in a suit for personal injuries by a child employed in violation thereof, from setting up the defense of assumption of risk, where that defense is directly contractual or contractual in the sense applicable to intentional and voluntary continuance of labor under conditions dangerous and fully comprehended, and under such conduct as is equivalent to an agreement by the employee to relieve the employer from the duty which otherwise rests on him; but other parts of the doctrine of assumption of risk, referable generally to due care and negligence, are not changed by the statute.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 544-546; Dec. Dig. § 204.*]

10. MASTER AND SERVANT (§ 96*)—EMPLOYMENT OF MINORS—PROXIMATE CAUSE OF INJURY.

A child, employed in violation of St. 1909, c. 514, §§ 56, 61, is not entitled to recover for personal injuries thereunder, unless the violation directly contributed to his injury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 162; Dec. Dig. § 96.*]

11. MASTER AND SERVANT (§ 265*)—INJURY—EMPLOYMENT OF CHILDREN—PRESUMPTIONS AND BURDEN OF PROOF.

While a child, employed in violation of St. 1909, c. 514, §§ 56, 61, in suing for injuries thereunder must make out his case as does an ordinary plaintiff as to his own care, and show that his injury resulted from the negligence of the defendant, he may establish this by showing a violation of the statute alone, provided it contributed directly to his injury, and such proximate cause might arise from the fact of his immaturity rendering him incapable of appreciating the dangers in which he was placed.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 877-908; Dec. Dig. § 265.*]

Exceptions from Superior Court, Middlesex County; John H. Hardy, Judge.

Action by Elias Berdos, by his next friend, against the Tremont & Suffolk Mills. Verdict was directed for defendant, and plaintiff excepts. Exceptions sustained.

Trull & Wier and H. A. Varnum, for plaintiff. F. E. Dunbar, A. C. Spalding, and J. J. Rogers, for defendant.

RUGG, J. There was evidence tending to show that the plaintiff at the time of his injuries was less than fourteen years old, and had been in this country about seven weeks, during four of which he had been in the service of the defendant. He had never before worked in a factory, and could not speak or read English. While waiting for his work, which was about spinning mules in a cotton factory, he stood with his back toward some gears covered by a guard or shield, on which one of his hands rested. In some way not exactly explained, this hand got beyond or under the guard, and

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

and was cut by the gear. No instructions or warning were giving him as to such a danger. The plaintiff testified that he had never looked to see, and did not know that there were gears under the guard.

[1] R. L. c. 106, § 28, as amended by St. 1905, c. 267 (see now St. 1909, c. 514, § 56), prohibited the employment in any factory, workshop or mercantile establishment of a "child under the age of fourteen years," while St. 1906, c. 499, § 1 (see now St. 1909, c. 514, § 61), imposed a heavy penalty for violation of this law. This statute was passed in the exercise of the police power as a humanitarian measure and in the interest of the physical well-being of the race. It prevents children of immature judgment and undeveloped bodies from working under conditions likely to endanger their health, life or limb. While these considerations are important for society, they are also significant for the child. This statute imposes a duty upon every employer with reference to children under fourteen years of age. It is a general rule of statutory interpretation that a violation of a duty created by statute, resulting in damage to one of the class for whose benefit the duty was established, confers a right of action upon the injured person. A difficulty often arises to determine whether a private right arises for breach of the statutory duty imposed or whether the only consequence is to subject the violator to punishment. It is not enough for a plaintiff to prove a violation of a statute concurrent with his injury, but he must go further and show that a condition to which the statute directly relates has a causal connection with his injury. It becomes necessary to determine the purpose of this statute. That may be ascertained by the purview of the Legislature in the language it employed, having regard to prevailing social conditions, the evil attacked, the remedy provided, the practical results likely to flow from one interpretation or the other, and the public policy established. Although this statute has educational as well as economic aspects, and may have been enacted in part to supplement the general law as to compulsory school attendance, it is not directed exclusively against illiteracy, as is St. 1911, c. 310, for example. The titles of the various statutes, of which the present is the successor, as well as its context in the chapter of the Revised Laws, entitled "Of employment of labor," indicate that one of its chief purposes is to govern labor conditions. The title of the first statute touching this subject was "An Act in Relation to the Employment of Children in Manufacturing Establishments." St. 1866, c. 273. In most, if not all subsequent revisions of this act, the words, "employment of children" or equivalent language have been used. St. 1876, c. 52; Pub. St. 1882, c. 48; St. 1883, c. 224; St. 1885, c. 222; St. 1887, c. 121; St. 1888, c. 348; St. 1892, c. 352. This statute is a declaration of legislative policy that parents and guardians or children undertak-

ing to act in their own behalf shall no longer be permitted to bargain at all as to the work of children of tender years in specified employments. It relates to a class who are least able to protect themselves by appreciating and avoiding danger, or to request instructions as to matters beyond their understanding, or to arrange by contract for their protection, or to resist any compulsion arising from their own necessities or other circumstances. There would be difficulty in discovering instances of failure to comply with the law arising from the tendency of both parties to such failure to conceal the wrong-doing. The statute has to do with the protection of childhood. It pertains to a subject of universal interest fundamentally vital in its broader bearings to the future of mankind. [2] These considerations require the inference that the remedy intended by the Legislature against the delinquent employer was not confined to the criminal one. The right of civil action in addition may well have been regarded as a more efficacious means of compelling observance of the law. Therefore, while the public purposes of this act are important, any member of the public so situated with reference to its subject-matter as to suffer special damage by its infraction has a right of action against the violation of the statute. *Bourne v. Whitman*, 95 N. E. 404; *Norton v. Eastern Railroad*, 113 Mass. 366; *Turner v. Boston & Maine Railroad*, 158 Mass. 261, 263, 33 N. E. 520; *Grover v. Wimborne*, [1898] 2 Q. B. D. 402; *David v. Britannic Merthyr Coal Co.*, [1909] 2 K. B. 146; *D. Davis & Sons, Ltd., v. Taff Vale R. Co.* (1895) A. C. 542; *Gibson v. Dunkerley Bros.*, 102 Law Times Rep. (Court of Appeal) 587; *Rose v. King*, 49 Ohio St. 213, 30 N. E. 267, 15 L. R. A. 160; *Baxter v. Coughlin*, 70 Minn. 1, 72 N. W. 797; *Pauley v. Steam Gauge & Lantern Co.*, 131 N. Y. 90, 29 N. E. 999, 15 L. R. A. 194; *Sipes v. Michigan Starch Co.*, 137 Mich. 258, 100 N. W. 447. This principle was recognized and adopted, although different results were reached in its application, in *Union Pacific R. Co. v. McDonald*, 152 U. S. 262, 14 Sup. Ct. 619, 38 L. Ed. 434, and in *Menutt v. Boston & Maine Railroad*, 207 Mass. 12, 92 N. E. 1032, 30 L. R. A. (N. S.) 1196. This statute does not fall within the class illustrated by *Dahlin v. Walsh*, 192 Mass. 163, 77 N. E. 830, 6 L. R. A. (N. S.) 615, *Kirby v. Boylston Market Ass'n*, 14 Gray, 249, 74 Am. Dec. 682, *Atkinson v. Newcastle & Gateshead Water Works Co.*, L. R. 2 Ex. Div. 441, and *Johnston & Toronto Type Foundry Co., Ltd., v. Consumers' Gas Co. of Toronto* (1898) A. C. 447, which held that the plain purpose of the statutes was to affect only public obligations and to confer no private rights. It follows that a minor who can trace his injury to a breach of the duty imposed by this statute as its direct and proximate cause may have a right of action therefor.

[3-6] In ordinary actions for personal in-

jury, the plaintiff must prove, as the first branch of his case, that he was himself in the exercise of due care. This involves certain phases of the subsidiary questions of assumption of risk and contributory negligence. Minors of tender years, although held to the same rule of law in its general statement as adults, are yet required to exercise only that degree of care which is naturally incident to their youth, inexperience and immature stage of mental development. Although cases have sometimes arisen where the comprehension by the minor of the risks of the employment has been so plain as to warrant a ruling of law, usually that question and the duty and extent of warning resting upon the defendant have raised inquiries of fact. It is common knowledge that children under the age of fourteen are lacking in prudence, foresight and restraint, and that their curiosity and restlessness have a tendency to get them into positions of danger. There is some point in every life where these conditions are present in such degree as to deprive the child of capacity to assume risk intelligently, or to be guilty of negligence consciously. That point varies in different children for divers reasons. There is no hard and fast rule that at any particular age a minor is presumed to be able to comprehend risks or to be capable of negligence. Extreme cases can be stated which obviously fall on one side or the other of the line. In some jurisdictions it has been held that *prima facie* a child under fourteen years of age is presumed not to be capable of contributory negligence. *Tucker v. Buffalo Cotton Mills*, 76 S. C. 539, 57 S. E. 626, 121 Am. St. Rep. 957; *Tutwiler Coal, Coke & Iron Co. v. Enslin*, 129 Ala. 336, 30 South. 600. But the sounder doctrine seems to be that age is an important though not decisive factor in determining capacity, and that the decision of that question is not helped or hampered by any legal presumption. This is the law of this Commonwealth. *Cirjack v. Merchants' Woolen Co.*, 151 Mass. 152-156, 23 N. E. 829, 6 L. R. A. 733, 21 Am. St. Rep. 438; *Sullivan v. India Mfg. Co.*, 113 Mass. 396; *McCarragher v. Rogers*, 120 N. Y. 526, 24 N. E. 812. It is commonly a question of fact to be determined in each case as it arises, whether considering his age, experience, intelligence, judgment and alertness, the particular child was capable of understanding the nature and extent of the danger in which he was placed. A situation, which might carry plainly to the mind of an adult comprehension of danger, might make little or no impression upon a child. This might arise either from immaturity or from the lack of the caution and judgment natural to youth. The contributory negligence of a child stands upon the same ground. His carelessness depends not alone upon the act done, but upon the degree of knowledge and intelligence of the actor. This statute by prohibiting the employment of children under fourteen years of age in cer-

tain employments does not purport in terms to change the ordinary rules of negligence applicable to actions of tort arising between master and servant, as do certain other statutes. See St. 1909, c. 514, § 143, and chapter 363. A plaintiff employed in violation of its terms must still prove his own due care, though conduct which might be pronounced reasonably cautious in him might fall far short of it in an adult.

[7] Nor was the plaintiff while at work acting in violation of law. The statutes here under consideration are plainly different from those before the court in *Moran v. Dickinson*, 204 Mass. 559, 90 N. E. 1150, in that they impose no penalty upon the child for being employed. The only person subjected to punishment under St. 1906, c. 499, § 1, is one who "employs" or "procures or, having under his control a minor under such age, permits such minor to be employed." This language as well as the general purpose of the statute excludes the idea that the minor himself is included. The circumstance that this plaintiff asked for his own employment does not prevent him from invoking whatever protection the statute may throw around him, nor from relying upon whatever liability may spring from its violation by the defendant.

[8] Considering the age of this plaintiff, his inexperience and ignorance of our language and customs, and his proximity to partially hidden moving machinery, it could not have been ruled properly as matter of law that he was not in the exercise of such care as ought reasonably to have been expected of him. It is plain from the plaintiff's testimony that he did not understand the danger of getting his fingers under the guard, nor can it be said as matter of law that the perils of his position were so plain that a child of his years and inexperience ought to have comprehended them. The circumstances of the case at bar do not bring it within the class of cases like *Burke v. Davis*, 191 Mass. 20, 76 N. E. 1039, 4 L. R. A. (N. S.) 971, 114 Am. St. Rep. 591; *Marshall v. Norcross*, 191 Mass. 568, 77 N. E. 1151; *Simoneau v. Hutchins*, 202 Mass. 82, 88 N. E. 433; *Cohen v. Hamblin & Russell Mfg. Co.*, 186 Mass. 544, 71 N. E. 948; and *Taylor v. Hennessey*, 200 Mass. 263, 86 N. E. 318; *Kelley v. Calumet Woolen Co.*, 177 Mass. 128, 58 N. E. 182.

The violation of the statute by the defendant rendered its negligence a question of fact for the consideration of the jury. It was said in *Bourne v. Whitman*, ante, "It is universally recognized that the violation of a criminal statute is evidence of negligence on the part of the violator as to all consequences that the statute was intended to prevent." The subject is there discussed at length, and the reasonableness of this rule fully established. The statute does not go to the extent of conclusively establishing negligence as a part of the penalty for its violation. It is not so drastic in its

terms as that under consideration in *Dudley v. Northampton St. R. Co.*, 202 Mass. 443, 89 N. E. 25, 23 L. R. A. (N. S.) 561. It is the ordinary penal statute enacted for the protection of a particular class in the community. But it does not mean that a defendant who employs a child in violation of its terms is thereby conclusively rendered liable for every accident which occurs to him, while in the service. It is conceivable that injury might result wholly from the minor's own act so obviously negligent, that it could not be argued intelligently not to have been within his comprehension and quite disconnected with his work. Under such circumstances there could be no recovery. The form of the prohibition in this statute is like that which inhibits traveling by a horse drawn sleigh without bells. R. L. c. 54, § 3. Yet it cannot be contended that one violating this statute is rendered thereby necessarily responsible civilly for the damages of an accident in which he may be a participant. The usual rules of negligence are superimposed upon any liability claimed to grow out of the breach of the statute. *Counter v. Couch*, 8 Allen, 436. We are not able to follow in this regard the reasoning of the majority of the court in *Marino v. Lehmler*, 173 N. Y. 530, 66 N. E. 572, 61 L. R. A. 811. The statute does not deprive a defendant, charged in a civil action with liability arising from its violation, of the ordinary defenses (except contractual assumption of risk as hereafter pointed out) which are open to a defendant in that class of actions. The violation of the statute, if it has a causal connection with the injuries sustained by the plaintiff, is evidence of negligence.

[9] The statute has, however, the further effect of preventing the defendant from shielding himself behind the defense of contractual assumption of risk. The reason for this is that this branch of the doctrine of assumption of risk rests upon an implied term of the contract of employment to the effect that the employé assumes all the obvious risks of the business, apparatus and place of his work. *Murch v. Wilson's Sons Co.*, 168 Mass. 408, 47 N. E. 111; *Crimmins v. Booth*, 202 Mass. 17-22, 88 N. E. 449, 132 Am. St. Rep. 468. The contract of employment, however, in the case at bar was absolutely prohibited by the terms of the statute, and was therefore an illegal act on the part of the defendant. The defendant cannot be permitted to show an illegal contract and his own consequent criminal guilt in order to interpose a defense. Any contractual assumption of risk in the light of the fact that the plaintiff was under fourteen years of age would show as an essential element the violation of a penal statute. No court consciously will enforce, directly or indirectly, an illegal contract. *O'Brien v. Shea*, 96 N. E. 99, and cases cited. The phrase, assumption of risk, is sometimes used in another sense as applicable to the intentional

and voluntary continuance of labor under conditions, the dangerous nature of which is fully comprehended, both as to its character, extent, and degree of capacity to harm. When used in this sense sometimes it is resolved into such conduct as is equivalent to an agreement on the part of the employé to relieve the employer from a duty which would otherwise rest on him. *Fitzgerald v. Conn. River Paper Co.*, 155 Mass. 155, 29 N. E. 464, 31 Am. St. Rep. 537; *Leary v. Boston & Albany R. R. Co.*, 139 Mass. 580-587, 2 N. E. 115, 52 Am. Rep. 733; *O'Toole v. Pruyn*, 201 Mass. 126-129, 87 N. E. 608. See *Thomas v. Quartermaine*, 18 Q. B. D. 685-698; *Yarmouth v. France*, 19 Q. B. D. 647, 651, 657; *Smith v. Baker*, [1891] A. C. 325, 344, 355, 363. So far as it involves a contractual element in this sense, it is not available to the defendant for the same reason. Other parts of the doctrine of assumption of risk are referable generally to due care and negligence. These are not changed by the statute. They are explained at length in *Fitzgerald v. Conn. River Paper Co.*, 155 Mass. 155, 29 N. E. 464, 31 Am. St. Rep. 537, and it is not necessary to go over them again here. See also *Schlemmer v. Buffalo, Rochester & Pittsburg Ry. Co.*, 205 U. S. 1-12, 27 Sup. Ct. 407, 51 L. Ed. 681; *Bagley v. Wonderland Co.*, 205 Mass. 238, 244, 91 N. E. 317.

There is nothing in the statute, however, to indicate an intent that the defense of contributory negligence should be abolished. It does not purport to regulate, further than is implied by other statutes of like character, the civil liability arising between the parties. Having stamped the act of the employment of minors under the prohibited age as criminal and thereby available as evidence of negligence to one whose civil rights are affected, it leaves undisturbed in any other respect the principles by which liability may be enforced and defense may be established.

This is the general rule as to the interpretation of penal and inhibitory statutes, and has been applied to a wide variety of cases. *Taylor v. Carew Manuf. Co.*, 143 Mass. 470, 10 N. E. 308; *Bourne v. Whitman*, 209 Mass. 155, 95 N. E. 404, and cases cited; *Schlemmer v. Buffalo, Rochester & Pittsburg Ry.*, 220 U. S. 590, 596, 31 Sup. Ct. 561, 55 L. Ed. 596; *Delk v. St. Louis & San Francisco R. R.*, 220 U. S. 587, 31 Sup. Ct. 617, 55 L. Ed. 590; *Denver & Rio Grande Ry. v. Norgate*, 141 Fed. 247, 72 C. C. A. 365, 6 L. R. A. (N. S.) 981; s. c., 202 U. S. 616, 24 Sup. Ct. 764, 50 L. Ed. 1172; *Erdman v. Deer River Lumber Co.*, 182 Fed. 42, 104 C. C. A. 482. To give this statute a broader effect would be to go outside the usual canons of statutory construction. There appears to be no sound reason for establishing an exception respecting particular enactments, which have no especially distinguishing features. If the Legislature had intended to change the fundamental rules of the law of negligence in the present

instance, the expression of such an intention would have been simple. The great weight of authority as to child labor statutes supports this view. *Smith v. Nat. Coal & Iron Co.*, 135 Ky. 671, 117 S. W. 280; *Darsam v. Kohlmann*, 123 La. 164, 171, 172, 48 South. 78, 20 L. R. A. (N. S.) 881; *Queen v. Dayton Coal & Iron Co.*, 95 Tenn. 458, 465, 32 S. W. 460, 30 L. R. A. 82, 49 Am. St. Rep. 935; *Iron & Wire Co. v. Green*, 108 Tenn. 161, 165, 63 S. W. 399; *Sterling v. Union Carbide Co.*, 142 Mich. 284, 105 N. W. 755; *Syneszewski v. Schmidt*, 153 Mich. 488, 116 N. W. 1107; *Beghold v. Auto Rody Co.*, 149 Mich. 14, 112 N. W. 691, 14 L. R. A. (N. S.) 609; *Rolin v. Tobacco Co.*, 141 N. C. 300, 53 S. E. 891, 7 L. R. A. (N. S.) 335; *Leathers v. Blackwell Durham Tobacco Co.*, 144 N. C. 330, 57 S. E. 11, 9 L. R. A. (N. S.) 349; *Norman v. Virginia-Pocahontas Coal Co. (W. Va.)* 69 S. E. 857; *Burke v. Big Sandy Coal & Coke Co. (W. Va.)* 69 S. E. 992; *Sharon v. Winnebago*, 141 Wis. 185, 189, 124 N. W. 299; *Dalm v. Bryant Paper Co.*, 157 Mich. 550, 122 N. W. 257; *Roberts v. Taylor*, 31 Ont. 10; *Nickey v. Steuder*, 164 Ind. 189, 196, 73 N. E. 117. See, however, *Inland Steel Co. v. Yedinak*, 172 Ind. 925, 87 N. E. 229; *Jacobson v. Merrill & Ring Co.*, 107 Minn. 74, 119 N. W. 510, 22 L. R. A. (N. S.) 309; *Perry v. Tozer*, 90 Minn. 431, 97 N. W. 137, 101 Am. St. Rep. 416; *Bromberg v. Evans Laundry Co.*, 134 Iowa, 38, 46, 111 N. W. 417; *Evans v. American Iron & Tube Co. (C. C.)* 42 Fed. 519, 522; *Peters v. Silk Manuf. Co.*, 133 Mo. App. 412, 419, 113 S. W. 706; *Nairn v. National Biscuit Co.*, 120 Mo. App. 144, 147, 96 S. W. 679; *Kirkham v. Wheeler-Osgood Co.*, 39 Wash. 415, 81 Pac. 869. There is a considerable body of authority which holds that a statute of this sort abrogates the defense of contributory negligence. (See cases in footnote.) But for the reasons stated the other view seems more consonant with general principles of statutory interpretation and of the law of negligence.

[10] The plaintiff is not entitled to recover unless the violation by the defendant of its statutory duty to him directly contributed to his injury. The breach of law upon which a plaintiff may found his right of recovery must be not merely a condition or an attendant circumstance, but a contributory cause. *Newcomb v. Boston Protective Department*, 146 Mass. 596, 16 N. E. 555, 4 Am. St. Rep. 354; *Moran v. Dickinson*, 204 Mass. 559, 90 N. E. 1150; *Finnegan v. Winslow Skate Co.*, 189 Mass. 580, 76 N. E. 192. The injury must be referable to the breach of the statute as a cause. There was sufficient evidence that the plaintiff's injury was due to the act of the defendant in putting a minor of tender years at work in a position of danger to him on account of his youth, which a more ma-

ture person might have avoided. Apparently, the sole cause of the injury was the temperamental uneasiness and heedlessness of the consequences of restless movements characteristic of childhood when placed in the midst of rapidly moving machinery. Hence the violation of the statute may have been found to be a contributing or perhaps the sole cause of the injury suffered. *Hankins v. Reimers*, 86 Neb. 307, 125 N. W. 516; *Starnes v. Albion Mfg. Co.*, 147 N. C. 556, 61 S. E. 525, 17 L. R. A. (N. S.) 602; *Casteel v. Pittsburg Vitrified Paving & Building Brick Co.*, 83 Kan. 583, 112 Pac. 145; *Caspersen v. Michalls*, 142 Ky. 314, 134 S. W. 200. The injury was not necessarily so remote from the illegal act that there could be no causal connection between the two, as in *Bellevue v. S. C. Lowe Supply Co.*, 200 Mass. 237-241, 86 N. E. 301; *Stone v. Boston & Albany R. R. Co.*, 171 Mass. 536, 51 N. E. 1, 41 L. R. A. 794, and the decisions cited in *Davis v. John L. Whiting & Son Co.*, 201 Mass. 91-96, 87 N. E. 199.

[11] The result is that the plaintiff is entitled to go to the jury upon the question of his own due care. He must make out his case, as does the ordinary plaintiff in cases of negligence. He must also show that his injury resulted from the negligence of the defendant. He may establish this, however, by showing a violation by the defendant of the statute in question and by that alone, provided the violation be found to have contributed directly to the injury. Such proximate cause might arise from the fact that he was a child by reason of his tender years so restless, heedless and active as to be naturally incapable of appreciating the dangers of the position in which he was placed by the defendant. The defense, that the plaintiff assumed by contract the risks which surrounded him, is not open to the defendant. But the defense that the plaintiff contributed to his injury by failure to exercise the degree of care, which the normal child of his age, intelligence and experience ought to have exercised, is open to the defendant. The direction of a verdict for the defendant was error.

Exceptions sustained.

FOOTNOTE.—*Strafford v. Republic Iron & Steel Co.*, 238 Ill. 371, 87 N. E. 358, 20 L. R. A. (N. S.) 876, 128 Am. St. Rep. 129; *American Car & Foundry Co. v. Armentraut*, 214 Ill. 509, 73 N. E. 766; *Koester v. Rochester Candy Works*, 194 N. Y. 92, 87 N. E. 77, 19 L. R. A. (N. S.) 783; *Marino v. Lehmaier*, 173 N. Y. 530, 66 N. E. 572, 61 L. R. A. 811. See, however, *Lee v. Sterling Silk Manuf. Co.*, 134 App. Div. 123, 118 N. Y. Supp. 852; *Lenahan v. Pittston Coal Mining Co.*, 218 Pa. 311, 67 Atl. 642, 12 L. R. A. (N. S.) 461, 120 Am. St. Rep. 885; *Stehle v. Jaeger Automatic Machine Co.*, 220 Pa. 617, 69 Atl. 1116; s. c., 225 Pa. 348, 74 Atl. 215, 133 Am. St. Rep. 884; *Sullivan v. Hanover Cordage Co.*, 222 Pa. 40, 70 Atl. 909.

(84 Oh. St. 297)

**SHINEW et al. v. FIRST NAT. BANK
OF BOWLING GREEN.**

(Supreme Court of Ohio. June 13, 1911.)

*(Syllabus by the Court.)***1. BILLS AND NOTES (§ 61*)—FORGED INSTRUMENTS—RATIFICATION.**

A forged instrument is not merely voidable, but absolutely void, and there can be no ratification of a forgery that will make the instrument valid.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. § 77; Dec. Dig. § 61.*]

2. ESTOPPEL (§ 95*)—SILENCE.

One may by conduct, statements, or silence estop himself from claiming that his signature is a forgery; but before he can be estopped by mere silence facts must be alleged and proven showing a duty and opportunity to speak, that he knew or had reason to believe that the holder of the forged instrument would rely on his silence, and that the holder in fact did rely on his silence, and was in fact injured thereby.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. § 285; Dec. Dig. § 95.*]

*(Additional Syllabus by Editorial Staff.)***3. ESTOPPEL (§ 112*)—SILENCE—"OCCASION."**

The word "occasion," as used in an averment in a pleading of estoppel that S. had full time, occasion, and opportunity in which to notify the plaintiff of a forgery, *held* to mean, not only time and opportunity, but such conditions and circumstances as required him to speak, or otherwise be forever estopped from denying his signature.

[Ed. Note.—For other cases, see Estoppel, Dec. Dig. § 112.*]

For other definitions, see Words and Phrases, vol. 6, pp. 4806, 4897.]

Error to Circuit Court, Wood County.

Action by the First National Bank of Bowling Green against George M. Shinew and others. Judgment for plaintiff was affirmed in the circuit court, and defendant Shinew brings error. Reversed, and judgment for plaintiff in error.

The First National Bank of Bowling Green, Ohio, commenced an action in the common pleas court of Wood county to recover from Annette J. Snyder, J. C. Snyder, and George M. Shinew the sum of \$400 and interest thereon, upon a promissory note dated March 5, 1906, and purporting to be signed by the above-named persons. A *cognovit* judgment was taken, which was later opened up, and George M. Shinew was permitted to file his separate answer, in which he denied that he signed, or authorized any person to sign for him, the promissory note copied in plaintiff's petition; denied that he executed the note, or authorized any person so to do; and denied that there is anything due from him to the plaintiff. It appears from the record that about the 5th day of March, 1906, Dr. J. C. Snyder, desiring to borrow \$400 from the First National Bank of Bowling Green, Ohio, called upon George M. Shinew and asked him to sign the same as surety. The testimony of Dr. Snyder offered on the trial of the

cause on behalf of the bank is to the effect that Shinew was in the field plowing; that he asked him to sign the note as surety, and Shinew agreed to do so, but not having any pen and ink at hand he directed the doctor to go to the house and tell Mrs. Shinew to sign his name for him; that he did as directed by Mr. Shinew, and that Mrs. Shinew did sign the name of George M. Shinew to this note upon his representation to her that her husband desired her to do this. George M. Shinew, in his testimony, denies that he was willing to sign this note as surety; denies that he told Dr. Snyder to go to the house and have Mrs. Shinew sign his name thereto, but, on the contrary, says that he told Dr. Snyder he would not sign the note; that he had signed as surety once before and lost money thereby, and would not sign again as surety for any one; that he did not know that his name had been signed by his wife until that night when he was through work, and had gone to his house, at which time his wife told him that the doctor had represented to her that he desired her to sign his name to this note. It is also claimed on the part of the bank that George M. Shinew had full knowledge that his name had been signed to said note by his wife before any money was paid upon it; that Shinew recognized the same and ratified the signing of his name by his wife, affirmed his liability on said promissory note to plaintiff, and promised to pay plaintiff the same; that he knew that said note was to be presented to the bank, and did not make any attempt to prevent the payment by the bank of the sum named in the note to Snyder, but remained silent and allowed the bank to accept the note and pay the money thereon about four days after the making of the same, and after he had full time, occasion, and opportunity in which to notify the bank not to pay any money, before it was in fact paid to Snyder, and claims that he is now estopped from denying his signature or denying that the same was placed upon said note without his authority.

Upon the trial of the cause in the common pleas court, the jury returned a general verdict against all of the defendants including Shinew, for the full face of the note, with interest, and also answered certain interrogatories as follows: "(1) Do you find from the evidence that the defendant, George Shinew, signed his name to the note sued on in this action? Answer: No. (2) Do you find from the evidence that the defendant George Shinew authorized any other person to sign his name to the note sued on in this action? Answer: No."

George M. Shinew then filed a motion for judgment in his favor on the special findings of the jury, which motion the court overruled. He then filed a motion for a new trial, which the common pleas court also overruled.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes 95 N.E.—56

and rendered judgment on the general verdict. Error was prosecuted in the circuit court, and that court affirmed the judgment of the common pleas court, and this proceeding in error is brought to reverse the judgment of the common pleas court and the judgment of the circuit court affirming the same.

N. R. Harrington, for plaintiff in error.
James & Kelly, for defendant in error.

DONAHUE, J. (after stating the facts as above). The answer of the jury to the second interrogatory submitted to it disposes of the disputed question of fact as to whether or not George M. Shinew directed Dr. Snyder to tell Mrs. Shinew to sign his name to this note. On this question there is a direct conflict of evidence, and therefore this finding of the jury must be accepted by this court as conclusive of that fact for the purposes of this case as it is now presented. If George M. Shinew did not authorize his wife to sign this note, then the placing of his name upon the note was a forgery, for it clearly appears that Mrs. Shinew did not place her husband's name upon the note through any implied authority, or by reason of the fact that she had on previous occasions assumed to sign his name to other papers. She was not acting or pretending to act upon any assumption of authority on her part to sign his name because of former transactions, but solely upon the representation made to her by Dr. Snyder that her husband had specifically directed and authorized her to sign this particular paper, and, if her husband did not do so, then the signing of his name was a forgery. True she would not be guilty of forgery, because from all that here appears she was acting in good faith and relying upon the information imparted to her by Dr. Snyder, but if his representations to her were false then he would be guilty of forgery, just the same as if he had used his own hand to write the signature of George M. Shinew. The fact that he procured her to attach the signature of George M. Shinew would make no difference; she was no more than the instrument by which he accomplished the act of signing George M. Shinew's name to this note.

This court, in the case of *Workman v. Wright*, 33 Ohio St. 405, 31 Am. Rep. 546, held that: "The principle of agency, by which a principal may ratify the unauthorized act of his agent, does not apply to the alleged ratification of a forged note; the act of the agent being voidable may be ratified; the act of the forger is void, and can not be ratified." In that case this court also held that, although Wright had promised to pay the note, the mere promise to pay a forged note, without any new consideration, and without circumstances creating an estoppel against the promisor, does not become a binding contract creating a liability to pay such note.

In this case the common pleas court charged the jury as follows: "If you find by a preponderance of the evidence that Mrs. Shinew, while assuming to act as the agent of Mr. Shinew, signed his name to this note, and you find that after the defendant learned that his name had been signed to said note he ratified the signing of his name by his wife, then the defendant is bound, even though he did not authorize the signing of his name. In order that there may have been a ratification, the defendant at the time of ratifying the act of his wife must have known of the facts relating to the execution of said note and his liability thereon." This charge is in direct conflict with the law announced in the case of *Workman v. Wright*, supra. As already stated, there is no foundation for the claim of agency in this case. Mrs. Shinew did not pretend to have any authority to sign her husband's name as his agent, or to bind him by her acts as his agent, except the communication made to her by Dr. Snyder that her husband desired her to sign his name to this note; nor is it seriously claimed by the plaintiff below that she undertook, independent of this communication, to act as her husband's agent, or to bind him by her contract as his agent, so that the validity of his signature depends entirely on whether Mr. Shinew directed the doctor to tell her to sign his name to this note. If the doctor's testimony be true, then the transaction was just the same as if the husband had been present and asked the wife to sign his name for him. In such case her act would be his act, and the signature so attached, to this note would be his signature and would be valid and binding upon him; therefore the first question for the jury was whether Shinew did or did not authorize Dr. Snyder to tell his wife to sign his name to this note.

[1] If he did not, then the signature was a forgery. Forgery being a crime, there could be no ratification of that crime that could operate to change its character. The crime being completed, it would forever remain a criminal act, and George M. Shinew could not by any subsequent conduct or admission on his part ratify a crime that would give validity to an instrument that was absolutely void at the time of its execution. It is true, however, that, while he might not by any act or conduct on his part ratify a forgery of his name, so as to make the instrument a valid instrument, yet he might by his conduct, or even by mere silence, estop himself from defending against the payment of the same, on the ground that his signature was a forgery; but before he can be estopped by mere silence facts must be alleged and proven showing a duty and opportunity to speak, that the party to be estopped knew, or had reason to believe, that the holder of the note would rely on his silence, and that he did rely on his silence and was injured thereby. *Viele v. Judson*,

82 N. Y. 32; *Wiser v. Lawler*, 189 U. S. 260, 23 Sup. Ct. 624, 47 L. Ed. 802.

In the third paragraph of the amendment and supplement to the petition, an attempt is made to plead an estoppel. It is averred that Shinew had full time, occasion, and opportunity in which to notify the plaintiff not to pay any money thereon. If there were any proof showing that Shinew had "occasion," when it became his duty to speak, when he knew or ought to have known that if he did not speak the bank would rely upon his silence and would be injured thereby, and that it in fact did rely upon his silence and was injured, then this pleading might be held sufficient to have submitted this question of estoppel to the jury, but the proofs do not show any such occasion.

[2, 3] From the evidence it does appear that he had time in which he might have notified the bank of the forgery, before the money was paid; but the record does not disclose any opportunity, except that there was sufficient time for him to seek such opportunity by voluntarily traveling to the bank, or in some other way communicating with it. The evidence wholly fails to show an *occasion* to speak, for by "occasion" is meant, not only time and opportunity, but such conditions and circumstances as require him to speak, or otherwise be forever estopped from denying his signature. It is true that a decent regard for the rights of others ought to induce every man to make such disclosure immediately upon the fact coming to his knowledge. The fact that Shinew did not immediately communicate with the bank is a circumstance tending strongly to corroborate the evidence of Dr. Snyder that he had authorized him to tell his wife to sign the note; for the natural and usual thing for an honest man to do would be to communicate immediately to those most interested, or most likely to be injured thereby, the fraud sought to be perpetrated upon them, and this even though it calls for some inconvenience upon his part, and his failure to do so might well reflect upon the credibility of his evidence, and induce a jury to disregard it altogether,

or to find against him upon any disputed question of fact. But he is under no legal obligation to do so, unless the circumstances are such that the holder of the forged instrument would have a right to rely upon his silence, and relying thereon would be prejudiced thereby; and the fact that he did not immediately communicate with the bank, while it might reflect upon the credibility of his evidence, has no further legal significance.

And therefore it was not error for the trial court to instruct the jury not to consider the question of estoppel. This question being entirely out of the case and the jury having found that Shinew did not authorize his signature to this paper, it must have found that he ratified the same; for there could be no other theory upon which a verdict against Shinew was returned, except the theory of ratification. The trial court should not have submitted this question to the jury, but should have instructed it that if it found Shinew did not authorize his signature to be placed upon this note that the placing of it there was a forgery and could not be ratified; and for the same reason the motion of the defendant, George M. Shinew, for judgment on the special verdict should have been sustained by the common pleas court, and the circuit court erred in affirming the judgment of the common pleas.

For these reasons the judgment of the common pleas court and of the circuit court affirming the same are reversed, and the motion of George M. Shinew for judgment on the special verdict is sustained; plaintiff's petition is dismissed as to George M. Shinew, with costs, and it is ordered that the said George M. Shinew recover from the defendant in error, the First National Bank of Bowling Green, Ohio, his costs expended in the common pleas, circuit court, and Supreme Court, taxed at \$——, for all of which execution is awarded.

Judgment reversed, and judgment for plaintiff in error.

SPEAR, C. J., and DAVIS, SHAUCK, PRICE, and JOHNSON, JJ., concur.

(84 Oh. St. 210)

CINCINNATI NORTHERN TRACTION CO.
v. ROSNAGLE.

(Supreme Court of Ohio. June 13, 1911.)

(Syllabus by the Court.)

1. CARRIERS (§ 350*)—CARRIAGE OF PASSENGERS—WRONGFUL EJECTION.

The power of a railway company to expel from its cars persons who refuse to pay the legal fare is vested in the conductor in charge of such cars. But, if the conductor wrongfully expels one who is entitled to the rights of a passenger, the company is liable to such person in damages, even though such expulsion is done through an error of judgment on the part of the conductor in charge.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 1400; Dec. Dig. § 350.*]

2. PAYMENT (§ 10*)—CARRIERS (§ 358*)—LEGAL TENDER—EJECTION OF PASSENGER—LIABILITY OF CARRIER.

A coin issued by authority of law to circulate as money is not deprived of its legal tender quality merely by being worn in the process of circulation, nor when bruised or cracked, so long as it is not appreciably diminished in weight, and retains the evidence of its being genuine coinage. And when a passenger on a car of a common carrier tenders such a coin in payment of his fare, which is refused, and the passenger ejected, he may maintain an action for damages against the company, even though the conductor in good faith believed the coin not to be legal tender. In such case the passenger is not required to tender other money in payment of his fare.

[Ed. Note.—For other cases, see Payment, Cent. Dig. § 42; Dec. Dig. § 10;* Carriers, Cent. Dig. §§ 1434-1438; Dec. Dig. § 358.*]

3. PAYMENT (§ 10*)—LEGAL TENDER—RULES OF TREASURY DEPARTMENT.

The rules of the United States Treasury Department in regard to the redemption of coins authorized by statute relate simply to redemption, and do not affect the question of legal tender.

[Ed. Note.—For other cases, see Payment, Cent. Dig. § 42; Dec. Dig. § 10.*]

4. CARRIERS (§ 382*)—WRONGFUL EJECTION—COMPENSATORY DAMAGES—NATURE AND ELEMENTS.

In an action by an infant of tender years for wrongful ejection from a railway car or train, which wrongful ejection was willful and intentional, fright and terror are proper elements of damage, if such ejection was under circumstances which would naturally cause fright and terror to the infant.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1488-1491; Dec. Dig. § 382.*]

Error to Circuit Court, Warren County.

Action by Howard F. Rosnagle, by his next friend, against the Cincinnati Northern Traction Company. From a judgment for plaintiff, defendant brings error. Affirmed.

This was a proceeding brought in the common pleas court of Warren county, by Howard F. Rosnagle, an infant, by his next friend, against the Cincinnati Northern Traction Company. On May 21, 1907, the infant resided at Franklin, in Warren county, and was about 10 years old. On that day he went to the city of Middletown, in Butler county, on an errand, and in the evening boarded one of the defendant's cars at Mid-

dletown to go to his home. When the car was near the outskirts of the city, the conductor asked him for his fare, and he tendered him a nickel. The conductor refused to accept the nickel and requested him to leave the car, which he did. The petition sets forth these facts, together with the further allegation that the night was dark, and that he became greatly frightened and went to the home of a nearby resident, who gave him care and assistance, and it alleges that he was damaged in the sum of \$1,000.

The answer of the defendant admits the tender of the nickel and all the other facts, except as to damages, and further answering says that said Howard F. Rosnagle got upon the car of said defendant at or near Third street, in the city of Middletown, Ohio, and he rode upon said car to the east corporation line of said city; that when the conductor of said car demanded of him his fare he tendered to said conductor the coin commonly termed a nickel; that said coin had been mutilated, defaced, and was cracked; that the conductor of said car informed said Howard F. Rosnagle that he could not take said nickel owing to the condition that the same was in, and said Rosnagle informed the conductor that said nickel was all the money he had, and thereupon said conductor informed said Rosnagle that he would have to pay his fare or get off the car; that said Rosnagle thereupon voluntarily left the car at said point.

Plaintiff filed a reply, in which he denies that he voluntarily left said car of the defendant. On the trial a verdict was returned in favor of the plaintiff, upon which judgment was entered. This judgment was affirmed by the circuit court, and error is now prosecuted here to reverse the judgments below.

The nickel that was tendered by plaintiff to the conductor is in evidence, and it is conceded that five cents was the regular and legal fare between the points named. The error alleged and relied on by the plaintiff in error is that the court of common pleas charged, as a matter of law, that the particular nickel tendered and introduced in evidence was legal money of the United States, and a legal tender for five cents. It is claimed that there are other errors in the charge which will be noticed in the opinion.

W. C. Shepherd, for plaintiff in error. P. H. Rue, for defendant in error.

JOHNSON, J. (after stating the facts as above). There is no claim that the five-cent piece which was tendered by plaintiff was not originally a genuine coin issued by the United States. The testimony and an inspection of the coin disclose such genuine character. It has the appearance of being somewhat bruised, and there is a slight crack from the rim toward the center. The

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

minor coins of the United States are provided for by section 3515, Revised Statutes of the United States (U. S. Comp. St. 1901, p. 2349), in which the alloy and weight are prescribed. Section 3587, Revised Statutes of the United States (U. S. Comp. St. 1901, p. 2401), provides that the minor coins shall be legal tender, at their nominal value, for any amount, not exceeding 25 cents, in any one payment.

[1] It is not doubted that a railway company may expel from its cars persons who refuse to pay the legal fare. Necessarily that inherent power is vested in the conductor employed by the company and placed by it in charge of the train or car. But, if the company wrongfully expels one who is entitled to the rights of a passenger, it is liable in damages to such person, and this is so, even if such expulsion is done through an error of judgment on the part of the conductor or agent in charge.

[2] And where a passenger tenders to the conductor a genuine coin of the United States, not so worn, defaced, or mutilated but that its mint marks are plainly discernible, and not appreciably diminished in weight, and such tender is refused and the passenger ejected on refusal to pay in other money, he may have an action of damages against the company. And this is so, even if the conductor in good faith believed the coin to be counterfeit or not a sufficient coin. In such case the passenger is not required to tender other money, if the first coin tendered was sufficient. *Chicago Union Traction Co. v. McClevey*, 126 Ill. App. 21; *Jersey City & Bergen R. Co. v. Morgan*, 52 N. J. Law, 60, 18 Atl. 904; *Mobile St. Ry. Co. v. Watters*, 135 Ala. 227, 33 South. 42; *Atlanta Con. St. Ry. Co. v. Keeny*, 99 Ga. 266, 25 S. E. 629, 33 L. R. A. 824.

In *Jersey City & Bergen R. Co. v. Morgan*, 52 N. J. Law, 60, 18 Atl. 904, the court in the opinion say: "It seems by these statutes (U. S. statutes) that so long as a genuine silver coin is worn only by natural abrasion, is not appreciably diminished in weight, and retains the appearance of a coin duly issued from the mint, it is a legal tender for its original value. The coin in question in this case was shown to the court and jury, but does not appear in the evidence to have been so worn that it was light in weight, or not distinguishable as a genuine dime. If no limitation is put upon its circulation by the government, it would seem none was intended, so long as it was not defaced, cut, or mutilated, and was only made smooth by constant and long-continued handling, and by being circulated as a part of the national currency."

The question as to what treatment, usage, or acts amount to mutilation of coins was before the court in *United States v. Lissner* (C. C.) 12 Fed. 840, and the court in that case hold: "Where a coin which had been regularly coined at the mint was afterwards

punched and mutilated and an appreciable amount of silver removed from it, and the hole plugged up with base metal, or any substance other than silver, it is an act of counterfeiting; but it is otherwise where the hole was punched with a sharp instrument, leaving all the silver in the coin, though crowding it into a different shape."

Now in this case, as to the five-cent piece or nickel, the bruise and the crack may have been caused by a blow from a hammer or other heavy instrument, but it retains all of its material and all of the evidences of genuine coinage, though the material is very slightly "crowded into different shape." There is not such mutilation, defacing, punching, or cutting as to deprive it of its legal tender character within any of the rules laid down in the authorities or the statute. The law does not require that minor coins, tendered in payment of debt, or for service which the person making the tender has the right to demand, shall be absolutely perfect.

[3] It is contended by defendant in error that, so long as a coin is in such condition that it would be redeemed by the United States government, it does not lose its legal tender character. The trial court appears to have adopted this as a reasonable test by which to determine the question. The United States statutes provide that the Treasury Department may prescribe rules by which coin and paper money which may become unfit for circulation may be redeemed or exchanged, and such rules have been so prescribed. One of the provisions is that "pieces that are stamped, bent or twisted out of shape or otherwise imperfect, but showing no material loss of metal will be redeemed."

We do not think that the existence of this rule, even though adopted under sanction of the statute, would justify the tender to a railway company, or other creditor, of a coin which "had become unfit for circulation," and thus impose on the payee the burden of applying to the Treasury Department for a coin fit for circulation, nor to impose on him the risk of failing to obtain it. This view, in a case where a piece had been torn from a one-dollar bill, was adopted by the court in *North Hudson Ry. Co. v. Anderson*, 61 N. J. Law, 248, 39 Atl. 905, 40 L. R. A. 410, 68 Am. St. Rep. 703. In this case we think the evidence shows the coin was not so affected in any manner as to be deprived of its legal tender character, and therefore the court did not err in its charge to the jury in that regard.

[4] Plaintiff in error also urges that the court erred in its charge as to the measure of damages. The court charged that, "if by the wrongful act of defendant plaintiff was put off the car, under circumstances which would naturally result in great fright and terror to the boy, he is entitled to have proper compensation for that injury." It is contended that fright and terror are not elements that

can be taken into consideration in awarding compensation, and the case of *Miller v. Ry. Co.*, 78 Ohio St. 309, 85 N. E. 499, 18 L. R. A. (N. S.) 949, 125 Am. St. Rep. 699, is relied on in support of this contention. That case was an action for negligence. The court, *Crew, J.*, points out that there was no claim that the negligence of the defendant was willful or wanton. There was no intentional wrong. In the opinion many cases are examined and discussed, all of which are negligence cases, and the conclusion of the court was that no liability exists for acts of negligence causing mere fright or shock, where the negligent acts complained of are neither willful nor malicious.

Such a rule is salutary and necessary in negligence cases. But the reasons for the rule do not apply in cases where the act complained of is not only wrongful, but intentional and willful. In such a case mental suffering and fright and terror, where they would naturally ensue, as in case of an infant 10 years old, willfully expelled from a car at night, may be taken into account. 6 Cyc. 506; *Curtis v. Railway Co.*, 87 Iowa, 622, 54 N. W. 339; *Smith v. P. Ft. W. & C. Ry. Co.*, 23 Ohio St. 10; *C. St. L. & P. R. Co. v. Holdridge*, 118 Ind. 281, 20 N. E. 837; *Sloane v. Railway Co.*, 111 Cal. 668, 44 Pac. 320, 32 L. R. A. 193.

We find no error in the record, and the judgments of the courts below will be affirmed.

Judgment affirmed.

SPEAR, C. J., and DAVIS, SHAUCK, PRICE, and DONAHUE, JJ., concur.

(200 Mass. 368)

HUNNEMAN et al. v. LOWELL INST. FOR SAVINGS et al.

(Supreme Judicial Court of Massachusetts. Suffolk. June 22, 1911.)

1. EXECUTION (§ 338*)—RETURN—AMENDMENT.

An amendment of the officer's return of an execution having been allowed by the court, the copy thereof filed in the registry of deeds had the same effect as if incorporated in the original return.

[Ed. Note.—For other cases, see *Execution* Cent. Dig. §§ 1015-1023; Dec. Dig. § 338.*]

2. EXECUTION (§ 337*)—RETURN—FILING.

Under Rev. Laws, c. 178, § 4, a copy of the execution with the return thereof need not be filed with the registry of deeds when the real estate levied on had been attached in the suit in which the execution issued.

[Ed. Note.—For other cases, see *Execution*, Dec. Dig. § 337.*]

3. ATTACHMENT (§ 184*)—PROCEEDINGS ON LEVY—IMPAIRMENT OF RIGHTS UNDER ATTACHMENT.

That the levy of plaintiff's execution on the interest in land which he had attached, necessary only to preserve the priority of his lien, proceeded and was completed as far as possible, there being no sale on the execution because of

foreclosure of a mortgage transforming the land into money, while attachments intervening his attachment and the levy of his execution were pending, did not impair or defeat its effect in preserving his rights under his attachment.

[Ed. Note.—For other cases, see *Attachment*, Cent. Dig. §§ 585-598; Dec. Dig. § 184.*]

Appeal from Superior Court, Suffolk County; William F. Dana, Judge.

Suit by Carleton Hunneman and another against the Lowell Institution for Savings and another. From a decree for petitioner the United Surety Company, respondent Della C. Phelps appeals. Affirmed.

Albin L. Richards, for appellant. Peabody, Arnold, Batchelder & Luther, for appellee.

BRALEY, J. [1, 2] The facts concerning this litigation are fully set forth in the former appeal and need not be recited, nor the grounds of decision which established the right of the surety company in the name of the plaintiff, who was the judgment creditor, to reach and apply the money in the possession of the bank in satisfaction of the judgment, reviewed. *Hunneman v. Lowell Institution for Savings*, 205 Mass. 441, 91 N. E. 526. It there appeared from the officer's return, that the execution was levied as of the date of the seizure, and not as of the date when the equity of redemption, which had been turned into money by foreclosure of the mortgage, leaving a surplus in the possession of the bank after its debts and the expenses of sale were satisfied, had been attached on mesne process. But as the right to maintain the bill was based upon the theory, that the lien of the attachment had been transferred to the money, and as other superior equitable or legal rights had intervened, unless the right of the plaintiff was established as of the date of the attachment, it was held that the bill could not be maintained. The decree, therefore, was reversed, and at the second trial, the officer having so amended his return as to show that he actually levied as of the date of the attachment, a decree was entered for the plaintiff for the amount of the judgment with interest and costs. The judgment debtor has appealed from this decree, upon the ground, that the attachment lapsed, as the levy was not made within 80 days from the date of the judgment, and even if there was a valid levy, the attachment also was lost because the officer did not suspend the levy by reason of prior attachments, but proceeded while the interest to be sold still was subject to them. The amendment, however, having been duly allowed by the court, the copy filed in the registry of deeds had the same effect as if incorporated in the original return. *Childs v. Barrows*, 9 Metc. 413, 416; *Bates v. Willard*, 10 Metc. 62, 81; *Hunneman v. Lowell Institute for Savings*, 205 Mass. 441, 446, 91 N. E. 526. A fur-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

ther answer is, that a copy of the execution with the return need not be filed when the property has been attached in the suit. Rev. Laws, c. 178, § 4.

[3] The second objection also is not well founded. It is to be remembered, that a sale on execution never took place as the foreclosure transformed the land into money, and the proceedings by the officer were necessary only to secure the priority of the plaintiff's lien. The fact that the levy proceeded, and was completed as far as possible, while the intervening attachments were pending cannot impair or defeat its effect in preserving the plaintiff's rights under the attachment. *Owen v. Neveau*, 128 Mass. 427, 431; *Cowles v. Dickinson*, 140 Mass. 373, 376, 5 N. E. 302; *Hunneman v. Lowell Institution for Savings*, 205 Mass. 441, 445, 91 N. E. 526; Rev. Laws, c. 178, § 31.

Decree affirmed.

(200 Mass. 298)

CORNELL-ANDREWS SMELTING CO. v. BOSTON & P. R. CORPORATION.

(Supreme Judicial Court of Massachusetts.
Bristol. June 19, 1911.)

1. EMINENT DOMAIN (§ 168*)—DAMAGES—RIGHT TO SUE.

The parties entitled to bring petition for damages caused by taking land, or to intervene in one brought by another, are those who have an estate in the land taken or damaged.

[Ed. Note.—For other cases, see *Eminent Domain*, Cent. Dig. §§ 457-460; Dec. Dig. § 168.*]

2. RAILROADS (§ 99*)—GRADE CROSSINGS—ABOLITION—DAMAGES—RIGHTS OF LESSEE.

On petition for damages caused by abolishing a grade crossing, under Rev. Laws, c. 111, § 149 et seq., a lessee of adjoining land is not entitled to compensation for consequent loss in the value of an option to purchase given him under the lease.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 293-304; Dec. Dig. § 99.*]

3. RAILROADS (§ 99*)—GRADE CROSSINGS—ABOLITION—DAMAGES—LEASES—INTERVENTION.

On petition by a lessee of land for damages caused by abolishing a grade crossing, under Rev. Laws, c. 111, § 149 et seq., the lessor, being compelled to intervene, should file a petition covering the land described in the lease, and not a larger tract owned by him.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 293-304; Dec. Dig. § 99.*]

4. RAILROADS (§ 99*)—GRADE CROSSINGS—ABOLITION—DAMAGES—LEASES—NEW TRIAL.

No new trial on petition by a lessee of land for damages caused by abolishing a grade crossing, under Rev. Laws, c. 111, § 149, should have taken place until determination of the question whether verdicts on the lessor's separate petitions were to stand, since, if such verdicts do not stand, the damage done to both lessor and lessee should be established by one verdict, as prescribed by Rev. Laws, c. 48, § 22.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 293-304; Dec. Dig. § 99.*]

5. EMINENT DOMAIN (§ 157*)—LEASED PROPERTY—DAMAGES.

In fixing damages for taking leased land upon which buildings containing fixed machin-

ery have been erected by the lessee, an entire sum should be found as representing the whole damage, the same as if the property were owned by one person in fee; such sum to be apportioned between the lessor and the lessee.

[Ed. Note.—For other cases, see *Eminent Domain*, Cent. Dig. § 427; Dec. Dig. § 157.*]

6. FIXTURES (§ 15*)—RIGHT TO REMOVE—LESSEES.

Buildings and fixed machinery, erected by a lessee at his own expense, are trade fixtures, which he can remove during the term of his lease.

[Ed. Note.—For other cases, see *Fixtures*, Cent. Dig. §§ 23-29; Dec. Dig. § 15.*]

7. RAILROADS (§ 99*)—GRADE CROSSINGS—ABOLITION—DAMAGES—EVIDENCE.

On petition for damages caused by abolishing a grade crossing, under Rev. Laws, c. 111, § 149, a railroad company could show that the land damaged could be connected with another street at a comparatively small expense.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 293-304; Dec. Dig. § 99.*]

Exceptions from Superior Court, Bristol County; William B. Stevens, Judge.

Petition by the Cornell-Andrews Smelting Company against the Boston & Providence Railroad Corporation for damages caused by abolishing a grade crossing. Verdict for petitioner, and both parties bring exceptions. Respondent's exceptions sustained. Petitioner's exceptions overruled.

John W. Cummings and Charles R. Cummings, for petitioner. Choate, Hall & Stewart, for respondent.

LORING, J. At the trial consequent upon the decision of this court in *Cornell-Andrews Smelting Co. v. Boston & Providence Railroad Corporation*, 202 Mass. 585, 89 N. E. 118, the respondent asked for a ruling in the words used by us in describing the rules of law by which the new trial then ordered was to be governed. This the presiding judge refused to give without modification, and the respondent took an exception. The questions of law involved in this ruling were not discussed in the former opinion. In view of that and of the earnest argument made by the learned counsel for the petitioner we have considered the matter anew.

The second trial was had on the lessee's petition against the railroad. The ruling requested by the respondent was in these words: "The value of the lessee's option of purchase, provided for in the lease, can neither enhance nor diminish the petitioner's claim, as damages are assessed for injury to its interest as of the date of the taking." This was the eighth ruling asked for by the respondent. Coupled with it was the respondent's fourteenth request for a ruling in these words: "The jury are not to assess total damages to the land leased and the buildings and fixed machinery therein to this petition, but are limited to damages for the remainder of the term, which is approximate-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep't Indexes

ly six years. The jury are to consider that all damages to the leasehold property beyond the six-year term, if any, have been or will be recovered by the lessor." The judge refused the fourteenth and gave the eighth, "with the addition, 'except so far as it may add to the value of the leasehold interest.'" He told the jury that they were first to determine "the fair market value of the leasehold interest which this petitioner had in that property, including, of course, the improvements made upon it, including any additional value that may have been given to it, if there was an additional value on account of the option, on account of the privilege of buying it at the end of ten years if it saw fit to do so," and then to decide how much that value of the leasehold interest had been impaired by the order for splitting grades which cut off access to Maple street and put the factory under the new embankment which was 27 feet high at the easterly end of the petitioner's premises and 21 feet at the westerly end of them.

Our former decision went on the footing that the damage done to the lessor's reversionary interest (1) in the land leased to the petitioner and (2) in the buildings and machinery put on the land by the lessee at its expense, had been finally disposed of by the separate verdicts which the lessor had recovered, or at any rate by those verdicts coupled with a statement of the petitioner's counsel made in argument before this court and acceded to by the respondent's counsel. We shall have to deal later on with this statement and concession. In other words the former opinion went on the footing that although originally the damage done in the case at bar had been done to land owned in part by a lessor and in part by a lessee (whereby a case within R. L. c. 48, §§ 20-23, was presented), yet when this case was sent back for a new trial by the decision in 202 Mass. 585, 89 N. E. 118, the amount due to the lessee was the only matter left to be determined, as was the case in *Pegler v. Hyde Park*, 176 Mass. 101, 57 N. E. 327. But although it was then assumed that the only matter left to be determined was the damage due to the lessee, the question whether the judge was or was not right in telling the jury in the case at bar that they could consider the option of purchase given in the lease to the lessee in determining the value of its leasehold interest depends upon the principles upon which compensation is to be made when land taken or damaged by the exercise of the power of eminent domain is owned by a lessor and lessee.

There is no better way of arriving at a full understanding of that question than by starting at the beginning and following down the course of our decisions and of the statutes enacted by the Legislature. There is the more reason for doing that here because in the case at bar the proceedings have not been

kept in the channel prescribed by these enactments of the Legislature.

It was held in *Ellis v. Welsh*, 6 Mass. 246, 4 Am. Dec. 122, that "any person having an interest in the land [taken for a public way], either as lessee for years, tenant for life, or for any greater estate of freehold, as also he in reversion or remainder, is an owner within" St. 1780, c. 67, § 1, giving to the owner of land taken for a highway compensation for damage thereby done. To have the damage done to the tenant in such a case determined by one jury and that done to the reversioner determined by another manifestly led or was likely to lead to results which varied when they should have been the same, even in the simplest of cases, for example, in case of a farm in the country. But there are cases where the miscarriage of justice likely to result is still greater if the damage done to the tenant or tenants and that done to the landlord are determined in separate actions. Take the case put by the commissioners of the Revised Statutes, where there are "a number of tenants for different terms of years, on conditions creating very different rights and liabilities and exposing them to different degrees of injury." Commissioners' Report, 153. Or take as an example the case presented in *Patterson v. Boston*, 23 Pick. 425, where the front wall of a building fronting on Hanover street in the city of Boston and let out in parts to several tenants was taken down in widening that street and never replaced.

To remedy these evils the commissioners of the Revised Statutes suggested that "whenever there shall be several parties having several estates or interests at the same time in any land or any buildings standing thereon" taken for a public way, any one of such parties may on application cause "all the other parties" interested to "become parties to the proceedings." And in such a case the jury "shall first find, and shall set forth in their verdict, the total amount of the damages sustained by the owners of such land and buildings, estimating the same as an entire estate and as if the same were the sole property of one owner in fee simple; and they shall then apportion the said total amount of damages among the several parties whom they shall find to be entitled, in proportion to their several interests and to the damages sustained by them respectively; and they shall set forth such apportionment in their verdict." The commissioners further recommended that if any person having an interest in land or buildings as aforesaid who had been summoned in should neglect to appear and become a party to the proceeding, he should be forever barred from making any application for damages. Commissioners' Report, c. 24, §§ 42-47. And see note to the same at page 153. This recommendation was adopted by the Legislature, became Rev. St. 1836, c. 24, §§ 48-53, and since then, with

some amendments, has been the law of the commonwealth. Gen. St. 1860, c. 43, §§ 53, 58; Pub. St. 1882, c. 49, §§ 20-25; R. L. c. 48, §§ 20-24.

The commissioners' statement of the reasons for this suggestion was in these words: "The provisions of these six sections, which are in the nature of a bill in equity, are intended to afford a more convenient means of doing justice to all parties in such cases."

By St. 1851, c. 290, it was provided that "Whenever any person shall have a claim for damages * * * having different or separate interests in the said property, so that an estate for life or for a term of years in the same belongs to one person, and the remainder or reversion in fee belongs to another," an entire sum shall be assessed without apportionment, and shall be paid over to a trustee upon trust to pay the income of the trust fund to the tenant for life or for years and on the termination of that estate to pay the principal to those entitled to the reversion. This (with an amendment made by St. 1883, c. 253) is now R. L. c. 48, §§ 17-19. For cases within these sections, see *Boston v. Robbins*, 121 Mass. 453; *Turner v. Robbins*, 133 Mass. 207. See, also, *Edmands v. Boston*, 108 Mass. 535, 547. All other cases are within the provision originally adopted in Rev. St. c. 24, §§ 48-53, pursuant to the recommendation of the commissioners (now R. L. c. 48, §§ 20-24). See *Edmands v. Boston*, 108 Mass. 535; *Willard v. Boston*, 149 Mass. 176, 21 N. E. 298; *Providence, Fall River & Newport Steamboat Co. v. Fall River*, 187 Mass. 45, 72 N. E. 338; *Galeano v. Boston*, 195 Mass. 64, 80 N. E. 579; *Cornell-Andrews Smelting Co. v. Boston & Providence Railroad*, 202 Mass. 585, 89 N. E. 118.

The purpose of these statutes regulating the method of procedure where a lot of land taken for a highway is owned by more than one person, is twofold: First, to have the interdependent rights of all settled at the same time; and secondly, to establish the principle that the amount of damages to be paid where the same land is owned by several persons shall be determined as if it had been owned by one person in fee. This was stated in terms in the original act (Rev. St. c. 24, § 50), and is stated in terms in the present act (R. L. c. 48, § 22). It is this feature of the act which has been most often insisted upon by the court. In *Edmands v. Boston*, 108 Mass. 535, 544, Wells, J., said: "The situation of the estate and the manner of its occupation are doubtless to be taken into consideration in estimating the injury caused by disturbing that occupation. But between the public and the landowner it is but one estate. The public right is exercised upon the land itself, without regard to subdivisions of interest by which the subject is affected through the various contracts of individual owners. The public cannot be expected to forego its right to take property

for public uses because the exercise of that right will defeat private contracts; nor is it reasonable that losses arising from the failure of such contracts which otherwise might furnish grounds of damage between the individual parties, should measure the compensation to be rendered for the property so taken. Such a rule would seriously impair the public rights. A fair compensation for the property taken and injury done, ascertained by general rules, is a substitution to the owners for that of which they are deprived. That is the whole of the transaction with which the public is concerned. The apportionment is merely a setting out to the several owners of partial interests of their corresponding rights in the fund which has been substituted for the property taken." In *Burt v. Merchants' Ins. Co.*, 115 Mass. 1, 15, Gray, C. J., said: "But no contracts between the owners of different interests in the land can affect the right of the government to take the land for the public use, or oblige it to pay by way of compensation more than the entire value of the land as a whole." To the same effect see *Knowlton, C. J.*, in *Providence, Fall River & Newport Steamboat Co. v. Fall River*, 187 Mass. 45, 50, 72 N. E. 338.

[1] The parties who have a right to bring a petition for damages or to intervene in one brought by another are those who have an estate in the lot of land taken or damaged. There is no case in which any one but the owner of an estate in the land in question has been allowed to bring a petition for land damages or to intervene in one brought by another, and it was on this ground that the case of *Emery v. Boston Terminal Co.*, 178 Mass. 172, 59 N. E. 763, 86 Am. St. Rep. 473, was decided.

It was said in *Boston v. Robbins*, 121 Mass. 453, 455, that: "It was afterwards decided that these sections, in terms as well as in intent and spirit, were applicable to a tenancy in common, or to an estate in which one person had the legal title and another an equitable interest under a bond for a deed. *Dwight v. County Commissioners*, 7 Cush. 533; *Proprietors of Locks & Canals v. Nashua & Lowell Railroad*, 10 Cush. 385." The second of these two cases (*Proprietors of Locks & Canals v. Nashua & Lowell Railroad*) is the case referred to above as the case in which it was decided that these sections were applicable to an estate in which one person held the legal title and another an equitable interest under a bond for a deed. In that case the Locks & Canals had given a bond to one Howard on May 14, 1844; the land was taken in August, 1846; Howard completed his payments on May 16, 1847, and received a deed at that time; and the petition was brought on July 11, 1850. Under these circumstances the Locks & Canals and Howard joined in bringing the petition for the sole benefit of Howard. What was decided and all that was decided was

"that the respondents as they cannot be injured by a single assessment, can take no exception." 10 Cush. 387. This was pointed out by Colt, J., in *Drury v. Midland Railroad*, 127 Mass. 571, 578. More than that, the petition in *Proprietors of Locks & Canals v. Nashua & Lowell Railroad* was brought to recover the injury done to the fee which was owned by the corporation when the land was taken, but which had passed to Howard under a prior contract before the petition was brought. The two were joined because this one fund had passed under a prior contract to Howard not because it became necessary to apportion the amount due between the Locks & Canals and Howard. For that reason it was not a case under Rev. St. c. 24, § 48, at all.

By St. 1874, c. 388, it was provided that in cases provided for by St. 1851, c. 290, any special and peculiar damages suffered by a tenant should be assessed separately and paid to the tenant and not to the trustee. It was held in *Galeane v. Boston*, 195 Mass. 64, 80 N. E. 579, that in cases under the other section (where the fund is not paid to a trustee but is apportioned between the several persons whose estates together make up the fee) if there are damages special and peculiar to one tenant they should be dealt with in the same way.

[2] The petition now before us is a petition for compensation for damages done by a decree for a change in a railroad private grade crossing made under R. L. c. 111, § 149 et seq., and the statutes amending these statutes. By the terms of section 153, the highway acts stated above apply to such petitions.

We understand that the learned counsel for the petitioner in effect concedes that ordinarily the only person who can bring a petition for compensation is the owner of an estate in the land. His argument is that the option added to the value of the lessee's leasehold interest, and if it did he has asked with great insistence why the petitioner should not have compensation for the diminution in the value of all his rights under the lease including the option.

The objection to his contention which first presents itself is that it would be impossible to apportion the damage done to the land "as if it were the sole property of one owner in fee simple" between the lessee (who has an option to buy the fee if he elects to do so but not otherwise) and the owner of the fee subject to a lease for a fixed term of years and to this right of the lessee to purchase the fee at its election and only at its election.

But the real objection to this contention is that although the insertion in a lease of an option giving to the lessee at his option a right to buy the fee adds to the value of the lessee's rights under the lease, it is no part of the lessee's estate in the land. It is a contract right and nothing more, although

contained in the lease and although it is a contract right which passes to an assignee of the lease. It is not an extension or amplification of the lessee's estate. Where a lease contains an agreement for an extension of the term thereby created it was assumed in *Stark v. Mansfield*, 178 Mass. 76, 59 N. E. 643, that the lessee should be treated as having an estate for the extended term. But what a lessee gets by the exercise of an option to buy the fee is not an extension of the leasehold estate but a new estate of a different kind. The lessee's rights under such an option are rights which lie in contract and do not create in the lessee any estate in the land. Being rights which lie in contract the lessee as the holder of such an option cannot bring a petition for damage done to the land, or intervene in one brought by the owner of an estate in the land. Neither can he in a petition brought by himself as lessee (to recover the compensation due for damage done to his estate in the land) have the value of his estate in the land increased by the value of the option. As was said by Gray, C. J., in *Burt v. Merchants' Ins. Co.*, 115 Mass. 1, 15: "But no contracts between the owners of different interests in the land can affect the right of the government to take the land for the public use, or oblige it to pay by way of compensation more than the entire value of the land as a whole."

In such a case the holder of an option to buy is not remediless. Where land of B. on which A. has an option of buying the fee is taken by the exercise of the paramount power of eminent domain, A. can no longer at his election buy the land but he can at his election buy the fund into which in equity the land has been converted by the exercise of the power of eminent domain. The doctrine that the compensation paid for land taken by the exercise of the power of eminent domain in equity represents the land and is subject to all the rights of persons who had rights in the land, is a familiar doctrine, resting on principles of general application. See, for example, *Holland v. Cruft*, 3 Gray, 162; *Bates v. Boston Elevated Railway*, 187 Mass. 328, 337, 72 N. E. 1017, and cases cited; *Hunneman v. Lowell Institution for Savings*, 205 Mass. 441, 445, 91 N. E. 526, and cases cited. Indeed the provision of St. 1851, c. 290 (now R. L. c. 48, §§ 17, 18), providing that when land taken is owned entirely by a lessor and lessee the fund shall be paid to a trustee and held by him on the same terms that the land was subject to, is based upon and is a statutory regulation of this principle of equitable conversion. As to this see *Wells, J.*, in a portion of the opinion in *Edmands v. Boston*, 108 Mass. 535, 544, which we have already quoted.

In the case at bar, before the taking the *Cornell-Andrews Company* had the right at its election to buy the property covered by the lease on paying the price named therein.

After the taking this right attached to the land and the lessor's share of the damage done by the taking to the land covered by the lease. We are of opinion that the presiding judge should have given the eighth ruling asked for by the respondent without modification, and that the exception taken to his refusal to do so must be sustained.

We proceed to the consideration of several matters which will arise at the new trial.

[3] When the first trial took place there were eight petitions before the court, consisting of four sets of two petitions each. Each set consisted of one petition against the Boston & Providence Railroad and of another against the town of Attleboro. The first set of two petitions (Nos. 4,497 and 4,498) were petitions brought by the Cornell-Andrews Smelting Company for damage done to the land, building and machinery covered by the lease. The second set (Nos. 4,600 and 4,601) were petitions brought by Watson, the lessor, and covered all his land west of the railroad (10 acres in extent), including the 78,000 feet let to the Cornell-Andrews Smelting Company. The third set (Nos. 4,604 and 4,605) covered all Watson's land west of the railroad and south of Maple street including the land let to the Cornell-Andrews Smelting Company. And the fourth set (Nos. 4,606 and 4,607) covered Watson's land west of the railroad and north of Maple street.¹ There were four sets of two petitions each in place of four petitions, because by the terms of the statute a petition had to be brought against the town for the damage done by laying out the new highway, and against the railroad for the damage done by the abolition of the crossing of Maple street (which was a private way) over the railroad.

In both petitions brought by the Cornell-Andrews Smelting Company (the lessee), on motion made by it under R. L. c. 48, § 21, Watson the lessor was ordered to intervene. Pursuant to those orders he filed copies of the petitions in Nos. 4,600 and 4,601 covering all his land west of the railroad 10 acres in extent.

The eight petitions came on for trial together and Watson was required to elect between Nos. 4,600 and 4,601, each of which covered the 10 acres, and 4,604, 4,605, 4,606 and 4,607, in which the 10 acres were divided into two parts as stated above. Watson elected to proceed with 4,600 and 4,601, each of which covered the whole 10 acres, and the presiding judge directed verdicts to be entered for the respondents in Nos. 4,604, 4,605, 4,606 and 4,607. The jury found two verdicts for the lessee in the two petitions brought by it (Nos. 4,497 and 4,498), one against the town and the other against the railroad, and two verdicts for the lessor in

the two petitions brought by him (Nos. 4,601 and 4,600), one against the town and the other against the railroad.

The lessee's verdict in 4,497 was set aside by the judge and its verdict in 4,498 was set aside as the result of our decision in *Cornell-Andrews Smelting Co. v. Boston & Providence Railroad*, 202 Mass. 585, 89 N. E. 118. We infer from what appears that it has not yet been decided whether the verdicts in favor of the lessor in 4,600 and 4,601 are or are not to stand.

We are of opinion that when Watson the lessor was summoned in by the lessee to intervene in its petition he should have filed an intervening petition covering the land described in the lease and not one covering his whole ten acres. The lessee was not interested in the eight acres not covered by the lease and that land should not be made the subject of the intervening petition of the lessor in the lessee's petition.

[4] After the order to Watson to intervene in the lessee's petition had been made Watson's right to proceed under his separate petitions (so far as his interest in the land covered by the lease was concerned) came to an end by force of R. L. c. 48, § 23, and his independent petitions for the recovery of damages to the leased land were not properly before the court. At the first trial the presiding judge stated to the jury that the lessor had intervened in both petitions brought by the lessee and he also told them, with respect to the land covered by the lease, "You are to assess the damages as a whole and then divide it" between the lessor and the lessee. But he then went on, ignoring the fact that the lessor had been required to intervene in the petitions brought by the lessee and the fact that the lessor's independent petitions, (so far as the leased land was concerned) were no longer properly before the court, and took four verdicts, two in favor of the lessor on his independent petitions (which as we have said were not then properly before the court) and two in favor of the lessee on its petitions. Apparently the intervening petitions of the lessor were ignored and never have been disposed of.

It is manifest that the judge who presided at the first trial was wrong in taking separate verdicts fixing the damage done to the lessor and to the lessee, so far as the real estate covered by the lease (including the buildings and fixed machinery) was concerned. It is equally manifest that a mistake was made at the second trial when (ignoring the fact that the lessor had intervened in it) the lessee's petition against the railroad was tried, before it had been ascertained whether the separate verdicts taken in the lessor's independent petitions were or were not to stand. No new trial should have taken place on the lessee's petition as a separate petition until the question whether the verdicts on the lessor's petitions were or were not to stand. That question has not yet been set-

¹ Maple street, as stated in the former report of this case in 202 Mass. 585, 589, 89 N. E. 118, is the street shown on the plan there published as "roadway," "private way discontinued" and "private way."

tled. If the verdicts in the lessor's petitions do not ultimately stand, the damage done to both lessor and lessee should be established by one verdict, as prescribed by R. L. c. 48, § 22, rendered in the petition or petitions brought by the lessee in which the lessor has been summoned in to intervene. Until the question has been decided whether the verdicts in the lessor's petitions are or are not to stand, no trial should be had on the lessee's petition.

The present status of these petitions has been brought into further confusion by a statement made by the lessee's counsel in his argument when the case was first before this court. He then made a statement, which was referred to in our former opinion (202 Mass. at page 598, 89 N. E. at page 122) as a statement that "the lessor made no claim that the buildings and fixed machinery formed a part of his estate." The statement made by the lessee was acquiesced in by the counsel for the respondent railroad and was referred to by us in our former opinion as a fact which was important in fixing the status of the litigation. We shall deal with this later on.

We have not until now referred to the fact that the buildings on the leased land at the date of the decree had been erected by the lessee at its own expense, and that there was in these buildings fixed machinery which had been attached to the freehold by the lessee and that this had been done at the lessee's expense.

[5] Before considering the effect to be given to this statement of the lessee's counsel acquiesced in by the counsel for the railroad, we stop to point out how a case should be dealt with where leased land (on which buildings containing fixed machinery have been erected by the lessee) has been taken or damaged by the exercise of the power of eminent domain.

[6] Such buildings at the time of the taking are part of the freehold and as such are the property of the lessor subject to the leasehold interest of the lessee for the unexpired term of the lease. In estimating the damage done in such a case an entire sum is to be found (and set forth in the verdict) as if the property were owned by one person in fee, and this entire sum represents the whole damage done to the realty including the buildings and fixed machinery. *Allen v. Boston*, 137 Mass. 319; *Williams v. Commonwealth*, 168 Mass. 364, 47 N. E. 115. But where the buildings and the fixed machinery are put in by the lessee at its own expense, they are trade fixtures which the lessee has a right to remove during the continuance of the lease. See *Smith v. Whitney*, 147 Mass. 479, 18 N. E. 229; *Antoni v. Belknap*, 102 Mass. 193; *Watriss v. National Bank of Cambridge*, 124 Mass. 571, 575, 26 Am. Rep. 664.

In such a case, before the taking the lessee

had a right to remove the buildings and fixed machinery. After the taking that right is transferred to the buildings and fixed machinery plus the damages done to them by the taking.

The obvious meaning of the statement of the lessee's counsel, as set forth in 202 Mass. 598, 89 N. E. 118, standing alone and carried to its logical conclusion was that the damage done to the buildings and fixed machinery did not enter into the verdicts which the lessor had recovered and that so far as any damage was done to the buildings and fixed machinery the lessee and the lessee alone always had had and still had the right to recover the whole of that damage.

But respondent's counsel never has acceded to that as the true interpretation of what then took place. It seems that this statement was made by the lessee's counsel in answer to a question put by the Chief Justice to find out whether, having reference to the lessor's claim for damages, the lessee's separate petition could then be heard. Counsel for the respondent may well have understood that the statement in which he acquiesced, made in answer to that question, did not go to the length to which it goes standing by itself and as set forth in 202 Mass. 598, 89 N. E. 118. Counsel for the respondent has contended at great length in his brief in this case that under the charge of the presiding judge at the first trial the damage done to the lessor's reversionary interest in the buildings and fixed machinery was included in the verdicts rendered on the lessor's petitions, and that he never has agreed to any other view of the case. The lessor's petitions for damages set forth that the buildings here in question had been erected on his land, and asked for damages sustained by him as set forth in the petitions; and in our opinion, under the charge of the judge at the first trial the lessor's share of damage done to the buildings and fixed machinery must be taken to have been included in the verdicts rendered on the lessor's petitions. If the lessor's proportion of the damage done to the buildings and fixed machinery was included in the verdicts rendered on the lessor's petitions, the effect of the acquiescence of the respondent's counsel in this statement would have been to make the respondent pay twice for the reversioner's share of the damage done to the buildings and fixed machinery. Further, there are two statements in the opinion in 202 Mass., one at page 598 and the other at page 599, 89 N. E. at page 122, which show that this court did not then give to this statement the meaning which it is now sought to have attached to it. After making the statement quoted above this court said: "It will then be open under the allegations in the petition for the petitioner to recover the difference between the fair market value of the leasehold, including the improvements,

as of the date of the decree, and its value as left after the building of the street to its westerly end, with the elevation of the bed of the railroad at the easterly end, cutting off the use of the spur track." By this was meant that at the new trial the lessee could recover the difference between the value of the leasehold interest in the real estate, including the land, buildings and fixed machinery before and after the taking. Again on page 599 of 202 Mass., on page 122 of 89 N. E., this court said: "The value of the lessee's option of purchase, provided for in the lease, can neither enhance nor diminish the petitioner's claim, as damages are assessed for injury to its interest as of the date of the taking." If by reason of the statement quoted above the lessee was to recover the whole damage done to the buildings and fixed machinery as if it always had been the sole owner of them, but so far as the land was concerned it was entitled to its leasehold interest only, the court would not have dealt with the option as it did. We are of opinion that under these circumstances the petitioner did not have the right to proceed on the basis that none of the damage done to the buildings and fixed machinery had been included in the verdicts recovered by the lessor on his petitions, and that the whole of it always had belonged to the petitioner and was to be recovered in this action.

The term of the lease to the Cornell-Andrews Company has now expired, and the lessor's right to remove the buildings and fixed machinery and to buy the fee under the option has in the absence of some further agreement come to an end. Some further agreement as to these matters may have been made between the parties. For these reasons it may be that at the new trial it will not be necessary to make the apportionments of the entire sum due for damage to the estate as if it were owned by one person in fee, which would have been originally necessary to preserve all the rights of lessor and lessee.

But if none of these matters has been thus eliminated by subsequent agreements and all the rights of the parties have to be established, the lessor should file an intervening petition covering his interest in the land subject to the lease. It was said by Wells, J., in *Edmonds v. Boston*, 108 Mass. 535, 547: "That statute [Gen. St. c. 43, § 17, now R. L. c. 48, § 17] is adapted to cases only in which the relation of tenant for life or years and remaindermen exists without modification by contract between the parties or otherwise." The right of the lessee in the case at bar to remove the buildings and fixed machinery as trade fixtures takes this case out of section 17 and brings it within sections 20-22. At the trial on the lessee's petition and that intervening petition the entire damage done to the land leased to the Cor-

nell-Andrews Company, including the buildings and the fixed machinery put in them by the lessee, must be determined and set forth in the verdict. Then the amount of this entire damage (done to the leased land including the buildings and fixed machinery) must be apportioned between the lessor and lessee. If the lessee suffered any special damage during construction, or if its damage in the matter of access is different from that of the lessor (as seems to have been the case), those sums should be found and set forth in the verdict specially in addition to the sums mentioned above. A further apportionment should be made of the lessor's share of the whole damage done to the real estate, so that his share of the damage done to the buildings and fixed machinery shall be separate from his share of the damage done to the land in order that the lessee may exercise its right of removing trade fixtures. That right, as we have said, after the taking covers the buildings and fixed machinery, and the damage done to them, including the lessor's share of that damage.

When the petitions are amended so that all damage done to the interests of the lessor and of the lessee in the land covered by the lease is covered on one petition and intervening petition, and the damage done to the lessor's other eight acres is covered by his independent petition, it will be proper to try them all together, as is provided in R. L. c. 48, § 29.

[7] This brings us to a consideration of the questions raised by the petitioner's bill of exceptions.

The presiding judge allowed the defendant to introduce evidence which tended to show that at a comparatively small expense a way could have been constructed connecting the leased land with new Olive street, and that the value of the land (belonging to Watson the lessor) covered by the new way would have been small. In his charge the presiding judge instructed the jury that although he could not say that the petitioner was bound or was not bound to attempt to do those things, yet if they were satisfied that the possibility of his doing them would have affected the market value of the leased land (including the buildings and fixed machinery) after the taking, they could take that into account: "The purpose of the evidence is the effect it would have upon the market value of the property, the effect it would have upon the mind of the purchaser or person who desired to purchase the property. Just so far as those possibilities affect the market value of this property you may take them into consideration." Guarded as this evidence was by the instructions given to the jury, it was rightly admitted. See *New York, N. H. & H. R. R. v. Blacker*, 178 Mass. 386, 59 N. E. 1020; *Cochrane v. Com.*, 175 Mass. 299, 56 N. E. 610, 78 Am. St. Rep. 491. The petitioner also took an exception to the

judge's refusal to give its seventh, twelfth and thirteenth requests for rulings. This exception goes to the same point.

The entry must be:

Respondent's exceptions sustained.

Petitioner's exceptions overruled.

(209 Mass. 481)

SANGER v. BOURKE et al.

(Supreme Judicial Court of Massachusetts.
Suffolk. July 21, 1911.)

1. WILLS (§ 687*)—CONSTRUCTION—ESTATES—DEVISE.

Where testator bequeathed the interest on trust funds to his children for life, and in case of their death without issue then over to the survivors, the residue of the trust fund remaining after the death of the last child who dies without issue will go as undevise property, unless some person was designated to take it.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1638-1643; Dec. Dig. § 687.*]

2. WILLS (§ 439*)—CONSTRUCTION—INTENT OF TESTATOR.

The court cannot conjecture as to the testator's intention, and then read it into his will.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 952; Dec. Dig. § 439.*]

3. WILLS (§ 687*)—CONSTRUCTION—INTENT OF TESTATOR—ESTATES DEVISED.

Where a testator gave the residue of his estate to trustees, and directed them to pay all the income and interest to his nine children, to be equally divided among them, provided that in the case of the death of any child without issue the income should be divided among the survivors, but, in case a child died leaving issue, then the capital of such deceased child's share should be equally divided among such issue, share and share alike, it was obvious that he intended the entire trust fund to go to his children or their issue, and, where the last surviving child died leaving no issue, the residue of the estate will be divided equally among the living issue of the other deceased children and the issue of deceased grandchildren by right of representation.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1638-1643; Dec. Dig. § 687.*]

4. TRUSTS (§ 284*)—DISPOSAL OF TRUST—DUTY OF TRUSTEE.

Where the trust for which real estate was given has expired, such real estate should be conveyed by the trustee to the ultimate beneficiaries.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 405; Dec. Dig. § 284.*]

Case Reserved from Supreme Judicial Court, Suffolk County.

Bill for instructions by Sabin P. Sanger against Emily Bourke and others. Decree for defendants.

Geo. D. Burrage, guardian ad litem, pro se. W. N. Buffum, for certain respondents.

SHELDON, J. Windsor Fay by his last will gave the residue of his estate to trustees, and directed them to pay all the income and interest thereof to his nine children, naming them, to be equally divided among them. He then provided as follows: "In

case of the decease of either of my said children without children or lawful issue, I then will that the income and interest so given as aforesaid shall in like manner be divided among the survivors, but in case my said children die leaving issue, then the capital of such deceased child's share shall be equally divided among such issue share and share alike, to their heirs and assigns forever."

One of these children died before the testator; and before August, 1868, three others of the testator's children died, of whom two left children and one had no issue. The trustees under the will thereupon filed a bill in equity in this court for instructions; and it was decided that no part of the principal of the trust fund should be distributed as undevise estate upon the death of a child without issue, but that the children of those of the testator's children who had died leaving issue were entitled respectively by representation to have "the capital of such deceased child's share," that is, the fractional part of the fund of which their respective parents received the income, withdrawn from the fund and divided among them. *Cook v. Smith*, 101 Mass. 342, 343. It was declared by Wells, J., in giving the opinion of the court that the will showed "that the testator intended to dispose of the principal as well as the income" of the fund, and to give the remainder after the life interest of his children "to the issue of such as should leave issue." He also said that "the will is made operative to pass the entire principal of the trust fund to the issue of such children as leave issue." The question however was not determined, because not then presented, whether the issue of a deceased child, whose share of capital already had been separated from the trust fund, were entitled to any share of the principal or income which would fall in by the subsequent decease without issue of any child of the testator. After this decision, all but one of the five remaining children of the testator successively died, leaving issue, and there was paid over to such issue respectively one-fifth, one-fourth, one-third, and one-half of the trust fund as it existed at those respective times. A daughter of the testator, Lydia A. Robbins, was thus left the sole survivor of the testator's children, and she received accordingly the whole income of the diminished trust fund during her life. She has now died without issue; and the question arises whether the fund is to go to the heirs of the testator as undevise or intestate estate, or whether by the terms of the will it devolves upon the issue of the other children of the testator, whose then expectant shares of the capital had before the death of Mrs. Robbins been separated from the trust fund.

[1] We cannot read this will without seeing that it was the intention of the testa-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

tor to dispose of his whole estate, and moreover to provide that all the residue of his estate after the termination of the life estate of his own children, should go to the issue of those children. That was the view taken by this court in *Cook v. Smith*, 101 Mass. 341. But in the event which has happened the existing fund has been left undisposed of by the literal terms of the will; for Mrs. Robbins has left no issue to whom it can go and no surviving brothers and sisters to whose shares it can be added. Unless there is to be found in the will not only a manifestation of the testator's intention that this fund should be disposed of by the will, but also a clear and certain designation of the persons to whom it is to be paid, it must go as undivided property to his heirs at law. *Keating v. Smith*, 5 Cush. 232; *Buffington v. Maxam*, 152 Mass. 477, 25 N. E. 975; *Stearns v. Stearns*, 192 Mass. 144, 77 N. E. 1154; *Walton v. Draper*, 206 Mass. 20, 91 N. E. 884. If, however, the language of the will does plainly and distinctly show that he intended a particular disposition of the fund, the court must give effect to that intention.

The case is governed by our decisions in *Metcalf v. Framingham Parish*, 128 Mass. 370, and *Boston Safe Deposit & Trust Co. v. Coffin*, 152 Mass. 95, 25 N. E. 30, 8 L. R. A. 740. Both of these cases go upon the ground stated by Gray, C. J., in the former of them: "If a reading of the whole will produces a conviction that the testator must necessarily have intended an interest to be given which is not bequeathed by express and formal words, the court must supply the defect by implication, and so mould the language of the testator as to carry into effect as far as possible the intention which it is of opinion that he has on the whole will sufficiently expressed." In each of the cases cited, the facts presented closely resembled those which are before us. In each case, the contingency which actually happened had not in terms been provided for, just as in the case at bar the event of the testator's last surviving child leaving no issue was not specifically provided for; but in each case the language which the testator used showed clearly and unmistakably that his intention would have been frustrated if effect had not been given to it in the manner adopted by the court. So in this case the language used leads directly and certainly to the conclusion that he intended the whole of this fund to go finally to the issue of his children to the exclusion of everybody else, although he did not concern himself with its disposition after it should have come into the hands of such issue.

[2] We are not framing for the testator a conjectural intent, such as he might or perhaps naturally would have expressed, but which is not imported by the words which he has used. That we could not do. *Child v. Child*, 185 Mass. 376, 70 N. E. 464; *Boston Safe Deposit & Trust Co. v. Buffum*, 186

Mass. 242, 71 N. E. 549; *Todd v. Tarbell*, 187 Mass. 480, 73 N. E. 556. As was said by Loring, J., in *Lathrop v. Merrill*, 207 Mass. 6, 10, 92 N. E. 1019, 1020, "the province of the court is not to conjecture what the testator's intention was, and then read it into the will, but to ascertain his intention by construing the words which he used as the declaration of it." If it necessarily appears from those words that he intended to make a disposition of his property which he has not formally and precisely expressed, his intention will be declared and carried into execution. *Rugg, J.*, in *Jones v. Gane*, 205 Mass. 37, 45, 91 N. E. 129. The principle has been declared and applied in many cases, both in this commonwealth and in England. See, besides those already cited, *Hood v. Boardman*, 148 Mass. 330, 19 N. E. 379; *Seaver v. Griffing*, 176 Mass. 59, 57 N. E. 220; *Dary v. Grau*, 190 Mass. 482, 77 N. E. 507; *Polsey v. Newton*, 199 Mass. 450, 85 N. E. 574; *Towns v. Wentworth*, 11 Moore, P. C. 526; *Abbott v. Middleton*, 7 H. L. Cas. 68; *Baker v. Tootal*, 11 H. L. Cas. 143; *Greenwood v. Greenwood*, 5 Ch. D. 954. The reasoning in *Little v. Silveira*, 204 Mass. 114, 90 N. E. 527, though the point was not directly involved, tends to the same effect. And see the other cases cited in *Metcalf v. Framingham Parish*, *ubi supra*.

[3] But it has been argued that the language of the testator does not show that he intended the fund, in the event which has happened, to go to the issue of his deceased children. It is said that he dealt with the case of children dying without issue, and definitely provided that in that case it should go to his own surviving children, but chose to make no provision for the event of the last survivor having no issue. It is argued that he really provided that no part of the share of which children dying without issue had enjoyed the income should go to the issue of children who had previously deceased, but that the same should go to the surviving children. It is urged that his intention was that the issue of a deceased child, having received the "capital of such deceased child's share" as it was at the time of the latter's death, should not thereafter receive any further part or share of the trust fund; for what he said and all that he said was that the income of a child dying without issue should be divided among the survivors, which of course meant the surviving children of the testator.

This argument has been very ingeniously put by counsel, but its fallacy is that it first assumes that the testator could not have intended to make any other or further disposition of his property than what he has expressly and formally stated, and then rests upon the further assumption that the giving of a bequest to one set of beneficiaries, the issue of deceased children, together with a different disposition of other property or

shares to take effect in a certain event, necessarily shows an intention that the first set of beneficiaries should in no event share in such other property. A similar line of argument applied to the facts of those cases would have reversed the decisions in *Metcalf v. Framingham Parish*, 128 Mass. 370, *Boston Safe Deposit & Trust Co. v. Coffin*, 152 Mass. 95, 25 N. E. 80, 8 L. R. A. 740, and in many of the other cases already cited, in which interests in bequests have been either created or extended beyond what could have been given under the mere words of the wills, in order to carry out the manifest intention of the testator. That intention must be gathered from all the language of the will, in connection with the circumstances that were known to the testator when he made it. We are not to look merely to singled out words, in which he plainly failed to express the whole of the intention which is apparent upon the face of the will.

In this case we are satisfied by reading the will that the testator intended to dispose of all his estate and to provide that it finally should go to the issue of his children.

We are of opinion upon the language of the will that distribution of the fund should now be made in equal shares among the grandchildren of the testator and the issue of any deceased grandchildren by right of representation. *Dexter v. Inches*, 147 Mass. 324, 17 N. E. 551; *Hills v. Barnard*, 152 Mass. 67, 25 N. E. 86, 9 L. R. A. 211; *Jackson v. Jackson*, 158 Mass. 374, 26 N. E. 1112, 11 L. R. A. 305, 25 Am. St. Rep. 643; *Dary v. Grau*, 190 Mass. 482, 77 N. E. 507; *Coates v. Burton*, 191 Mass. 190, 77 N. E. 311; *McClench v. Waldron*, 204 Mass. 554, 91 N. E. 126.

[4] Real estate constituting part of the trust fund should be conveyed by the trustee to the beneficiaries. *Keating v. Smith*, 5 Cush. 232.

Decree accordingly.

(209 Mass. 474)

EVANS et al. v. MIDDLESEX COUNTY.(Supreme Judicial Court of Massachusetts.
Suffolk. July 5, 1911.)**1. APPEAL AND ERROR (§ 1008*)—FINDINGS—CONCLUSIVENESS.**

The findings of the trial court are not open to revision by an appellate court, and can be set aside only when they have no foundation in evidence.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 1008.*]

2. CONTRACTS (§ 284*)—BUILDING CONTRACTS—DECISION OF ARCHITECT—CONCLUSIVENESS.

The decisions of an architect, authorized by a building contract to determine practical questions of performance arising during the progress of the work, are binding on the parties, where he acts honestly and with reasonable efficiency.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 1326; Dec. Dig. § 284.*]

3. TRIAL (§ 382*)—DIRECTION OF VERDICT—WHEN AUTHORIZED.

Where the burden of proof of an affirmative issue is on plaintiff, and part of his evidence is oral, the court cannot ordinarily give a general prayer that he is entitled to recover.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 898; Dec. Dig. § 382.*]

4. CONTRACTS (§ 284*)—BUILDING CONTRACTS—PERFORMANCE—DECISION OF ARCHITECT—CONCLUSIVENESS.

Where a contract to erect a power and heating plant according to specifications called for "sectional covering * * * air cells, class A" and the contractor furnished covering known in the trade as "air cells, sectional covering, class A," but the architect, supposing that the only kind of covering that would conform to the specifications was that manufactured by a particular manufacturer, rejected the work, the mere fact that the covering furnished was not inferior, in quality or otherwise, to that of the particular manufacturer, did not prevent the decision of the architect from being conclusive; he acting in good faith and not whimsically, though somewhat ignorantly or mistakenly.

[Ed. Note.—For other cases, see Contracts, Dec. Dig. § 284.*]

5. TRIAL (§ 386*)—INSTRUCTIONS—ASSUMPTION OF FACTS.

Rulings of law, which assume the existence of facts contradicted by even slight evidence, are properly refused.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 901, 902; Dec. Dig. § 386.*]

6. COUNTIES (§§ 128, 224*)—BUILDING CONTRACTS—WAIVER OF STIPULATIONS.

A clause, in a contract to erect a power, electric, and heating plant for a county, that the county commissioners shall approve the additional sum to be paid for all additions to the contract which may be ordered, may be waived by the commissioners, and whether it has been waived is a question of fact.

[Ed. Note.—For other cases, see Counties, Dec. Dig. §§ 128, 224.*]

7. APPEAL AND ERROR (§ 696*)—FINDINGS—BILL OF EXCEPTIONS—REVIEW.

Where the bill of exceptions does not state that it contains all the material evidence, exceptions depending on a finding of fact cannot be considered.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2916, 2917; Dec. Dig. § 696.*]

Exceptions from Superior Court, Suffolk County; John H. Hardy, Judge.

Action by Quimby N. Evans and another against the County of Middlesex. There was a verdict for defendant, and plaintiffs bring exceptions. Overruled.

J. A. Brackett, for plaintiffs. G. L. Mayberry, for defendant.

RUGG, J. This is an action of contract. The declaration contains five counts, only four of which are now material. The first is upon a written contract between the plaintiffs and the defendant, by which the former undertook to erect a power, electric and heating plant for the defendant, and alleged partial performance by the plaintiffs and unreasonable refusal by the defendant to permit them to complete it. The third and fourth counts were for work done and materials supplied, as extras to the contract. The fifth count was upon a quantum meruit for the same work claimed under count one. The answer set up that the contract did not comply with St. 1898, c. 170, or St. 1897, c. 137, and that the work under the contract was not done as required by it to the satisfaction of the architect, who for this reason acting under the contract stopped further performance of it. The case was sent to an auditor, who found the facts in favor of the plaintiffs. It was thereafter tried upon the auditor's report and additional evidence, part of which was oral, before a justice of the superior court, who found generally for the defendant. The case is brought here by the plaintiffs' exceptions to the refusal of the trial court to grant certain rulings.

The contract provided that the work was "(A) * * * to be done and materials furnished under the direction of an engineer selected by the architect and to the satisfaction of the architect and such engineer. And in case of said work or materials * * * shall be unsatisfactory to the said architect, then the said party of the second part shall on being notified thereof in writing by the said architect immediately remove such unsatisfactory work or materials and supply the place thereof with other work and materials satisfactory to the architect. (B) All work contemplated and described by the plans and these specifications and this contract shall be done to the satisfaction of the said architect and engineer * * * and who shall be the sole judges as to the fitness of the work and materials as herein set forth. If any objection is made by the architect or engineer to any work or materials, then the said party of the second part shall remove such unsatisfactory work and materials. (C) And if at any time any of the work mentioned in said specifications is not progressing or any materials are not in accordance with the said specifications to the entire satisfaction

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

of the said architect after five days' notice having been served on the said party of the second part by the said architect, then the said party of the first part shall have the right to enter upon and take possession of said work and remove all materials that are considered by said architect unfit for said work and furnish suitable materials instead therefor." The trouble arose over the furnishing "sectional covering * * * air cell, class A," required by the specifications. The plaintiffs provided a kind of covering, which, they contended, complied with this description, and the architect claimed that it did not, and on refusal by the plaintiffs to substitute he gave the notice to remove the materials, and subsequently to terminate the contract. The auditor found that the covering furnished by the plaintiff was "air cell sectional covering class A," and was so known in the trade, and did not find that it was inferior in quality to that demanded by the architect which was manufactured by a particular manufacturer alone, and that the engineer and architect both supposed that the only kind of covering, which would conform to the specification, was that manufactured only by a particular manufacturer. He does not find that this was through corruption, but the inference appears to be that it was through ignorance.

[1, 2] At the trial before the superior court there was some evidence tending to show that the goods furnished by the plaintiffs did not comply with the specification in that class A covering meant a five-ply covering, while that furnished by the plaintiffs was four-ply covering. The weight of the evidence including the auditor's report seems strongly to support the view that the plaintiffs complied with the terms of the contract, and that the architect was wholly without justification in fact for the action he took, yet under the familiar rule that the findings of fact of a trial court are not open to revision by an appellate tribunal and can be set aside only when they have no foundation in evidence, we cannot disturb a general finding for the defendant. The evidence is not quite so conclusive as to enable us to say that no finding was reasonably possible, except that the architect acted unreasonably, capriciously, arbitrarily, willfully or fraudulently. *Hebert v. Dewey*, 191 Mass. 411, 77 N. E. 822; *Handy v. Bliss*, 204 Mass. 513, 90 N. E. 864, 134 Am. St. Rep. 673. The architect was by the terms of the contract constituted an arbitrator by the parties to determine practical questions of performance that might arise during the progress of the construction. So long as he acted honestly and with reasonable efficiency his action was binding upon the parties. *Norcross v. Wyman*, 187 Mass. 25, 72 N. E. 347.

[3, 4] The first prayer of the plaintiffs, which was a general one, that they were entitled to recover, could not have been given properly. The burden of proof was upon the

plaintiff, and where an affirmative issue must be made out by one party upon evidence, a part of which is oral, ordinarily such a ruling cannot be given as matter of law. The second ruling called for a finding of fact, which by refusing to give, the court apparently decided adversely to the plaintiffs. In view of the finding which must have been made in order to refuse the second prayer, the third was also properly refused. Moreover this prayer was not quite an accurate statement of the law. It might be that "the covering furnished by the plaintiffs was not inferior in quality or otherwise to that of the Asbestos Paper Company," and yet a rejection of it might be within the legal right of the architect and engineer acting in good faith and not whimsically, even though somewhat ignorantly or mistakenly.

[5] The fourth, fifth, seventh and eighth requests ask for findings of fact, which by his refusal the court seems not to have been able to make. The sixth prayer called for a ruling of law which was correct in its terms but for a finding of fact which it appears from the other findings of fact requested the court was unable to make. The eighth and ninth prayers were requests for rulings of law based upon a certain construction of all the evidence. But as there was some slight evidence that a five-ply covering alone would satisfy the terms of the contract, it does not appear that the facts existed which were assumed in the prayer.

[6] The contract also provided that no demand should be made for any portion of the work done or materials furnished "until each and all of the stipulations" contained in the contract "are complied with and the architect shall have given his certificate to that effect, and until all disputes, disagreements and questions between the parties hereto affecting the right to any portion of the work claimed shall have been settled as above provided for." It was found by the auditor and does not appear to have been disputed at the trial, that the labor and materials referred to in the third, and fourth counts were in addition to that required under the contract, and were ordered in writing by the county commissioners, who represented the defendant. The fair value to be added to the contract price was not fixed by the architect as required by the contract, for the reason as testified by him that "there was no necessity of my approving them until the final adjustment of the accounts." Requests for arbitration were made but came to nothing. A clause in the contract required that the commissioners should also approve the additional sum to be paid for all additions to the contract. This was a detail of the contract which might have been waived, but whether it was waived or not was a fact which it may be inferred from the general finding in favor of the defendant, the court was unable to make.

[7] The bill of exceptions does not state that it contains all the material evidence, and the defendant has taken this point in argument. Exceptions which depend upon a finding of fact may be disposed of on this ground. *Appleton v. O'Donnell*, 173 Mass. 398, 53 N. E. 882; *York v. Bristol*, 175 Mass. 187, 55 N. E. 846; *Cohen v. Longarini*, 207 Mass. 556, 93 N. E. 702. But we have placed the decision on a broader ground.

Although the case appears to be one of great apparent hardship to the plaintiffs, the governing rules of law make no other result possible upon these exceptions. Exceptions overruled.

(208 Mass. 470)

DALY v. FOSS et al.

(Supreme Judicial Court of Massachusetts.
Suffolk. July 1, 1911.)

1. APPEAL AND ERROR (§ 356*)—“CASE REPORTED”—DISMISSAL.

A case reserved is a “case reported,” within Rev. Laws, c. 173, § 115, providing for discharge of reports by the trial court on failure to take necessary steps for review.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 1926, 1927; Dec. Dig. § 356.*]

2. APPEAL AND ERROR (§ 356*)—RESERVATION—DISCHARGE.

Rev. Laws, c. 173, § 115, provides that if plaintiff, upon a report in equity, fails to enter it in the Supreme Judicial Court, or to take necessary steps for review, the report may be discharged. Under chapter 159, §§ 19, 29, a reservation must be entered at least within 30 days from the time of the reservation or forthwith thereafter. *Held*, that a ruling that plaintiff was not entitled to an injunction affirmed under section 115 for plaintiff's failure to take the necessary steps to complete the reservation, was not reviewable on appeal.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 1926, 1927; Dec. Dig. § 356.*]

Appeal from Superior Court, Suffolk County; Franklin J. Fessenden, Judge.

Bill by Crohan J. Daly against Eugene N. Foss and others. Decree for defendants, and plaintiff appeals. Affirmed.

I. R. Clark and G. F. Ordway, for plaintiff. S. J. Elder, H. R. Bailey, and G. W. Mathews, for defendants.

HAMMOND, J. This was a bill in equity to enforce certain restrictions upon the use of certain land. The case was tried and the trial judge made certain findings and rulings and then reserved “the case and all questions therein” for the consideration of this court upon the pleadings, the evidence, and upon the findings made by him, “such orders to be made as law and justice require.”

The defendants, alleging that the plaintiff had neglected to take the necessary measures for the completion of the reservation and the hearing in this court, moved that the reservation be discharged and that the rul-

ings made by the court be affirmed and a final decree be entered dismissing the bill with costs, “all as provided in R. L. c. 173, § 115.” This motion was allowed and a final decree was entered which, after reciting that it appeared to the court “that the plaintiff has neglected to take the necessary steps or measures for the completion of the reservation and the hearing of the case in the Supreme Judicial Court,” “ordered, adjudged and decreed that the reservation be discharged and the rulings of the court affirmed and the plaintiff's bill be dismissed,” and for costs to the defendants. From this order the plaintiff appealed and the judge in compliance with the request made certain additional findings affecting the merits of the case. He also filed a memorandum concerning the delay of the plaintiff which is considered a part of the record.

[1] 1. The first question is whether and to what extent the final decree is conclusive, or in other words what if any question is before this court on this appeal. R. L. c. 173, § 115, reads as follows:

“If an appellant or an excepting party, or if the plaintiff in a case reported, at law, in equity, or in probate proceedings, neglects to enter the appeal, exceptions or report in the Supreme Judicial Court or to take the necessary measures by ordering proper copies to be prepared or otherwise for the hearing of the case, or if an excepting party neglects to provide a transcript of the evidence or of the instructions to the jury within the time ordered by the justice under the provisions of section one hundred and eleven, the court in which the appeal was taken or by which the exceptions were allowed or the case reported may, upon the application of the adverse party and after notice to all parties interested, order that the appeal be dismissed, the exceptions overruled or the report discharged, and that the judgment, opinion, ruling, order or decree appealed from, or excepted to, be affirmed.”

Previous to St. 1888, c. 94, in case of the failure of the party whose duty it was to enter the case in this court the application for affirmation of the judgment or order in question had to be made to this court. Pub. St. 1882, c. 150, § 16; Id. c. 151, § 20. But by St. 1888, c. 94, a change was made, applicable however only to appeals and exceptions, by which the court in which the appeal was taken or the exceptions allowed “may” upon the application of the adverse party and after due notice affirm the judgment or decree in question. Amendments to the statute were made from time to time until it finally took the shape in which it now stands. R. L. c. 173, § 115. See St. 1895, c. 153, § 2; St. 1896, c. 451; St. 1900, c. 371, § 1; Report of the Commissioners on the Revision of 1902, p. 1547.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

In *Ingalls v. Ingalls*, 150 Mass. 57, 25 N. E. 92, the libellant filed in this court a complaint for the affirmation of a decree of the superior court in a libel for divorce to which the libellee had excepted and had neglected to enter the exceptions in this court. The application was refused on the ground that under St. 1888, c. 94, it should have been made to the superior court. The court there says that the statute was intended to obviate the necessity of applying by complaint to this court for the affirmation of the judgment or order in the trial court, and "to substitute as the appropriate tribunal for affirming such order, etc., when the appeal or exceptions had not been entered, the court where such order, etc., had originally been made. While the word 'may' is used in the statute of 1888, it was not intended by this use to leave the right to apply to his court for affirmation as it had before existed, and thus to make the remedy provided merely cumulative." And in *Erlund v. Manning*, 160 Mass. 444, 38 N. E. 59, the same rule was applied to an appeal from the decision of a justice of this court. Both of the foregoing decisions were made under St. 1888, c. 94, which applied only to appeals and exceptions. R. L. c. 173, § 115, applies to a case reported in equity; and a case reserved is a case reported within the meaning of the statute.

The power given to the trial court under this statute is given only in certain classes of cases therein enumerated. One class includes a case where the plaintiff upon a report in equity neglects to enter the report or to take the necessary steps by ordering proper copies to be prepared, or otherwise, for the hearing of the case in this court. Upon this appeal the first question is whether the allegations of the decree that the plaintiff has neglected to take the necessary steps for the completion of the reservation and the hearing of the case in this court is true. Unless the court was justified in coming to that conclusion it had no right to pass the order of affirmation.

After many delays for which the plaintiff seems to have been in some degree responsible, the terms of the reservation were finally substantially settled and, the cause coming on for final decree, the reservation was signed October 18, 1910. The statutes provide in substance that the reservation of a judge of the superior court shall be entered at least within 30 days from the time of the reservation or forthwith thereafter. R. L. c. 159, §§ 19 and 29. The decree was made December 5, 1910. It is apparent that a case within R. L. c. 173, § 115, was before the court as set forth in the decree, and the court had the power to affirm the rulings.

[2] The rulings thus affirmed must stand. The appeal does not bring to this court the correctness of such rulings. The order of

affirmation made by the trial court acting within its jurisdiction has the same effect as when formerly made by this court. The party who by exception, appeal, report or reservation seeks to have the action of the trial court modified in any way by this court by his default loses the right to the judgment of this court; and the findings and rulings affirmed, whether right or wrong, become the law of the case.

It becomes necessary to see what it was that the court affirmed. There was no final decree as in the case of an appeal from a final decree. The case being reserved under R. L. c. 159, § 29, the trial court, instead of entering a formal decree, ruled substantially as to the form the decree should take and left the formal entry until the rescript should come from this court. This is in accordance with the usual practice.

In the present case the court made 27 "findings and rulings" of fact and law. In paragraph 24 is the following: "I find that I ought not, in the exercise of my discretion, to issue any injunction as prayed for in this case." This is in legal effect a ruling that the plaintiff is not entitled to an injunction. This ruling having been affirmed by the court under R. L. c. 173, § 115, for reasons hereinbefore stated cannot be revised by this court, but must stand as the conclusive declaration of the law of the case. And under the finding of the court that the plaintiff has suffered no damages there is no occasion to keep the bill for the assessment of damages. Under these circumstances the decree dismissing the bill and for costs should be affirmed with the costs since the decree.

2. The conclusion which we have reached as to the final decree renders it unnecessary to consider at length the questions arising upon the defendants' motion for the dismissal of the appeal. The decree denying the motion is affirmed.

So ordered.

(34 Oh. St. 323)

**WILLIAMS & THOMAS CO. v.
PRESLO et al.**

(Supreme Court of Ohio. June 13, 1911.)

(Syllabus by the Court.)

1. STATUTES (§ 82*)—UNIFORMITY—REGULATION OF PROPERTY RIGHTS—RULES OF EVIDENCE.

The provisions of the Constitution which require that laws regulating rights in property shall operate generally and equally extend to statutes which prescribe the presumptions and rules of evidence by which those rights are enforced.

[Ed. Note.—For other cases, see Statutes, Dec. Dig. § 82.*]

2. STATUTES (§ 82*)—RIGHTS IN PROPERTY—PRESUMPTIONS—DISCRIMINATION.

The act of April 30, 1908 (99 O. L. 241), to render presumptively fraudulent sales in bulk of stocks of merchandise unless the seller shall, not less than seven days before the trans-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

fer, file with the recorder of the county a notice of his intention to make such sale, is repugnant to the 1st article of the Constitution, and therefore void. *Miller v. Crawford et al.*, 70 Ohio St. 207, 71 N. E. 631, approved and followed.

[Ed. Note.—For other cases, see Statutes, Dec. Dig. § 82.*]

Error to Circuit Court, Mahoning County.

Action by the Williams & Thomas Company against Mike Preslo and others. Judgment for defendants in common pleas was affirmed by the circuit court, and plaintiff brings error. Affirmed.

The Williams & Thomas Company brought suit in the court of common pleas to set aside a sale in bulk to Preslo of a stock of merchandise, and to subject the property to the payment of the vendor's creditors, it being alleged that the sale was made to hinder, delay, and defraud creditors. The defendants denied that the sale was fraudulent. Upon the trial the cause was submitted on the following agreed statement of facts: "W. T. Williams and G. T. Williams are partners, trading under the firm name of the Williams & Thomas Company, and are creditors of Angelo Spina and Tony Spina, partners, formerly trading under the firm name of Tony Spina & Bro. Company. Angelo Spina and Tony Spina, trading as said firm sold their entire stock of groceries in bulk, and not in the usual and regular course of business, on the 5th day of April, A. D. 1909, to Mike Preslo. No written notice of such intended sale was filed, as provided by section 6343, Revised Statutes of Ohio, by Angelo Spina or Tony Spina, or by the firm of Tony Spina & Bro. Company, with the county recorder of Mahoning county, Ohio, the county in which said stock of groceries was situated, and in which said firm did business. That said sale or transfer was not made under the direction or order of a court of competent jurisdiction or by an executor, administrator, receiver, assignee for the benefit of creditors, or other officer or person, acting in the regular and proper discharge of official duty, or in the discharge of any trust imposed upon him by law. Said stock of groceries are not exempt from execution."

No other evidence was offered by either party, the plaintiff relying on the presumption intended to be created by the following statutory provision added by way of amendment to sections 6343 and 6344, Revised Statutes, April 30, 1908 (99 Ohio Laws, p. 241): "Any sale or transfer of any portion of a stock of goods, wares or merchandise otherwise than in the ordinary course of trade in the regular and usual prosecution of the seller's or transferrer's business, or the sale or transfer of an entire stock in bulk shall be presumed to be made with the intent to hinder, delay or defraud creditors within the meaning of this section, unless the seller or transferrer shall, not less than seven (7) days previous to the

transfer of the stock of goods sold or intended to be sold, and the payment of the money thereof, cause to be recorded in the office of the county recorder of the county in which such seller or transferrer conducts his business, and in the office of the county recorder of the county or counties in which such goods are located, a notice of his intention to make such sale or transfer, which notice shall be in writing, describing in general terms the property to be sold and all conditions of such sale and the parties thereto; excepting, however, that no such presumption shall arise because of the failure to record notice as above provided in the case of any sale or transfer made under the direction or order of a court of competent jurisdiction, or by an executor, administrator, guardian, receiver, assignee for the benefit of creditors or other officer or person acting in the regular and proper discharge of official duty or in the discharge of any trust imposed upon him by law, nor in the case of any sale or transfer of any property exempt from execution."

In the court of common pleas judgment was rendered for the defendants, and that judgment was affirmed by the circuit court.

McKain & Ohl, Thompson & Hine, and Thomas H. Hogsett, for plaintiff in error. William R. Stewart, for defendants in error.

SHAUCK, J. (after stating the facts as above). The courts below have concluded that the statute, upon which the plaintiff relied to relieve it from the burden of proving the fraud which it had alleged, is unconstitutional. On behalf of the defendant it is insisted that that judgment is fully sustained by our decision in *Miller v. Crawford*, 70 Ohio St. 214, 71 N. E. 631. Counsel for the plaintiff in error call attention to manifest differences between this statute and its predecessor, which was denounced as unconstitutional in the case cited. The statute denounced in that case apparently gave no consideration either to the nature of legislative power or to the limitations which are placed upon its exercise. In that case it was pointed out that in view of the intricate provisions of the act sales in compliance with it would, in many cases, be entirely impracticable, and that the statute in effect would amount to a prohibition of such sales. The terms of the present statute go no farther than to create a presumption that a sale in bulk, without giving the prescribed notice, is fraudulent, only placing upon the parties to the transaction the burden, of which vendors and purchasers are relieved in all other cases, of proving a sale free from fraud. The statute does not define the character of the presumption intended by the act, whether it shall be *prima facie* or conclusive. If the difference is material in the present inquiry, as counsel seem to regard it, we should, in def-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

erence to the familiar doctrine that if of two permissible interpretations one would render a statute unconstitutional and the other would not the latter should be adopted, accept the statement of plaintiffs' counsel as correctly defining the character and scope of the presumption intended: "The provisions of section 6343, Revised Statutes, that certain sales 'shall be presumed to be made with intent to hinder, delay or defraud creditors,' unless notice is filed as thereafter provided, creates a rule of evidence. It renders admissible the fact that the vendor has failed to file notice of a sale out of the ordinary course of business, as a fact from which the intent of the parties may be inferred, and places upon the defendant the burden of proceeding with evidence of the actual intent after proof of the lack of notice has been introduced."

[1] The question then is, whether the guarantees of the Constitution respecting the equal rights of all to the enjoyment and use of property includes or excludes the rules of evidence and the presumptions by whose application those rights are practically preserved and enforced. This question is quite apart from that so much discussed in the briefs and cases cited respecting the power of the General Assembly to establish rules of evidence by statutes of general and equal operation. It would seem that the distinction in this respect upon which counsel for plaintiff insist is quite inconsistent with the nature and scope of these constitutional guarantees as they are set forth in *Miller v. Crawford*. Without repetition of anything that is there said, it is quite convenient to quote a pertinent statement of the nature of those guarantees from a writer whose views are received with general respect: "If the Legislature should undertake to provide that persons following some specified lawful trade or employment, should not have capacity to make contracts, or to receive conveyances or to build such houses as others were allowed to erect, or in any way to make such use of their property as was permissible to others, it can scarcely be doubted that the act would transcend the due bounds of legislative power, even though no express constitutional provision could be pointed out with which it would come in conflict." Cooley, *Const. Limitations*.

[2] Although counsel point out the suggested differences between the provisions of the two statutes, they do not inform us of any difference in the constitutional view between a provision that a sale without compliance with the statute should be fraudulent absolutely, and one which upon the same condition shall be prima facie evidence that the sale is fraudulent, thus devolving upon the parties in the limited case to which the statute applies, a burden for the protection of their property rights of which all others are relieved. The pertinent effect of the constitutional provisions referred to is to ordain

equality of rights in property. In contemplation of this act, where the subject of the contract of sale is the limited property described by the terms of the act, the sale is to be presumed to be fraudulent, while in all other cases the sale is presumed to be unaffected by fraud. Counsel have not communicated to us any view upon which we could sustain the proposition that laws can be equal which accord to one, without proof, rights which they accord to others only upon proof.

Not placing ultimate reliance upon the suggested differences between the two statutes, counsel insist that there is a valid basis for discrimination to be found in the ease with which stocks of merchandise may be purchased upon credit and then sold and transferred to the prejudice of the original vendor. Careful attention to what has been said upon this point has failed to develop in our minds the perception of any difference in this respect between sales where the subject, upon one hand, is merchandise, and on the other, flocks, herds, or machinery, or the capital stock of corporations, or any others of the large list of the subjects of property. The case in this respect does not differ from *Miller v. Crawford*, and it is not deemed necessary to add further to what was said in that case.

Finally, we are admonished that acts of the General Assembly should not be adjudged unconstitutional upon doubtful considerations. Not since *State ex rel. Knisely v. Jones et al.*, 66 Ohio St. 453, 64 N. E. 424, 90 Am. St. Rep. 592, has the admonition been urged upon our attention with so much eloquence and impressiveness. Since the beginning of constitutional government, according to the American understanding of that phrase, the courts have so admonished themselves, and the admonition has become an established rule of interpretation. It was founded upon the observation that members of the lawmaking department of the government take the same oath as do those of the judicial department to heed the provisions of the Constitution, and the further observation that they were mindful of their oath. The rule continues as expressive of becoming deference to a co-ordinate department of the government. But nothing would be more fatal to the efficient exercise of the judicial function in constitutional government than to invoke, for the purpose of raising doubts, a rule devised for solving them. In that respect it is quite like the familiar rule respecting reasonable doubts as a test of the probative effect of evidence in criminal cases. He has been an inattentive student of the history of the state who thinks that public or private injury has resulted from a too devoted adherence to the provisions of the organic law. It seems to us that this act very plainly from its nature takes its place among the enactments which constitute the promot-

ed legislation of the state not suggested by comprehensive views of the rights and interests of all the people, but furthered by those who desire to obtain advantages not accorded by the general law.

Judgment affirmed.

SPEAR, C. J., and DAVIS, PRICE, JOHN-SON, and DONAHUE, JJ., concur.

(84 Oh. St. 319)

McCLURE v. FERGUS.

BILLINGSLEY v. HOLE.

(Supreme Court of Ohio. June 13, 1911.)

(Syllabus by the Court.)

APPEAL AND ERROR (§ 396*)—PROCEEDINGS TO TRANSFER CAUSE—NOTICE OF INTENTION.

Appeals from the court of common pleas to the circuit court are to be taken as provided for in sections 5227 and 5228, Revised Statutes, and not as provided in section 6408 of the same statutes. *Layer, Gdn., v. Schaber, Adm'r*, 57 Ohio St. 234, 48 N. E. 939, approved.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 396.*]

Error to Circuit Court, Franklin County.

Error to Circuit Court, Darke County.

Actions by one Fergus, as administrator of Fannie J. Hanna, against one McClure, executor of Moses Hanna, and by one Billingsley, as guardian of Edward Alexander, a weak-minded and improvident person, against one Hole. From judgments dismissing the appeal of the defendant in the first case and of the plaintiff in the second case, from the court of common pleas to the circuit court, the appellants, respectively, bring error. Reversed.

Pugh & Pugh, William T. McClure, George W. Mannix, Jr., and T. A. Billingsley, for plaintiffs in error. Arlington C. Harvey and D. W. Bowman, for defendants in error.

PRICE, J. While the main question of law involved is common to both cases, we deem it best to state their facts separately.

The first case grows out of an action commenced in the court of common pleas of Franklin county, by the defendant in error Fergus against the plaintiff in error McClure. Fergus sued as administrator of the estate of Fannie J. Hanna, deceased, and his cause of action was against McClure as executor of the will and trustee of Moses Hanna.

In the second amended petition Fergus alleged that his decedent and Moses Hanna intermarried in the year 1869, and that the estate of said Moses Hanna consisted of personal property and certain described real estate; that said Fannie J. Hanna was adjudged insane on the 9th day of June, 1897, and that she remained insane until her death in 1904; that in April, 1872, her husband, with her money, purchased the real estate described in the petition, but took the title thereto

in his own name, and thereafter refused to recognize the rights of said wife. The prayer of the petition was for an accounting for the money so invested in the land, as between the executor of the will of Moses Hanna and the said administrator of Fannie J. Hanna, the wife. The said executor answered, and admitted the alleged marriage and the subsequent insanity and death of the wife, and the purchase of the real estate, but denied the other averments of the petition. A second defense pleads facts to operate as a bar to the prosecution of the action.

The case was tried to the court, who found in favor of the plaintiff Fergus; that the executor of the husband, Moses Hanna, should account for the sum of \$2,350, also for rents collected by the husband, and these sums were declared a lien on said real estate, and other equitable relief was granted. This trial was had about December 22, 1908, and McClure, as executor of Moses Hanna, desiring to appeal from the decree to the circuit court, the following entry was placed on the journal of the court on the 24th day of December, 1908.

"It appearing to the court that written notice has been given according to law by William T. McClure, trustee, etc., defendant in the above-entitled cause, of his intention to appeal from the decision of this court to the circuit court of Franklin county, Ohio, and that the defendant has given bond in the probate court of Franklin county, as trustee of the estate of Moses Hanna, deceased; it is therefore ordered by the court that no appeal bond be required of the said defendant." On the 11th day of February, 1909, the clerk transmitted transcript of docket and journal entries and original papers to the circuit court. On February 15, 1909, the appellee (Fergus) filed the following motion: "Now comes the plaintiff and moves the court to dismiss this cause on appeal for the reasons: First. The appellant, defendant below, did not give written notice of his intention to appeal said cause as is required by law. Second. Said appeal has not been perfected as required by law." This motion was heard in the circuit court, and it decided that the second ground of the motion was not well taken, but sustained the motion on the first ground—that appellant did not give written notice of his intention to appeal said cause as is required by law. Having so found, the appeal was dismissed. The decision sustaining said first ground of the motion is brought here for review.

From the character of the briefs, we are of opinion that the lower court confused several provisions of the statute respecting appeals, and in passing from one provision to another, came to a conclusion which would render the practice uncertain to a very embarrassing degree.

The appeal was taken from a decree made

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

in December, 1908, and no question is or can be made that a right of appeal existed, if properly exercised. The action was equitable in character and was triable by the court. This right of appeal is given by section 5226, Revised Statutes of 1908, which has been in force for many years. Section 5227 has not been so fortunate, and has suffered several alterations, but when the appeal in question was attempted, it read as follows: "A party desiring to appeal his cause to the circuit court shall, within thirty days after the judgment or order is entered on the journal of the court, give an undertaking with sufficient surety to be approved by the clerk of the court or a judge thereof as hereinafter provided, and in such amount as is required or fixed by the provisions of section 5230, Revised Statutes of Ohio."

Section 5228, Revised Statutes, provides that "a party in any trust capacity, or a county treasurer in his official capacity, who has given bond in this state with sureties according to law, shall not be required to give bond and security to perfect an appeal. * * *" The balance of the section prescribes the duty of the clerk of the court to make transcript and transmit the same with the pleadings and other papers to the circuit court.

The above sections as quoted were in operation when the appeal was taken in the present case, and McClure, as executor, having appealed in his trust capacity, of which there is no doubt, was not required to give bond, and to perfect the appeal it remained for the clerk to make and transmit a transcript and original papers, which was done to the satisfaction of the circuit court. Therefore we have a plain and simple method of appeal from the common pleas to the circuit court, which has been followed in this case. The common pleas, for some reason, went beyond the requirement of section 5227, supra, and stated in the journal entry that it appeared "that written notice has been given according to law by William T. McClure, trustee, * * * of his intention to appeal from the decision of this court," etc. No such notice was required by section 5227 as it was in force at the time appeal was attempted, and that part of the entry was superfluous.

A quotation is made from the opinion of the circuit court which indicates that it was of opinion that, as section 5227 did not require notice where appeal was desired by one acting in a trust capacity, some other statute should come to the rescue as to giving notice, and section 6408, Revised Statutes, was selected for that purpose. This section is one of the general provisions regulating probate practice, and when read in connection with the preceding section, contains no provision intended to modify or control sections 5227 and 5228. This seems to be the view entertained in *Layer, Guardian, v. Schaber, Adm'r*, 57 Ohio St. 234, 48 N. E. 939. At the time

the appeal was taken in that case, section 5227 required notice of an intention to appeal to be entered on the records within three days after the judgment or order is entered on the journal. Such notice was not required in the instant case, but this court in above report decided that "appeals from the court of common pleas to the circuit court are to be taken as provided for in sections 5227 and 5228, Revised Statutes, as to notice of appeal and not as provided in section 6408 of said statutes."

Browne, Assignee, v. Wallace, 66 Ohio St. 57, 63 N. E. 588, has been cited to sustain the judgment of dismissal, but the syllabus must be read with the facts in view. It was a case beginning in the insolvency court of Hamilton county, and therefore an appeal from its judgment would be governed by section 6408, Revised Statutes, and the doctrine of the syllabus relates to cases in which an appeal is desired from the probate or insolvency court to the court of common pleas. In the body of the opinion it is said: "This section does not provide that the notice may be entered in the first instance in the records, as in appeals from the court of common pleas to the circuit court. Revised Statutes, § 5227."

Having a plain road for appeal from the court of common pleas to the circuit court provided by sections 5227 and 5228, Revised Statutes, there is no reason for complicating the remedy by adopting section 6408, and laboring to utilize all of them under a pretext of harmonizing their various provisions.

The circuit court erred in dismissing the appeal, for which error its judgment is reversed, and the cause is remanded to the circuit court for further proceedings according to law.

Judgment reversed.

The record in the second case discloses that Billingsley, as guardian of Edward Alexander, a weak-minded and improvident person, commenced an action in the court of common pleas of Darke county, in March, 1908, against defendant in error, in which the guardian prayed for the rescission and cancellation of a certain deed previously executed and delivered by the ward to the defendant in error. This petition was amended in May of the same year. On issues joined, the case was tried before the court of common pleas and the court found against the plaintiff and dismissed his petition. Following the judgment and as part of the entry is the following: "And now comes the plaintiff and gives notice of his intention as such guardian to appeal this cause to the circuit court of Darke county, Ohio, and the said T. A. Billingsley having as such guardian given bond in this state according to law, and that this appeal is in the interest of the trust, no appeal bond is required." Transcript and original papers were duly filed in the appellate court. At the time this appeal was attempted, sections 5227 and 5228 were worded

as quoted in the opinion in the preceding case, and as now found in the Revised Statutes. No notice of an intention to appeal was required by either section. The action was of an equitable character and no doubt is expressed by counsel about it being an appealable case.

But the circuit court and counsel for defendant in error became possessed of the view that, as section 5227, as it then stood, did not require notice of intention to appeal to be given, it was proper practice to find some other section of the statute which did require notice of such intention to be given, and the search resulted in adopting section 6408, Revised Statutes, and, on motion for that purpose, the circuit court dismissed the appeal.

What we have said in the preceding case controls the disposition of this proceeding, and need not be repeated here.

The circuit court erred in dismissing the appeal, and its judgment is reversed, and the cause is remanded for further proceedings according to law. Judgment reversed.

SPEAR, C. J., and DAVIS, SHAUCK, JOHNSON, and DONAHUE, JJ., concur.

(84 Oh. St. 379)

MICHAEL v. AMERICAN NAT. BANK et al.
(Supreme Court of Ohio. June 30, 1911.)

(Syllabus by the Court.)

1. JUDGMENT (§ 405*)—EQUITABLE RELIEF—GROUNDS.

Where a cause has proceeded to trial and final judgment, a court of equity will not vacate or open up the judgment and grant a new trial of the same issue determined in the former hearing, in the absence of fraud or undue advantage by the prevailing party.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 766, 767; Dec. Dig. § 405.*]

2. JUDGMENT (§ 443*)—EQUITABLE RELIEF—GROUNDS.

The fraud or undue advantage for which a court of equity will set aside a judgment or decree must consist of extrinsic acts outside of and collateral to the matter actually tried by the first court, and not related to the matter concerning which the judgment or decree was rendered.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 836-838; Dec. Dig. § 443.*]

(Additional Syllabus by Editorial Staff.)

3. JUDGMENT (§ 407*)—EQUITABLE RELIEF—CUMULATIVE REMEDY.

Where a judgment is attacked for fraud, the statutory remedy provided by Rev. St. 1908 §§ 5300, 5354, authorizing the vacation of a judgment after the term at which it was rendered, is not exclusive of the remedy in equity, but cumulative.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 768-774; Dec. Dig. § 407.*]

Error to Circuit Court, Allen County.

Action by Nathan L. Michael against the American National Bank of Lima, Ohio, and another. From a judgment of the circuit

court affirming a judgment of the common pleas court sustaining a demurrer to the petition and dismissing the petition, plaintiff brings error. Affirmed.

The amended petition of the plaintiff in the court of common pleas in this cause is as follows:

"Now comes the plaintiff, and for his cause of action avers:

"That the defendant the American National Bank of Lima, Ohio, is a corporation, duly organized under the laws of the United States of America, and, on the 24th day of December, 1898, it was engaged in the business of conducting a bank, under the national banking laws of the United States of America, at the city of Lima, in the county of Allen and state of Ohio.

"That at said date of December 24, 1898, Joseph Goldsmith was president, this plaintiff, Nathan L. Michael, was vice president, and Gus Kalb was the cashier of said bank, and said cashier at the close of business on said 24th day of December, 1898, had in his custody, of the moneys deposited in said bank, and for which said bank was responsible as custodian aforesaid, the sum of eighteen thousand two hundred fifty-three and $\frac{72}{100}$ (\$18,253.72) dollars.

"That at the close of business on the said 24th day of December, 1898, said sum of eighteen thousand two hundred fifty-three and $\frac{72}{100}$ (\$18,253.72) dollars was deposited and locked in a safe inside of the vault in the room where defendant conducted its banking business, and said vault was provided with an outer steel door three inches in thickness, with a combination lock to which was attached a time lock. And said time lock was properly wound and set, and said vault door closed and bolted, and the combination thereon was distributed, and said appliances for the safe-keeping of said money were properly used, and said vault door securely locked by the cashier, Gus Kalb.

"That on the 26th day of August, 1899, the defendant the American National Bank of Lima, Ohio, filed its petition in the court of common pleas of Allen county, Ohio, in case No. 10,050 of said court, making Gus Kalb and this plaintiff defendants in an action for money had and received, and praying for a judgment against said Gus Kalb and this plaintiff for the said sum of eighteen thousand two hundred fifty-three and $\frac{72}{100}$ (\$18,253.72) dollars, with interest from the 27th day of December, 1898; that thereafter, to wit, on December 4, 1899, this plaintiff filed his amended separate answer in which he averred as a defense that between the dates of December 24 and December 27, 1898, the vaults of said the American National Bank of Lima, Ohio, were entered and robbed, and the said sum of eighteen thousand two hundred fifty-three and $\frac{72}{100}$

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

(\$18,253.72) dollars was stolen and carried away by some person or persons unknown to Nathan L. Michael, one of the defendants in said cause No. 10,050, and without his neglect or default.

"That thereafter on the 4th day of December, 1899, the said the American National Bank of Lima, Ohio, plaintiff in said cause No. 10,050, filed its reply to the amended answer of Nathan L. Michael in said cause, and denied the allegations of the amended answer of Nathan L. Michael filed in said cause No. 10,050.

"That said averment of plaintiff in his answer, as defendant in said cause No. 10,050 and the denial of said averment by the American National Bank of Lima, Ohio, as plaintiff in said cause, made up a material issue of fact, and that said cause was tried to a jury on the issue thus made up; and on December 12, 1899, said jury rendered a verdict on behalf of the defendant the American National Bank of Lima, Ohio, as plaintiff in said action, against the defendants Gus Kalb and Nathan L. Michael, in the sum of nineteen thousand sixty-nine and $\frac{4}{100}$ (\$19,069.04) dollars.

"That within three days after the rendition of said verdict, each of said defendants filed his separate motion for a new trial, which was overruled by the court of common pleas, and a bill of exceptions was prepared, allowed, signed, sealed and made a part of the record in said cause, but not spread upon the journal; and each of said defendants thereafter filed his petition in error in the circuit court of Allen county, Ohio, praying for the setting aside of said verdict and for a new trial, but the judgment of the court of common pleas was duly affirmed.

"That thereafter each of said defendants, within the time allowed by law, prosecuted error in the Supreme Court of Ohio, to the affirmance of said judgment by the circuit court of Allen county, Ohio, and said cause was fully reviewed by the Supreme Court of Ohio, and by it, the said judgments of the lower courts were affirmed and a mandate was directed and issued on October 23, 1901, to the clerk of the court of common pleas for Allen county, Ohio, commanding him to carry into effect the judgment and orders of said court of common pleas.

"That by reason thereof, on the 25th day of October, 1901, this plaintiff, as a defendant in said cause No. 10,050 aforesaid, was compelled to pay to the defendant, the American National Bank of Lima, Ohio, as plaintiff in said cause, and did pay to the clerk of the courts for Allen county, Ohio the one-half ($\frac{1}{2}$) of said judgment, interest and costs, amounting to the sum of ten thousand eight hundred eighty-six and $\frac{74}{100}$ (\$10,886.74) dollars.

"That the defendant Gus Kalb was a co-defendant of this plaintiff in said cause No. 10,050 of the Allen county common pleas court, in which cause the American National

Bank of Lima, Ohio, recovered the verdict and judgment heretofore mentioned; that the consent of said Gus Kalb to be joined as plaintiff herein cannot be obtained, and that by reason thereof, the said Gus Kalb is made a defendant in this action.

"That between the date of closing and locking said vault on the 24th day of December, 1898, aforesaid, and the 27th day of December, 1898, the aforementioned appliances for the safe-keeping of said sum of eighteen thousand two hundred fifty-three and $\frac{72}{100}$ (\$18,253.72) dollars were tampered with and rendered useless by a thief in the person of one at the time of action heretofore mentioned and for a long time thereafter unknown to this plaintiff, and said sum was taken, stolen and carried away by said thief, whom the plaintiff avers to be one Elijah Bowsher.

"That the plaintiff at the time of said action in cause No. 10,050 aforesaid had no knowledge and no means of knowing the connection of Elijah Bowsher with the theft from said bank of said sum of eighteen thousand two hundred fifty-three and $\frac{72}{100}$ (\$18,253.72) dollars, and that he had no knowledge of the same until the fall of the year 1905.

"That said Elijah Bowsher at the September term of the court of common pleas for Allen county, Ohio, in the year of 1905, was indicted by the grand jury of said county for the larceny of said sum of eighteen thousand two hundred fifty-three and $\frac{72}{100}$ (\$18,253.72) dollars of the moneys and property of the American National Bank of Lima, Ohio, so by him stolen and carried away, and was convicted and sentenced for said crime to the Ohio penitentiary for a period of seven years.

"Plaintiff further avers that owing to the lapse of time between the time of the trial of said action in said cause No. 10,050, and the time of the discovery and disclosure of the fact that the theft heretofore referred to was committed by said Elijah Bowsher, plaintiff is without adequate remedy at law.

"Wherefore, plaintiff prays that said verdict in said cause No. 10,050 of Allen county, Ohio, common pleas court, entitled the American National Bank of Lima, Ohio, Plaintiff, v. Gus Kalb and Nathan L. Michael, Defendants, may be set aside and a new trial of said cause awarded; and that plaintiff may have any other and further orders necessary to have adequate relief in equity."

A demurrer was filed by the defendants to this amended petition, which was sustained by the common pleas court, and the plaintiff not desiring to plead further, judgment was entered dismissing the petition at the costs of the plaintiff. On error proceedings in the circuit court of Allen county this judgment was affirmed, and the action here is to reverse the judgments of the courts below.

Halfhill, Quail & Kirk, for plaintiff in error. Richie & Richie, for defendants in error.

JOHNSON, J. (after stating the facts as above). It will be observed that the amended petition specifically avers that "owing to lapse of time between the time of the trial of said action in cause No. 10,050 and the time of the discovery and disclosure of the fact that the theft heretofore referred to was committed by said Elijah Bowsher, plaintiff is without adequate remedy at law." It is conceded that there is no statutory authority for the relief prayed for. Proceedings under sections 5309 and 5354, Revised Statutes, to open up and vacate a judgment after the term at which it was made must be commenced within times shorter than the time which elapsed in this case. Therefore the question presented here is whether the amended petition states a case which warrants the exercise of the equitable jurisdiction of the court.

[3] Where a judgment is attacked for fraud the statutory remedy is not exclusive, but cumulative. This principle is well settled in Ohio. *Long v. Mulford*, 17 Ohio St. 485, 93 Am. Dec. 638; *Coates v. Bank*, 23 Ohio St. 415; *Darst v. Phillips*, 41 Ohio St. 514. The syllabus in *Darst v. Phillips* is as follows: "The special proceeding provided by section 5354, Revised Statutes, authorizing courts to vacate their own judgments rendered at a previous term, for fraud practiced by the successful party is a cumulative remedy and does not exclude or limit the right of a party by original action to impeach a judgment or enjoin its collection for such fraud." It would seem to follow that where a proper case is stated in a petition calling for the exercise of the equitable powers of the court to set aside a judgment for fraud, the statute would not begin to run until the discovery of the fraud.

[2] But the acts of fraud which confer jurisdiction are such as are extrinsic and outside of the matter directly tried and determined, and do not relate to the matter on which the judgment was rendered. This was the contention in each of the three Ohio cases cited above. The fraud related to the manner of acquiring jurisdiction in the original cases, and amounted to a fraud on the court as well as on the party. In *Darst v. Phillips*, supra, the judgment had been entered on a promissory note with warrant of attorney attached. There was no service of process. The note had actually been paid, and the court say: "The fraud charged was one upon the court as well as upon the judgment defendants. * * * The payment of the debt revoked the power and left the cognovit without any support, and there was no jurisdiction actually acquired."

In *United States v. Throckmorton*, 98 U. S. 68, 25 L. Ed. 93, the court say: "The acts for which a court of equity will on account of a fraud set aside or annul a judgment or decree, between the same parties, rendered by a court of competent jurisdiction, have relation to frauds, extrinsic and collateral, to

the matter tried by the first court, and not to a fraud in the matter on which the decree was rendered." And Mr. Chief Justice Shaw, in *Greene v. Greene*, 2 Gray, 361, 61 Am. Dec. 454, says: "But where the same matter has been actually tried or so put in issue that it might have been tried, proof of fraud is not again admissible." In *Dringer v. Receiver*, 42 N. J. Eq. 573, 8 Atl. 511, the court say: "He (the defendant) may sue out a writ of error, apply for a new trial, or rehearing, or take an appeal, but he cannot maintain a bill in equity or retry the case on its merits or any of the questions settled by the judgment." Other cases in which these principles are declared and enforced are *Pico v. Cohn*, 91 Cal. 129, 25 Pac. 970, 27 Pac. 537, 13 L. R. A. 836, 25 Am. St. Rep. 159; *Hilton v. Guyott* (C. C.) 42 Fed. 252; *United States v. Hancock* (C. C.) 30 Fed. 858; *Gray v. Barton*, 62 Mich. 186, 28 N. W. 813.

[1] When tested by well-settled rules, does the amended petition in this case state facts on which the court would be warranted in granting relief? It sets out that in the original action against Michael by the bank, he (Michael) filed an answer in which he averred as a defense that between December 24, 1898, and December 27, 1898, the vaults of the bank were entered and robbed by persons unknown to him and without his fault. He avers that the bank filed a reply denying said allegations, and that the issue thus made was tried to the court and jury. In the amended petition in the present case, Michael sets up the same facts, and in addition avers that he now knows the name of the person who robbed the bank. The amended petition herein contains no allegation of fraud in the original action on the part of the bank or of any one. It is not claimed that the bank perpetrated any fraud at any time on the court, or on the defendants, nor that the verdict in that case was the result of fraud. There is no averment that there was any false testimony introduced by the bank. The newly discovered evidence set out in the amended petition is merely cumulative.

If evidence was offered on the trial of the original action in support of the defense set up, it must have been to the effect that the bank had been robbed, and the additional evidence now tendered is to the same claim and that the name and identity of the robber is now known. There is no allegation in this amended petition from which any inference can be drawn other than that the original action was fully and fairly tried without improper conduct by any one of the parties. Counsel for plaintiff state in their brief that they have been unable to furnish a precedent for the decree prayed for in their petition, but they insist that the facts set out present a case which calls for the assertion of the equitable power of the court without reference to any prior fixed rule.

They cite authorities in which the inherent power of the court to grant relief demanded

by good conscience is stated and upheld. But those authorities and the reasons upon which they are based have no application to a proceeding in which the rights of the parties have been submitted to a court and jury under rules securing to each a full and fair hearing, and in which there was no suggestion or claim of fraud or improper conduct.

It is insisted that this case presents a great hardship, and that in the result of the original action injustice was done the defendants. That may be true. Courts at their best can only approximate exact justice. Where such hardships and imperfections seem to be apparent, courts would gladly redress them if a rule could be contrived that would remedy the evil without producing worse conditions. The mischief of endless litigation in which nothing is finally determined is a thing more to be dreaded than an occasional miscarriage of justice. If by allegation in a bill in equity, that false testimony had been given, or forged documents introduced or new evidence discovered, controversies which had been regularly adjudicated could be opened up, there could be no assurance of the conclusive effect of final judgments.

In the case referred to in the amended petition, the defendants Michael and Kalb filed their answers setting up what they claimed and believed to be the truth. The trial of that case was their opportunity for making the truth appear. Unfortunately they failed (not by perjured testimony, or unfair practices by their opponents), and in the reviewing courts they were not able to show that injustice had been done them, or that there was any error in the proceeding.

Judgment affirmed.

SPEAR, C. J., and DAVIS, SCHAUCK, PRICE, and DONAHUE, JJ., concur.

(84 Oh. St. 360)

FISHER v. STATE.

(Supreme Court of Ohio. June 30, 1911.)

(Syllabus by the Court.)

1. INFANTS (§ 20*)—CRIMINAL LAW (§ 252*)—CONTRIBUTING TO DELINQUENCY OF INFANTS—DUPLICITY IN AFFIDAVIT.

An affidavit charging that F., on or about the 1st day of March, 1909, and at divers other days and times between that date and the 1st day of April, 1910, did unlawfully aid, abet, induce, cause, encourage, and contribute to the delinquency of L. S., a female minor child, and further stating the acts, means, and methods by which he contributed to such delinquency, states an offense under the provisions of section 1654, General Code, and is not bad for duplicity.

[Ed. Note.—For other cases, see Infants, Dec. Dig. § 20;* Criminal Law, Dec. Dig. § 252.*]

2. INDICTMENT AND INFORMATION (§ 137*)—MOTION TO QUASH—GROUNDS.

A motion to quash an indictment should not be sustained, unless the defect or imperfec-

tion complained of is of such nature as to tend to the prejudice of the substantial rights of the defendant upon the merits of the case.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 480-487; Dec. Dig. § 137.*]

3. INDICTMENT AND INFORMATION (§ 142*)—MOTION TO QUASH—FINALITY OF DECISION.

The overruling of a motion to quash an indictment will not be regarded as a final decision of the question presented thereby, when the point is one that, if well taken, would be available on demurrer, or upon motion in arrest of judgment. *Ex parte Bushnell*, 8 Ohio St. 599, approved and followed.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 477, 478; Dec. Dig. § 142.*]

(Additional Syllabus by Editorial Staff.)

4. CRIMINAL LAW (§ 429*)—EVIDENCE—RECORD—JUDGMENT IN CRIMINAL CASE.

In a prosecution for contributing to the delinquency of a minor child, the record of the conviction of the minor child on a charge of delinquency, was admissible.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1018, 1020; Dec. Dig. § 429.*]

Error to Circuit Court, Clark County.

C. B. Fisher was convicted of contributing to the delinquency of a minor child, and brings error. Affirmed.

On the 2d day of April, 1910, Harry Boswell filed with the probate judge of Clark county, Ohio, an affidavit charging the plaintiff in error with contributing to the delinquency of S., a female minor child, a portion of which affidavit, omitting names, reads as follows: "That one F., late of said county, on or about the 1st day of March, 1909, and at divers other days and times between said day and the 1st day of April, 1910, at the city of Springfield, county of Clark, and state of Ohio, did unlawfully aid, abet, induce, cause, encourage, and contribute to the delinquency of S., a female minor child, as aforesaid, in this, to wit: that the said F. did then and there unlawfully and knowingly aid, abet, procure, cause, and encourage the said S. to associate with vicious and immoral persons, one of said vicious and immoral persons then and there being said F., and the said F. did then and there have unlawful sexual intercourse with the said S.; that the said F. did then and there unlawfully aid, abet, procure, cause, contribute and encourage the said S. to have certain indecent, immoral, and lascivious relations with the said F., and that the said F. did then and there unlawfully aid, abet, procure, cause, contribute, and encourage the said S. to be then and there and thereby guilty of immoral conduct, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the state of Ohio."

To this affidavit the plaintiff in error filed a motion to quash, which motion was overruled and a plea of not guilty entered. A jury was waived, and the cause tried to the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

court, resulting in a finding of guilty, and the plaintiff in error was sentenced to pay a fine of \$1,000, and to be imprisoned in the Xenia workhouse for one year, and to further stand committed until said fine and costs are paid. Error was prosecuted to the circuit court of Clark county, which court affirmed the judgment of the probate court, and this proceeding in error is now prosecuted in this court to reverse the judgment of the probate court and the judgment of the circuit court affirming the same.

George C. Rawlins and Clem V. Collins, for plaintiff in error. Lawrence E. Laybourne, Pros. Atty., for the State.

DONAHUE, J. (after stating the facts as above). The petition in error contains numerous assignments of error, but counsel particularly urge upon the attention of this court the following: First. The probate court erred in overruling defendant's motion to quash. Second. Said court erred in not according to defendant a public trial. Third. Said court erred in depriving the defendant of the right to cross-examine a witness for the state. Fourth. Said court erred in refusing to exclude a witness for state from the courtroom during the trial. Fifth. Said court erred in permitting an unreasonable cross-examination of the defendant. Sixth. Said court erred in admitting in evidence the record of the conviction of the delinquent child named in the affidavit.

[1] The first and most important question urged upon the attention of this court by counsel for plaintiff in error is that the probate court erred in overruling the motion to quash the affidavit. This motion to quash is of considerable length, and assigns eight several reasons why this affidavit should be quashed; the first, second, third, fourth, sixth, and seventh reasons all being directed to the contention that the affidavit does not set forth sufficient facts with sufficient certainty and definiteness, but it appears that there are enough facts clearly and definitely stated in the affidavit to charge an offense under section 1654, General Code. It is perhaps true that some matters are stated in this affidavit in such a general way as not to permit of the admission of any evidence in relation thereto, but these allegations must be treated as mere surplusage, and if, by treating them as surplusage, sufficient remains to state an offense then as to these grounds the motion to quash was properly overruled.

The eighth ground of the motion reads as follows: "Eighth. For that, in said affidavit, consisting of a single count, there is duplicity, and for that more than one offense is charged against the said defendant, and for that a multiplicity of separate and distinct offenses is charged therein against the said defendant, among others, namely, the date on or about the 1st day of March, 1909, which

said defendant is alleged to have contributed to the delinquency of the said S., constituting a distinct and separate offense, and the 'other days' between said date and the 1st day of April, 1910, constituting each a distinct and separate offense and distinct and separate offenses."

The question raised by this ground of the motion to quash is not a new one in Ohio. The same principle was involved in the case of *Hughes v. State of Ohio*, affirmed by this court in 77 Ohio St. 640, 84 N. E. 1132. The case is reported in full in 9 Ohio Cir. Ct. (N. S.) at page 369. This was a prosecution under the Valentine anti-trust law, and the indictment charged the defendant with being a trust combination in violation of that law from March 10, 1900, and continuing until March 9, 1906, and further charged violations of said law during that time. Section 4427—4, Revised Statutes, provides that each day of the existence of such unlawful combination constitutes a separate offense, and it was claimed in that case that by reason thereof the indictment was bad for duplicity, and a motion to quash the same was filed by the defendant, and that motion being overruled a plea in abatement was filed, and that was followed by a demurrer, all of which were overruled by the court. The circuit court affirmed this ruling, but reversed for other reasons. The principle involved and the manner of raising the question there is identical with the question raised in this case by the eighth ground of defendant's motion to quash, except that in this case the defendant did not file any demurrer to the affidavit, or any motion in arrest of judgment. It has been held by this court that a motion to quash an indictment addresses itself to the sound discretion of the court, and is never granted, except in very clear cases; but the defendant is left to raise the question in a more formal way by demurrer or a motion in arrest of judgment.

[3] It also has been held that the refusal to grant a motion to quash cannot be regarded as a final decision of the question presented thereby, when the point is one which, if well taken, would be available on demurrer or in arrest of judgment. *Ex parte Bushnell*, 8 Ohio St. 599; *Picket v. State*, 22 Ohio St. 405.

[2] In no case should a motion to quash be sustained, unless the defect or imperfection complained of be of such nature as to tend to the prejudice of the substantial rights of the defendant upon the merits of the case. In the case at bar, if the affidavit had fixed one certain positive date alleging that the crime was committed on or about that date, the state would not have been restricted in its proofs to one particular transaction, but might have proved several transactions at or about the date named, and then on motion have been required to elect at the close of its evidence as to which transaction it would rely upon for conviction. Therefore, even if

the contention of counsel for plaintiff in error be correct, the rights of the defendant could have been fully protected by a motion to require the state to elect, and the overruling of the motion to quash would not be prejudicial error. The offense herein sought to be charged is that the defendant did unlawfully contribute to the delinquency of S., a female child. All the other averments of the affidavit set forth the manner and methods by which he contributed to her delinquency. These acts are not sought to be charged as separate crimes in this affidavit, but rather as a series of acts, by which he committed the crime of contributing to the delinquency of this minor child. The crime as charged in this affidavit is in its nature a continuing one. It is predicated upon the fact that S. is a "delinquent child," and that fact is the first one necessary to be proven, for it is only when she, by his aid, inducement, and encouragement, has become a "delinquent," within the meaning of section 1644, General Code, that the crime of contributing to her delinquency is complete. Were it not for the provisions of the section that each day of such contribution to such delinquency should be deemed a separate offense, then it would not be questioned but that all of his acts prior to the filing of the affidavit, and reasonably proximate in time to the date named in the affidavit, would be taken together as constituting the offense charged. The fact that the statute provides that each day of such contribution to such delinquency shall be deemed a separate offense does not affect the construction of this statute with reference to the first offense of which the defendant may be guilty under its provisions. This defendant might have committed numerous acts that would tend to contribute to her delinquency, yet, if these facts failed in their purpose, he would not be guilty of an offense within the prohibition of section 1654, General Code. It is only when by his aid, inducement, and encouragement she has become a delinquent, within the meaning of the statute, that the crime of contributing to her delinquency is complete. After that each subsequent day of contribution to her delinquency is a separate offense, whether defendant be originally responsible for that delinquency or not.

In charging the first or original offense, the affidavit may properly state the same with a *continuando* covering all that period in which the defendant, by his acts and inducements, has contributed to the final result or condition of delinquency, as defined by the statute. In such case the state would be forever barred from further prosecution of the defendant for any particular act, or any particular day embraced within the time covered by the *continuando*, and all further prosecutions must be confined to later dates. That the state has charged this crime in this way in this particular case is not prejudicial to the plaintiff in error, but rather to his

benefit, and he cannot be heard to complain that the affidavit groups all these acts as constituting one offense, to wit, contributing to the delinquency of this child, instead of charging each of the acts as a separate contribution, and consequently a separate crime.

Nor can the plaintiff in error be prejudiced by reason of the testimony that may be introduced in proof of the charge, by reason of the numerous acts stated, or the period of time covered by the allegations of the affidavit, for, as heretofore observed, if the indictment had named a specific date, evidence could have been offered of different transactions reasonably approximate in time to the date named, and the plaintiff in error's only remedy would be by motion to compel the state to elect as to which one of the transactions it would rely upon for conviction.

The principle for which plaintiff in error contends is undoubtedly the correct one, and is fully established, not only by repeated decisions of this court, but by the decisions of the courts of last resort of practically all the states in the Union. He fails, however, to distinguish this case from the reported cases, but predicates his argument upon the presumption that each of the defendant's acts set forth in this affidavit is necessarily a separate and distinct crime, while it clearly appears from the affidavit that these separate and several acts are not intended to be charged as separate and several crimes, but, on the contrary, the state has charged, and the fact may well be, that it required all of these acts to complete the crime with which he is charged, to wit, not the commission of any or all of the acts, *but contributing to the delinquency of a female minor child by these acts*. If the affidavit sought to charge an offense for contributing to the delinquency of this child, and a separate offense for each subsequent day he contributed to her delinquency after the first offense, then the contention of plaintiff in error would obtain, and the affidavit would be bad for duplicity, but, as it now stands, the affidavit charges but one distinct, separate, and certain crime, and further specifies the manner and method of the commission of this crime by detailing the various acts done by the defendant, which acts in the aggregate, and not separately or severally, resulted in the crime charged.

With reference to the second assignment of error, it is only necessary to say that the question is not presented by this record. So far as appears, the defendant *was* granted a public trial. The right to cross-examine a witness, or to permit the cross-examination of a witness, or to exclude a witness from the courtroom during a trial, are all matters within the sound discretion of the trial court, and a reviewing court will not reverse, except for an abuse of that discretion. It is, therefore sufficient to say with reference to the third, fourth, and fifth assignments

of error that the record does not disclose any such abuse of discretion by the trial court as would justify a reversal of this case.

[4] The record of the conviction of the minor child upon a charge of delinquency was properly admitted in evidence as tending to show that she was a delinquent child, without proof of which the charge must fail, no matter how culpable his acts may be; for if she had not become a delinquent then in the very nature of things he could not have contributed to her delinquency. It is the initial fact to be proven, and the fact to which the evidence offered in the case ought to be first directed, and upon failure of proof of this fact the defendant would have been entitled to his discharge.

It is unnecessary to cover in detail the remaining assignments of error.

This record does not disclose any error prejudicial to the rights of the plaintiff in error, and the judgment of the circuit court is affirmed, and cause remanded for execution.

Judgment affirmed.

SPEAR, C. J., and DAVIS, SHAUCK, and PRICE, JJ., concur.

(84 Oh. St. 399)

STATE ex rel. CLINE, Pros. Atty., v. VAIL et al.

(Supreme Court of Ohio. June 30, 1911.)

(Syllabus by the Court.)

1. CONSTITUTIONAL LAW (§ 43*)—RIGHT TO RAISE CONSTITUTIONAL QUESTIONS—ESTOPPEL.

A party may assert that an unconstitutional act of the General Assembly is a nullity, unless his conduct with reference to the subject of the act has been such that to permit the assertion would place his adversary in a less favorable position than he would have occupied if the act had not been passed.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 41; Dec. Dig. § 43.*]

2. COUNTIES (§ 77*)—OFFICERS—COMPENSATION—FEES.

A county officer who pays into the treasury of the county the fees of his office in excess of the salary affixed thereto by an unconstitutional act may, after the act is adjudged to be unconstitutional, receive and retain fees accruing before, but not paid until after, such adjudication.

[Ed. Note.—For other cases, see Counties, Dec. Dig. § 77.*]

Error to Circuit Court, Cuyahoga County.

Action by the State, on the relation of one Cline, Prosecuting Attorney, against one Vail and others. From a judgment for defendants, plaintiff brings error. Affirmed.

Plaintiff in error brought suit against the defendants in error in the court of common pleas of Cuyahoga county to recover the sum of \$8,602.94. The defendants demurred to his petition, and their demurrers were sustained and final judgment rendered in their

favor. This judgment was affirmed in the circuit court. The relator, alleging his official character, alleges the following facts as the grounds of recovery: That, on the 7th of November, 1893, the defendant Vail was elected clerk of the court of common pleas of Cuyahoga county for the term of three years, and was re-elected to that office, to succeed himself, on the 3d of November, 1896. He entered upon his office by virtue of his first election August 6, 1894, and by virtue of the two elections served until the first Monday of August, 1900. His codefendants were sureties upon his official bond. During his second term of three years, to wit, from the first Monday of August, 1897, to the first Monday of August, 1900, Vail, after paying his clerks and deputies out of the fee fund of said county, was paid and received a salary of \$4,000 per annum out of fees collected and paid by him as clerk into said fee fund, as well as the percentages allowed him by law on all fees collected by him as said clerk, as provided by an act of the General Assembly of the state of Ohio passed April 23, 1896, entitled "An act fixing the compensation of county officers in counties containing a city of the second grade of the first class." In said act it was provided that the fees, etc., including all perquisites of whatever kind, which by law said clerk might receive and collect for any services rendered by him, should be received and collected by him for the sole use of the treasury of said county as public moneys belonging to it, and should at the end of each month be accounted for and paid into the treasury of said county on the warrant of the auditor of the county to the credit of the fee fund created by said act for said county; that, pursuant to said act, Vail paid into the treasury to the credit of the fee fund all fees, costs, etc., received by him during his second term; that during his second term he earned and taxed fees aggregating a large sum, belonging to the county; that on the first Monday of August, 1900, Vail was succeeded by another clerk; and he three years later by another; that during the terms of the said successors the sum of \$8,602.94 was received by them on account of fees accruing, but not collected, during the second term of said Vail, and paid the same over to Vail, which he now withholds from the treasury of the county, and for that amount judgment is prayed for. The case was argued orally for the plaintiff in error by Mr. Meals; for the defendant in error by Mr. Blandin and Mr. Taft.

John A. Cline, Pros. Atty., W. D. Meals and Fielder Sanders, Asst. Pros. Attys., U. G. Denman, Atty. Gen., and John H. Price, for plaintiff in error. Smith, Taft & Arter and Griswold & White, for defendants in error.

SHAUCK, J. (after stating the facts as above). [1, 2] Counsel, by bringing the argu-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

ments directly to the questions in difference, have rendered very material aid in the investigation of the case. The act of April 23, 1896, fixing the compensation of county officers in counties containing a city of the second grade of the first class was, by Vail, supposed to be constitutional, and he acted upon that belief throughout his second term. Later the circuit court of Cuyahoga county, following the decision of this court in the case of State ex rel. Guilbert v. Yates, 66 Ohio St. 546, 64 N. E. 570, held the act to be unconstitutional. Thereupon Vail and his successors, assuming the nullity of the act and the operative force of the general law relating to fees, concluded that the fees which had accrued, but had not been paid, during the official term of Vail should be paid to him, and that course was taken. No controversy exists respecting the proposition that an unconstitutional law is in legal contemplation inoperative, as though it had not been passed. But, on behalf of the plaintiff in error, it is contended that this case comes within the recognized doctrine that parties may so conduct themselves with respect to the subject of unconstitutional legislation that they are estopped thereafter to deny its binding character. Cases of that character are well recognized, and a number of them are collected in the briefs.

The cases all present, in some form or another, equitable grounds of election or estoppel. In the different briefs presented for plaintiff in error, the grounds alleged in this case are variously stated to be election, estoppel, acquiescence, and waiver. The admission that this act was a legal nullity implies an admission that, not only the fees now sued for (that is, those which were collected after the act was declared a nullity), but those which Vail deposited with the county treasurer in excess of his salary during his second incumbency of the office belonged to him. The adjudication that the act was unconstitutional only declared that that was its character. Its character had been fixed from the time it was enacted. These claims of counsel for the plaintiff must therefore be applied to a situation in which, according to the averment of the petition, Vail, after paying his clerks and deputies out of the fee fund of the county, was

himself paid a salary of \$4,000 per annum out of the fees collected and paid by him as clerk into said fee fund; that is, his salary was received out of moneys which, so far as any merit of the statute was concerned, were his own. This consideration, if borne in mind, shows that the case cannot be determined favorably to the plaintiff by the doctrine of election, which involves a choice made, or the necessity of making a choice, between inconsistent rights and gifts. Nor can it be governed by the doctrine of estoppel, which requires that the party by whom it is asserted shall have sustained some detriment by reason of the conduct or representation of him against whom the estoppel is invoked. The express averment of this petition shows that the county parted with nothing in consequence of Vail's temporary recognition of the validity of the salary act. On the contrary, it has profited thereby to the extent of the excess of the fees collected by him during his second incumbency over the salary received by him during that time. The county sustains no loss whatever by reason of Vail's later assertion of the invalidity of the salary act, which, it is conceded, he might have insisted upon from the beginning.

Nor can any inference unfavorable to Vail be drawn from waiver or acquiescence. What he waived was his right to the costs above salary during his second incumbency, and until the salary act was declared unconstitutional, and his acquiescence was in the receipt of such surplus fees during the same time by the county. The fees to which he thus waived his right thereby became blended with the funds of the public; but as to those which are the subject of controversy here the county occupies precisely the same position it would have occupied if the unconstitutional act had not been passed, or the defendant had challenged it immediately upon its passage. There appears to be no reason why the defendant should be deemed to have waived that which he did not waive, or to have acquiesced in that in which he did not acquiesce.

Judgment affirmed.

SPEAR, C. J., and DAVIS, PRICE, JOHNSON, and DONAHUE, JJ., concur.

(24 Ohio St. 424)

SCHEINESOHN v. LEMONER.

(Supreme Court of Ohio. June 30, 1911.)

(Syllabus by the Court.)

1. ATTORNEY AND CLIENT (§ 134*)—EMPLOYMENT—BREACH OF CONTRACT—MEASURE OF DAMAGES.

Where an attorney at law accepts an account for collection with an agreement that he is to have as compensation 25 per cent. of the amount collected, and the client, without sufficient cause, and without giving the attorney a reasonable time to make collection, wrongfully takes the account out of the hands of the attorney, a right of action for such breach of contract accrues at once in favor of the attorney, and, upon establishing by proof that the account was a collectible claim, he is entitled to recover damages. The measure of damages is not what is finally collected on the claim by some one else, but is the rate of compensation fixed by the contract.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 301-304; Dec. Dig. § 134.*]

2. ATTORNEY AND CLIENT (§ 167)—COMPENSATION OF ATTORNEY—ACTION—INSTRUCTION.

In a suit to recover generally for attorney's fees for professional services claimed to have been rendered by plaintiff for defendant, it is error for the court to instruct the jury that if they "find the plaintiff rendered services for defendant at his request, and the service was of value to him you can take into consideration in that matter the nature of the service, and benefits that he has derived therefrom, or might have derived therefrom."

[Ed. Note.—For other cases, see Attorney and Client, Dec. Dig. § 167.*]

(Additional Syllabus by Editorial Staff.)

3. APPEAL AND ERROR (§ 671*)—RECORD—QUESTIONS PRESENTED FOR REVIEW.

Though the bill of exceptions does not contain, nor purport to contain, all the evidence given at the trial, it does not follow that there is nothing in the record that can be reviewed; enough appearing in the bill of exceptions to raise questions of law which are sought to be raised.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2867-2871; Dec. Dig. § 671.*]

4. ATTORNEY AND CLIENT (§ 167*)—ACTIONS FOR COMPENSATION—INSTRUCTIONS.

In an action by an attorney for compensation, where the answer admits that some services were rendered, but not the services claimed by plaintiff to have been rendered, a statement in the instructions that there is no question but that the services were rendered is erroneous.

[Ed. Note.—For other cases, see Attorney and Client, Dec. Dig. § 167.*]

5. APPEAL AND ERROR (§ 923*)—REVIEW—PRESUMPTIONS—INSTRUCTIONS.

Where a petition for compensation of an attorney is so general as to give no information as to plaintiff's claim, other than that he rendered service as an attorney of the value of \$300, and the answer puts in issue the plaintiff's demand and puts plaintiff to his proof, it is not to be assumed, in support of a charge that there is no question but that the services were rendered, that there was evidence given at the trial as to any admission by defendant inconsistent with the answer.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3749-3754; Dec. Dig. § 923.*]

6. ATTORNEY AND CLIENT (§ 165*)—ACTION FOR COMPENSATION—ISSUES AND PROOF.

Proof of breach of contract by a client by which an attorney was prevented from rendering service is a variance from a petition demanding compensation for services rendered.

[Ed. Note.—For other cases, see Attorney and Client, Dec. Dig. § 165.*]

Error to Circuit Court, Hamilton County.

Action by one Scheinesohn against one Lemonek. From a judgment for plaintiff, defendant brings error. Reversed and remanded.

The controversy out of which the present proceeding in error arises was commenced in the court of a justice of the peace of Hamilton county, by the defendant in error against the plaintiff in error, and thence appealed to the court of common pleas of that county. The petition on appeal declared in general terms upon a claim for professional services alleged to have been rendered as an attorney at law of the value of \$300, without stating what the services were. The answer admitted that defendant below employed plaintiff below to do some work for him for which he agreed to pay plaintiff \$1.50, which he offered to pay and is willing to pay, but which plaintiff refused to accept, and denied that defendant is indebted to plaintiff in any other sum. The allegations of the answer with respect to agreement that defendant was to pay plaintiff the sum of \$1.50, and that such a sum was offered, were denied by the reply.

At the trial evidence was given by plaintiff tending to show that services were rendered by him in three matters, one known as the Glassmeyer matter of the value of \$25, the same relating to the completion of a building contract. Another known as the Toohy matter, the evidence tending to show that a claim for \$260 against Sarah Toohy was placed in plaintiff's hands for collection by defendant, but that the same was taken out of his hands by defendant before plaintiff had collected any of said sum, and defendant had agreed to pay plaintiff 25 per cent. of the amount he should collect. In the third matter, known as the Adams matter, plaintiff's evidence tended to show that plaintiff had rendered services in relation to a certain alleged blackmailing letter received by defendant; that he had consulted with defendant for several hours on different days, and had obtained an affidavit from the writer exonerating defendant.

On defendant's part evidence was given tending to show that the only service rendered by plaintiff in the Glassmeyer matter was to write a letter, for which he offered plaintiff a dollar, but the same was refused on the ground that defendant was a regular client. Also testimony tending to show that in the Toohy matter plaintiff did not collect any of the amount due, and that he gave up

the account and refused to collect it. Also, that in the Adams matter, he had consulted plaintiff only in reference to a collection demanded from Adams, a letter having been received by defendant to the effect that if credit were not given the writer, trouble would be made defendant; that defendant did not employ plaintiff to secure any affidavit from Adams, but that plaintiff suggested the obtaining of a statement from Adams which he said would cost \$1, and 40 cents notary's fee; that defendant offered plaintiff \$1.50, but plaintiff then demanded \$500.

The jury returned a verdict for the plaintiff below in the sum of \$186. Judgment was thereupon entered for plaintiff which was affirmed by the circuit court. Scheinesohn brings error.

Hoffman, Bode & Le Blond, for plaintiff in error. Frank Seinsheimer, for defendant in error.

SPEAR, C. J. (after stating the facts as above). [3] Objection is made by defendant in error that the bill of exceptions in the record does not contain and does not purport to contain all the evidence given at the trial, and that therefore there is nothing in the record that a reviewing court can review. We think the conclusion does not follow. There appears to be enough in the bill of exceptions to raise the questions of law which are sought to be raised, although the bill is not of such character as to warrant a review of the case upon the evidence.

The principal error urged in this court relates to the charge of the court to the jury. Among other instructions the court gave to the jury the following: "As there is no question made as to the plaintiff's right to sue or that the services were rendered you will direct your attention as to what if any agreements were made between the plaintiff and the defendant as to the amount of compensation for the first and third items, and as to the second item as to whether the plaintiff abandoned the collection or whether the defendant took it out of his hands. If you believe from the evidence that the plaintiff performed for, or rendered to, the defendant legal services, and that there was an agreement between them either before or after they were performed as to the price of compensation for such services, then the plaintiff has a right to recover for such services at the agreed price and no other. If the defendant took a claim out of the plaintiff's hands without giving him a reasonable opportunity to collect the same, he is entitled to recover the agreed price on the sum collected by the defendant or any other person. If a client employs an attorney for a specific action, that is an entire contract. And if you find that the attorney broke the contract himself or acted in such a manner as to make the relation of attorney and client no longer possible, you must find that the attorney is

not entitled to any compensation for such items of service. On the other hand, if you find that the plaintiff rendered services to the defendant at his request, and that that service was of value to him, you can take into consideration in that matter the nature of the services or benefits that he has derived therefrom or might have derived therefrom; also the amount involved in fixing the amount if you find that the plaintiff is entitled to recover."

[4] In at least three particulars we think the foregoing embodies erroneous instructions. The record shows nothing to justify the statement to the jury that there is no question but that the services were rendered. The answer admits that *some* services were rendered, but it does not admit that *the* services claimed by the plaintiff to have been rendered were in fact rendered. The petition is so general in its terms as to give no information respecting plaintiff's claim other than that he rendered service as an attorney of the value of \$300. The answer is scarcely more definite, but it is definite enough to put in issue the demand of the plaintiff and put the plaintiff to his proof.

[5] It is not to be assumed, therefore, in support of the charge, that there was evidence given at the trial as to any admission by defendant with respect to the rendering of service inconsistent with the answer. Therefore the court should not have said to the jury that there was no question made that the services were rendered.

[6] 2. Referring to the pleadings and the statement in the bill as to the evidence, it is clear that the testimony respecting the Tooby claim was a manifest variance from the petition, that pleading being a statement of a demand for services rendered, and the testimony respecting the Tooby claim tending to support a declaration for a breach of contract by which plaintiff was prevented from rendering service. Such evidence was clearly incompetent, but the question of error as to that feature of the case seems not to have been saved. It is adverted to here because it seems to throw light upon the entire proceeding.

[1] The court's instruction that if the defendant took a claim out of the plaintiff's hands without giving him a reasonable opportunity to collect the same he is entitled to recover the agreed price on the sum collected by the defendant or any other person is not, we think, an accurate statement of the law. The case made by the record presents a new question, one not exactly parallel by any case to which our attention has been called. The case is differentiated from many to be found in the books where attorneys have been discharged after entering upon the work by the fact that in this case no service had been rendered while in the other class of cases the attorney had rendered service and was allowed to recover on a quantum meruit.

It is held in *French v. Cunningham*, 149 Ind. 632, 49 N. E. 797: "It is well settled that, where the complete performance of an attorney's service had been rendered impossible, or otherwise prevented, by the client, the attorney may as a rule recover on a quantum meruit for the services rendered by him"—citing numerous authorities. Also, that, "if the compensation agreed upon is contingent on the successful result of the suit, the measure of damages is not the contingent fee, but the reasonable value of the services rendered"—citing additional authorities. The court adds: "But, whatever may be the rule as to other contracts, the rule as to contracts employing attorneys is, as we have shown, that if the same is broken by the client the attorney may recover on a quantum meruit for the reasonable value of the services, or he may sue on the contract and recover damages for its breach." The latter observation seems to have in view the loss by the attorney of whatever value there is in the contract, and to indicate that he may, by a suit for the breach, recover whatever damage he can prove he suffered including the loss of a valuable contract.

The question we have is by no means without its difficulties. It seems, as before stated, to be practically new so far as the books are concerned, although there are cases which possibly reach it in principle. It is not proposed to enter upon a review of all the cases treating of the general question, but a brief reference to a few may be useful.

Hochster v. De Latour, 20 E. L. & Eq. 157, was an action by a courier on a contract of employment for three months beginning June 1, 1852, for specified monthly wages. Averment of readiness and willingness to enter upon the employment and perform the service. Breach that defendant, before said first of June, discharged the plaintiff and wholly broke and put an end to his promise. Held, that after the refusal by defendant plaintiff was entitled to bring action immediately, and that the jury might take into account all that had happened to the day of trial to increase or mitigate the loss.

Howard v. Daly, 61 N. Y. 362, 19 Am. Rep. 285, approaches our case closely. The plaintiff was an actress and made a contract with Daly, a theatrical manager, to perform at the Fifth Avenue Theater, for the season commencing September 15, 1870, and ending July 1, 1871, at a stipulated salary per week. She was ready and willing to perform on her part, but the defendant repudiated the contract and refused to allow plaintiff to enter upon the service. It appeared that she had endeavored to obtain like employment at other theaters, but failed. The opinion is exhaustive and able, reviewing a great number of decisions. The holding is that plaintiff's remedy was not an action for wages, but for damages for breach of contract, and that the damages

were prima facie the amount of the wages for the full term.

In *Baldwin v. Bennett*, 4 Cal. 392, which was for breach of contract with an attorney for legal services for an agreed compensation, where the client settled the claim without knowledge or consent of plaintiff, a recovery for the contract price was had, the court holding: "The general rule as to the measure of damages, in an action for the breach of contract, is the actual loss sustained. But where from the nature of the contract no possible mode is left of ascertaining the damage, we adopt the only measure of damages which remains, and that is the price agreed to be paid."

Coffee v. Melggs, 9 Cal. 363, was a suit brought to recover damages for the breach of an agreement to employ plaintiff to make certain alterations on a steam engine, he to furnish all material; the compensation to be \$1,000 provided the alterations produced the desired result; otherwise nothing. In the progress of the work the defendant stopped it. Plaintiff had judgment for the amount named in the contract. This judgment was affirmed, the court following the case in 4 Cal., supra, and holding that: "Where, from the nature of the contract it is not practicable to ascertain the amount of damages sustained by a breach of contract, the measure is the price agreed to be paid."

Kersey v. Garton, 77 Mo. 645, was a suit for attorney's fees. Plaintiff was employed by defendant to bring suit for certain land for a fee contingent upon success. The suit was brought and was being prosecuted when defendant refused to have the cause proceed. Plaintiff had judgment. This judgment was affirmed, the court holding that: "If an attorney is prevented by his client from completing his employment, he will be entitled to recover his fees as if the contract was fully performed."

Webb v. Trescony, 76 Cal. 621, 18 Pac. 796, was for attorney's fees. Plaintiff was employed to defend certain suits at an agreed compensation of \$950. Plaintiff appeared and did all things necessary for over a year when defendant discharged him. Plaintiff recovered \$950 and costs. This was affirmed, the court following earlier cases, and holding that: "When an attorney at law is employed to defend certain suits at an agreed price, and is discharged from employment without cause before the suits are concluded, having fully performed the contract upon his part until discharged, the measure of damages for breach of the contract of employment is the full contract price agreed upon by the parties."

After considerable reflection, and search of authorities, the majority of the court is led to the conclusion that a cause of action accrued to plaintiff, for breach of contract, so soon as the claim was wrongfully taken

out of his hands. If, then, at the trial, he established that the account was a collectible claim, a right to recover followed, and that right did not depend at all on whether the claim was afterward in fact collected by some one else. Proof of such fact might establish the collectibility of the claim, but it was not essential to plaintiff's right to recover. Then, what was the measure? No rule seems wholly free from objection. The attorney had performed no service; hence the rule of quantum meruit does not apply; nor does it appear that the defendant had been in any way benefited. But the value of the attorney's anticipated services had been fixed by the agreement of the parties. In the absence of any other ascertained rule of damage why may not this sum be taken as the one nearest in contemplation of the parties, and the one nearest a fair solution? The majority think it is, and that a recovery on that basis, properly ascertained, might attain a result not involving injustice and at the same time afford reasonable recompense to the party who, by the wrong of the other party, has lost the advantage of a valuable contract. Contracts such as the one before us are in their nature dissimilar from the ordinary contract of employment. Peculiar and confidential relations are often formed, and it not infrequently happens that in the relations thus brought about the attorney obtains private information respecting his client's business which he may not

afterwards divulge. This consideration would prevent in some cases which might be easily supposed, the discharged attorney from taking employment from the opposite party. Such instances would be rare, still they occasionally occur, and a rule of damage which would entirely ignore this consideration would hardly meet with general approval. These considerations, and the fact of the impracticability of ascertaining a satisfactory measure of damage sustained by the attorney from such breach differentiates the case presented from that involved in a case of ordinary employment, and it is believed, justify fixing the measure of damages at the rate of compensation agreed to be paid.

[2] 8. The instruction that in case the jury should find that the plaintiff was entitled to recover for services, the jury might take into account the benefits defendant might have derived therefrom, is also erroneous. This instruction introduces the element of speculation—guesswork—that is, and is necessarily, misleading and prejudicial. *Hajish v. Payson*, 107 Ill. 365.

The judgments below will be reversed, and the cause remanded.

Reversed.

DAVIS, PRICE, JOHNSON, and DONAHUE, JJ., concur. SHAUCK, J., concurs in the reversal of the judgment and in the second paragraph of the syllabus.

(84 Oh. St. 400)

BYERS v. MERIDIAN PRINTING CO. et al.

(Supreme Court of Ohio. June 30, 1911.)

*(Syllabus by the Court.)***1. LIBEL AND SLANDER (§ 38*)—PRIVILEGED COMMUNICATIONS—PAPERS FILED IN COURT.**

The publication of pleadings or papers which have been placed on the files of a court, when the court has not yet acted thereon, is not privileged, even though the publication is made in good faith and without malice (The Cincinnati Gazette Co. v. Timberlake, 10 Ohio St. 549, 78 Am. Dec. 285, approved and followed).

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 117-123; Dec. Dig. § 38.*]

2. CONSTITUTIONAL LAW (§§ 206, 321*)—LIBEL AND SLANDER (§ 1½*)—DUE PROCESS OF LAW—PRIVILEGES AND IMMUNITIES OF CITIZENS—BURDEN OF PROOF.

The amendment and supplement to section 5094, Revised Statutes of Ohio, passed April 16, 1900, 94 O. L. 295, changing the presumption and burden of proof as to malice, is unconstitutional and void.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 950-955; Dec. Dig. §§ 206, 321.* Libel and Slander, Dec. Dig. § 1½.*]

Donahue, J., dissenting in part.

Error to Circuit Court, Cuyahoga County.

Action by one Byers against the Meridian Printing Company and others. From a judgment for defendants, plaintiff brings error. Reversed and remanded.

The plaintiff in error was plaintiff in the court of common pleas in which he filed his petition alleging that the defendants had published in a newspaper owned and controlled by them, viz., the Cleveland News, a libelous statement, which was in substance that warrants for the arrest of the plaintiff on the charge of perjury together with warrants for other persons for other felonious crimes had been sworn out before a justice of the peace by one L. A. Damschroeder. It was further stated in said article that Damschroeder asserts that the plaintiff committed perjury in swearing to the affidavit by which suit was brought, etc. The plaintiff's petition further alleged that he is an attorney qualified to practice in the courts, and that he is the person referred to in this article, and that so far as it refers to the plaintiff the language complained of is viciously false and untrue, and is calculated to injure the plaintiff in his reputation as a man, as a citizen, and in the practice of his profession and to bring him into public scandal, infamy and disgrace. He charges that he has been disgraced and humiliated, and his business has been injured thereby, for all of which he claims damages.

The defendants made a joint answer setting up three defenses. The first defense, after admitting the formal allegations of the petition and the publication of the article complained of, denies all and singular the

averments of fact in said amended petition contained saving and excepting the averments hereinbefore expressly admitted to be true. In their second defense the defendants set forth a certain affidavit made by one Lawrence A. Damschroeder charging the plaintiff with perjury, and setting forth a warrant alleged to have been issued by the justice of the peace with whom said affidavit was filed. And they further say that they thereupon caused the publication complained of to be made, and that the same is a fair and accurate report of the said proceedings had before the said justice of the peace. Further answering, the defendants say that they made said publication in good faith, relying on the said affidavit and warrant and said proceedings before the said justice of the peace, and they deny that in making said publication they were actuated by any malice whatsoever toward the plaintiff. For their third defense the defendants say that a reporter representing the defendant, the Meridian Printing Company, went to the office of the justice of the peace referred to in said publication and made inquiry as to whether or not a warrant had in fact been issued for the arrest of the plaintiff; that the said justice informed the reporter that the warrant had been issued, and that the reporter thereupon requested to see the files in said case, and the same were exhibited to him and examined by him, and he found in the file envelope an affidavit charging the plaintiff with perjury, and otherwise making charges against him as set forth in said publication; that the reporter also found in said file envelope a warrant for the arrest of the plaintiff duly signed by the justice of the peace, and that thereupon acting upon such examination and information he prepared the publication complained of which the defendants thereupon caused to be published. Defendants further alleged that at the time of the publication they believed and had reasonable grounds to believe that the statements contained in said publication were true; that they made the same in good faith and believed it to be by reason of the aforesaid inquiries a fair and accurate report of the proceedings had before the said justice of the peace. They further say as a part of said third defense that thereafter the plaintiff demanded that the defendants make retraction of the matter contained in said publication so far as it related to him, the said plaintiff, and that in response to this demand for a retraction, and acting on information from the plaintiff and statements made by him, without further investigation, and solely with desire to set right a possible wrong which they may have done the plaintiff, they promptly published a full and complete retraction of the same in as public a manner and as conspicuous a place as that in which they had made the original publication. A copy of

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Index.

this retraction is given. And they deny, further, that in making the said publication they were actuated by any malice whatever toward the plaintiff.

Demurrers to each one of the separate defenses filed by the plaintiff were overruled by the common pleas court. The plaintiff not desiring to plead further final judgment was entered for the defendants. To this judgment the plaintiff filed his petition in error in the circuit court which affirmed the judgment of the court of common pleas and this proceeding in error is prosecuted to reverse the judgment of both the lower courts.

Friebolin & Byers and P. L. A. Lieghley, for plaintiff in error. Gage, Wilbur & Wachner, for defendants in error.

DAVIS, J. (after stating the facts as above). We regard it as unnecessary to consider whether the demurrer to the first defense stated in the answer of the defendants should have been sustained. The demurrer to the first defense having admitted the facts pleaded for the purposes of the demurrer only, when the demurrer was overruled the issue made by the petition and the answer remained for trial; and therefore the court of common pleas erred in rendering judgment against the plaintiff on the pleadings, and the circuit court erred in affirming that judgment. That is the necessary result in the view which we take of the third defense.

[1] The second defense is evidently drawn with the intention of raising the point that the publication was one of a qualified privilege, and it is frankly admitted by counsel that this defense is irreconcilable with the ruling of this court in *Cincinnati Gazette Co. v. Timberlake*, 10 Ohio St. 549, 78 Am. Dec. 285, and accordingly a vigorous effort is made to show that the doctrine of that case is wrong and should now be overruled. We shall not undertake to review the cases which counsel have brought to our attention from other jurisdictions. It is sufficient to say that few, if any, of them are relevant to the precise facts of this case, and none of them is convincing to us that the case of *Cincinnati Gazette Co. v. Timberlake*, supra, was wrongly decided. Whatever may be said as to the authority, at the present time, of cases cited by the court in the opinion, the reasons given seem to be sound and even more applicable to the case now in hand than the one then under consideration. We quote from the opinion: "But in this case there is no claim that the charge against the plaintiff below was, in fact, true. The defense rests wholly on the claim of privilege. And if the publisher of a newspaper may, in virtue of his vocation, without responsibility, publish the details of every criminal charge before a police officer, however groundless, and whether emanating from the mistake or

the malice of a third party, then must private character be, indeed, imperfectly protected. Such publications not only inflict an injury of the same kind with any other species of defamation, but their tendency is also to interfere with the fair and impartial administration of justice, by poisoning the public mind and creating a prejudice against a party, whom the law still presumes to be innocent." What follows this quotation in the opinion might well be adopted, *mutatis mutandis*, in the present case.

The publication was not a fair and accurate report of any judicial "proceeding" or, still less than the *Timberlake* Case, of any purely "ex parte proceedings," for in that case a warrant had been issued and an arrest had been made, although the accused was discharged on the very day of the publication. In this case no action had been taken by the justice of the peace, no warrant had been "issued," and no arrest had been made. It appears from the alleged retraction which is set out in the answer that the affidavit had not been sworn to, and that the justice convinced the complainant that he could not maintain an action against the plaintiff, whereupon he took the affidavit away without having sworn to it. We cannot conceive of any process of reasoning, nor of any considerations of public policy, which would justify such a publication as this one was, under the facts of this case, as a privileged publication, in the face of the well-supported doctrine that there is no privilege extended to the publication of papers which have been merely filed in court and on which there has been no judicial action. It was thus expressed in one case: "There is no rule of law which authorizes any but the parties interested to handle the files or publish the contents of their matters in litigation. The parties, and none but the parties, control them. One of the reasons why parties are privileged from suit for accusations made in their pleadings is that the pleadings are addressed to courts where the facts can be fairly tried, and to no other readers. If pleadings and other documents can be published to the world by any one who gets access to them, no more effectual way of doing malicious mischief with impunity could be devised than filing papers containing false and scurrilous charges, and getting those printed as news. The public have no rights to any information on private suits till they come up for public hearing or action in open court; and, when any publication is made involving such matters, they possess no privilege, and the publication must rest on either nonlibelous character or truth to defend it. A suit thus brought with scandalous accusations may be discontinued without any attempt to try it, or on trial the case may entirely fall of proof or probability. The law has never authorized any such mischief. In *Scripps v. Reilly*, 35 Mich. 371, 24 Am. Rep.

575; *Id.*, 38 Mich. 10, this court found it necessary to decline accepting the doctrine of privilege in such cases." *Park v. Free Press Co.*, 72 Mich. 560, 568, 40 N. W. 731, 734, 1 L. R. A. 599, 16 Am. St. Rep. 544. The same distinction was recognized and the doctrine applied in *Cowley v. Pulsifer*, 137 Mass. 392, 50 Am. Rep. 318; *Sutton v. Belo & Co.* (Tex. Civ. App.) 64 S. W. 686; *Barber v. St. Louis Dispatch Co.*, 3 Mo. App. 377; *American Pub. Co. v. Gamble*, 115 Tenn. 663, 90 S. W. 1005; *Stuart v. Press Pub. Co.*, 83 App. Div. 487, 478, 479, 82 N. Y. Supp. 401. We need not pursue the discussion of this subject further. The demurrer to the second defense should have been sustained.

[2] We come now to the consideration of a question of more serious import. The third defense was drawn under Revised Statutes, § 5094, as amended and supplemented by an act passed April 16, 1900; 94 Ohio Laws, 295. The effect of the amendment, as claimed by the defendants and upon the construction adopted by the United States Court of Appeals in *Post v. Butler*, 137 Fed. 723, 71 C. C. A. 309, is that "it is optional with the person libeled to stand upon his rights under the old law, or to waive a part by demanding and accepting a retraction under the law as amended." The federal court could see no way to sustain the statute as constitutional, except by adopting the construction above given; and we are of the opinion, for reasons that will appear, that even that construction, obviously resorted to for the purpose of saving the statute, will not relieve it from the taint of unconstitutionality.

The constitutional guaranties are that "every person, for an injury done him in his land, goods, person or reputation, shall have remedy by due course of law." Const. Ohio, art. 1, § 16, and, "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law." Const. U. S. Fourteenth Amendment. In *Park v. Free Press Co.*, supra, the court say: "There is no room for holding in a constitutional system that private reputation is any more subject to be removed by statute from full legal protection than life, liberty, or property. It is one of those rights, necessary to human society, that underlie the whole social scheme of civilization. It is a thing which is more easily injured than restored, and where injury is capable of infinite mischief. And, on the other hand, it is one where the injury is frequently, and perhaps generally, aggravated by malice. The law has therefore always drawn distinctions between intentionally false and wicked assaults on character, and those which were not actually designed to create a false impression, although necessarily tending to injure reputation if false in fact, but it has made both actionable."

In *McGee v. Baumgartner*, 121 Mich. 287, 80 N. W. 21, the court approved and followed *Park v. Free Press Co.*, holding that "The right to recover in an action of libel for damages to reputation, cannot be abridged by statute."

Now in what respect, if any, are the rights and privileges of the plaintiff abridged by the statute? Or, in what respect, if any, is he deprived of his remedy by due course of law? We confine ourselves to the consideration of the statute as construed in *Post v. Butler*, supra, because this defense is planted on *Post v. Butler*, and because if the statute as therein construed cannot be sustained as constitutional, it is conceded in that case to be unconstitutional. "Due process of law in each particular case means such an exertion of the powers of government as the settled maxims of the law permit and sanction, and under such safeguards for protection of individual rights as those maxims prescribe for the class of cases to which the one in question belongs." *Cooley Const. Lim.* § 356. Due process of law has also been defined to be, "Law in its regular form of administration through courts of justice." 2 Kent, Com. 10. It is obvious that it does not mean that anything which the Legislature may declare without regard to constitutional limitations is due process of law; for that would abrogate all guaranties of the Constitution. By settled principles of the common law, the publication of defamatory matter, which is false in fact and not privileged, is presumed to be malicious—that is, the plaintiff may recover without proving malice—and the burden is upon the defendant to disprove it. This is the substantive law, and not mere matter of procedure. By the common law, also, one who is injured by such a publication may, by natural right, demand an apology or retraction, but unless it were accepted as a satisfaction it would not be a complete defense, and would only be considered in mitigation of damages. This, again, is substantive law and not a matter of formal procedure. These rules have always been regarded as primary and essential in the law of libel for protection of reputation not only for injury which may be measured by money values, but for that "Intangible but fatal influence which suspicion, helped by ill will, spreads beyond recall or reach by apology or retraction." And therefore they are to be regarded as part of the "remedy by due course of law" of which the Constitution declares that no person shall be deprived. These rights the Legislature did not give to the libeled person and the Legislature cannot take them away. We are not disposed to question, at least for our present purpose we will not, that a citizen may waive a constitutional right; but we do deny that he can be compelled to waive his right, or that he can be arbitrarily subjected to an option to stand upon one right

under penalty of losing another. Under this statute the plaintiff is given the choice of resorting to the courts without the right of demanding a retraction, or of demanding a retraction, and, if given, being limited in his right of recovery; and if he chooses either course, he must do it at his own peril and without any recompense whatever. Recurring again to the opinion in *Park v. Free Press Co.*, supra, "it is not competent for the Legislature to give one class of citizens legal exemption for wrongs not granted to others; and it is not competent to authorize any person, natural or artificial, to do wrong to others without answering *fully* for the wrong."

It was said in the argument that the circuit court in disposing of this case said that there could be no doubt that the Legislature had the power to change the presumption as to malice. The constitutional power of the Legislature to prescribe the presumptions of evidence and to change the rules of evidence was recently considered by this court in

Williams & Thomas Co. v. Preslo, 95 N. E. 900.

That was a case in which property interests were concerned, and it was held that the provisions of the Constitution which require that laws regulating rights in property shall operate generally and equally, extend to statutes which prescribe presumptions and rules of evidence by which those rights are enforced. In other words, the guaranties of the Constitution, which are the same for the protection of property and reputation, shall be regarded by the Legislature as well in passing laws relating to evidence and remedies as to substantive law.

The demurrer to the third defense should have been sustained; and the judgments of the circuit court and court of common pleas are reversed and cause remanded.

SPEAR, C. J., and SHAUCK, PRICE, and JOHNSON, JJ., concur. DONAHUE, J., concurs in the first proposition of the syllabus, but does not concur in the second.

(34 Oh. St. 335)

LANNING et al. v. BROWN.

(Supreme Court of Ohio. June 30, 1911.)

*(Syllabus by the Court.)***INFANTS (§ 81*) — LIMITATION OF ACTIONS (§ 72*)—CONTRACT OF INFANT—DISAFFIRMANCE—SUSPENSION OF LIMITATION.**

On the 12th day of March, 1888, B., an infant 18 years of age, executed deeds conveying his interests in certain real estate situate in this state to grantees therein named, who did not file such deeds for record until the year 1909. B. arrived at majority on the 24th day of October, 1890, and thereafter did no act to ratify or confirm said conveyances; but, on the contrary, brought suit, on the 17th day of April, 1909, to obtain partition of said real estate, in which action he also prayed that the deeds he had executed be canceled.

Held, that B.'s action so commenced operated to disaffirm the deeds, and it was not barred by the 21-year statute of limitations. He is entitled to partition and the other relief prayed for.

[Ed. Note.—For other cases, see *Infants*, Cent. Dig. §§ 48, 50-63; Dec. Dig. § 31.* *Limitation of Actions*, Cent. Dig. §§ 390-398; Dec. Dig. § 72.*]

Error to Circuit Court, Morrow county.

Action by Victor E. Brown against Satira M. Levering and others for partition and to cancel deeds; one Lanning being subsequently brought in as a defendant. From a judgment for plaintiff, defendants bring error. Affirmed.

On the 17th day of April, 1909, the defendant in error filed his petition against Satira M. Levering et al., asking partition of certain real estate, part of which is situated in Knox county and part in Morrow county.

After the defendants were brought in, the petition was amended by making the plaintiff in error party defendant, and also alleging that the plaintiff, Victor E. Brown, while a minor 18 years of age, had joined some of the defendants in executing deeds, by the terms of which he had conveyed his interest in said lands to the grantors of some of said defendants, which deeds, made during his minority, he prayed to have canceled by decree of the court, and that partition be ordered as originally prayed for.

The defendants set up, in two forms, the statute of limitations as a bar to the action. The reply denied the facts alleged to constitute the statutory bar.

The case having reached the circuit court on appeal, that court found the following facts, in which the entire case is developed.

"That Joseph Levering died intestate in the year 1871, seised of the lands in the amended petition described, leaving Shannon Levering, Charles Levering, Edward Levering, Calvin Levering, and Lurana Levering Brown his only children and only heirs at law.

"In the year 1873, the said Edward Levering and Calvin Levering, being in possession of said real estate as tenants in common, purchased the shares of said Shannon

Levering and Charles Levering, and continued in possession as cotenants with said Lurana Levering Brown until her death; that she died in the year 1885, leaving Edmond W. Brown, her husband, and two children, Victor E. Brown, the plaintiff, and Lillie B. Hill, her only heirs at law; that on the 12th day of March, 1888, the said Edmond W. Brown, Victor E. Brown, and Lillie B. Hill, by two deeds executed in due form, conveyed their interest in said lands to Edward and Calvin Levering; that said Victor E. Brown at the date of the execution of said deeds was a minor 18 years of age, and received no consideration for said conveyance; that he attained his majority on the 24th day of October, 1890; that said deeds were not filed for record until the year 1909, and when they were so filed for record he had no knowledge of their existence, or recollection of having signed the same; that he filed his petition in this action on the 17th day of April, 1909, within 21 years after he arrived at the age of majority, but more than 21 years after said deeds had been executed by him; that said Edmond W. Brown died prior to the commencement of this suit; that said Edward and Calvin Levering continued in possession and exercised control over said lands by living upon, farming, and keeping the same in repair, and paying the taxes thereon, until the death of said Edward Levering; that he died intestate in the year 1893, without issue, leaving Satira M. Levering, his widow, and said Shannon Levering, Charles Levering, Calvin Levering, Victor E. Brown, and Lillie B. Hill, his only heirs at law.

"That in the year 1896 said Calvin Levering intermarried with said Satira M. Levering, widow of said Edward M. Levering, deceased, and died in the year 1904 intestate, and without issue, leaving said Satira M. Levering, his widow, and the said Lillie B. Hill, Victor E. Brown, Milton Levering and Homer Levering, his only heirs at law.

"The said plaintiff, Victor E. Brown, lived within 1½ miles of said lands from the time of his mother's death until the commencement of this suit, and frequently visited at the Levering home, and was on friendly terms with all of them, and frequently assisted said Satira M. Levering, upon her request, in the management of said lands, by his counsel and advice. That said Victor E. Brown made no demand or effort to assert his rights as to the ownership of said lands, or of any interest in them, until the commencement of this suit, April 17, 1909."

As conclusion of law, the court found "that the possession of said Edward and Calvin Levering during their lifetime was not adverse to plaintiff, and that said J. W. Lanning has not held the same by adverse possession a sufficient length of time to perfect his title against the said plaintiff; that

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

this action is not barred by the statute of limitations; that said Victor E. Brown never ratified his said deeds; that he disaffirmed the same by the bringing of this action, and is entitled to have the same set aside and to have partition as prayed for." The court ordered partition to be made, setting off to Victor E. Brown one-tenth part, and in addition thereto that he has an estate of seven-eighths, subject to life estate of Satira M. Levering.

The defendants excepted and prosecute error in this court to reverse the judgment entered on said findings of fact.

L. K. Powell, for plaintiffs in error. Harlan & Wood and M. W. Spear, for defendant in error.

PRICE, J. (after stating the facts as above). It is important to keep in mind at least three dates—dates of events which are vitally involved in the consideration of this case. The deeds which were executed by Victor E. Brown for land he desires partitioned were executed on the 12th day of March, 1888, when he was 18 years of age. He arrived at his majority on the 24th day of October, 1890. The action now under review was commenced by him on the 17th day of April, 1909.

If he can now be relieved from the effect of the deeds made during his infancy, there is no doubt that he is entitled to partition as prayed for, because such deeds are the only legal obstacle to his obtaining that relief.

The conveyances having been made during the infancy of the grantor, three or more questions arise: (1) Did the minor grantor, after arriving at majority so confirm or ratify the conveyances that he is bound by them? (2) Has he disaffirmed the conveyances within proper time and in a legal manner? (3) Did he commence this action within the time allowed by law for that purpose? Or was his right of action barred by the statute of limitations on the 17th day of April, 1909?

Looking at the findings of fact, we see nothing to show a ratification or confirmation of the conveyances, after Brown arrived at majority. All that relates to that subject is contained in the following finding: "That said plaintiff, Victor E. Brown, lived within 1½ miles of said lands from the time of his mother's death until the commencement of this suit, and frequently visited at the Levering home, and was on friendly terms with all of them, and frequently assisted said Satira M. Levering, upon her request, in the management of said lands, by his counsel and advice. That said Victor E. Brown made no demand or effort to assert his rights as to the ownership of said lands, or of any interest in them, until the commencement of this suit, April 17, 1909."

We take this finding to mean that Brown was a near neighbor to the lands occupied by

some of the grantees, with whom he was on friendly terms, and whom he frequently visited, and that he gave advice to the aged widow about the management of said lands. One other finding should be remembered, which is that the grantees of Victor E. Brown kept the deeds from record until the year 1909, and "that when they were so filed for record Brown had no knowledge of their existence, or recollection of having signed them." It seems to be the law that to confirm or ratify one must have knowledge of the matter or transaction to be confirmed or ratified, and that silence, or even acquiescence, does not amount to such ratification.

In *Tucker v. Moreland*, 10 Peters, 75, 76, 9 L. Ed. 345, it is said: "Without undertaking to apply this doctrine to its fullest extent, and admitting that acts in pais may amount to a confirmation of a deed, still we are of opinion that these acts should be of such a solemn and unequivocal nature as to establish a clear intention to confirm the deed, after a full knowledge that it was voidable. A fortiori, a mere acquiescence, unconnected with any acts demonstrative of an attempt to confirm it, would be insufficient for the purpose."

In *Jackson v. Carpenter*, 11 Johns. (N. Y.) 542, 543, it is held by the Supreme Court of New York that acquiescence by the grantor in a conveyance made during his infancy, for 11 years after he came of age, did not amount to a confirmation of the conveyance; but some positive act was necessary evincing his assent to the conveyance. The same doctrine is found in *Curtin v. Patton*, 11 Serg. & R. 311; *Urban v. Grimes*, 2 Grant, Cas. (Pa.) 96. In the latter case, it is remarked: "However, should an infant grantor neglect to make an actual disaffirmance of his deed of lands, or sale of personal chattels after coming of full age until the time limited by the statute of limitations for bringing an action has elapsed, the delay would operate as an affirmation of the deed or sale."

In the history of this case, Brown joined others in conveying the real estate. He was young and lacked business experience, and the grantees, for some reason, kept the deeds from record over 21 years and until 1909, which was the year suit was commenced. Until then, it is found that Brown had no knowledge or recollection of having signed the deeds. If the signing had ever impressed his mind, the impression faded into forgetfulness, until these instruments appeared of record. Then he sued.

And this brings us to the second question: Has Brown disaffirmed the conveyances within proper time and in proper manner?

In *Drake v. Ramsay et al.*, 5 Ohio, 252, it is held "that a conveyance by an infant feme covert may be disaffirmed whilst action of ejectment is not barred by the statute of limitations." The opinion of Lane, J., is instructive, both on when the right of dis-

affirmance may be exercised, and what may be considered a sufficient act of disaffirmance. On page 254, 5 Ohio, the learned writer of the opinion says: "We believe that an entry suit, or action, a subsequent conveyance, an effort to restore parties to their original condition, or any act unequivocally manifesting the intention, would render the avoidance effectual, and that the institution of this suit is an act fully possessing this character." Continuing, it is said: "But it is strenuously urged that the power of disaffirmance must be executed in a reasonable time; in some short period after the infant becomes of age. The cases cited do not appear to us to establish this proposition, nor do we believe it supported by any sound reasons. * * *

Again, on the same page, after commenting on authorities cited, it is said: "In our opinion, lapse of time may frequently furnish evidence of acquiescence, and thus confirm the title, but of itself does not take away the right to avoid, until the statute of limitations takes effect. In this position we are countenanced by decisions of the most respectable courts." And certain cases are cited. The remainder of the opinion tends to further elucidate the position taken. The foregoing decision was approved and followed in *Hughes v. Watson*, 10 Ohio, 127-134. See, also, *Cresinger v. Lessee of Welch*, 15 Ohio, 156, 45 Am. Dec. 565, where the foregoing cases were thoroughly discussed and approved. There is no later case decided by this court in which these holdings have been questioned or overruled.

Hence it is, that the bringing of the action now under review of itself is a disaffirmance of the deeds in unmistakable language, and it has been done within the statute of limitations, as will fully appear later in this opinion.

There was nothing for Brown to restore to the grantees before disaffirming, for the circuit court has found that he received no consideration for the conveyances, and therefore he could restore nothing, even if such duty could be imposed upon him in case he had received valuable consideration, which we need not decide.

Closely related to the last is the third question: Did Brown commence his action within the time allowed by law for that purpose? Or, in other form, was his right of action barred by the statute of limitations, April 17, 1909, the day it was commenced?

Counsel for plaintiff in error labor to convince us that "the statute begins to run with the accruing of the cause of action, and not when the right to maintain it becomes personal to the infant; * * *" and we infer that it is suggested that the cause of action accrued at the time the minor made the deeds, and not when he arrived at majority. We are unable to realize how this view will aid plaintiff in error, for, if the cause of action accrued as claimed, it must be conceded that Brown was not required to sue during

his minority, and, if not during his minority, what is the limitation?

But we think the premise assumed by counsel is wrong. The right to ratify or disaffirm is a personal privilege conferred by law upon the minor. After coming of age, he may ratify, and his deed be absolutely binding. On the other hand, he may disaffirm.

It is said, in *Andrews' American Law*, 698: "Conveyances of real property by an infant cannot be affirmed or avoided until he attains his majority, although the infant may obtain the use of the land in such cases." This seems a reasonable assertion, because, if the infant is under disability when he executes a voidable deed for real estate, he is likewise disabled to ratify or disaffirm during minority. In *Wood on Limitations*, § 238, the author says: "Persons who have not attained the age of majority are infants, and, in those states where infancy is within the saving clause of the statute, the statute does not begin to run against him or her, even though he or she has a guardian who might sue the claim in question; nor even though other persons are jointly interested in the claim who are of full age—until he or she attains the age of majority. The fact that a guardian or infant himself brings a suit before the disability is removed does not operate as a waiver of the saving clause in favor of the disability."

This is akin to the holding in *Roof v. Stafford*, 7 Cow. (N. Y.) 179, where the reasons for the rule are clearly stated. In harmony with the latter case is *Boal v. Mix*, 17 Wend. (N. Y.) 119, 31 Am. Dec. 285. See, also, *Carrell v. Potter*, 23 Mich. 377; *Prout v. Wiley*, 28 Mich. 164; *Donovan v. Ward*, 100 Mich. 601, 59 N. W. 254. These Michigan cases fully cover our questions, and they cite many authorities in support of what they decide. See, also, *Sims v. Everhardt*, 102 U. S. 312, 26 L. Ed. 87.

Has our statute of limitations made any exception to the current law as we have found it?

Section 4977, Revised Statutes, provides: "An action for the recovery of the title or possession of real property, can only be brought within twenty-one years after the cause of action accrues. * * *" The next section provides that: "If a person entitled to bring the action mentioned in section four thousand nine hundred and seventy-seven (4977) is, at the time the cause of action accrues, within the age of minority, of unsound mind or imprisoned, such person may, after the expiration of twenty-one years from the time the cause of action accrues, bring such action within ten years after such disability is removed."

A restatement of some dates enables us to apply these two provisions. The deeds were executed by Brown on the 12th day of March, 1888, while he was an infant 18 years of age. He arrived at majority on the 24th day of October, 1890, and he filed his original peti-

tion in this case on the 17th day of April, 1909. Twenty-one years, one month, and five days elapsed from the date of the deeds until the original petition was filed herein, and eighteen years, five months, and twenty-three days elapsed from the time Brown reached his majority before the original petition was filed. He disaffirmed the deeds by filing said petition, April 17, 1909, which was done within 21 years from the date of his majority.

From what we have said as to the law which controls this case, there is no reasonable construction of our statute of limitations which bars a recovery.

It follows that we should affirm the judgment of the circuit court, and it is affirmed.

Judgment affirmed.

SPEAR, C. J., and DAVIS, SHAUCK, and JOHNSON, JJ., concur. DONAHUE, J., not participating.

(84 Oh. St. 346)

STATE v. BOONE.

(Supreme Court of Ohio. June 13, 1911.)

(Syllabus by the Court.)

1. HEALTH (§ 21*)—VITAL STATISTICS—CONSTITUTIONAL AND STATUTORY PROVISIONS.

Sections 14, 17, and 21 of "An act to establish a bureau of vital statistics and to provide for the prompt and permanent registration of all births and deaths occurring within the state of Ohio" (99 O. L. 296), so far as they relate to a physician or midwife, in attendance upon a case of confinement, are unconstitutional and void, because they were enacted by an unnecessary, unreasonable, and arbitrary exercise of the police power.

[Ed. Note.—For other cases, see Health, Dec. Dig. § 21.*]

(Additional Syllabus by Editorial Staff.)

2. CONSTITUTIONAL LAW (§ 45*)—DISTRIBUTION OF GOVERNMENTAL POWER—JUDICIAL POWER.

It is within the judicial power to declare void an unnecessary and unreasonable exercise of police power.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 42; Dec. Dig. § 45.*]

Error to Circuit Court, Hardin County.

One Boone was convicted of violating the act relating to the registration of births. From a judgment of the circuit court reversing the judgment of conviction, the State brings error. Affirmed, and defendant discharged.

Timothy S. Hogan, Atty. Gen., Fred H. Kirtley, and James R. Stillings, Pros. Atty., for the State. George E. Crane, for defendant in error.

DAVIS, J. The defendant in error was indicted for an alleged violation of an act entitled "An act to establish a bureau of vital statistics and to provide for the prompt and

permanent registration of all births and deaths occurring within the state of Ohio" (99 Ohio Laws, 296). A demurrer to the indictment was overruled by the common pleas court, and the defendant was put upon trial, found guilty, and sentenced. The circuit court reversed the judgment for error in rejecting certain testimony offered by the defendant, and the state prosecutes error to reverse the judgment of the circuit court and to affirm the judgment of the court of common pleas.

The Attorney General and his associates insist that the act referred to is a constitutional exercise of legislative power, and that the evidence which was rejected in the trial court was properly held to be inadmissible; while the defendant still maintains that the proffered evidence was admissible, and that the act under which the indictment was framed is unconstitutional. We shall review the latter contention only.

That the general grant in the Constitution of the legislative power includes police power is conceded; and that the registration of births, deaths, marriages, and the like, may be included in a proper exercise of the police power is also conceded. But it is disputed that, while requiring the registration of such facts as may naturally and readily come to the knowledge of persons present at a birth, death, or marriage, the state may compel such persons to inquire for, investigate, and report upon, certain collateral matters which may be interesting and of possible value to a bureau of statistics, and that, too, without substantial compensation. We understand the counsel for the state to maintain the affirmative all along the line of this contention.

The police power is inherent in sovereignty; and its exercise is justified by the necessity of the occasion. Its foundation is the right and duty of the government to provide for the common welfare of the governed. It is tersely expressed in the maxim, "Salus populi suprema lex." While, therefore, a broad discretion is given to the Legislature to provide for the general welfare, it necessarily is not an arbitrary or unlimited discretion; for, if it were beyond judicial control or review, it would amount to a practical abrogation of all constitutional guarantees of personal rights, and the undefined boundaries of legislative power could be extended so as to authorize the worst and most irresponsible form of despotism—a legislative despotism conducted in the name of the people.

[2] Hence it has been held, not only in this state, but in a great number of cases, both in the federal and state courts, that it is within the judicial power to declare void an unnecessary or unreasonable exercise of police power. This rule was approved and applied in *Phillips v. State*, 77 Ohio St. 214, 82 N. E. 1064: "To justify the state in thus interposing its authority in behalf of the pub-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

lie, it must appear, first, that the interests of the public generally, as distinguished from those of a particular class, require such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals. The Legislature may not, under guise of protecting, arbitrarily interfere with private business, or impose unusual and unnecessary restrictions upon lawful occupations. In other words, its determination of what is a proper exercise of the police power is not final or conclusive, but is subject to the supervision of the courts." *Lawton v. Steele*, 152 U. S. 183, 14 Sup. Ct. 499, 38 L. Ed. 385. See, also, numerous cases cited in 22 Am. & Eng. Enc. Law (2d Ed.) 939.

[1] We need not inquire whether the state may not require a physician or midwife to report to the proper authority, for registration, the fact of a birth which has come under his or her observation, first, because it is conceded that it may do so, and, second, because it obviously has some relation to the public welfare, and it cannot be very burdensome to comply with such regulation. But this statute goes much further. It imposes upon the physician or midwife the duty of investigating and certifying as to certain facts which would not necessarily or naturally come within the knowledge of the attending physician or midwife, viz., whether the birth was legitimate or illegitimate, and, except in case of illegitimacy, the full name, residence, color or race, birthplace, age, and occupation of the father; also the maiden name in full, residence, color or race, birthplace, age, and occupation of the mother; likewise the number of this child of the mother, and the number of living children of the mother. It is further provided that no certificate shall be held to be complete and correct which does not supply all of the items of information called for therein, or *satisfactorily* account for their omission; and that the physician or midwife who shall neglect or refuse to file a *proper* certificate of birth with the local registrar, within the time required by the act, shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be fined, etc. In short, a professional attendant at a birth is required to enter upon an inquiry as to nonprofessional questions, to supply information to, it may be, a nonprofessional official, "clothed with a little brief authority," in relation to matters which perhaps are interesting as vital statistics, but as to which it requires more than appears in this statute, or in the arguments in this case, to show that they are necessary or even closely related to the public safety, the public morals, or the public welfare; an inquiry, too, which could be just as well and more appropriately conducted, reported upon, and certified to, by the local registrar, or a township assessor, or a census taker.

The physician or midwife is compelled, under the penalties of the statute, to institute and carry out the necessary investigation and to "supply all of the information called for" without compensation. The contention is made on the part of the state that statutes which impose the duty of making such report or certificate are not unconstitutional, because they do not provide for compensation to physicians. While we do not regard this point as decisive of the present case, yet we are not prepared to yield unqualified assent to the proposition thus broadly stated. None of the cases cited for the state in that connection appear to have been carefully considered, except *State v. Worden*, 56 Conn. 216, 14 Atl. 801. In one of them, indeed, *Robinson, Clerk, v. Hamilton*, 60 Iowa, 134, 14 N. W. 202, 46 Am. Rep. 63, it is frankly said: "We have not been favored with an argument on behalf of the defendant and are therefore not informed of the grounds upon which the statute in question was assailed in the court below and is claimed to be unconstitutional. It cannot be expected that we shall consider arguments of which we have not heard, or that we will imagine objections and discuss them." Besides the case does not seem to go further than the defendant in this case concedes the law to be. The Connecticut case referred to, after a statement of the guarantees of personal liberty contained in the Constitution of the United States, contains the following language: "But these provisions place no limitation upon the power of the Legislature of this state to require gratuitous service from one member of the community in the protection of the lives of all, other than that which would have been equally upon it in their absence, namely, that it shall not violate fundamental principles and purposes of the social compact." This language should be read in the light of the facts of that case; but, assuming that it correctly states the law in its general application, there is grave reason to doubt whether it is sound law in this jurisdiction, owing to specific provisions of the Ordinance of 1787.

The purview of that famous act of Congress is expressly "for the government of the territory of the United States northwest of the river Ohio." The first 12 sections of the ordinance obviously provided for the temporary government of the territory, until it should be divided and organized into states. Then follows something of more enduring interest. We quote: "And for extending the fundamental principles of civil and religious liberty, which form the basis whereon these republics, their laws and constitutions, are erected; to fix and establish those principles as the basis of all laws, constitutions, and governments, which forever hereafter shall be formed in the said territory; to provide, also, for the establishment of states, and permanent government

therein, and for their admission to a share in the federal councils on an equal footing with the original states, at as early periods as may be consistent with the general interest: It is hereby ordained and declared, by the authority aforesaid, that the following articles shall be considered as articles of compact, between the original states and the people and states in the said territory, and forever remain unalterable, unless by common consent, to wit." Then follow the several articles of compact. We quote from only two of them. It is provided in article 2 that: "No man shall be deprived of his liberty or property, but by the judgment of his peers, or the law of the land, and should the public exigencies make it necessary, for the common preservation, to take any person's property, or to demand his particular services, full compensation shall be made for the same."

Perhaps it may be said that the adoption of a Constitution by the people of Ohio superseded the Ordinance of 1787, and that the Constitution of Ohio contains no such provision as that which we have quoted from article 2 of the Ordinance of 1787. We recur again to the "articles of compact," and quote from article 5: "And whenever any of the said states shall have sixty thousand free inhabitants therein, such state shall be admitted, by its delegates, into the Congress of the United States, on an equal footing with the original states, in all respects whatever: Provided, the Constitution and government, so to be formed, shall be republican, and in conformity to the principles contained in these articles." If our Constitution, instead of creating a republican form of government for the state, had provided a pure democracy, a government directly by the people, and, so framed, it had been accepted by the President and Congress of the United States, there might have been *some* reason for the claim that, in that respect, the compact which was to "remain forever unaltered, unless by common consent," had been repealed by implication; yet, even under such circumstances, a conclusive presumption would not be raised that the compact had been altered, without the common consent of all the parties thereto. But if the convention which prepared our Constitution had omitted from the Bill of Rights the famous interdiction against slavery, contained in article 6 of the Ordinance, would that have justified the conclusion that the compact was altered, and that the existence of slavery in Ohio would be constitutional? Or, to put the question in another form, if our Constitution contained nothing whatever in regard to the privilege of the writ of habeas corpus, or to trial by jury, or to proportional representation of the people in the Legislature, or to the prohibition of cruel and unusual punishments, it could not be justly inferred that the great

compact had been altered, and that these privileges and guaranties had been subtracted from the rights of the citizens, and were not included among the rights reserved by the people (Const. of Ohio, art. 1, § 20), because there would have been nothing in the Constitution which was inconsistent with the Ordinance, and the declared purpose thereof, "to fix and establish those principles as the basis of all laws, constitutions, and governments, which forever hereafter shall be formed in the said territory," and that these "articles shall be considered as articles of compact between the *original states* and the *people and states* in the said territory, and forever remain unalterable, unless by common consent."

In *Hogg v. Manufacturing Co.*, 5 Ohio, 410, at page 416, Hitchcock, J., speaking of a clause in article 4 of the Ordinance, said: "This portion of the Ordinance of 1787, is as much obligatory upon the state of Ohio as our own Constitution. In truth it is more so; for the Constitution may be altered by the people of the state, while this cannot be altered without the assent, both of the people of this state and of the United States, through their representatives. It is an article of compact, and, until we assume the principle that the sovereign power of the state is not bound by contract, this clause must be considered obligatory." And in *Hutchinson v. Thompson*, 9 Ohio, 52, at page 62, Grimke, J., remarked: "But when application for admission into the Union was made by the people inhabiting the eastern part of the territory, modifications in several parts of the Ordinance were asked for, and they were granted by the United States, as one party, to the state as the other. This seems to show that the people of Ohio have so far treated the articles of compact as of perpetual obligation. The alterations proposed were with a view to the immediate formation of a state Constitution, and were of no importance if the states should have a right to annul the Ordinance the moment it assumed that condition."

Similar language is found in the opinion in *Cochran's Heirs v. Loring*, 17 Ohio, 409, 424, 425, and the foregoing quotations remain as the unmodified expressions of this court upon this subject.

We are not unaware of various dicta which have appeared from time to time in opinions by learned Justices of the Supreme Court of the United States, beginning with *Pollard's Lessee v. Hagan*, 3 How. 212, 11 L. Ed. 565, *Permoli v. First Municipality*, 3 How. 589, 11 L. Ed. 739, and *Strader v. Graham*, 10 How. 82, 13 L. Ed. 337. But it requires no acute analysis to differentiate those cases and to show that they do not go very thoroughly into the question whether the Ordinance of 1787 can be superseded, otherwise than by the "common consent" of the parties to the compact, as required by

the terms of the Ordinance, or whether such "common consent" ever has been given; and, giving the fullest effect that can be claimed from those remarks by the distinguished judges, it is obvious that they ignore the distinction between a mere act of Congress, which may be repealed or superseded by subsequent acts, and a solemn and formal "compact," in the nature of a treaty as it were, between the proprietary states and the people and states of the territory which was subsequently to be erected into several states of this Union. They ignore, moreover, the fact that the compact, on the good faith of which the original proprietors ceded this territory to the United States, expressly declared that the principles declared therein shall be the basis of "all laws, constitutions and governments which forever hereafter shall be formed in the said territory;" and at best these declarations rest on no stronger foundation than the provision of the compact itself, namely, that a state with constitutional limitations as provided, "shall be admitted, *by its delegates*, into the Congress of the United States, on an equal footing with the original states, in all respects whatever." See cases above cited and *Escanaba Co. v. Chicago*, 107 U. S. 478, 688, 689, 2 Sup. Ct. 185, 194, 27 L. Ed. 442; *Van Brocklin v. Tennessee*, 117 U. S. 151, 159, 6 Sup. Ct. 670, 29 L. Ed. 845; *Sands v. Manistee River Improvement Co.*, 123 U. S. 288, 295, 296, 8 Sup. Ct. 113, 31 L. Ed. 149; *Willamette Iron Bridge Co. v. Hatch*, 125 U. S. 1, 9, 10, 8 Sup. Ct. 811, 31 L. Ed. 629. Whatever that clause may mean, it certainly does not mean that all state Constitutions shall be, or are, alike, nor that a new state erected in the Northwest Territory, shall be understood to surrender all the guaranties of the compact as a condition of admission as a state.

We have thus briefly indicated the reasons for our belief, that the Great Charter of the Northwest Territory is still under, and above, and before, all laws or Constitutions which have yet been made in the states which are parts of that territory; and that under its guaranties the state has not the right to draft a citizen into particular service without substantial compensation. At least, it is clear to us that the provisions of this statute, which require a professional man to search out nonprofessional information and certify it to state authorities, are unnecessary, unreasonable, and arbitrary, and are not, therefore, a valid exercise of police power. The demurrer to the indictment should have been sustained, and therefore the judgment of the circuit court reversing the judgment of the court of common pleas is affirmed, and defendant discharged.

SPEAR, C. J., and SHAUCK, PRICE, JOHNSON, and DONAHUE, JJ., concur.

(208 Mass. 614)

IN RE OPINION OF THE JUSTICES TO
THE HOUSE OF REPRESENTATIVES.

(Supreme Judicial Court of Massachusetts.
April 28, 1911.)

COURTS (§ 208*)—SUPREME JUDICIAL COURT—
JURISDICTION—CERTIFIED QUESTIONS.

The constitutional provision requiring the Justices of the Supreme Judicial Court to give opinions to each branch of the Legislature "upon important questions of law and upon solemn occasions" does not authorize them to give their opinion as to whether the Constitution requires, in order to pass a bill over the Governor's veto, an affirmative vote of two-thirds of the entire membership of the General Court, in which the bill originated, merely because the civil service commission doubted the legality of a statute which affected it, on the ground that it violated such constitutional provision, there being nothing pending before the Legislature calling for such advice.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 208.*]

On an order of the House of Representatives requiring the Justices of the Supreme Judicial Court to answer a question as to the validity of a statute. Answer refused.

The following order was passed by the House of Representatives on April 24, 1911, and on April 27, 1911, was transmitted to the Justices of the Supreme Judicial Court:

"Whereas, an act entitled 'An act relative to qualifications for examination by the civil service commission' was enacted by the General Court of Massachusetts at its present session, and was laid before his excellency the Governor for his revision; and

"Whereas, said act was returned to the House of Representatives, in which branch it originated, with the objections of the Governor thereto in writing; and, after reconsideration, was declared passed by the House of Representatives, notwithstanding said objections, 155 members having voted in the affirmative and 51 members in the negative; and the bill, together with the objections, was sent to the Senate and was there agreed to by two-thirds of said Senate—all in accordance with chapter 1, section 1, article II, part the second, of the Constitution of Massachusetts; and

"Whereas, the civil service commission, whose authority is affected by the passage of said act, has raised the question of its legality, on the ground that less than two-thirds of the entire membership of the House of Representatives voted to pass the bill, notwithstanding the objections of his excellency the Governor: therefore be it

"Ordered, that the Justices of the Supreme Judicial Court be required to give to the House of Representatives their opinion upon the following important question of law:

"Do the provisions of chapter 1, section 1, article II, part the second, of the Constitution of Massachusetts require, in order to

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

pass a bill or a resolve over the veto of the Governor, that there shall be an affirmative vote of two-thirds of the entire membership of the branch of the General Court in which the bill or resolve originated, or is an affirmative vote of two-thirds of the members present in the branch in which the bill or resolve originated sufficient?"

To the Honorable the House of Representatives of the Commonwealth of Massachusetts:

We, the Justices of the Supreme Judicial Court, have received the question upon which our opinion is required, a copy of which is hereto annexed.

Under the Constitution of Massachusetts the Justices of the Supreme Judicial Court are required to give opinions to each branch of the Legislature only "upon important questions of law, and upon solemn occasions."

It sometimes has happened that opinions have been required when the nature of the questions or the importance of the occasion has not been such as to justify the Justices in exercising the power conferred upon them by the clause of the Constitution under which the questions were put. For some of these occasions see Answer of the Justices, 122 Mass. 600; Id., 148 Mass. 623, 21 N. E. 439; Id., 150 Mass. 598, 24 N. E.

1086. The reasons for declining to act have been stated at length at different times.

In Opinion of the Justices, 180 Mass. 608, 608, 72 N. E. 95, 97, after a brief discussion of the subject, it is said that we ought to answer "only so far as our opinion is desired as an aid in the performance of official duties in regard to a matter then pending." The same rule is also discussed and reaffirmed in Opinion of the Justices, 190 Mass. 611, 612, 77 N. E. 820, which relates to questions similar to that now before us.

In the present order we discover nothing that shows any action or proceeding now pending before the House of Representatives which make an answer to the question important for its guidance or constitutes this a solemn occasion. The fact that the civil service commission has raised a question as to the legality of the act is no sufficient reason for invoking the exercise of this extraordinary power under limited constitutional authority.

We therefore respectfully ask to be excused from answering the question.

MARCUS P. KNOWLTON.

JAMES M. MORTON.

JOHN W. HAMMOND.

WILLIAM CALEB LORING.

HENRY K. BRALEY.

HENRY N. SHELDON.

ARTHUR PRENTICE RUGG.

(209 Mass. 533)

CONVERSE et al. v. UNITED SHOE MACHINERY CO. et al.

(Supreme Judicial Court of Massachusetts. Suffolk. Sept. 6, 1911.)

1. CORPORATIONS (§ 320*)—SUIT IN BEHALF OF CORPORATION—PERSONS ENTITLED TO SUE.

A stockholder of a corporation cannot maintain a bill in equity for an injury to his individual rights resulting from a sacrifice of the corporation's interests by other stockholders who are its directors, although the corporation be made a party defendant, since the injury is not done to them as individuals, but to the corporation.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1426-1439; Dec. Dig. § 320.*]

2. CORPORATIONS (§ 320*)—RIGHTS OF STOCKHOLDERS—SUIT IN BEHALF OF CORPORATION.

To prevent a failure of justice, stockholders may institute proceedings on behalf of the corporation, if neither the corporation nor its officers can be induced to take action.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1426-1439; Dec. Dig. § 320.*]

3. CORPORATIONS (§ 320*)—SUIT BY STOCKHOLDERS IN BEHALF OF CORPORATION—CORPORATION A NECESSARY PARTY.

When proceedings are instituted by stockholders in behalf of the corporation, it is necessary that the corporation itself be made a party defendant.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1426-1439; Dec. Dig. § 320.*]

Case Reserved from Superior Court, Suffolk County; Franklin G. Fessenden, Judge.

Bill in equity by Ida B. Converse and others against the United Shoe Machinery Company, the Goddu Sons Metal Fastening Company, and others, as stockholders and directors of the latter company. Case reserved for a full court on demurrer to the bill. Demurrer sustained, and bill dismissed.

Whipple, Sears & Ogden, for plaintiffs. Coolidge & Hight, for defendants.

MORTON, J. This is a bill in equity to compel the Shoe Machinery Company and the individual defendants to account for alleged wrongdoing as stockholders in and officers and directors of the Goddu Sons Metal Fastening Company, in the management and conduct of the business and property of said company. The Goddu Company is made a party defendant. The defendants severally demurred, and the case was thereupon reserved for the full court; if the demurrers are sustained the bill is to be dismissed; if overruled the case is to be remanded to the superior court and the defendants are to answer and such other proceedings are to be had as equity may require.

[1] Without reciting the allegations of the bill it is plain, we think, that the bill sets out a willful breach of duty on the part of the individual defendants as directors and officers of the Goddu Company, and an intentional violation and disregard by them of

the obligations resting upon them as such officers and directors, and a sacrifice by them in combination with the Shoe Machinery Company of the interests of the Goddu Company to promote those of the Shoe Machinery Company. The bill alleges that the plaintiffs have protested to the defendants against their acts and conduct as stockholders, officers and directors of the Goddu Company without avail, that the defendants own a large majority of the stock, and that any further application to them would be futile.

At or about the time that the bill in this suit was filed, an action at law was brought against these defendants based on substantially the same allegations. The defendants demurred and the demurrer was sustained by the full court. The case is reported in 185 Mass. 422, 70 N. E. 444.

The bill in the present case is not brought and does not purport to be brought, as we construe it, in behalf of the plaintiffs and such other stockholders as may join, or on behalf of the corporation, but is brought by the plaintiffs to enforce individual rights assumed to belong to them as stockholders, and this constitutes, it seems to us, as the case stands, a fatal defect and renders it necessary to sustain the demurrers. The wrong, if any, was done not to the plaintiffs as individual stockholders but to the corporation, and the remedy must be sought by or on behalf of the corporation. As was said by the present Chief Justice in the former case, "All the wrongs done or intended * * * are wrongs against the corporation * * * and except through the corporation they have no relation to the plaintiff." *Converse v. United Shoe Machinery Co.*, 185 Mass. 422, 423, 70 N. E. 444, and cases cited.

[2] In order to prevent a failure of justice stockholders are allowed to institute proceedings on behalf of the corporation if neither the corporation nor its officers can be induced to take action. But such proceedings derive their validity not from wrongs done to the individual stockholders instituting them but from the right of the stockholders to act under the circumstances on behalf of the corporation.

[3] When proceedings are instituted by stockholders in behalf of the corporation, it is necessary that the corporation should be made a party defendant, but we do not think that the fact that the corporation is made a party defendant is enough to show of itself that the proceedings in the present case are prosecuted in behalf of the corporation or of such stockholders as may join in the absence of any allegations in the bill to that effect. The whole tenor of the bill in the present case shows, we think, that it is brought for the purpose of enabling the plaintiffs to recover individually for damages alleged to have been suffered by them as stockholders in consequence of the wrongful conduct of the de-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes 95 N.E.—59

endants as stockholders and officers of the Goddu Company in the management of its business. That, as we have said, cannot be done.

It sufficiently appears, we think, from the allegations of the bill that an attempt was made to procure redress through the corporation and its officers, and that any further attempt to obtain such redress would have been useless. We do not indeed understand the defendants to contend to the contrary. But for the reason that the bill does not appear to be brought on behalf of the corporation, or of such other stockholders as may join, which is in effect the same thing, and seeks to enforce individual rights against the defendants, the demurrers must be sustained and the bill dismissed.

So ordered.

(208 Mass. 625)

In re OPINION OF JUSTICES TO SENATE.

(Supreme Judicial Court of Massachusetts.

June 13, 1911.)

1. MUNICIPAL CORPORATIONS (§§ 680, 681*)—USE OF STREETS—POWER TO LICENSE.

The Legislature may authorize a board of public officers of a city or town to permit and license private owners of buildings on opposite sides of the street to erect a passageway over it between the buildings for private purposes, if the Legislature itself could authorize such act by statute.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. §§ 680, 681.*]

2. CONSTITUTIONAL LAW (§ 208*)—CLASS LEGISLATION.

A statute permitting the private owners of buildings on opposite sides of a street to construct a passageway over the street between the buildings for private purposes, if the fee of the street is in them, provided any one damaged by the interference thereby with light and air may have such damages determined by a jury, is not invalid as class legislation.

[Ed. Note.—For other cases, see Constitutional Law, Dec. Dig. § 208.*]

3. EMINENT DOMAIN (§ 71*)—COMPENSATION—MANNER OF SECURING.

A statute which permitted private owners of buildings on opposite sides of a street to erect a passageway over it between them for private purposes, providing any damages by the interference with light or air were determined by a jury and paid by the grantees of the license, would be invalid for not securing compensation to the persons damaged in the manner required by the Constitution.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 180-187; Dec. Dig. § 71.*]

4. MUNICIPAL CORPORATIONS (§ 755*)—TORTS—LIABILITY OF CITIES.

Cities and towns are not liable for injuries received from unsafe conditions while traveling on a highway, in absence of statute.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1587, 1589, 1590; Dec. Dig. § 755.*]

On an order by the state Senate for an opinion by the Justices of the Supreme Judicial Court as to the constitutional power of the Legislature to enact certain statutes. Opinion given as stated.

See, also, 208 Mass. 603, 94 N. E. 849.

On June 2, 1911, the following order was passed by the Senate, and on June 6, 1911, was transmitted to the Justices of the Supreme Judicial Court:

"Whereas, the questions upon which the opinion of the Justices of the Supreme Judicial Court was required by the order adopted on April 4th last, and the answer of the Justices thereto, were based upon two pending bills which were somewhat dissimilar in their form and in their substantive provisions, and did not call attention to the fact that one of these, namely, House Bill No. 817, was a bill in favor of certain named individuals, and did not make any mention of the recovery of damages for the loss of light and air caused by the construction of a bridge under the authority of an act of Legislature:

"Now, therefore, ordered, that the opinion of the Justices of the Supreme Judicial Court be required by the Senate upon the following questions:

"(1) Is it within the constitutional power of the Legislature to enact a law which shall give to the city of Boston the power to grant permits or licenses to the owners of any estates which abut upon any public street and which are situated directly opposite to each other upon opposite sides of said street to erect structures which will bridge said street and which will connect the premises on opposite sides thereof for private purposes, provided that the fee of the street over which the structures are to be erected is in the grantees of said permits or licenses, and subject to the condition that any person owning property or doing business in property which abuts upon a street over which the construction of a bridge is authorized, whose property or business is damaged either through interference with light and air or otherwise by the construction or maintenance of said bridge, may have damages therefor determined by a jury upon petition to the superior court filed within a specified time against the grantees of the permit for the construction of said bridge?

"(2) Is it within the constitutional power of the Legislature to enact a law which shall suspend the existing law as to certain named individuals, so as to allow the city of Boston to grant to such individuals the right to build and maintain a bridge across a certain named public street in said city for the purpose of connecting for private purposes buildings owned by said individuals on opposite sides of said street, or for the purposes of a fire escape, provided that the fee of the street over which the structures are to be erected is owned by the individuals in whose favor the suspension and grant is made?

"(3) Is it within the constitutional power of the Legislature to enact a law which shall suspend the existing law as to certain named individuals, so as to allow the city of Boston to grant to such individuals the right to

build and maintain a bridge across a certain named public street in said city for the purpose of connecting for private purposes buildings owned by said individuals on opposite sides of said street, or for the purposes of a fire escape, provided that the fee of the street over which the structures are to be erected is owned by the individuals in whose favor the suspension and grant is made, and that the bridge is so constructed as not to interfere with the reasonable use of the surface of the street for public travel?

"(4) Would the provision of the bill now pending in the General Court, which authorizes the construction of a bridge over Avon street in the city of Boston, being House Bill No. 817, a copy of which is transmitted herewith, be constitutional, if enacted?

"(5) Would the provisions of the bill of similar tenor to said House Bill No. 817, a copy of which is transmitted herewith, be constitutional, if enacted?

"(6) Would the provisions of said House Bill No. 817 be constitutional, and would the provisions of the bill which forms the subject of the last question be constitutional, if these bills were amended by striking out section 3 of the former bill and section 4 of the latter bill, and substituting in the place of each of said sections the following section:

"Any person owning property, or doing business in property abutting on Avon street, whose property or business is damaged either through interference with light and air or otherwise by the construction or maintenance of a bridge constructed in accordance with the provisions of section 1 of this act, may have damages therefor determined by a jury upon petition to the superior court filed against the grantees of said permit within one year after the permit for the erection of said bridge is approved by the mayor, as provided in section 1 of this act."

"(7) If any time after the enactment of such a bill and the issue of such permit, and the construction or beginning of construction of such bridge under said permit, any person using said street and passing under said bridge shall suffer any injury either to his person or to his property on account of the construction or maintenance of said bridge, as by the falling of material used in the construction of said bridge, or by the falling of snow or ice from said bridge, will the city of Boston be liable for said injury?

"House Bill No. 817.

"An act to authorize the construction of a bridge over Avon street in the city of Boston.

"Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:

"Section 1. Upon petition and after seven days' public notice published in at least three newspapers published in the city of Boston, and a public hearing thereon, the board of

street commissioners of the city of Boston may, with the approval of the mayor, issue a permit to Eben D. Jordan and Edward J. Mitten to build and maintain a bridge across Avon street in said city for the purpose of connecting buildings owned by them on opposite sides of said street, or for the purposes of a fire escape, on such conditions and subject to such restrictions as said board may prescribe.

"Section 2. No bridge built across said street, under a permit granted as provided in section 1 of this act, shall be constructed or maintained at a height less than thirty feet above the grade line of said street; and no part of the bridge or its supports shall rest upon the surface of the street.

"Section 3. Any person whose property is damaged by reason of the construction of any bridge permitted to be built, as provided in section 1 of this act, may have the damages therefor determined by a jury upon petition to the superior court therefor filed within one year after the permit for the erection of such bridge is approved by the mayor, as provided in section 1 of this act.

"Section 4. This act shall take effect upon its passage."

The following is "the bill of similar tenor to said House Bill No. 817," referred to in the foregoing order of the Senate:

"An act to authorize the construction and maintenance of a bridge over Avon street in the city of Boston.

"Section 1. Upon petition and after seven days' notice published in at least three newspapers in the city of Boston, and a public hearing thereon, the board of street commissioners in said Boston may, with the approval of the mayor, issue a permit to Eben D. Jordan and Edward J. Mitten to build and maintain a bridge across Avon street in said city for the purpose of connecting buildings owned by them on opposite sides of said street, and to serve as a fire escape.

"Section 2. Any permit given by the board of street commissioners of the city of Boston, as provided in section 1 of this act, shall be upon the express condition that the person or persons receiving such permit shall pay a fee for the same, the amount of said fee to be determined by the board of street commissioners. The board of street commissioners may further impose such other conditions and restrictions in granting said permit, as to the board may seem wise.

"Section 3. No bridge built across said street, under a permit granted as provided in the preceding sections of this act, shall be constructed or maintained at a height less than 30 feet above the grade line of said street; and no part of the bridge or its supports shall rest upon the surface of the street.

"Section 4. Any person whose property is damaged by reason of the construction of any bridge permitted to be built as provided in the preceding sections of this act may have

damages therefor determined by a jury upon petition to the superior court therefor filed within one year after the permit for the erection of such bridge is approved by the mayor. Whatever damages are found by the jury, under the provisions of this section, shall be paid by the person or persons to whom the permit has been granted by the board of street commissioners.

"Section 5. This act shall take effect upon its passage."

To the Honorable Senate of the Commonwealth of Massachusetts:

We, the Justices of the Supreme Judicial Court, having received the questions contained in your order of June 2, 1911, a copy of which is hereto annexed, respectfully answer as follows:

[1] It is a familiar rule of law in this commonwealth that the Legislature may authorize a board of public officers in a city or town to permit and license, as a matter of local administration, any act or proceeding, such as is referred to in these questions, that the Legislature itself could authorize or license by the enactment of a statute. *Brodhine v. Revere*, 182 Mass. 598, 66 N. E. 607; *Sprague v. Dorr*, 185 Mass. 10, 11, 69 N. E. 344; *Commonwealth v. Crowninshield*, 187 Mass. 221, 225, 72 N. E. 963, 68 L. R. A. 245; *Commonwealth v. Sisson*, 189 Mass. 247, 252, 75 N. E. 619, 1 L. R. A. (N. S.) 752, 109 Am. St. Rep. 630; *Welch v. Swasey*, 193 Mass. 364, 375, 376, 79 N. E. 745, 23 L. R. A. (N. S.) 1160, 118 Am. St. Rep. 523; *Sprague v. Minon*, 195 Mass. 581, 583, 81 N. E. 284; *Commonwealth v. Kingsbury*, 190 Mass. 542, 546, 85 N. E. 848, 127 Am. St. Rep. 513; *Wyeth v. Cambridge Board of Health*, 200 Mass. 474, 481, 86 N. E. 925, 23 L. R. A. (N. S.) 147, 128 Am. St. Rep. 439; *Codman v. Crocker*, 203 Mass. 146, 155, 89 N. E. 177, 25 L. R. A. (N. S.) 980; *Commonwealth v. Maletsky*, 203 Mass. 241, 247, 89 N. E. 245, 24 L. R. A. (N. S.) 1168; *Dewey v. Richardson*, 206 Mass. 430, 433, 92 N. E. 708.

[2] We think that a statute such as is mentioned in these questions would not be invalid as class legislation.

The law covering the matters to which these questions relate was very fully stated in an Opinion of the Justices communicated to the House of Representatives on April 17, 1911, 208 Mass. 603, 94 N. E. 849, which appears by your order to be before the honorable Senate.

[3, 4] It is elementary doctrine that such an amendment as is proposed, providing that the damages to persons injured in their property shall be paid by the grantees of the permit, who are private parties, would not secure compensation to such persons in the manner required by the Constitution and as to them, in reference to damages to which they might be entitled under the Constitu-

tion, would render the statute invalid. It is equally elementary law that cities and towns are not liable in damages to persons for injuries received from unsafe conditions, while traveling on a highway, unless there is a statute imposing a liability for such conditions.

Without determining whether, in view of numerous decisions of this court and published Opinions of the Justices, the questions submitted to us are of a kind that ought to be answered as "important questions of law" within the meaning of the Constitution, we give this opinion, and we do not deem it necessary to answer more particularly.

MARCUS P. KNOWLTON.
JAMES M. MORTON.
JOHN W. HAMMOND.
WILLIAM CALEB LORING.
HENRY K. BRALEY.
HENRY N. SHELDON.
ARTHUR PRENTICE RUGG.

(209 Mass. 509)

ASHLEY et al. v. WINKLEY et al.

(Supreme Judicial Court of Massachusetts.
Suffolk. June 30, 1911.)

1. TRUSTS (§ 325*)—ACTION FOR ACCOUNTING—BURDEN OF PROOF.

Where trustees under an express trust, in an action for an accounting, admit that they have received the property, the burden is on them to show that they have exercised reasonable skill, prudence, and judgment.

[Ed. Note.—For other cases, see *Trusts*, Cent. Dig. §§ 483-485; Dec. Dig. § 325.*]

2. TRUSTS (§ 225*)—MANAGEMENT OF PROPERTY—EXPENDITURES.

Where trustees for the management of a hotel, on taking possession to terminate the lease of a tenant, and while carrying on the business and seeking for a new tenant, took and used supplies which were in the hotel, and furniture belonging to the tenant's wife, and, on the advice of competent counsel as to their liability, arranged a settlement with the tenant, they will not be personally charged with the sums so paid, unless the settlement appears to the court to have been injudicious and unwarranted.

[Ed. Note.—For other cases, see *Trusts*, Cent. Dig. § 322; Dec. Dig. § 225.*]

3. TRUSTS (§ 225*)—MANAGEMENT OF PROPERTY—TRUSTEE'S LIABILITY FOR RENT PAID.

The trustees of a real estate trust company, one of whom was related to a shareholder who held two-thirds of the shares, consisting of a hotel property, and who was also beholden to him for financial assistance, and the other of whom was the confidential secretary of the shareholder and had been appointed because of the large interest owned by his employer, and both of whom were dominated by the shareholder in all important affairs of the trust, permitted or requested him to act for them in the purchase of furniture, fixtures, and household supplies for use in the hotel, and paid him \$5,200 for their use, although it was found that he had been fully compensated for their use and for his loss on their sale, and after the payment the trustees signed an antedated paper in the form of a vote, reciting that the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes

payment was to reimburse him for his loss sustained in behalf of the hotel property in the sale of the furniture and for its use. *Held*, in an action by the other shareholders for an accounting, that the trustees' charge for the sum paid was properly disallowed, and that the paper signed by them was not effective as a ratification, as the payment was unauthorized. [Ed. Note.—For other cases, see Trusts, Dec. Dig. § 225.*]

4. TRUSTS (§ 172*)—ACTION AGAINST TRUSTEES FOR ACCOUNTING—IGNORANCE OF DUTIES NO DEFENSE.

Trustees, whose powers are expressly defined by a written instrument under which they are appointed, cannot excuse themselves in an action for an accounting by the fact that they may have been ignorant of the scope of their duties or the legal requirements connected with their office.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 227; Dec. Dig. § 172.*]

5. TRUSTS (§ 240*)—MANAGEMENT OF TRUST PROPERTY—JOINT OR SEVERAL LIABILITY OF TRUSTEES.

Mortgaged hotel property, in which there was an equity of redemption valued at \$100,000, was held in trust for beneficiaries whose interests were represented by shares of stock in a company. One of the three original trustees died and another resigned. The surviving trustee was related to a shareholder who held two-thirds of the company's shares, and was also beholden to him for financial assistance. At the request of the shareholder one of the vacancies was filled by the appointment of his confidential secretary, and thereafter the trustees, who were dominated in all the important affairs of the trust by the shareholder, made no effort to pay or renew the second mortgage when it became due, and took no precautions to provide for a contingency which would occur if the mortgage was not paid or renewed, and under the virtual direction of the shareholder suffered a foreclosure extinguishing the equity of redemption. The new trustee misled the original trustee in the final attempt to save the property, but the original trustee had himself assented to other acts in breach of the trust. *Held*, in an action by some of the other shareholders for an accounting, that while a trustee is not responsible for acts or misconduct of a cotrustee, in which he has not joined or to which he does not consent, or which he has not aided or made possible by his own neglect, the cotrustees were under the circumstances jointly liable for the value of the equity of redemption.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 347; Dec. Dig. § 240.*]

6. TRUSTS (§ 230*)—MANAGEMENT OF TRUST PROPERTY—CORPORATE BENEFICIARIES—RIGHT OF ACTION.

Where trustees in an action for an accounting are held liable to a part of the shareholders in the trust estate for misconduct in its management, a plaintiff corporation, some of whose stock is owned by a person who participated in the misconduct of the trustees, is not estopped from sharing in the distribution of the amounts recovered, but the trustees cannot be charged with the proportion of its loss represented by such shares.

[Ed. Note.—For other cases, see Trusts, Dec. Dig. § 230.*]

Appeal from Superior Court, Suffolk County; Loranus E. Hitchcock, Judge.

Bill for an accounting by Eleanor C. Ashley and others against Robert L. Winkley and others, trustees. Decree for plaintiffs,

and defendants appeal. Modified and affirmed.

Dickinson & Dickinson and S. Williston, for appellants. I. R. Clark and G. F. Ordway, for appellees.

BRALEY, J. [1] The defendants are trustees under an express trust, and in accounting for their administration of the property, which they admit that they have received, the burden is on them to show that in the discharge of their duties they have exercised reasonable skill, prudence and judgment. *Andrews v. Tuttle-Smith Co.*, 191 Mass. 461, 78 N. E. 99; *Pine v. White*, 175 Mass. 585, 56 N. E. 987. If we examine the allegations of the bill, they are charged with having failed to protect the property from foreclosure of a second mortgage whereby the equity of redemption was lost, and generally that they grossly neglected their duties, entailing great pecuniary loss to the plaintiffs in common with other beneficiaries and shareholders. But in the master's report to whom the case was referred, the transactions which the plaintiffs contended were imprudent, and unjustifiable are specifically stated and reviewed. The trust estate when conveyed consisted of the Copley Square Hotel, with the appurtenant land, upon which were a first mortgage for \$300,000, and a second mortgage for \$50,000. The equity of redemption, valued and capitalized at the nominal sum of \$200,000, was divided into shares of \$100 each, for which certificates were issued in accordance with the provisions of the declaration or instrument of trust. By the death of one trustee, and the resignation of another, only the defendant, Frederic Pope, of the original trustees remained, and at the request of Albert A. Pope, who had become the owner of two-thirds of the shares, the defendant Winkley, with the consent of some of the other principal shareholders, was appointed to one of the vacancies, while the other vacancy remained unfilled. It was during the incumbency of Winkley that the transactions took place on which the plaintiffs rely as proof of a flagrant mismanagement of the estate. The evidence is not reported, and the master's findings as to Winkley's personal relations to Albert A. Pope, and the reasons for his appointment, and Pope's control of Winkley, and through Winkley of the management of the trust, are not only important, but should not be reversed unless clearly wrong. It is only when these relations are understood that the unfortunate conduct of the trustees becomes intelligible. The report states that this defendant was his confidential secretary, and bookkeeper, and became trustee because of the large interest which his employer had acquired, while the defendant Frederic Pope was the cousin of Albert A. Pope, to whom he was beholden for

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

financial assistance at various times. The master concludes that in administrative capacity the trustees, and especially Winkley, were not well qualified to administer the trust, and that his double employment "goes far to explain many things which happened later." It appears that, from Winkley's accession to the day of the foreclosure, the influence of Albert A. Pope was dominant in all important business affairs with which the trustees dealt. The very full statements relating to the defendants' first and third exceptions need not be reviewed. The master reports the facts, but does not decide the question of liability. [2] If when the defendants took possession of the premises for the purpose of terminating the lease of their tenant one Risteen, or the occupancy of his successor, the Copley Square Hotel Company, and while seeking for a new tenant carried on the business, they also took and used supplies which were in the hotel, and furniture belonging to the tenant's wife, they were accountable to the owners for their value. The settlements arranged with them upon the advice of competent counsel, do not appear to have been so injudicious and unwarranted, that the defendants should be personally charged with the amounts paid. *Pine v. White*, 175 Mass. 585, 56 N. E. 967.

[3] But the payment to Albert A. Pope of \$5,200, for 13 months' use of the furniture, fixtures and household supplies which were in the hotel, but permitted or requested Pope to act for the sole benefit of the trust as apparently he did, the master finds, that he had been fully reimbursed by the trustees for the loss sustained, when he sold the property to their new lessee for a less sum than that which he paid. The trustees themselves were doubtful, as to the propriety of recognizing his claim for rent. It was after their promissory note had been given in payment for the combined amount, that acting under the suggestion of counsel they signed an antedated paper with a preamble and form of vote containing recitals that the purpose of the note was, "to reimburse him for his loss sustained in behalf of the Copley Square Hotel property in the sale of the furniture, and for the use of the same." The master fittingly characterized their action, as a "posthumous record of an imaginary meeting." It was ineffective as an act of ratification, for the payment was unauthorized, and his disallowance of this item was right, and should not be disturbed. *Rowland v. Maddock*, 183 Mass. 360, 67 N. E. 347; *Hayes v. Hall*, 188 Mass. 510, 74 N. E. 935; *Andrews v. Tuttle-Smith Co.*, 191 Mass. 461, 78 N. E. 99. But the principal sum for which the plaintiffs seek to charge the defendants, is the loss arising from the foreclosure of the second mortgage. [4] The powers of the defendants are defined by the instrument under which they were appointed. By section 5 they were given discretionary authority to mortgage the estate, either to pay in whole

or in part outstanding mortgages, or to renew them, and it is no excuse that they may have been ignorant of the scope of their duties, or of the legal requirements connected with their office. *Pierce v. Prescott*, 128 Mass. 145, 147.

[5] The second mortgage was long overdue when Winkley became trustee, but "he made no effort to pay, renew or extend it," and "failed to exercise the care and prudence which the law demands of a trustee in his position." The findings which we have quoted, were amply justified by the history of his management set forth at length in the report. Having taken no precautions to provide for a contingency which must occur if the mortgage was not paid, renewed or extended, a foreclosure followed extinguishing the equity of redemption which the master valued at \$100,000. If the foreclosure resulted from improvident management, the master further determined, that the property even then could have been saved, if the trustees had acted promptly and judiciously. It would not be profitable, nor is it material, to recount the efforts which finally were put forth, or the participation of Albert A. Pope, who the master reports, "virtually directed the sale." But his findings, that a loan sufficient to have paid the mortgage could have been obtained, and was offered to them upon terms which would have saved the property, and should have been accepted, is proof of their further delinquency. If there is no doubt that Winkley must be charged with the full amounts previously stated the defendant Pope urges that he should be exonerated from all blame. It is well settled that a trustee is not responsible for the acts or misconduct of a cotrustee in which he has not joined, or to which he does not consent, or has not aided or made possible by his own neglect. *Hayes v. Hall*, 188 Mass. 510, 514, 74 N. E. 935; *Pom. Eq. Jur.* (3d Ed.) §§ 1081, 1082. The defendant was required to inform himself of the various business transactions involved in the execution of the trust. He could not properly discharge his duty by surrendering the substantial or entire control to Winkley, or delegate his authority to him, or to Albert A. Pope, or be indifferent when the course of affairs was distinctly disadvantageous to the beneficiaries whose interests he had been selected to protect. But even if he is given the benefit of the master's finding, that Winkley misled and deceived him in the final attempt to preserve the property from foreclosure, his previous findings, that with knowledge of the transaction he assented to the payment for the use of the furniture, and was responsible with his cotrustee for the loss sustained through their failure to provide for the payment or extension of the second mortgage having been amply warranted, he cannot escape liability to the shareholders. *Stowe v. Bowen*, 99 Mass. 194; *Hayes v. Hall*, 188 Mass. 510, 74

N. E. 935; *Cunningham v. Pell*, 5 Paige (N. Y.) 607.

[6] We may add, that notwithstanding the defendants' contention, that the Sheldon Corporation, which is one of the parties plaintiff, should not be permitted to recover, it is not estopped upon the facts reported, from sharing in the distribution of the amounts which the defendants must pay, but Albert A. Pope having participated in their misconduct, they should not be charged with the proportion of the loss represented by his shares. *Andrews v. Tuttle-Smith Co.*, 191 Mass. 461, 468, 78 N. E. 99, and cases cited.

The result is that the interlocutory decree must be modified by overruling the defendants' second exception to the master's report, and the final decree should charge the defendants with the sum of \$100,000 with interest from September 19, 1907, and the additional sum of \$4,000 with interest from September 30, 1905, and when so modified, the decrees severally are affirmed, and the plaintiffs are respectively entitled to recover the amounts as therein specified.

Ordered accordingly.

(209 Mass. 556)

**NEW ENGLAND FOUNDATION CO. v.
REED et al.**

(Supreme Judicial Court of Massachusetts.
Norfolk. Sept. 6, 1911.)

1. CONSPIRACY (§ 9*)—CONSPIRACY TO DEFRAUD—GIST OF ACTION.

The gist of a civil action for damages for conspiracy to defraud for work performed is the deceit or fraud causing the damage; a conspiracy being charged merely to establish joint liability.

[Ed. Note.—For other cases, see *Conspiracy*, Cent. Dig. § 12; Dec. Dig. § 9.*]

2. CONSPIRACY (§ 14*)—CIVIL LIABILITY—JOINT LIABILITY.

Where defendant's only connection with the building of houses by another, who fraudulently induced plaintiff to commence work on houses by misrepresentations as to his financial standing, was as mortgagee of the land purchased for a building site, which relation was assumed to enable such other to pay for the land, defendant was not liable in an action against him and the other for conspiracy to defraud plaintiff in making the contract with plaintiff for work on the lot; mere passive willingness to profit by the failure of one under no legal responsibility, as agent, copartner, or otherwise, not being the basis of any civil liability as a joint wrongdoer.

[Ed. Note.—For other cases, see *Conspiracy*, Cent. Dig. § 14; Dec. Dig. § 14.*]

3. REFERENCE (§ 85*)—MASTER'S AUTHORITY—RULINGS OF LAW.

The only duty of the master is to find the facts of the case referred to him; he not being required to make general rulings of law as to the effect of his findings.

[Ed. Note.—For other cases, see *Reference*, Cent. Dig. § 131; Dec. Dig. § 85.*]

Appeal from Superior Court, Norfolk County; James B. Richardson, Judge.

Suit by the New England Foundation

Company against William W. Reed and others. Decree dismissing the bill, and plaintiff appeals. Affirmed.

John B. Sullivan, Jr., and Paul R. Blackmur, for appellant. Lincoln & Hemenway and Edwin G. McInnes, for appellees.

RUGG, J. [1] This is a suit in equity by which the plaintiff seeks to hold the several defendants on the ground of a conspiracy to defraud it, for work performed and materials furnished in the construction of apartment houses. The gist of a civil action of this sort is not the conspiracy, but the deceit or fraud causing damage to the plaintiff, the combination being charged merely for the purpose of fixing joint liability on the defendants. *May v. Wood*, 172 Mass. 11, and cases cited at 13, 51 N. E. 191; *Gurney v. Tenney*, 197 Mass. 457-465, 84 N. E. 428.

The material facts are these: The defendant Conner conceived the idea of building a block of houses in Brookline, and had negotiations for the purchase of land for this purpose with one Stearns, the owner. Before the terms of this purchase were concluded, Conner, by misrepresentation as to his financial standing, induced the plaintiff to commence work on the lot, and a written contract between the plaintiff and defendant was signed for concrete piling on December 24, 1908. It is for performance of this contract that the plaintiff seeks to hold the other defendants. The plaintiff does not allege any communication between it and the other defendants. It made no inquiries of them, and received no information from them, directly or indirectly. At the time it began work, and when the contract was signed, Conner did not own the land. On January 9, 1909, Conner procured, through deceit, as the master found, as to his financial resources, in which the defendant W. W. Reed participated, the conveyance of the land from Stearns to himself and at the same time executed to Reed and his associates a first mortgage. Conner was without money, and as a stranger he had sought Reed for the purpose of placing this mortgage, from the proceeds of which he hoped to be able to build the houses. The money on the mortgage was to be advanced in installments, and a part of it was to be used toward the purchase price of the land in a way which, as to Stearns, the master has found was fraudulent. But he has also found that Conner was not the agent of Reed, and that although Conner was without experience, skill or efficiency in this kind of business, and the plan of getting title and application of advancements on the mortgage were such as to make it "not only possible but probable at the outset" that Conner would be unlikely to be able to proceed, yet he also finds

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

that Reed maintained the relation of mortgagee, and had no other active intent about the matter; that the joint action between Reed and Conner ended with the execution of the mortgage from Conner to Reed and his associates, and that Reed did not intend to cause Conner to fail, and did not have the equivalent of actual knowledge as to the result of Conner's operations.

[2] This does not go quite to the extent of making Reed and his associates liable for the false representations of Conner, or for a conspiracy with him to defraud. It does not show a connection sufficiently close between Reed and Conner to constitute them joint adventurers, or to establish the relationship of principal and agent. This is not a case where the master has found that the real design of the defendant mortgagees was to put forward the nominal owner of the land for the purpose of procuring its improvement through the labor and materials of others, either consciously intending or as reasonable men bound to anticipate the result that through the failure of the nominal owner, all that was done would inure to their benefit. He does not find that the elaborate agreement between Conner and Reed for the advancement of the money ostensibly by way of mortgage, although lacking nothing in legal form, was in truth a mere pretense to mask the real purpose of ultimately defrauding all who might add value to the property described in the mortgage. Nor does he find that Reed and his associates used Conner as their tool, either with or without his knowledge and consent, in a scheme which they had made their own to the end that they might defraud. Findings like these would call for the application of different principles of law. But in this case the plan originated with Conner. The contract, by the performance of which the plaintiff has suffered damage, was made before the defendants other than Conner had any connection with the matter. The mortgage was a genuine one. The defendant mortgagees were able and ready to carry out their part of the mortgage contract with Conner and to advance him the money from time to time as required by it. While Conner was wholly incompetent, he regarded himself as the responsible head, and was treated as such by the other defendants. When the relation between the parties is not such as to impose some duty, passive observation of the conduct or readiness to profit by the failure of one for whom no legal responsibility exists as agent, copartner, confederate or otherwise, does not constitute a basis for civil liability as a joint participator. This case is distinguishable in its facts from *Light v. Jacobs*, 183 Mass. 206, 66 N. E. 799, and *In re Friedman* (D. C.)

164 Fed. 134, especially relied upon by the plaintiff.

[3] The master undertook, as a part of his report, to make rulings of law. His only duty was to find the facts, and he was not required to make general rulings of law as to the effect of these findings. *Clark v. Seagraves*, 186 Mass. 430-435, 71 N. E. 813; *Adams v. Young*, 200 Mass. 588, 590, 86 N. E. 942. The facts which he has reported do not warrant the ruling that the defendants are responsible in damages to the plaintiff. The first and second exceptions of the defendant Reed and the fifth exception of the defendant Conner to the master's report should be sustained.

It does not appear to be necessary to discuss the question whether the finding of the master was warranted, that the deed from Stearns to Conner was procured by the deceit of the latter in which Reed participated.

Decree dismissing the bill affirmed.

(209 Mass. 529)

LYDON v. EDISON ELECTRIC ILLUMINATING CO.

(Supreme Judicial Court of Massachusetts. Middlesex. Sept. 6, 1911.)

1. ELECTRICITY (§ 18*)—INJURIES—CONTRIBUTORY NEGLIGENCE.

If, after a city employé, engaged in trimming trees in the street, had been told that if the wire, from contact with which he was killed, was a street light the current was not on, the employé touched the wire to determine whether it was on, the electric company would not be liable for his death.

[Ed. Note.—For other cases, see *Electricity*, Cent. Dig. § 10; Dec. Dig. § 18.*]

2. ELECTRICITY (§ 18*)—INJURIES—CONTRIBUTORY NEGLIGENCE.

If a city employé, engaged in trimming trees in the street, accidentally slipped or lost his balance as he was descending, and instinctively threw up his hand, touching a lighting wire running through a tree, he would not necessarily be guilty of contributory negligence.

[Ed. Note.—For other cases, see *Electricity*, Cent. Dig. § 10; Dec. Dig. § 18.*]

3. ELECTRICITY (§ 19*)—INJURIES—CONTRIBUTORY NEGLIGENCE—SUFFICIENCY OF EVIDENCE.

In an action against an electric company for intestate's death while trimming trees for a city, by throwing his hand against a lighting wire, evidence held not to warrant a finding that intestate exercised due care.

[Ed. Note.—For other cases, see *Electricity*, Dec. Dig. § 19.*]

Exceptions from Superior Court, Middlesex County; Daniel W. Bond, Judge.

Action by Nellie Lydon, administratrix, against the Edison Electric Illuminating Company. Verdict for plaintiff, and defendant excepts. Exceptions sustained.

Elder, Whitman & Barnum and Jas. T. Pugh, for plaintiff. Henry F. Hurlburt and Chas. M. Davenport, for defendant.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

MORTON, J. While at work in the employ of the town of Winchester, destroying gypsy and brown-tail moths in a tree at the corner of Mt. Pleasant street and Highland avenue in that town, the plaintiff's intestate was instantly killed by reason of his left hand coming in contact, at a place where the insulation had been worn off, with an electric light wire running through the tree, and maintained by the defendant. This is an action under R. L. c. 171, § 2, as amended by St. 1907, c. 375, to recover damages for his death. There was a verdict for the plaintiff and the case is here on exceptions by the defendant to the refusal of the presiding judge to rule that upon all the evidence the plaintiff was not entitled to recover and to give certain other rulings that were requested, to the admission of evidence, and to certain portions of the charge.

It appeared that at the corner of Mt. Pleasant street and Highland avenue there was a large pole on which were two cross-arms. From the lower cross-arm three telephone wires passed through the tree, and from the upper seven electric light wires, including the one by which the plaintiff's intestate was killed. It was admitted that the electric light wires were controlled, maintained and operated by the defendant. It was also admitted that the tree was within the limits of the highway. The wires were parallel with Mt. Pleasant street, which ran east and west. The distance of the upper wires from the ground was variously estimated at from 12 to 20 feet more or less. The wire which the plaintiff's intestate came in contact with was the northerly wire on the upper cross-arm. This was what was called a primary wire and carried 2,300 volts, more than twice enough to cause instant death. Shortly before the accident the deceased had gone up into the tree for the purpose of destroying moths' nests. There was evidence tending to show that he went up till he was about a foot above the electric light wire, and that he was from 15 to 18 inches to one side and northerly of the wire which killed him and on the side next to the street. In going up he went one side of the wires and not through them so far as appeared. Before going up his attention had been called by the foreman to the place on the wire where the insulation was worn off, and he passed the wire safely in going up. Worn places on wires were not uncommon and the men were expected to look out for them and to warn each other. The evidence tended to show that after he had finished cutting off and painting the nests he passed down his cutting pole and the swab with which he had been painting the nests and prepared to descend along the limb where he was. While going down he asked one of the men, who was in the tree and back to back with him and about 5 or 6 feet away on the opposite side of the tree, whether he thought a certain

wire was a street light and the man said he thought it was, and the foreman, who was on the ground and heard the question and answer, thereupon said that if it was "there is no current on." The man of whom the question was asked testified that the deceased pointed to the second wire and not to the one by which he was killed. But the jury might have found that he was mistaken and that the deceased pointed to the other wire, the one which killed him. At the time when he asked the question the deceased had descended several feet. This was the last time that he was seen alive. Shortly after, the time varying according to the witnesses from two seconds to half a minute or more, one of the men heard a groan and looking up saw the deceased about a foot below the wire with his left arm extending up above his head in a bent position and the inside of the tip of the third finger in contact with the wire at the place where the insulation was worn off. The deceased was standing rigid, bent a little backward, with the spur on his right foot driven into the limb. His hold on or contact with the wire was broken as soon as possible and he was taken down, but was found to be dead.

We assume in favor of the plaintiff without deciding that there was evidence of negligence on the part of the defendant.

[1, 2] The difficult question is whether there is any evidence warranting a finding that the plaintiff's intestate was in the exercise of due care. No one saw him when the accident that caused his death occurred. He had come down by the wire safely, just as he had gone up safely, and was a foot below it when in some entirely unexplained way the inside of the third finger of his left hand at the tip end of it came in contact with the wire. In order to make the contact he had to raise his hand about a foot above his head after, as we have said, he had come down safely by the wire. He was not required in the performance of any duty to examine the wire, and any presumption of due care which might have arisen in such a case is wanting. If, bearing in mind what had been said to him to the effect that if the wire was a street wire the current was not on, he chose to touch it for the purpose of testing the truth of the remark, it is manifest that he took the risk and the defendant is not liable. If as he went down he accidentally slipped or lost his balance and instinctively and naturally threw up his hand and happened in that way to touch the wire, that would not be inconsistent with due care on his part. *Garant v. Cashman*, 183 Mass. 13, 66 N. E. 599. But whether he did so or not is wholly a matter of conjecture. The fact that he exercised care in going down as it is shown that he did by the fact that he had got safely by the wire and by the fact that the spur on his right foot was driven into the limb, does not remove the manner in which

the accident occurred from the field of conjecture or warrant an inference that at the instant of the accident he was in the exercise of due care. It is impossible to say that the fact that a man has been careful down to the instant before he is injured warrants of itself the inference that he was in the exercise of due care the instant after, when the accident occurs.

We assume in favor of the plaintiff that she was not bound to show positive acts of due care on the part of her intestate, but that it was sufficient if circumstances were shown which fairly excluded negligence on his part or from which due care could be fairly inferred. The difficulty in the present case is that no circumstances appear in regard to the manner in which the accident happened from which such an inference can be fairly drawn. In *Prince v. Lowell Elec. Light Corp.*, 201 Mass. 276, 87 N. E. 558, relied on by the plaintiff, there was evidence of circumstances from which an inference that the deceased was in the exercise of due care at the instant that he was killed could be fairly drawn.

[3] The case is a hard one, but we feel compelled to say that there was no evidence warranting a finding that the deceased was in the exercise of due care when he was killed. See *MacDonald v. Edison Elec. Ill. Co.*, 208 Mass. 199, 94 N. E. 259; *Horne v. Boston Elev. Ry.*, 206 Mass. 231, 92 N. E. 223; *Hanna v. Haverhill Gas Light Co.*, 203 Mass. 572, 89 N. E. 1043; *French v. Sabin*, 202 Mass. 240, 88 N. E. 845; *Ralph v. Cambridge Elec. Light Co.*, 200 Mass. 566, 86 N. E. 922; *McCarthy v. Clinton Gas Light Co.*, 193 Mass. 76, 78 N. E. 739.

The conclusion to which we have come on the principal question in the case renders it unnecessary to consider other questions which the defendant has raised.

Exceptions sustained.

(209 Mass. 542)

BIGELOW CARPET CO. v. WIGGIN et al.

(Supreme Judicial Court of Massachusetts.
Middlesex. Sept. 6, 1911.)

1. EASEMENTS (§ 36*)—EVIDENCE TO ESTABLISH—SUFFICIENCY.

A party claiming an easement of way by adverse user must show by a fair preponderance of the evidence that, with the acquiescence of the owner or his predecessors in title, the use of the land as a way has been open, uninterrupted, and adverse for 20 years, the prescriptive period provided by Rev. Laws, c. 130, § 2.

[Ed. Note.—For other cases, see *Easements*, Cent. Dig. §§ 88-93; Dec. Dig. § 36.*]

2. EASEMENTS (§ 8*)—ADVERSE CHARACTER—PERMISSIVE USE.

An adverse right cannot be gained from permissive enjoyment, or mere accommodation.

[Ed. Note.—For other cases, see *Easements*, Cent. Dig. §§ 23-33; Dec. Dig. § 8.*]

3. EASEMENTS (§ 37*)—PRESCRIPTION—QUESTION FOR JURY.

In an action to establish a right of way by prescription, the question whether the use was under a claim of right, or only permissive, is for the jury.

[Ed. Note.—For other cases, see *Easements*, Cent. Dig. § 94; Dec. Dig. § 37.*]

4. RECORDS (§ 9*)—REGISTRATION OF TITLE TO LAND—BURDEN OF PROOF—STATUTORY PROVISIONS.

Where the judgment of the land court on petition to register title determines as an inference of fact that "a full and unobstructed use of the strip in question as a way for teams and persons on foot had been acquired by prescription in favor of the respective respondents' estates," this report, made by St. 1906, c. 288, prima facie evidence on appeal to the superior court, if unaffected, is sufficient to support the respondents' claim; but if the jury, on all the evidence, finds the report controlled, its probative effect disappears.

[Ed. Note.—For other cases, see *Records*, Dec. Dig. § 9.*]

5. EASEMENTS (§ 10*)—PRESCRIPTION—RIGHT OF WAY.

The undisclosed purpose of the dedicators of land for a public way to restrict its use to their estates and to their successors in title, if the way was not accepted, could not operate to prevent other persons from acquiring adverse rights therein.

[Ed. Note.—For other cases, see *Easements*, Cent. Dig. §§ 27-32; Dec. Dig. § 10.*]

6. EASEMENTS (§ 10*)—ACQUISITION OF RIGHTS OF WAY—GRANTS AND PRESCRIPTIVE RIGHTS.

A right of way may exist over the same place in favor of different persons, holding by diverse titles; and, if some of them enjoy it by grant or custom, this does not prevent others from acquiring a prescriptive right therein, even if the use be of the same character.

[Ed. Note.—For other cases, see *Easements*, Cent. Dig. §§ 27-32; Dec. Dig. § 10.*]

7. EASEMENTS (§ 37*)—QUESTION FOR JURY—EFFECT OF SIGN.

The effect to be given to the act of the owner of the fee in a way which, on an attempt to dedicate it, had not been accepted, in putting up a sign, "Private Way," as indicative of a purpose to withdraw the dedication or to prevent the acquirement of prescriptive rights therein, is for the jury.

[Ed. Note.—For other cases, see *Easements*, Cent. Dig. § 94; Dec. Dig. § 37.*]

8. EASEMENTS (§ 8*)—PRESCRIPTION—USE PROHIBITED.

Under the express provision of Rev. Laws, c. 130, § 3, an easement of way by use may be barred by a notice of an intention to prevent the acquisition of a right of way.

[Ed. Note.—For other cases, see *Easements*, Cent. Dig. §§ 23-33; Dec. Dig. § 8.*]

9. EASEMENTS (§ 36*)—PRESCRIPTIVE RIGHT OF WAY—SUFFICIENCY OF EVIDENCE.

Evidence in a proceeding in which respondents claimed a prescriptive easement of way by adverse user, and in which it was conceded that the way had been used continuously and openly for more than 20 years, held sufficient to show that the user was with the assent of the owner of the fee to the exercise of an adverse right.

[Ed. Note.—For other cases, see *Easements*, Cent. Dig. §§ 88-93; Dec. Dig. § 36.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

10. EASEMENTS (§ 36*)—USE AS EVIDENCE OF ADVERSE RIGHT.

Where the evidence tends to prove an attempted dedication, which failed because of nonacceptance, it is admissible to show that the use thereafter by an abutting owner was in the exercise of an adverse right.

[Ed. Note.—For other cases, see Easements, Cent. Dig. § 36.*]

11. EASEMENTS (§ 9*)—PRESUMPTION OF ACQUIESCENCE.

It is not necessary that owners of estates abutting upon a private way give formal notice or assert that their use of it is with claim of right, or that the owner of the fee should be directly informed of their claim, since, where their use is open and continuous for over 20 years, the owner's acquiescence may be presumed.

[Ed. Note.—For other cases, see Easements, Cent. Dig. § 25; Dec. Dig. § 9.*]

12. EVIDENCE (§ 241*)—PRESCRIPTION—ADMISSIONS—EMPLOYÉ.

In a petition to register title to land, where other parties claimed prescriptive rights of way over it, the statement of a person, who died before the trial, but who had been intrusted with the superintendence of the petitioner's property, made while in its management and within the scope of his employment, that the way must be kept unobstructed for the use of the abutters thereon, is admissible.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 887-892; Dec. Dig. § 241.*]

13. TRIAL (§ 260*)—REQUESTS—INSTRUCTIONS ALREADY GIVEN.

Requested instructions, which have been covered, so far as applicable, by instructions given, are properly refused.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 651-659; Dec. Dig. § 260.*]

14. EASEMENTS (§ 10*) — ACQUISITION OF RIGHTS OF WAY OVER PUBLIC WAYS.

One cannot prescribe for a right of way common to the whole community, or to the public.

[Ed. Note.—For other cases, see Easements, Cent. Dig. §§ 27-32; Dec. Dig. § 10.*]

15. APPEAL AND ERROR (§ 171*)—REVIEW—THEORY OF CASE.

One cannot try his case on one theory of the evidence in the trial court and on another theory on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1053-1069; Dec. Dig. § 171.*]

16. RECORDS (§ 9*)—REGISTRATION OF TITLE TO LAND—ISSUES FRAMED FOR JURY—RIGHT TO OPEN AND CLOSE.

The petitioner, asking to have a title registered, is the moving party, and, if an issue for the jury is framed, the transfer of the issue to the superior court for trial does not remove the case, which still remains in the land court for final disposition after the answer of the jury has been certified; and where the burden of proof on an affirmative claim has shifted to the adversary party the petitioner still has the right to open and close.

[Ed. Note.—For other cases, see Records, Dec. Dig. § 9.*]

Exceptions from Superior Court, Middlesex County; John H. Hardy, Judge.

Petition by the Bigelow Carpet Company to register title to land, in which Burton H. Wiggin and others claimed rights of way. Issue tried in the superior court, with ver-

dict for Wiggin and others, and petitioner excepted. Exceptions sustained.

Hutchins & Wheeler, for petitioner. Frank E. Dunbar and Spalding & Spalding, for respondent Wiggin. John J. Pickman, for respondent Parsons. Pratt & Devine, for respondent Davey.

BRALEY, J. [1] The respondents concede that the fee in the land is owned by the petitioner, but contend that it is subject to an easement of way, which has become appurtenant to their several estates by prescription. To support their contention under the issue framed to try the question, they were required to show, by a fair preponderance of the evidence, that with the acquiescence of the petitioner, or its predecessor in title, the use of the land as a passageway to and from Market street to Carpet lane, on which the rear of their estates abutted, had been open, uninterrupted and adverse for a period at least of 20 years. *Lipsky v. Heller*, 199 Mass. 310, 317, 85 N. E. 453; *Barnes v. Haynes*, 13 Gray, 188, 74 Am. Dec. 629; *Blake v. Everett*, 1 Allen, 248; *Claffin v. Boston & Albany R. R.*, 157 Mass. 489, 32 N. E. 659, 20 L. R. A. 638. Rev. Laws, c. 180, § 2. But while unquestioned, at the trial, that for more than the required period the way had been used openly and continuously, the petitioner asserted that in its origin the use was permissive, and that the evidence of the respondents was insufficient to warrant a finding that the easement had been established. [2, 3] It is undoubtedly true that an adverse right cannot be gained from permissive enjoyment, or mere accommodation, but generally, in an action to establish a right of way by prescription, the question whether the use was under a claim of right or only permissive is for the jury. *Putnam v. Bowker*, 11 Cush. 542.

[4] The judge of the land court, whose findings of fact are made prima facie evidence by St. 1905, c. 288, determined as an inference of fact that "a full and unobstructed use of the strip in question as a way for teams and persons on foot had been acquired by prescription, in favor of the respective respondents' estates." See St. 1910, c. 560, §§ 2, 8. If the jury on all the evidence found his report had been controlled, the probative effect conferred by the statute disappeared, but if unaffected the report was sufficient to support the respondents' claim. *Cohasset v. Moors*, 204 Mass. 173, 90 N. E. 978. Independently, however, of the report there was evidence for the consideration of the jury, that prescriptive rights had been acquired. By an agreement duly executed and recorded in 1841 the owners, under one of whom the petitioner derives title, dedicated the strip of land in

question as a public street. Before the enactment of St. 1846, c. 203, it never became a public way, not having been accepted on the part of the city, and since the statute it has not been legally laid out and established. *Hayden v. Stone*, 112 Mass. 346; *Gen. St. 1860, c. 43, § 82*; *Pub. St. 1882, c. 49, § 94*; *Rev. Laws, c. 48, § 98*. But from the time of dedication it had remained open, even if since 1859 it has been paved and kept in repair by the petitioner and its grantor, and a sign with the words "Private Way" had been erected and maintained. [5] If the original intention had been to restrict its use to their estates, and to their successors in title, if the city did not accept, the undisclosed purpose of the dedicators could not operate to prevent other persons from acquiring adverse rights. *Fitchburg R. R. v. Page*, 131 Mass. 391, 396; *Ballard v. Demmon*, 156 Mass. 449, 453, 31 N. E. 635. [6] A right of way may exist over the same place in favor of different persons holding by diverse titles. If some of them enjoy it by grant or custom this does not prevent others from acquiring a prescriptive right, even if the use may be the same in character. *Kent v. Waite*, 10 Pick. 138, 142; *Ballard v. Demmon*, 156 Mass. 449, 31 N. E. 635. [7] And the effect to be given to the act of putting up the sign as indicative of a purpose to withdraw the dedication, or to prevent the acquirement of such rights was for the jury. [8] During the entire prescriptive period, however, they could have been effectually barred by the statutory notice of an intention to prevent the acquisition of the easement. *Rev. St. 1836, c. 60, § 28*; *Gen. St. 1860, c. 90, § 34*; *St. 1867, c. 302*; *Pub. St. 1882, c. 122, § 3*, now *Rev. Laws, c. 130, § 3*.

[9] But if the attempted dedication failed, the use of the way thereafter by the owners of the dominant estates could have been found by the jury to have been with the assent of the petitioner, and its predecessor. The assent, if proved, was not permissive, in the sense of being an accommodation or license, but the continued use would be evidence of the exercise of an adverse right. *Bassett v. Harwich*, 180 Mass. 585, 586, 62 N. E. 974; *Bolivar Mfg. Co. v. Neponset Mfg. Co.* 16 Pick. 241, 246, 247; *Stearns v. Jones*, 12 Allen, 582, 584, and cases cited. [10] As said by Holmes, J., in *Bassett v. Harwich*, 180 Mass. 585, 586, 62 N. E. 974: "So if the evidence tended to prove an attempted dedication, although the dedication failed because of *Pub. St. c. 49, § 94*, it would tend to show that the use thereafter was under a repudiation by the owner of any right to stop it. It would help, not hinder, the proof of an adverse right." [11] It also was unnecessary for the owners of these estates formally to assert or to give notice that they claimed the right to pass and repass, or that the petitioner or its predecessor should have been directly inform-

ed of their claim. *Gray v. Cambridge*, 189 Mass. 405, 418, 76 N. E. 195, 2 L. R. A. (N. S.) 976. The use was open, continuous and so persistent that the jury could find from these circumstances alone, that they knew of it, or their acquiescence could be presumed, even if actual knowledge may not be shown. *Deerfield v. Connecticut River R. R.*, 144 Mass. 325, 328, 11 N. E. 105; *McCreary v. Boston & Maine R. R.*, 153 Mass. 300, 305, 26 N. E. 864, 11 L. R. A. 359. But there was direct evidence of actual knowledge. [12] The statement of one Lyon, who died before the trial, that the passageway must be kept unobstructed for the use of the abutters on Carpet lane was admissible. It was made by a person intrusted with superintendence of its mill property, and while in the management of the petitioner's business, and from the evidence of the witness who testified to the declaration it appears to have been within the scope of his employment. *Parker v. Boston & Hingham Steamboat Co.*, 109 Mass. 447, 449, 452; *Bachant v. Boston & Maine R. R.*, 187 Mass. 392, 396, 73 N. E. 642, 105 Am. St. Rep. 408; *Garfield & Proctor Coal Co. v. Pennsylvania Coal & Coke Co.*, 199 Mass. 32, 42, 84 N. E. 1020. *Rev. Laws, c. 175, § 66*.

[13] The refusal to give the first four requests, and the ninth, eleventh and twelfth requests was right, and the fifth, sixth, seventh, tenth, thirteenth, fourteenth, fifteenth and sixteenth requests so far as applicable, were fully covered by the instructions. It is argued that the eighth and seventeenth requests should have been given, and that the instructions to which the petitioner excepted, are inconsistent with the requests. [14] The basis of the objection is that, if the way was used as a street in common with the general public, no prescriptive right ever attached. The main entrance to the mill property, with the company's office, fronted on the southerly end of the way, where it turned into the lane, and according to all the evidence the use was substantially confined to its employes, and tenants and persons having occasion to transact business at the office, and to the owners of the several estates of the respondents, and those who dealt with them. The petitioner neither at the trial, nor at the argument, claimed or admitted that a public way had been established by prescription, and the respondents therefore could not prescribe for a privilege common to the whole community. *Thomas v. Marshfield*, 13 Pick. 240, 249. [15] But it contended that, as the dedication failed, the way should be considered as appropriated and used for the exclusive use and accommodation of the corporation, and of its employes and tenants. The evidence it offered was confined to this inquiry, while the respondents relied wholly upon the use of the way as connected with their estates. It cannot, in order to defeat them, resort to a defense it did not care to make and which if successful would destroy its alleged right to the registration of an un-

encumbered estate. If the entire charge is read in connection with the evidence, and with the respective positions of the parties in mind, the instructions clearly stated that, if the use was permissive, it could not ripen into an easement, and the burden was on the respondents to prove that it was adverse. Whatever the mode of travel may have been, the jury must have understood that unless they were convinced that the use of the way by the owners was in connection with the respondent estates, and not merely as travelers, or members of the general public, an easement had not been acquired.

[16] The remaining exceptions to the instructions are covered by what has been said and need not be further considered. But if there was no error in the admission of evidence, or in the rulings and instructions, the ruling that as the respondents had the burden of proof they had the right to the opening and close requires us to sustain the exceptions. The petitioner asks to have registered a title in fee, and it is the moving party. If an issue for a jury is framed, that is only an incident of the proceedings, and the transfer of the issue to the superior court for trial does not remove the case, which still remains in the land court for final disposition, after the answer of the jury has been certified. *Weeks v. Brooks*, 205 Mass. 458, 92 N. E. 45. It long has been settled in actions at law, and under issues framed for a jury in equity and in probate appeals where a will is offered for proof, that the plaintiff and the executor has the right to open and close before the jury, irrespective of the form of the pleadings, or whether from the nature of the defense, or of an affirmative claim, or issue, the burden has shifted to the adversary party. *Dorr v. Tremont National Bank*, 128 Mass. 349, 358, 359, 360. The practice should be uniform, and there is no reason why the case at bar should be taken out of this general and salutary rule.

Exceptions sustained.

(209 Mass. 501)

COX v. SAVAGE.

(Supreme Judicial Court of Massachusetts.
Suffolk. June 21, 1911.)

1. STIPULATIONS (§ 14*)—CONSTRUCTION— AGREED STATEMENT AS TO FACTS.

The controversy in an action of contract on an account stated, in which the answer was a general denial and payment, being as to the character of the contract, whether under it defendant was a purchaser of all supplies sent him, or a consignee thereof, liable only for what he sold, the agreed statement as to facts, on which and oral evidence the case was tried, admitting the correctness of the items, and stating that defendant contended, and plaintiff denied, that his agreement with plaintiff's assignor was such that he was entitled to credit for such of said supplies as were in his possession, when their relations ceased, and that

whether he was entitled to such credit was the only question to be tried to the jury, did not have the effect of shifting from plaintiff to defendant the burden of proof as to what the contract was, relative to the right to be credited with such remaining supplies.

[Ed. Note.—For other cases, see *Stipulations*, Dec. Dig. § 14.*]

2. SALES (§ 88*)—SALE OR CONSIGNMENT—EVIDENCE.

Evidence in an action for price of supplies shipped to defendant *held* to make a case for the jury as to whether under the contract he received them as purchaser or as agent, with right to credit for those not ultimately sold by him.

[Ed. Note.—For other cases, see *Sales*, Cent. Dig. §§ 248-250; Dec. Dig. § 88.*]

Exceptions from Superior Court, Suffolk County; John H. Hardy, Judge.

Action by John L. Cox against Fred Savage. Verdict was directed for plaintiff, and defendant brings exceptions. Exceptions sustained.

E. V. Grabill, for plaintiff. D. T. Montague, Wade Keyes, and M. E. Sturtevant, for defendant.

RUGG, J. This is an action of contract upon an account annexed. The defendant was in November, 1906, appointed division manager of a corporation (of which the plaintiff is assignee) for Vermont and New Hampshire. The business of the corporation was dealing in milking machines and dairy supplies. At this time the defendant had a talk with the president and directors of the corporation, in which, to quote the defendant's testimony, "they said they didn't have money enough to run two stations of supplies, and if I had the supplies I would have to advance money toward the supplies." The company's depot of supplies was then in Holyoke. The defendant acted for the corporation from this time until July, 1908, at first leasing and afterwards selling machines, and he kept certain supplies at his place in Vermont for local needs. Both machines and supplies were shipped to the defendant on his order, and invoiced to him at a gross price less his commission. It is not claimed that the machines were sold to him, but it is claimed that the supplies were sold to him. The defendant made collections and remitted, but at no stated times. A change in management of the corporation occurred in March, 1908, and negotiations followed for the establishment of a new business arrangement between it and the defendant. These came to naught, and the relations ceased in July, 1908. At this time the defendant had in his possession certain supplies, which he claimed the right to return and receive credit for under the terms of his original contract with the corporation.

[1] The case was tried upon oral evidence, and an "agreed statement as to facts." A

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

question arises as to its construction. Among its terms were these: That "the terms and credits stated in its account annexed to the plaintiff's declaration * * * are correct so far as they go," with exceptions not here material. "That during the period of his said agency relations with the New England Dairy Supply Company the defendant received certain milking machinery supplies from the said company, and was charged therefor by the company in his accounts with them. That some of the said supplies were in his possession at the time of the termination of his relations with the company. The defendant claims and the plaintiff denies that the defendant should be credited for such supplies as were in his possession at the time of the termination of such relations, the defendant contending and the plaintiff denying that the relations and agreements of the defendant with such company were such that said credit should be given," and that "the only question to be tried before the jury shall be whether or not the defendant shall have any credit for such goods as were in his possession at the termination of his relations with said company."

This does not amount to an agreement to shift the burden of proof from the plaintiff as to its general right to recover and to impose it upon the defendant to establish as an independent defense his right to the return of the supplies on hand and be credited for them. The entire contention relates to the precise terms of the arrangement between the parties, and whether the defendant was a purchaser of all supplies sent, or whether he was a consignee ultimately liable only for such as he finally sold. The controversy did not relate to what in pleading was a confession and avoidance, but to the character of the original contract as to the dairy supplies; one claiming that it was an agency, and the other that it was a sale. This is confirmed by the fact that the declaration was a count upon an account annexed, and the answer a general denial and payment. The burden of proof as to what the contract was rested upon the plaintiff throughout. *Wylie v. Marinofsky*, 201 Mass. 583, 88 N. E. 448. The agreed facts admitted the correctness of the items, but did not reach to any admission as to what the contract was.

[2] The question at issue in one aspect was whether the defendant received the supplies as agent or as purchaser. The fact that they were all charged to him on account is not decisive and was for the jury to pass upon. That might have been found to be a matter of bookkeeping for convenience in keeping track of them. There are several circumstances which appear to support the contention of the defendant that he was agent and not purchaser. The supplies

were shipped and charged to him in the same way as were the machines, but both sides agree that the machines were sent to him as agent and not as purchaser. They were all invoiced to him at the gross price less "his commission." "Commission" is not used in a proper sense as to goods sold directly to a consignee. "Discount" is the natural word to use in such connection, while commission correctly describes that which an agent might receive on sales. It further appeared that in some instances customers in the defendant's territory dealt directly with the corporation, and in these cases it paid to the defendant the same commission he would have received had he secured the customer himself. Letters from officers of the corporation speak of the defendant as its agent. The conversation between the defendant and the president and directors of the corporation at the time of his appointment as manager for Vermont and New Hampshire may have been found to amount only to an agreement on his part to make advancements on account of supplies sent him so that the corporation would not be crippled by running two supply stations, which did not modify the general agency relation, and did not constitute an agreement to purchase.

In view of these considerations it could not properly have been ruled as matter of law that there was no evidence to support the defendant's contention as to what the contract was. The nature of the relation was a question of fact.

Exceptions sustained.

(209 Mass. 590)

AMERICAN SPIRITS MFG. CO. v. ELDRIDGE et al.

(Supreme Judicial Court of Massachusetts. Suffolk. Sept. 6, 1911.)

1. CORPORATIONS (§ 228*)—LIABILITY OF STOCKHOLDERS—INDIVIDUAL LIABILITY—REQUISITES OF ENFORCEMENT.

To enforce a stockholder's liability under a statute making each stockholder individually liable to creditors of the corporation until the whole of the capital stock has been paid, it must appear that the corporation is indebted to plaintiff and that defendant stockholder has partially or wholly failed to pay for the stock subscribed.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 874; Dec. Dig. § 228.*]

2. CORPORATIONS (§ 252*)—LIABILITY OF STOCKHOLDERS—ENFORCEMENT.

To enforce a stockholder's liability under a statute making each stockholder individually liable to creditors of the corporation until the whole of the capital stock has been paid, it is not necessary that judgment for the debt be first recovered against the corporation; such liability being contractual, and the stockholders being charged with notice of the liability imposed by the statute.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1016-1023; Dec. Dig. § 252.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

3. CORPORATIONS (§ 228*) — LIABILITY TO STOCKHOLDERS—STATUTORY LIABILITY.

Under a statute making each stockholder individually liable to creditors of the corporation until the whole of the capital stock has been paid, a stockholder cannot be compelled to pay more than he owes on the shares issued to him.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 875-884; Dec. Dig. § 228.*]

4. CORPORATIONS (§ 216*) — STOCKHOLDER'S LIABILITY—CORPORATE DEBTS—WHAT LAW GOVERNS.

In determining the extent of liability under a contract of stock subscription, the law of the place of contract must control.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 829-834; Dec. Dig. § 216.*]

5. CORPORATIONS (§§ 265, 267*) — LIABILITY OF STOCKHOLDERS—STATUTORY LIABILITY.

To enforce a stockholder's liability under a statute making each stockholder liable individually to creditors of the corporation until the whole of the capital stock has been paid, it is not essential that other delinquent stockholders or the corporation be joined, nor that a receiver be appointed to wind up the corporate affairs.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1069-1125; Dec. Dig. §§ 265, 267.*]

6. CORPORATIONS (§ 259*) — LIABILITY OF STOCKHOLDERS — STATUTORY LIABILITY — REMEDIES.

In enforcing a stockholder's liability under a statute of another state, in which the corporation was organized, making each stockholder individually liable to corporate creditors until the whole of the capital stock has been paid, any exclusive remedy provided by the statute for its enforcement would have to be followed in this state; but, where no remedy is prescribed, the resident stockholder's personal liability may be enforced by any appropriate legal procedure in this state.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1050-1067, 2272; Dec. Dig. § 259.*]

Report from Supreme Judicial Court, Suffolk County.

Action by the American Spirits Manufacturing Company against Chauncy Eldridge and others. On report from the superior court, upon overruling a demurrer to the declaration. Decree overruling demurrer affirmed.

Brandeis, Dunbar & Nutter (J. Butler Studley, of counsel), for plaintiff. Gaston, Snow & Saltonstall (Thos. Hunt, of counsel), for defendants.

BRALEY, J. [1] The defendants have demurred, and the question is whether the bill, the allegations of which are admitted, states a case. It is alleged, that by the laws of Illinois providing for the incorporation of associations "organized for the purpose of constructing railways, and maintaining and operating the same, * * * each stockholder of any corporation formed under the provisions of this act shall be individually liable to the creditors of such corporation, un-

til the whole amount of the capital stock of such corporation so held by him shall have been paid." Hurd's Rev. St. 1909, c. 114, § 17. The defendant became a stockholder in a corporation organized under this act, and the nature and measure of his liability to corporate creditors, is to be defined and determined by the language of the statute. It must affirmatively appear, in a suit to enforce the statute, that the corporation is indebted to the plaintiff, and that the defendant stockholder, while the holder, has failed either partially, or wholly, to pay into the treasury of the corporation the capital represented by the shares issued to him at its organization. Kelley v. Killian, 133 Ill. App. 102, 107. These essential requirements are complied with by the allegations of the existence of an unsatisfied indebtedness of the corporation to the plaintiff for installments of accrued rent, and that with the exception of 6 shares, the entire capital stock, consisting of 1,000 shares of the par value of \$100 each, for which he has not paid, were issued to the defendant, and have been continuously held by him.

[2] But the defendant contends that, before he can be made responsible, judgment for the debt must be obtained against the corporation. The liability imposed is contractual. Putnam v. Misochl, 189 Mass. 421, 423, 75 N. E. 956, 109 Am. St. Rep. 648; Converse v. Ayer, 197 Mass. 443, 453, 84 N. E. 98, and cases cited; Converse v. Nichols, 202 Mass. 270, 274, 89 N. E. 135; Bernheimer v. Converse, 206 U. S. 516, 27 Sup. Ct. 755, 51 L. Ed. 1163. The corporation came into existence by virtue of the statute, and its stockholders were charged with notice of the provisions of the act, which was equivalent to a charter of incorporation. In voluntarily joining as an original stockholder, the defendant must be presumed to have known that, if he did not pay for his shares, creditors could compel him to pay to them the money he justly should have contributed to its capital for the stock he had received, and which would have enhanced its assets. Converse v. Ayer, 197 Mass. 443, 84 N. E. 98. The justice and expediency of the statute are not before us. [3] Its evident purpose is to give a direct remedy to the creditor to obtain payment for his debt out of the unpaid capital, and in no event can the defendant be made to pay more than he owes. Fleischer v. Rentchler, 17 Ill. App. 402; Hatch v. Dana, 101 U. S. 206, 25 L. Ed. 835. If this liability had been made enforceable through the corporation, a judgment against it would have been indispensable before the stockholder could be reached. B. Remington & Sons v. Samana Bay Co., 140 Mass. 494, 496, 5 N. E. 292; Train v. Marshall Paper Co., 180 Mass. 513, 62 N. E. 967. By the statute, however, a judgment not having been required, none is necessary. [4] The defend-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

ant's liability instead of having been made secondary, as provided in the foreign statutes involved and construed in *Hancock National Bank v. Ellis*, 166 Mass. 414, 44 N. E. 349, 55 Am. St. Rep. 414, *Broadway Nat. Bank v. Baker*, 176 Mass. 294, 57 N. E. 603, and *Bearse v. Mable*, 198 Mass. 451, 84 N. E. 1015, is expressly declared to be unconditional under the law of the place of contract, which must control. *Electric Welding Co. v. Prince*, 195 Mass. 242, 81 N. E. 306; *Hager v. Cleveland*, 36 Md. 476; *Gebhard v. Eastman*, 7 Minn. 56 (Gil. 40); *Trippe v. Huncheson*, 82 Ind. 307; *Morrow v. Superior Court*, 64 Cal. 383, 1 Pac. 354; *Liverpool & Great Western Steam Co. v. Phenix Ins. Co.*, 129 U. S. 397, 9 Sup. Ct. 469, 32 L. Ed. 788.

[5] The suit for the creditor's benefit furthermore is not made dependent upon either the joinder of other delinquent stockholders, or of the corporation, or the appointment of a receiver to wind up its affairs, and distribute the assets, and if contribution from his costockholders, and the remedy over against the corporation, are deemed by him valuable rights, the defendant can establish and enforce them by appropriate proceedings. *Cary v. Holmes*, 16 Gray, 127; *Putnam v. Misochi*, 189 Mass. 421, 75 N. E. 956, 109 Am. St. Rep. 648; *Montgomery Door & Sash Co. v. Atlantic Lumber Co.*, 206 Mass. 144, 157, 92 N. E. 71. [6] If an exclusive remedy for the enforcement of the liability had been provided by the statute, it would have to be followed, and might not

have been adapted to our remedial law. But if the remedy is not prescribed, the statutory personal liability of a stockholder according to our recent decisions may be enforced by any appropriate legal procedure of the state of his domicil. *Hancock Nat. Bank v. Ellis*, 172 Mass. 39, 51 N. E. 207, 42 L. R. A. 396, 70 Am. St. Rep. 232; *Putnam v. Misochi*, 189 Mass. 421, 423, 75 N. E. 956, 109 Am. St. Rep. 648; *Converse v. Ayer*, 197 Mass. 443, 84 N. E. 98, and cases cited. See also *Perkins v. Church*, 31 Barb. (N. Y.) 84; *Aldrich v. Anchor Coal Co.*, 24 Or. 32, 32 Pac. 756, 41 Am. St. Rep. 831; *Hatch v. Dana*, 101 U. S. 205, 25 L. Ed. 885; *Flash v. Conn*, 109 U. S. 371, 3 Sup. Ct. 263, 27 L. Ed. 966; *Whitman v. Oxford Nat. Bank*, 176 U. S. 559, 20 Sup. Ct. 477, 44 L. Ed. 587. The adjustment of equities, if any, between the corporation and its stockholders, or between the stockholders themselves, not being a preliminary requirement, the plaintiff could have sued in an action of contract; but as the bill seeks to reach and apply property of the defendant which cannot be seized on execution, it can be maintained for the establishment of the debt, and for equitable relief. *Hancock Nat. Bank v. Ellis*, 172 Mass. 39, 51 N. E. 207, 42 L. R. A. 396, 70 Am. St. Rep. 232; *Broadway Nat. Bank v. Baker*, 176 Mass. 294, 57 N. E. 603; *Flash v. Conn*, 109 U. S. 371, 3 Sup. Ct. 263, 27 L. Ed. 966; *Rev. Laws*, c. 159, § 3, cl. 7. A majority of the court is of opinion that the decree overruling the demurrer should be affirmed.

Ordered accordingly.

(300 Mass. 538)

HOOKER v. BOSTON & M. R. R.

(Supreme Judicial Court of Massachusetts.
Middlesex. Sept. 6, 1911.)**1. CARRIERS (§ 405*)—LIMITING LIABILITY—LOSS OF BAGGAGE.**

Under the common law a carrier can limit liability for loss of baggage only by express contract with the passenger, or by his assent to a known regulation.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 1544-1549; Dec. Dig. § 405.*]

2. CARRIERS (§ 405*)—LIMITING LIABILITY—LOSS OF BAGGAGE—INTERSTATE COMMERCE.

In the absence of any provision in the interstate commerce law as to passengers' baggage, the filing and posting by a carrier, as a part of its schedules for passenger tariff for transportation between states, of a limitation of its liability to loss of baggage not exceeding a certain value, unless a greater value is declared and excess charges paid thereon at time of checking, does not make such limitation an essential part of the rate of transportation of passengers, so as to be binding on a passenger having no knowledge thereof.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 1544-1549; Dec. Dig. § 405.*]

Exceptions from Superior Court, Middlesex County; Robert O. Harris, Judge.

Action by Katherine Hooker against the Boston & Maine Railroad. The court found for plaintiff, and defendant brings exceptions. Exceptions overruled.

Samuel Williston, for plaintiff. Trull & Wier, for defendant.

RUGG, J. The plaintiff, an interstate passenger of the defendant, claims damages in excess of \$2,000 for loss of her baggage occurring through the negligence of the defendant. The defense is that the liability of the defendant is limited to \$100. The grounds upon which that defense is predicated are these: The defendant had complied with all the provisions of the statutes of the United States known as the "Interstate Commerce Act" and the orders of the Interstate Commerce Commission, and among other matters had filed and published schedules of rates, fares and charges, including those in force respecting the stations between which the plaintiff was a traveler. A part of the schedules relating to transportation of baggage was: "Regular baggage service.—One hundred fifty pounds of personal baggage not exceeding one hundred dollars in value, will be checked free for each passenger on presentation of a full ticket, and seventy-five pounds for a half ticket. * * * For excess value the rate will be one-half of the current excess baggage rate per one hundred pounds for each one hundred dollars, or fraction thereof, of increased value declared. The minimum charge for excess value will be 15 cents. Baggage liability is limited to personal baggage not to exceed one hundred dollars in value for a passenger presenting a full ticket and fifty dollars in

value for a half ticket, unless a greater value is declared and stipulated by the owner and excess charges thereon paid at time of taking the baggage." These provisions were filed with the Interstate Commerce Commission and with the agent of the defendant at Boston, where the plaintiff's baggage was checked, and a notice to this effect was conspicuously posted near the defendant's Boston ticket office, and a further notice of limitation of value of baggage was likewise posted in its Boston baggage room. The plaintiff did not, in fact, know of this regulation, nor of any rule limiting the value of baggage to be carried without extra charge. She was not asked for the value of her baggage at the time of checking it or of purchasing her ticket.

[1] The common-law rule fixing the rights of the parties is not open to doubt. It is that respecting the transportation of baggage or merchandise a common carrier may relieve itself from many of the heavy responsibilities amounting to insurance cast upon it by the law. It may not exonerate itself, however, by regulation or by contract from liability for its own negligence, but it may make just and reasonable stipulations in good faith as to the value of the property intrusted to its care, and the amount for which it shall respond in case of loss, even though occurring through its own negligence. Such stipulation must be brought home to the knowledge of the shipper through either a formal contract, or express or inferable notice, under circumstances warranting the assumption of actual assent. *Brown v. Eastern R. R. Co.*, 11 Cush. 97; *Malone v. Boston & Worcester R. R.*, 12 Gray, 338, 74 Am. Dec. 593; *Cox v. Central Vermont Ry.*, 170 Mass. 129-136, 49 N. E. 97; *Graves v. Adams Express Co.*, 176 Mass. 280, 57 N. E. 462; *John Hood Co. v. American Pneumatic Service Co.*, 191 Mass. 27, 77 N. E. 638; *Brown v. Cunard Steamship Co.*, 147 Mass. 58, 16 N. E. 717; *Hill v. Boston, Hoosac Tunnel & Western R. R.*, 144 Mass. 284, 10 N. E. 836; *Graves v. Lake Shore & Michigan So. R. R.*, 137 Mass. 33, 50 Am. Rep. 282; *Bernard v. Adams Express Co.*, 205 Mass. 254, 91 N. E. 902, 23 L. R. A. (N. S.) 293; *McKahan v. American Express Co.*, 209 Mass. 270, 95 N. E. 785; *Gardiner v. N. Y. C. & H. R. R.*, 201 N. Y. 387, 94 N. E. 876; *Hart v. Pennsylvania R. R.*, 112 U. S. 331, 5 Sup. Ct. 151, 28 L. Ed. 717; *The Majestic*, 166 U. S. 375, 17 Sup. Ct. 597, 41 L. Ed. 1030; *Cau v. Texas & Pacific Ry.*, 194 U. S. 427, 24 Sup. Ct. 663, 48 L. Ed. 1053; *Arthur v. Texas & Pacific Ry.*, 204 U. S. 505, 27 Sup. Ct. 338, 51 L. Ed. 590; *N. Y. C. & H. R. R. v. Fraloff*, 100 U. S. 24-27, 25 L. Ed. 531. See in the Matter of Released Rates, 13 Interst. Com. Com. R. 550; *Herbeck-Demer Co. v. Baltimore & Ohio R. R.*,

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17 Interst. Com. Com. R. 88; Elliott on Railroads (4th Ed.) § 1510, and cases cited. This rule prevails commonly in the states of the Union, except in Pennsylvania (Hughes v. Railroad Co., 202 Pa. 222, 51 Atl. 990, 63 L. R. A. 513, 97 Am. St. Rep. 713), Iowa, Kansas, Texas and Kentucky. See 1 Hutch. on Carriers (3d Ed.) § 405, and cases cited.

It is recognized generally that a public notice restricting in any respect the common-law liability of the carrier is not binding upon the shipper or passenger, even though known, unless assented to by him. Ordinarily, such assent is not implied merely from knowledge, though this may be a significant circumstance, in the light of the requirements of good faith, in connection with others in warranting the inference of assent. *New Jersey Steam Navigation Co. v. Merchants' Bank*, 6 How. 344-382, 12 L. Ed. 465; *Railroad Co. v. Mfg. Co.*, 16 Wall. 318-329, 21 L. Ed. 297; *Judson v. Western R. R.*, 6 Allen, 486, 83 Am. Dec. 646; *Buckland v. Adams Express Co.*, 97 Mass. 124, 93 Am. Dec. 68; *Faulk v. Columbia, Newberry & Lawrence R. R.*, 82 S. C. 369, 64 S. E. 383. See cases collected in 4 Elliott on Railroads (2d Ed.) § 1501, and note.

The English rule is slightly more favorable to the carrier, and affirms the binding force of a notice of limitation, if the carrier has done all that is reasonably sufficient to give to the shipper knowledge of the limitation. *Henderson v. Stevenson*, L. R. 2 H. L. Sc. 470; *Richardson, Spence & Co. v. Rawntree*, [1894] A. C. 217.

It is plain that if the plaintiff's case rested at common law, the action of the superior court would stand, for the fact is expressly found that the plaintiff had no knowledge of the regulation limiting the value of baggage gratuitously carried by the defendant as a part of the transportation for each passenger.

[2] It is earnestly argued by the defendant that the common-law rule is abrogated as to this case, which involves a transportation between two states, by the federal interstate commerce act. Act Feb. 4, 1887, c. 104, 24 Stat. 379 (U. S. Comp. St. 1901, p. 3154); Act March 2, 1889, c. 382, 25 Stat. 855 (U. S. Comp. St. 1901, p. 3158); Act Feb. 10, 1891, c. 128, 26 Stat. 743 (U. S. Comp. St. 1901, p. 3163); Act Feb. 8, 1895, c. 61, 28 Stat. 643 (U. S. Comp. St. 1901, p. 3171); Act Feb. 19, 1903, c. 708, 32 Stat. 847 (U. S. Comp. St. Supp. 1909, p. 1138); Act June 29, 1906, c. 3591, 34 Stat. 584 (U. S. Comp. St. Supp. 1909, p. 1149).

It may be conceded that the subject-matter of passenger's baggage in interstate travel is within the control of Congress, and any enactment by it would bind the parties. It is not contended that there is any specific regulation respecting it to be found in any act of Congress. The precise position of the defendant is that as the limitation of lia-

bility for baggage was filed and posted as a part of its schedules for passenger tariff, the limitation thereby became and was an essential part of its rate, from which under the interstate commerce law it could not deviate, and by which the plaintiff was bound, regardless of her knowledge of or assent to it. If the premise is sound, then the conclusion follows, for the public are held inexorably to the rate published, regardless of knowledge, assent or even misrepresentation. *Gulf, Colorado & Santa Fé Ry. v. Hefley*, 158 U. S. 98, 15 Sup. Ct. 802, 39 L. Ed. 910; *Texas & Pacific Ry. v. Mugg*, 202 U. S. 242, 26 Sup. Ct. 628, 50 L. Ed. 1011; *Melody v. Great Northern Ry.* (S. D.) 127 N. W. 545, 30 L. R. A. (N. S.) 568.

The aim of the interstate commerce act has been stated to be to secure for all the public reasonable rates and equality of rates without discrimination or preference, and that subject to these two dominating purposes the carriers and the people are left to their common-law freedom of making special contracts according to their interests and necessities. *Cincinnati, New Orleans & Texas Pacific Ry. v. Interstate Commerce Commission*, 162 U. S. 184, 196, 197, 16 Sup. Ct. 700, 40 L. Ed. 935; *Interstate Commerce Commission v. Cincinnati, New Orleans & Texas Pacific Ry.*, 167 U. S. 479-493, 17 Sup. Ct. 896, 42 L. Ed. 243; *N. Y., N. H. & H. R. R. v. Interstate Commerce Commission*, 200 U. S. 361-391, 26 Sup. Ct. 272, 50 L. Ed. 515; *Interstate Commerce Com. v. Delaware, Lackawanna & Western R. R.*, 220 U. S. 235-253, 31 Sup. Ct. 392, 55 L. Ed. 443.

Several expressions are to be found in decisions of the United States Supreme Court, which by themselves alone might be taken to indicate that whatever is posted and filed as required by the law thereby is called to the attention of the public, and everybody becomes bound thereby. See for example *Louisville & Nashville R. R. v. Mottley*, 219 U. S. 467-476, 31 Sup. Ct. 265, 55 L. Ed. 297; *Armour Packing Co. v. U. S.*, 209 U. S. 56-81, 28 Sup. Ct. 428, 52 L. Ed. 681; *Texas & Pacific Ry. Co. v. Cisco Oil Co.*, 204 U. S. 449-451, 27 Sup. Ct. 358, 51 L. Ed. 562; *Gulf, Colorado & Santa Fé Ry. v. Hefley*, 158 U. S. 98-101, 15 Sup. Ct. 802, 39 L. Ed. 910. But without examining them in detail, it is apparent from the context that these phrases were intended only to emphasize the general proposition that under the interstate commerce act full publicity of the rates established by the carriers is required, and ample facility given to every interested member of the public to ascertain precisely what those rates are, and that these rates so established under the law are binding upon everybody, and cannot be modified or departed from. Their reasonableness cannot be tried out in an ordinary action in courts between shipper and carrier, but only by petition to the Interstate Commerce Commission. *Texas &*

Pacific Ry. Co. v. Abilene Cotton Oil Co., 204 U. S. 427, 27 Sup. Ct. 350, 51 L. Ed. 553; **Baltimore & Ohio R. R. Co. v. U. S.**, 215 U. S. 481, 30 Sup. Ct. 164, 54 L. Ed. 292. It is apparent that the binding force of the limitation as to amount of recovery in case of loss must stand, if it can stand at all, as being a part of the established rate when filed with the commission and with its officers, and thus binding upon all the traveling public without knowledge of their contents, and not upon the proposition that by being posted "in two public and conspicuous places in every depot" the public were thereby constructively notified. This follows from the decision in **Texas & Pacific Ry. Co. v. Cisco Oil Co.**, 204 U. S. 449-451, 27 Sup. Ct. 358, 51 L. Ed. 562, to the effect that such posting is not a condition precedent to the taking effect of the schedule, but that the rate becomes operative upon filing with the Interstate Commerce Commission and furnishing copies to its officers, even though not publicly posted. It is to be noted also that this is not a case where the Interstate Commerce Commission has established a limitation of value of baggage to be carried free as a part of a rate.

The pivotal question then is whether the limitation as to liability for loss of baggage transported without extra charge is a part of the passenger rate or tariff, or whether it is a subsidiary incident to the main matter of fare. We are of opinion that it is not an essential element in the fare for transportation of passengers. Limitation of liability by contract in case of loss has not been abolished by the interstate commerce act. Reasonable agreements in this regard are upheld. This is a subject, about which the policy established in the several states prevails, since as well as before the enactment of the federal statutes. Hence an agreement inserted in a bill of lading limiting liability in case of loss has been held invalid if contrary to the law of a state, even though made the basis of a contract of interstate carriage. In **Pennsylvania R. R. v. Hughes**, 191 U. S. 477, 24 Sup. Ct. 132, 48 L. Ed. 268, a horse was shipped from Albany in the state of New York to Cynwyd, in the state of Pennsylvania, and was injured by a connecting carrier in the latter state. The bill of lading stated that the freight was to be paid at the lower published rate "upon the express condition that the carrier assumes liability * * * to the extent only of the following agreed valuation, upon which valuation is based the rate charged for the transportation * * * and beyond which valuation neither said carrier nor any connecting carrier shall be liable in any event." The valuation stated was not exceeding \$100. Under the law of Pennsylvania, such a limitation was invalid, and a verdict for the owner for \$10,000 was sustained in the state court. Upon error to the state court the point was clearly raised that this agreement in the bill of lading was

within the protection of the federal interstate commerce clause and act. But it was said by the court, through Mr. Justice Day, after summarizing the requirements of the interstate commerce act, at 191 U. S. 488, 24 Sup. Ct. 135 (48 L. Ed. 268): "We look in vain for any regulation of the matter here in controversy. There is no sanction of agreements of this character limiting liability to stipulated valuations, and, until Congress shall legislate on it, is there any valid objection to the state enforcing its own regulations upon the subject, although it may to this extent indirectly affect interstate contracts of carriage?" After a review of the cases, it is said further, at 191 U. S. 491, 24 Sup. Ct. 136 (48 L. Ed. 268): "The principle is that in the absence of congressional legislation upon the subject, a state may require a common carrier although in the execution of a contract for interstate carriage to use great care and diligence in the carrying of passengers and transportation of goods, and to be liable for the whole loss resulting from negligence in the discharge of its duties. We can see no difference in the application of the principle based upon the manner in which the state requires this degree of care and responsibility, whether enacted into a statute or resulting from the rules of law enforced in the state courts. The state has a right to promote the welfare and safety of those within its jurisdiction by requiring common carriers to be responsible to the full measure of the loss resulting from their negligence, a contract to the contrary notwithstanding." To the same point are **Chicago, Milwaukee & St. Paul Ry. Co. v. Solan**, 169 U. S. 133, 18 Sup. Ct. 290, 42 L. Ed. 688, **Martin v. Pittsburg & Lake Erie R. R. Co.**, 203 U. S. 284, 27 Sup. Ct. 100, 51 L. Ed. 184, and **Latta v. Chicago, St. Paul, M. & O. Ry. Co.**, 172 Fed. 850, 97 C. C. A. 198-202. It is true that in none of these cases, so far as appears in the reports, was the limitation of liability inserted in the schedules as filed and posted under the interstate commerce act, but that appears to us to be an immaterial circumstance. The rate was stated in the several contracts of carriage to be based on the value given. It would be hard to conceive of a rate more plainly bound up with the limitation. It is the substance of the matter and not the form which is decisive. A rate established by a carrier and stated in its schedule as filed to be dependent upon certain limitations of liability, can have no higher or different character than a like rate conditioned by a contract upon the same limitation of liability. The carrier cannot make something a rate merely by calling it by that name. It cannot convert that which is in its essence a subject for regulation, according to the law or policy of the several states, into the rigidity of a rate protected by the federal laws, simply by putting it into a schedule which is called a schedule of rates and tar-

iffs. The defendant seeks the protection of a federal statute. The decisions of the United States Supreme Court are of controlling authority in this respect. The cases we have cited seem to decide, in principle, that the limitation of liability invoked by the defendant is not one which is under the aegis of the interstate commerce act. The subject is one which is not so related to rates of transportation of passengers as to be a part of such a rate. It is governed by the law of the state where the contract of carriage is made and enforced. While this point has not been discussed to any extent, many decisions seem to be based upon the principle we have stated. See *Felder & Turley v. Adams Express Co.* (W. Va.) 71 S. E. 99; *Miller v. Chicago, Burlington & Quincy R. R. Co.*, 85 Neb. 458, 123 N. W. 449; *Windmiller v. Northern Pacific Ry. Co.*, 52 Wash. 618, 101 Pac. 225; *Louisville & Nashville R. R. Co. v. Venable*, 132 Ga. 501, 64 S. E. 466, 26 L. R. A. (N. S.) 969; *Hasbrouck v. N. Y. C. & H. R. R. Co.*, 202 N. Y. 363, 95 N. E. 808. As we have pointed out, there is no doubt that by the common law of this commonwealth the plaintiff was not bound by the limitation of liability of which she was wholly ignorant. She could have been restricted in right of recovery only by express contract or by assent to a known regulation.

The only other exception not expressly waived by the defendant has become immaterial in view of the ground upon which this judgment rests.

Exceptions overruled.

(210 Mass. 26)

SILVER et al. v. GRAVES.

(Supreme Judicial Court of Massachusetts.
Suffolk. Sept. 6, 1911.)

1. CONTRACTS (§ 71*)—CONSIDERATION—FORBEARANCE.

Forbearance to further prosecute a cause of action is sufficient consideration for an agreement to pay or do something, if the action was instituted in good faith, even though it might not have been well founded in law or fact, so that an agreement by a will contestant to withdraw an appeal from a decree probating the will was a sufficient consideration for a promise by contestee to pay contestant a satisfactory sum for withdrawing the appeal.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 295-297; Dec. Dig. § 71.*]

2. CONTRACTS (§ 9*)—CERTAINTY—AMOUNT.

That a will contestee agreed to pay a contestant for withdrawing his appeal from a decree of probate a sum which would be "right" or "satisfactory" did not make the agreement so indefinite as to the amount to be paid as to make it unenforceable; the agreement being to pay such sum as was just, in view of all of the circumstances of the controversy, such as the validity of the grounds upon which the will was contested, the amount which each party might have received in case of intestacy, etc.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 10-20; Dec. Dig. § 9.*]

3. CONTRACTS (§ 275*)—OBLIGATION TO PERFORM—EXECUTED CONTRACTS.

When a contract is executed by one party, the other party will not be permitted to retain the benefit received without himself performing, unless some inflexible rule of law requires it.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. § 1207; Dec. Dig. § 275.*]

4. APPEAL AND ERROR (§ 263*)—EXCEPTIONS—INSTRUCTIONS.

It must be assumed on appeal that instructions given were correct and adequate, where they were not excepted to.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 1516-1532; Dec. Dig. § 263.*]

5. WILLS (§ 230*)—AGREEMENT NOT TO CONTEST—ACTIONS—BURDEN OF PROOF.

In an action by a will contestant on an agreement by contestee to pay plaintiff a satisfactory sum in consideration of the withdrawal of contestant's appeal from a decree of probate, the burden was on plaintiff to show that he intended to prosecute an appeal in good faith.

[Ed. Note.—For other cases, see *Wills*, Dec. Dig. § 230.*]

6. EVIDENCE (§ 64*)—PRESUMPTIONS—INTENT.

It is ordinarily presumed that persons act in good faith, rather than dishonestly.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. § 84; Dec. Dig. § 64.*]

7. WILLS (§ 230*)—AGREEMENT NOT TO CONTEST—DEFENSES.

Plaintiffs were not prevented from suing on a contract by defendant, a party with them to a will contest, to pay them what was right, if they would withdraw a probate appeal, by accepting general legacies to them under the will and signing releases therefor; defendant not having been an executor until thereafter, and the action being against him individually, and not against the estate.

[Ed. Note.—For other cases, see *Wills*, Dec. Dig. § 230.*]

8. SUNDAY (§ 12*)—CONTRACTS—PRELIMINARY NEGOTIATIONS.

In an action on a contract executed on a weekday, a conversation occurring on a preceding Sunday, which was merely preliminary to the contract, was admissible.

[Ed. Note.—For other cases, see *Sunday*, Cent. Dig. § 35; Dec. Dig. § 12.*]

9. CONTRACTS (§ 346*)—ILLEGALITY—PLEADING.

The illegality of a contract sued on cannot be shown, where it was not specially pleaded.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. § 1728; Dec. Dig. § 346.*]

10. APPEAL AND ERROR (§ 1050*)—HARMLESS ERROR—ADMISSION OF EVIDENCE.

In an action by a will contestant on an agreement by contestee to pay plaintiff a sum in consideration of the withdrawal of his appeal from probate, the admission of the inventory of testator's estate could not have injured defendant, even if error.

[Ed. Note.—For other cases, see *Appeal and Error*, Dec. Dig. § 1050.*]

11. PARTIES (§ 15*)—PLAINTIFFS.

Where the promise relied on was made to all of the plaintiffs jointly, they might join in a single action thereon.

[Ed. Note.—For other cases, see *Parties*, Dec. Dig. § 15; *Contracts*, Cent. Dig. §§ 1598-1600.]

12. VENUE (§ 32*)—WAIVER OF OBJECTION—MATTERS OF ABATEMENT.

That plaintiffs' residences did not authorize the institution of a contract action in the county in which it was brought was a matter of abatement, and could not be first raised by a prayer for an instruction at the end of the trial, not going to the court's jurisdiction.

[Ed. Note.—For other cases, see Venue, Cent. Dig. §§ 47-50; Dec. Dig. § 32.*]

Exceptions from Superior Court, Suffolk County; Frederick Lawton, Judge.

Action by Lena M. Silver and others against Charles L. Graves. Verdict for plaintiffs, and defendant excepta. Exceptions overruled.

Geo. H. Tinkham and Simon E. Duffin, for plaintiffs. Wm. A. Davenport, for defendant.

RUGG, J. The father of the three plaintiffs and of the defendant was survived by them and a widow. By his will each of the plaintiffs was given \$100, the widow \$1,000, and the defendant the residue of the estate, amounting to about \$7,500. The plaintiffs appealed from a decree of the probate court allowing the will. There was evidence tending to show that during the pendency of the appeal there were several conferences between the plaintiffs, or some of them, and the defendant, at which the defendant promised the plaintiffs that, if they would withdraw the appeal and let the will be allowed, he would "make it right * * * with a certain sum" and "give a certain sum which would be satisfactory." He declined to name any specific sum of money which he would pay to them. As a consequence of his promise, the plaintiffs withdrew their appeal, and the will was allowed finally. This action is brought to recover the breach of this agreement.

[1-3] 1. The superior court refused to rule that upon all the evidence the plaintiffs could not recover. It is urged that this ruling should have been given for the reason that there was no evidence sufficient to show a binding contract. The promise was between parties competent to contract with each other. It was not tainted with illegality. It was to do a specific thing, namely, to withdraw an appeal in proceedings in court which had been seasonably taken and was pending. The pendency of a genuine cause in court is a definite subject about which to contract. Forbearance to prosecute further such a cause is an adequate consideration for a binding agreement. The only matter which was indefinite was the price to be paid for such forbearance. This was not left wholly to conjecture, for the parties were not silent about it, but might have been found to have agreed that it was to be a sum which would be "right" or "satisfactory." This means what ought to satisfy a reasonable person, or what was fair and just as between the parties. *Handy v. Bliss*, 204 Mass.

513-519. In determining what ought to be satisfactory to a rational person, all the circumstances of the controversy should be considered, and each given its due weight. The conditions under which the will was executed, the physical health and mental power and individual characteristics of the testator, the strength or weakness of the grounds upon which any contest of the allowance of the will might have been justly predicated, the amount of property which each of the plaintiffs might have received in case of intestacy, and the sum actually given to each under the will, for example, are elements to be considered in ascertaining what would be a fair compensation for the concession by the plaintiffs and the advantage to the defendant. It is true that in some aspects of the case there would be little if any gain to the parties from a contract of this sort. In some respects the range of inquiry might be as extensive in an action, like this as in the original controversy. But that is no ground for not enforcing the contract, if it is found to have been made. The only element left undetermined in this contract is that of price. But this is not infrequently found to be indefinite in contracts of sale and for work and labor. It is not necessary that the subject-matter of such a contract should possess a price in the market or be commonly bartered in trade. It is enough if there is a reasonable value, which can be ascertained by the practical methods of trial. The difficulty of fixing the compensation is no greater than occurs in many cases. *Maynard v. Royal Worcester Corset Co.*, 200 Mass. 1-8, 85 N. E. 877; *C. W. Hunt Co. v. Boston Elev. Ry.*, 199 Mass. 220, 233, 236, 85 N. E. 446; *Noble v. Joseph Burnett Co.*, 208 Mass. 75, 94 N. E. 289. This contract has become executed fully on the side of the plaintiffs by doing that which they agreed to do, and that which they can never recover back in kind. The withdrawal of their appeal wholly deprived them of opportunity for contesting the will. When a contract has been executed on one side, the law will not permit the injustice of the other party retaining the benefit without paying unless compelled by some inexorable rule. No insuperable difficulty arises as to the uncertainty or indefiniteness of this contract. *Carrig v. Carr*, 167 Mass. 544, 46 N. E. 117, 35 L. R. A. 512, 57 Am. St. Rep. 488; *Raymond v. Rhodes*, 135 Mass. 337; *Jemry v. Busk*, 5 Taunt. 302; *Acebal v. Levy*, 10 Bing. 376-382.

[4, 5] 2. There is no doubt that the forbearance to prosecute a genuine contest in the courts is a sufficient consideration for a promise. In order that it may have this effect, however, the intention must be sincere to carry on a litigation which is believed to be well grounded and not false, frivolous, vexatious or unlawful in its nature. The

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes

abandonment of an honest purpose to carry on a litigation, even though its character be not such, either in law or fact or both, as ultimately to commend itself to the judgment of the tribunal which finally passes upon the question, is a surrender of something of value, and is a sufficient consideration for a contract. But the giving up of litigation, which is not founded in good faith, and which does violence to an enlightened sense of justice in view of the knowledge of the one making the concession, is not the relinquishment of a thing of value, and does not constitute a sufficient consideration for a contract. *Blount v. Wheeler*, 199 Mass. 330-336, 85 N. E. 477, 17 L. R. A. (N. S.) 1036, and cases cited. *Prout v. Pittsfield Fire Dist.*, 154 Mass. 450, 28 N. E. 679; *Kennedy v. Welch*, 196 Mass. 592, 83 N. E. 11; *Palfrey v. Portland, Saco & Portsmouth R. R.*, 4 Allen, 55; *Atty. Gen. v. Am. Legion of Honor*, 206 Mass. 193-195, 92 N. E. 151. As was said by Morton, J., in *Mackin v. Dwyer*, 205 Mass. 472, at 476, 91 N. E. 893, at 894: "A threat to contest the will, merely for the purpose of compelling the defendant to settle with her and buy his peace, without any intention on her part of actually contesting the will if no such settlement was made, would not be sufficient and would not constitute a valid consideration for the defendant's promise." No exception was taken to the instructions given upon this branch of the case, and therefore it must be assumed that they were ample and correct. The only point open is that a verdict should have been directed for the defendant on the ground that there was not sufficient evidence to support a finding of an honest intention to prosecute a real contest. The burden of proof in this regard rested upon the plaintiffs.

[8] There was some evidence tending to show that the defendant had tried to dissuade one of the plaintiffs from visiting her father during his last illness. There was testimony also that the plaintiffs tried to convince the defendant that their action in claiming the appeal was to protect their rights, and that they thought that they succeeded in that effort. There is an implication possible from the defendant's promise to do "what was right" by the plaintiffs if they would withdraw their opposition to the will, that this claim seemed to him to have some foundation in justice. Moreover, the jury saw all the parties to the controversy upon the witness stand, and their manner of testifying may have furnished basis for an opinion as to the purpose of the plaintiffs in making the contest. These and all the

other circumstances of the case, together with the presumption, which exists commonly that people act in good faith rather than corruptly (*Interstate Commerce Com. v. Chicago Great Western Ry.*, 209 U. S. 108-119, 28 Sup. Ct. 493, 52 L. Ed. 705) rendered improper a ruling that a jury could not find that the contest which the plaintiffs forbore upon the defendant's promise was a real one honestly undertaken. *Rector of St. Mark's Church v. Teed*, 120 N. Y. 583-587, 24 N. E. 1014.

[7] 3. The plaintiffs were not precluded by the acceptance of their general legacies and the signing of formal releases from instituting the present action. Their action is against the defendant individually for a personal undertaking entered into by him before his appointment as executor. It is not a claim against the estate of the father.

[8, 9] 4. The conversation which occurred on Sunday was admitted in evidence properly. It was merely preliminary to the contract which was concluded on a secular day. *Miles v. Janvrin*, 200 Mass. 514-518, 86 N. E. 785. Moreover, the illegality of the contract was not pleaded, and hence could not be proved as of right. *O'Brien v. Shea*, 95 N. E. 99.

[10] 5. No error is shown in the admission of the inventory of the estate of the testator in evidence. It was a circumstance pertaining to the estate, and it does not appear that it could have injured the defendant. In some aspects of the evidence it is possible that it may have been competent, as, for example, an acknowledgment by the defendant of the items of property left by the testator.

[11] 6. The promise might have been found on all the evidence to have been to the sisters jointly, and therefore all might join as plaintiffs in a single action. The tenor of the oral testimony, as well as the rational inferences from the situation in which the defendant was placed, seems to indicate that his promise, if made at all, was made to all the plaintiffs jointly. The second prayer was refused rightly.

[12] 7. The only basis for the prayer, to the effect that the court did not have jurisdiction of the action, seems to be that the residences of the plaintiffs were not such as warranted the laying of the venue in Suffolk County. This did not go to the jurisdiction of the court, but was in the nature of abatement, and could not be raised for the first time by a prayer for instructions at the close of a trial. *Craig Silver Co. v. Smith*, 163 Mass. 262-268, 39 N. E. 1116; *Hastings v. Bolton*, 1 Allen, 529.

Exceptions overruled.

(209 Mass. 585)

RHINES v. WENTWORTH.**WENTWORTH v. RHINES.**(Supreme Judicial Court of Massachusetts.
Norfolk. Sept. 6, 1911.)**1. WILLS (§ 676*)—TESTAMENTARY TRUSTS.**

An implied trust arises from a gift of the income only of personalty with remainder over, unless the will expresses a contrary intent, and the property should be held by a trustee, or by the executor as such, if none is appointed.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1591, 1592; Dec. Dig. § 676.*]

2. WILLS (§ 684*)—TESTAMENTARY TRUSTS—CONSTRUCTION.

Where a will devised and bequeathed the residue to her brother, "to hold, use and improve the same without the intervention of any trustee for and during his natural life, and on his decease * * * whatever may then be remaining" to a town for public purposes, the brother was entitled as trustee for himself to the possession and control of the realty and personalty, with the unrestricted right of expenditure of the income.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1614-1623; Dec. Dig. § 684.*]

3. EXECUTORS AND ADMINISTRATORS (§ 315*)—DISTRIBUTION—NECESSITY OF DECREE.

Under Rev. Laws, c. 150, § 19, providing that, if the estate is to be distributed, the probate court, upon petition of an interested person, may order the executor to convert the personalty into cash and distribute it to the persons entitled, the transfer of a part of the estate to a legatee who is to act as his own trustee under the will may be stated in the accounts of the executor, when the allowance of the account has the same effect as a decree of distribution, so that where the will made a residuary legatee trustee for himself, with right to expend the income of the property in his possession and control, a formal decree of distribution was not necessary to enable him to receive such property.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 1299; Dec. Dig. § 315.*]

4. EXECUTORS AND ADMINISTRATORS (§ 120*)—CONVERSION BY EXECUTOR—RIGHT OF ADMINISTRATOR DE BONIS NON.

If the executor of an estate converted the estate's property to his own use, which under the will belonged to a town, by wrongfully transferring it to himself as legatee, an administrator de bonis non could recover it for the town's benefit.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 485-492; Dec. Dig. § 120.*]

5. EXECUTORS AND ADMINISTRATORS (§ 128*)—LIABILITIES OF EXECUTRIX OF EXECUTOR.

An executrix is not charged with the administration of an estate of which her testator was executor, and would only be liable, upon the settlement of his probate account, for property for which her testator had not accounted, so that the administrator de bonis non of the estate of which executrix's testator was executor could not recover from executrix for the wrongful conversion by her testator of the personalty of such estate, having a right to bring a bill in equity for its preservation, if he believed that it might be wasted or converted while in executrix's possession before such accounting.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 531, 532; Dec. Dig. § 128.*]

Appeal from Supreme Judicial Court, Norfolk County.

Appeal from Superior Court, Norfolk County; J. B. Richardson, Judge.

Proceeding for a final accounting, by John B. Rhines, executor, by his executrix, against George L. Wentworth, administrator. Action at law by George L. Wentworth, administrator, against Avis E. Rhines, executrix. From a judgment for plaintiff in the first proceeding, defendant appeals. From a judgment for defendant in the action at law, plaintiff appeals. Affirmed.

Wentworth was administrator de bonis non of the estate of Helen M. Rhines, and Avis E. Rhines was executrix of John B. Rhines, original executor of Helen M. Rhines, and filed his final account as such.

Stebbins, Storer & Burbank, for appellant. Charles E. Shattuck, for appellee.

BRALEY, J. By the fourth clause of her will, Helen M. Rhines devised and bequeathed the residue of her estate, including her homestead and land thereto belonging, to her brother John B. Rhines, "to have and to hold, use and improve the same without the intervention of any trustee for and during his natural life, and on his decease, I give, devise and bequeath whatever may then be remaining of said rest and residue and accumulations, if any, to the * * * town of Weymouth" to be used for public purposes. John B. Rhines, who also was the executor of the will, having died without rendering any probate account, Avis E. Rhines, the executrix of his will, presented for allowance the account of his administration of the estate, in which she asks to have allowed the amount of the "rest and residue paid over, transferred and delivered to John B. Rhines, as residuary legatee under article fourth of the will." The account was allowed in the probate court, and the decree having been affirmed by a single justice of this court, the case is before us on an appeal which contains no extrinsic evidence, but relies only on the reasons of appeal from the probate decree, that the allowance of this item was improper.

[1] We assume that the real property has not been disposed of, and upon the death of the life tenant the town was entitled to possession, if it chose to accept the devise. The item in dispute relates wholly to personalty which came into his possession as executor, and then was transferred to himself. If the testator has not expressed an intention to the contrary, there is an implied trust in a gift of personal property, where the legatee takes the income only with a remainder over, and the property should be held by a trustee, or if none is appointed by the executor as trustee. *Hooper v. Bradbury*, 133 Mass. 303, 307. The testatrix, however, dis-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

tincltly declares that her brother during his life is to have the enjoyment of the personal property without the intervention of a trustee, while the fund with the accumulation, if any, at his death is bequeathed to the town. [2] The gift was not absolute but qualified by the purpose of the testatrix to create a trust without making any distinction between the personal and real estate. He was entitled as trustee in his own behalf to the possession and control of the principal with the right of unrestricted expenditure of the income. See *Homer v. Shelton*, 2 Metc. 194, 206; *Howland v. Howland*, 100 Mass. 222; *Taggart v. Piper*, 118 Mass. 315; *Chase v. Chase*, 132 Mass. 473; *Sherburne v. Sischo*, 143 Mass. 439, 442, 9 N. E. 797; *Thissell v. Schillinger*, 186 Mass. 182, 71 N. E. 300. [3] And the formality of a decree of distribution was unnecessary before he could receive the property. Under *Rev. Laws, c. 150, § 19*, payment of a legacy, or the transfer of a portion of the estate to a trustee, or to a legatee who is to act as his own trustee, may be stated in the accounts of an executor, and the allowance of the account has the same effect as a decree of distribution under the statute. *Palmer v. Whitney*, 166 Mass. 306, 44 N. E. 229; *Lamson v. Knowles*, 170 Mass. 295, 297, 49 N. E. 440; *Libby v. Todd*, 194 Mass. 507, 512, 80 N. E. 584.

[4] The declaration in the action at law sets out a copy of the will, and contains a count in contract, alleging that the residue having been held in trust it still remains to be administered, and although the defendant has filed an account of her testator, which is still pending for allowance, the account only shows a pretended disposition of the property, and she owes the plaintiff the residuary amount which came into his possession as executor of the will of his sister. The second count with an averment, that both counts are for the same cause of action, alleges, that the defendant's testator converted the property to his own use, and the act of conversion relied on, is the transfer by the executor to himself as legatee. If the property was wrongfully transferred, the plaintiff may recover it for the benefit of the town. *Flynn v. Flynn*, 183 Mass. 365, 366, 67 N. E. 314. [5] But the defendant is not charged with the administration of the testatrix's estate, and if there are assets which the testator has not accounted for, she would be liable only upon the settlement of his probate account. *Tallon v. Tallon*, 156 Mass. 313, 315, 31 N. E. 287; *Foster v. Bailey*, 157 Mass. 160, 31 N. E. 771; *Green v. Gaskill*, 175 Mass. 265, 269, 56 N. E. 560; *Flynn v. Flynn*, 183 Mass. 365, 367, 67 N. E. 314. The question whether the action of the executor was authorized by the terms of the will was involved,

and would have to be determined, and the plaintiff as the representative of the estate had the right to appear and be fully heard. *Thayer v. Kinsey*, 162 Mass. 232, 235, 38 N. E. 360. The second ground of demurrer, therefore, having been well taken, the other causes assigned need not be considered. If the plaintiff was apprehensive that, until the account had been passed upon, the stocks and securities enumerated in the schedule annexed to the declaration, if in the possession and control of the defendant, might be wasted or converted, he should have brought a bill in equity for their preservation. *Holmes v. Holmes*, 194 Mass. 552, 553, 80 N. E. 614. But under our decision in the first of the cases at bar the defendant's liability is dependent upon the conversion, if any, by John B. Rhines of the trust estate after he received it from himself as executor.

In the first case, the decree of the probate court, and in the second case, the judgment in favor of the defendant, must be affirmed. So ordered.

(209 Mass. 563)

ATLAS SHOE CO. v. BLOOM et al.

(Supreme Judicial Court of Massachusetts.
Suffolk. Sept. 6, 1911.)

1. GUARANTY (§ 20*)—FRAUD OF DEBTOR.

Deception of the debtor, inducing guaranty of his debt, not having been instigated or participated in by the guarantee, is not ground for avoiding the guaranty.

[Ed. Note.—For other cases, see *Guaranty*, Cent. Dig. § 22; Dec. Dig. § 20.*]

2. CONTRACTS (§ 93*)—VOLUNTARY SIGNING IN IGNORANCE OF CONTENTS.

In the absence of fraud, one's mere ignorance, because of his limited intelligence and understanding of the language of the contents of the contract which he voluntarily executes, is not ground for avoiding it, though it be different from what he supposed.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 415-419; Dec. Dig. § 93.*]

3. GUARANTY (§ 16*)—CONSIDERATION—EXISTING INDEBTEDNESS.

The consideration of the original debt is insufficient to support a guaranty of payment of an existing debt, as well as of any future indebtedness.

[Ed. Note.—For other cases, see *Guaranty*, Cent. Dig. §§ 14-17; Dec. Dig. § 16.*]

4. GUARANTY (§ 17*)—FAILURE OF CONSIDERATION.

The only consideration of a guaranty of a debt for goods sold and to be sold being a continuous credit in the future to the debtor, it fails, discharging the guarantor; no goods being thereafter delivered to the debtor.

[Ed. Note.—For other cases, see *Guaranty*, Cent. Dig. § 19; Dec. Dig. § 17.*]

5. GUARANTY (§ 16*)—CONSIDERATION—FORBEARANCE.

A promise to forbear to press collection of a debt, without naming time, followed by actual forbearance for a reasonable time, is sufficient consideration of a guaranty of the debt.

[Ed. Note.—For other cases, see *Guaranty*, Cent. Dig. §§ 14-17; Dec. Dig. § 16.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Index

6. GUARANTY (§ 16*)—CONSIDERATION—FORBEARANCE.

The statement of a creditor to a debtor, communicated to one who afterwards guaranteed the debt, that the account must be protected, and that, unless the debtor could get it guaranteed by a responsible person, the creditor would have to close it out, does not show a promise to forbear to press collection of the debt, which, being followed by no action on the debt for six months, constitutes a consideration for the guaranty; the protection of the account required by the creditor being security for its payment, and it not being inferable that suit would be brought if a guarantor was not promptly furnished.

[Ed. Note.—For other cases, see Guaranty, Cent. Dig. §§ 14-17; Dec. Dig. § 16.*]

7. GUARANTY (§ 89*)—ACTION—PROOF OF INDEBTEDNESS.

One suing on a guaranty of an account, specifying no amount, has the burden of proving existence of an indebtedness.

[Ed. Note.—For other cases, see Guaranty, Cent. Dig. § 102; Dec. Dig. § 89.*]

8. EVIDENCE (§ 250*)—ACTION ON GUARANTY—ADMISSIONS OF DEBTOR.

Admission of one, whose account was guaranteed, that he had received goods to the amount named in the account then presented to him, being made after the alleged delivery of the goods, and in the absence of the guarantor, and not having been communicated to him, is inadmissible against the guarantor.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 976; Dec. Dig. § 250.*]

9. EVIDENCE (§ 354*)—BOOKS OF ACCOUNT.

Sale and delivery of goods may not be proved by books of account, and so not by the testimony of witnesses whose knowledge is derived solely from the entries in them; the entries having been transcribed from temporary memoranda, and the clerks who made the memoranda having had no knowledge of the sale and delivery, except on information from other clerks whose duties are not shown.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1432-1483; Dec. Dig. § 354.*]

10. EQUITY (§ 412*)—REFERENCE TO MASTER—RECOMMITMENT OF REPORT.

Plaintiff, possessing, but through inadvertence failing to offer, evidence supporting its claim, should move to recommit the report to the master to whom the cause was referred.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 924-926; Dec. Dig. § 412.*]

Appeal from Superior Court, Suffolk County.

Suit by the Atlas Shoe Company against Abraham Bloom and others. From a decree dismissing the bill, plaintiff appeals. Affirmed.

William M. Blatt, for appellant. P. B. Kiernan, for appellees.

BRALEY, J. [1, 2] The defendant, Abraham Bloom, signed the guaranty dictated in his presence, and upon which the bill is brought, although the master finds that he did not understand its terms, because of his limited intelligence, and inability to read our language. But the plaintiff held out no inducements, and he could have refused to sign until the contents had been translated,

or fully explained to him, or if deceived by the representations of his son, that the undertaking only made him responsible for a small bill of goods to be delivered in the future, there is no statement that the deception was instigated or participated in by the plaintiff. In the absence of fraud practiced upon him, the defendant comes within the general rule, that mere ignorance of the contents of an instrument which a party voluntarily executes is not sufficient ground for setting it aside if ultimately the paper is found to be different from what he supposed it to be. *Rice v. Dwight Mfg. Co.*, 2 Cush. 80; *Leddy v. Barney*, 139 Mass. 394, 2 N. E. 107; *Freedly v. French*, 154 Mass. 339, 28 N. E. 272, 342. [3] But if he cannot avoid the effect of his signature, the guaranty in terms included not only goods to be furnished, but payment of any past indebtedness due to the plaintiff from Bernard E. Bloom, and as the guaranty formed no part of the original debt would be insufficient to support the promise. *Cabot v. Haskins*, 3 Pick. 83, 93; *Tenny v. Prince*, 4 Pick. 385, 16 Am. Dec. 347. The plaintiff endeavored to supply this essential element, and the master reports that the plaintiff informed the son, before the guaranty was given, that "to make his account good it must be changed to a consigned account, and his present indebtedness guaranteed," and "that his account must be protected, and that unless he could get it guaranteed by a responsible person the plaintiff would have to close it," and that the defendant signed after this last statement had been communicated to him. The master, while he does not specifically state that the defendant obligated himself to preserve the credit of his son, finds that no goods were furnished under the guaranty, and no action was brought against the son on the past account until some six months had elapsed. [4] If the only consideration was a continuous credit in the future, it had failed, as no goods were delivered, and the failure of consideration would discharge the guarantor. *Cooper v. Joel*, 1 De G., F. & J. 240; *Coyle v. Fowler*, 3 J. J. Marsh. (Ky.) 473.

[5-7] But if the words "that his account must be protected" can be treated as a promise by the plaintiff to forbear to press collection of the debt, followed by an actual forbearance for a reasonable time, even if no time was named, there would have been a sufficient consideration to support the guaranty, notwithstanding the master also reports, that no money was paid to the defendant, nor any promise made to him of any money consideration. *Lent v. Padelford*, 10 Mass. 230, 6 Am. Dec. 119; *Walker v. Sherman*, 11 Metc. 170; *Johnson v. Wilmarth*, 13 Metc. 416. The "protection" of the account, however, was the giving of security for its payment, and there was no ex-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

press statement, or even an implied understanding upon the facts stated in the report, that suit would be brought if a guarantor was not promptly furnished. While the contract, therefore, was not binding as an undertaking to pay the accrued account, the guaranty furthermore named no amount, and the burden of proof as the master correctly held rested on the plaintiff to offer competent evidence in support of the allegations of the second paragraph of the bill. *Tenny v. Prince*, 4 Pick. 385, 16 Am. Dec. 347. The master found that the plaintiff failed to establish that Bernard E. Bloom was indebted to it at the date of the guaranty, and its exceptions to the report so far as argued relate to the exclusion of evidence, which it contends if admitted would have proved a sale and delivery of the goods. [8] The admissions of Bernard E. Bloom, in the absence of the defendant, that he had received goods to the amount named in the account then presented to him, were made after their alleged delivery, and, not having been communicated to the defendant, were correctly held to be inadmissible. *Evans v. Beattie*, 5 Esp. 26; *Dawes v. Shed*, 15 Mass. 6, 9, 8 Am. Dec. 80; *McKim v. Blake*, 189 Mass. 593, 594, 2 N. E. 157.

[9] The plaintiff also offered in evidence its books of account, kept in the usual course of business, as proof of the sale and delivery of the goods. *Costello v. Crowell*, 133 Mass. 352, 355; *Kaiser v. Alexander*, 144 Mass. 71, 78, 12 N. E. 209. If apparently there was no dispute as to whom credit was given, and the suppletory oath of the witness under whose supervision the books were kept was sufficient to prove the entries, the report states that the entries were transcribed from temporary memoranda, and the clerks who made the memoranda had no knowledge of the sale and delivery, except upon information received from other clerks whose duties are not shown. The goods were sold and delivered by the plaintiff's servants, who were not called as witnesses, and however elaborate or perfect the system may have been, neither the supervisor, nor the entry clerks, were possessed of such personal knowledge as would enable them to support the charges, and prove delivery. *Kent v. Garvin*, 1 Gray, 148; *Gould v. Hartley*, 187 Mass. 561, 73 N. E. 656. The books of account not having been of themselves competent evidence, and the knowledge of the plaintiff's witnesses being derived solely from the entries appearing in them, the ruling of the master, that the books were not admissible, must be sustained. *Kent v. Garvin*, 1 Gray, 148; *Miller v. Shay*, 145 Mass. 162, 13 N. E. 468, 1 Am. St. Rep. 449; *Gould v. Hartley*, 187 Mass. 561, 73 N. E. 656; *Allwright v. Skillings*, 188 Mass. 538, 541, 74 N. E. 944. [10] If through inadvertence the plaintiff neglected to offer

evidence which would have supported its claim, it should have moved to recommit the report, but having failed to prove either a valid guaranty, or any liability of the defendant under it, the bill cannot be maintained.

Decree affirmed.

(200 Mass. 552)

MARSTON v. PHIPPS et al.

(Supreme Judicial Court of Massachusetts.
Suffolk. Sept. 6, 1911.)

1. MUNICIPAL CORPORATIONS (§ 808*)—SIDEWALKS—INJURY FROM ICE—LIABILITY OF ABUTTING OWNER.

Where the bay window of a house projects beyond the street line, so that snow accumulated on the roof of the window there melts and, dripping on the sidewalk, forms ice, making the use of the way dangerous, the owner of the house is liable to one who, being rightfully on the way and in the exercise of due care, slips on the ice.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1684-1694; Dec. Dig. § 808.*]

2. LANDLORD AND TENANT (§ 167*)—INJURY TO PEDESTRIAN FROM ICE ON SIDEWALK—LIABILITY.

Where the bay window of a building projected over the sidewalk, so that snow falling on the roof of the window melted, dripped on the sidewalk, and there formed ice, on which a pedestrian slipped, the fact that the owner had let parts of the building to tenants at will does not relieve her from liability to a pedestrian slipping on the ice; she being liable, not only if she retained control of the outside and roof of the window, and assumed the care of keeping the sidewalk clear of ice and snow, but also if she let the building with the bay window so constructed, being responsible for the nuisance caused by the tenant's using the premises in the manner in which they were adapted and designed to be used.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. §§ 668-679; Dec. Dig. § 167.*]

3. MUNICIPAL CORPORATIONS (§ 812*)—SIDEWALKS—INJURY FROM ICE—NOTICE—STATUTES.

St. 1908, c. 305, making certain provisions of law as to notice of injury from snow or ice applicable to actions against persons founded on a defective condition of a way adjoining their premises, when such condition is caused by or consists of snow or ice, does not affect an action commenced before passage of the statute.

[Ed. Note.—For other cases, see *Municipal Corporations*, Dec. Dig. § 812.*]

4. ABATEMENT AND REVIVAL (§ 64*)—DEATH OF ONE DEFENDANT.

The declaration, the first count of which charged negligence of both defendants, the second negligence of one of them, and the third negligence of the other, not having been demurred to for misjoinder of counts, the case properly proceeded against the only defendant who was alive, and on whom service was had.

[Ed. Note.—For other cases, see *Abatement and Revival*, Cent. Dig. §§ 322-329; Dec. Dig. § 64.*]

Exceptions from Superior Court, Suffolk County; William F. Dana, Judge.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Action by Rose A. Marston against Benjamin Phipps and another. In accordance with an instruction that the evidence did not entitle plaintiff to recover, there was a verdict for Sarah C. Phipps, the only defendant who was alive, and plaintiff brings exceptions. Exceptions sustained.

The first count of the declaration charged negligence of both defendants, the second charged negligence of Benjamin Phipps, and the third charged negligence of Sarah C. Phipps.

Francis T. Leahy, for plaintiff. Berry, Upton & Harvey, for defendants.

SHELDON, J. This case was tried against the female defendant alone, the other defendant named in the writ being dead. There was evidence for the jury on the question of the plaintiff's due care. Knowlton, C. J., in *Cavanagh v. Block*, 192 Mass. 63, 64, 77 N. E. 1027, 6 L. R. A. (N. S.) 310, 116 Am. St. Rep. 220, and cases cited. The jury could have found also that her injury was due to her having slipped on a ridge of ice upon the sidewalk. They could have found that the bay window on the defendant's building projected beyond the street line and over the sidewalk, so that snow would and did accumulate upon its top and there melt and drip from the sloping places which formed its top and roof, and so fall upon the sidewalk. They could have found further, although as to this the evidence was meager, that the ridge of ice upon which the plaintiff fell had been formed in this way, by the freezing of water which had dripped from the projecting bay window.

[1] Upon such findings the plaintiff was prima facie entitled to recover. The case would come under the principle that one who so constructs or maintains a structure upon his own premises as to cause an artificial discharge or accumulation of water upon a public way, which by its freezing makes the use of the way dangerous, will be held liable to one who, being rightfully upon the way and in the exercise of due care, is injured in consequence of such dangerous condition. *Drake v. Taylor*, 203 Mass. 523, 89 N. E. 1035; *Fleld v. Gowdy*, 199 Mass. 568, 85 N. E. 884, 19 L. R. A. (N. S.) 236; *Hynes v. Brewer*, 194 Mass. 435, 80 N. E. 503, 9 L. R. A. (N. S.) 598.

[2] The fact that the defendant had let different parts of her building to different tenants at will is not decisive in her favor. So far as appears, she retained control of the outside and roof of the bay window. She did not make merely occasional repairs upon the building as a matter of favor; it could be found that she procured and paid for all the repairs that were made. *Perkins v. Rice*, 187 Mass. 28, 30, 72 N. E. 323; *Readman v. Conway*, 126 Mass. 374. It

could be found from her own testimony that she assumed the care of keeping the sidewalk clear of snow and ice, and employed Pitman to see to this for her. Moreover, if she let the building with the bay window overhanging the sidewalk of a public way (see Opinion of the Justices, 203 Mass. 603, 625, 94 N. E. 849), and constructed as it could be found that this was, the case would be within the rule of *Maloney v. Hayes*, 208 Mass. 1, 91 N. E. 911, 28 L. R. A. (N. S.) 200, and she would herself be responsible for the nuisance caused by her tenant's using the leased premises in the manner in which they were adapted and designed to be used.

[3] The plaintiff's right of action is not affected by the provisions of St. 1908, c. 305, passed since her suit was brought.

[4] Perhaps the defendant might have demurred to the declaration for a misjoinder of counts. But that was not done; and the case rightly proceeded against the only defendant who was alive and was served on. *Brown v. Kellogg*, 182 Mass. 297, 65 N. E. 378; *Elliott v. Hayden*, 104 Mass. 180.

The case should have been submitted to the jury upon the third count, which alone was relied on.

Exceptions sustained.

(209 Mass. 570)

FORBES et al. v. THORPE et al.

(Supreme Judicial Court of Massachusetts.
Suffolk. Sept. 6, 1911.)

1. BROKERS (§ 34*)—FRAUD OF AGENT.

One who contracts to sell property for others at not less than stated prices, on a commission basis, and reports sales at prices less than obtained, keeping the difference, is liable to them for fraud.

[Ed. Note.—For other cases, see *Brokers*, Cent. Dig. § 26; Dec. Dig. § 34.*]

2. FRAUD (§ 22*)—RELIANCE ON REPRESENTATIONS.

It is no ground for refusing persons relief for fraud practiced on them by another that it would have been possible for them by constant and suspicious watching to have discovered that they were being defrauded. It is enough that they acted reasonably in relying on the representations to them.

[Ed. Note.—For other cases, see *Fraud*, Cent. Dig. §§ 19–23; Dec. Dig. § 22.*]

3. APPEAL AND ERROR (§ 434*)—APPEARANCE ON APPEAL.

In the absence of statute or rule definitely covering the matter, the general principles of chancery practice, requiring appellant to appear in the appellate court at the time set down for argument, prevail.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 2183; Dec. Dig. § 434.*]

4. APPEAL AND ERROR (§ 389*)—APPEAL IN FORMA PAUPERIS.

Social conditions and the practice respecting costs and bonds required as security for appeals make inapplicable in Massachusetts the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

rule prevailing in England allowing appeal in forma pauperis.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2072-2076; Dec. Dig. § 889.*]

5. PARTNERSHIP (§ 20*)—THE RELATION.

Joint ownership of property, use of it in a business, sharing of profits, and division of net proceeds on dissolution constitute the part owners partners in the business, liable for its losses, as well as beneficiaries of its profits, in the absence of a specific agreement defining by express terms the status of the part owners.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 6, 7; Dec. Dig. § 20.*]

6. PARTNERSHIP (§ 238*)—INCOMING PARTNERS—LIABILITY FOR FRAUD.

One coming into a partnership, a contract of which with others was treated as part of its assets, is liable with the other partners for fraud of the partnership in respect thereto, though part of it was perpetrated before he came in.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 491, 492; Dec. Dig. § 238.*]

7. CORPORATIONS (§ 30*)—ASSUMPTION OF DEBTS.

The condition of a transfer to a corporation of the assets of a partnership, conducted under the name of the J. Co. without regard to change of partners, T. and C. being at all times the active partners, that the corporation should assume and pay all the liabilities of T. and C. incurred in the conduct of the business under such name, includes liability for all frauds committed by them as a part of their management of the partnership.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 30.*]

8. CONTRACTS (§ 187*)—AGREEMENT OF BUYER TO PAY SELLER'S DEBTS—ENFORCEMENT BY CREDITORS.

Where partners transfer all their property to a corporation, which as part of the consideration assumes and agrees to pay all liabilities of the partners incurred in the conduct of the business, creditors of the partners, while they cannot maintain an action at law in their own names against the corporation, the promise for their benefit not being sufficiently explicit, and the contract for payment being one under seal, on which only a party thereto can sue, can maintain a suit in equity against the corporation to enforce the agreement for their benefit, not only because it has obtained property by virtue of the transfer, of which such agreement is a part, which in equity ought to be held to satisfaction of their claim, but because they are entitled in equity to enforce the rights of the partners to compel the corporation to perform its agreement made with the partners for the benefit of their creditors.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 798-807; Dec. Dig. § 187.*]

9. CONTRACTS (§ 187*)—AGREEMENT OF BUYER TO PAY SELLER'S DEBTS.

As a conveyance by partners of all their property to a corporation would be fraudulent, except for the corporation's agreement to pay as part of the consideration the liabilities of the partners, the defense of misrepresentation as to the amount of such liabilities, which could be interposed by the corporation in an action by the partners on such agreement, is not available in a suit in equity against it by the partners' creditors to enforce such agreement, where it elects to assert the validity of the contract so far as giving it title to the property.

[Ed. Note.—For other cases, see Contracts, Dec. Dig. § 187.*]

10. FRAUDS, STATUTE OF (§ 33*)—PROMISE TO ANSWER FOR DEBT.

The statute of frauds is not available as a defense to a suit by creditors of partners to enforce the condition on which the partners transferred their property, through a third person, to a corporation, that it should pay the debts of the partners, though the instrument of transfer was not signed by the corporation, where it accepted and holds the property, and the sale, but for such condition, would be in fraud of the creditors.

[Ed. Note.—For other cases, see Frauds, Statute of, Dec. Dig. § 33.*]

11. EQUITY (§ 195*)—CROSS-BILL.

It is correct practice for a defendant to bring to the court's attention by cross-bill any rights he has against a codefendant growing out of the subject-matter of the suit, so that affirmative relief between the defendants may be granted.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 446-449; Dec. Dig. § 195.*]

12. COVENANTS (§ 93*)—WARRANTY OF TITLE—BREACH.

That a corporation, to which partners convey their property, is, by reason of its agreement, in the conveyance, to pay all obligations of the partners, held liable for debts of the partners in addition to those which they represented were all they had, does not constitute a breach of the warranty of title in the conveyance.

[Ed. Note.—For other cases, see Covenants, Dec. Dig. § 93.*]

13. FRAUD (§ 9*)—DAMAGES.

A corporation to which partners convey property, it agreeing as part of the consideration to pay all their indebtedness, is entitled to relief against them for damages sustained by it through their misrepresentation as to the amount of indebtedness.

[Ed. Note.—For other cases, see Fraud, Dec. Dig. § 9.*]

14. EQUITY (§ 195*)—CROSS-BILL—NEW PARTIES.

A defendant cannot by a cross-bill bring in new parties not essential to the case set out in plaintiffs' bill.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 446-449; Dec. Dig. § 195.*]

15. APPEAL AND ERROR (§ 173*)—THEORY OF CASE BELOW.

A corporation, to which partners conveyed property, being, in a suit by creditors of the partners, held liable, under its agreement in the conveyance to pay all the obligations of the partners, for debts other than those which the partners represented were all they had, cannot on appeal urge that the conveyance should be set aside and it be allowed to assert its claim as a creditor against the property for the amount for which it was held liable; this not being within the scope of its cross-bill, nor the theory on which the case was tried.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 173.*]

Appeal from Superior Court, Suffolk County.

Suit by Ralph E. Forbes and others against James Thorpe and others. Decree for plaintiffs, and certain defendants appeal. Modified and affirmed.

S. R. Wrightington, for appellant Jeremiah Clark Machinery Co. Gilles Taintor, for appellees.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep't Indexes

RUGG, J. The material facts upon which this suit is founded are that the defendants Thorpe and Cashin, with two associates, were the owners of a secondhand machinery business conducted under the name "Jeremiah Clark Machinery Company." Conveyance of real estate and personal property, with which this business was conducted, was made to Thorpe, who executed a declaration of trust to the effect that he held the title equally for the benefit of Cashin, himself and two others, each of whom had contributed \$6,000 to the purchase price. Subsequently, but before the events here complained of, Thorpe purchased the interest of these last two, and they now have no connection with this case. In January, 1904, Cashin sold one-sixth of his interest in the property and business and its profits to the defendant Wilde, Thorpe consenting to this transfer. No articles of copartnership were ever drawn up between Thorpe and his associates, but they considered that the business was being conducted as a partnership, Thorpe and Cashin being actively engaged in its prosecution all the time, while Wilde after purchasing his interest (which was in January, 1904, during the course of dealings complained of in this suit) was connected with the business in a clerical capacity. The plaintiffs were a committee of bondholders of the Simonds Rolling Machine Company, which had acquired title to a factory and its contents, consisting of a large amount of machinery and stock. In June, 1902, they entered into a contract with the Jeremiah Clark Machinery Company to sell the property for not less than designated prices on a commission basis, with a guaranty of purchase by the partnership on April 1, 1904, if not sold before, at a price which should yield the plaintiffs with prior sales not less than the appraised value. Immediately after the execution of this contract (as found by the master) Thorpe with the knowledge and participation of Cashin "entered upon a deliberately conceived scheme to defraud the plaintiffs by selling their property at prices far above those which he reported to the plaintiffs and taking the difference for the partnership." A final statement and apparent end of this scheme was made on April 20, 1904, but minor ramifications of the fraud continued to October, 1904. As a result the plaintiffs were defrauded of a sum considerably in excess of \$10,000. By reason of pressure by one of Thorpe's individual creditors, and at his suggestion in October, 1904, the Jeremiah Clark Machinery Company, a corporation, was organized to acquire all the assets of the firm which had done business under the same name. As steps in the execution of this plan, a conveyance was made to an intermediary named Pearson, who, immediately after the charter of the corporation was issued, executed a like conveyance to it of all the assets of the partnership, subject to "all the debts and

liabilities of James Thorpe and Charles E. Cashin contracted in or arising from or on account of the business and property conveyed," and the conveyance to the corporation was upon condition that it should pay and discharge "all and singular the indebtedness and liabilities of James Thorpe and Charles E. Cashin contracted in or arising from or on account of the conduct of said business carried on under the name of the Jeremiah Clark Machinery Company." The value of the property so conveyed was slightly in excess of \$30,000, and the partnership debts, aside from those to the plaintiffs by reason of the frauds committed on them, about \$8,200, of which about \$1,700 was on notes held by Thorpe, which were subsequently canceled and nothing paid on them. The statement of debts furnished to the corporation did not include those arising out of the frauds committed on the plaintiffs. The capital stock of the corporation was \$24,000, of which certificates for 180 shares of the par value of \$100 each were issued to Thorpe, who assigned them to his creditor as collateral for his private debt, for 10 shares to Wilde, for 15 shares to Cashin, and for 35 shares to his wife. Immediately after the organization of the corporation and its vote to accept the conveyance of property from Pearson in return for the issue of stock, the officers resigned, and Thorpe and Cashin were elected respectively vice president and general manager and two of a board of three directors. The master has found that the conveyance to the corporation was not according to the desire of Thorpe and Cashin, but was forced upon them by the creditor of Thorpe, but that they at that time had no good reason to believe that their fraud upon the plaintiffs would even be detected, and hence that in the conventional sense they had no actual intent to defraud their creditors in making the conveyance, nor did Pearson or the corporation participate in any plan to defraud the creditors of the partnership in receiving the conveyance, for the reason that both conveyances made express provision for the payment of the firm debts by the corporation, and that but for such provision the conveyance would have been a fraud upon the firm creditors.

[1, 2] 1. The partnership was liable to the plaintiffs for the frauds committed against them. All the sales of machinery and stock made by the partnership as agents for the plaintiffs and the purchases made by the partnership at the end under the guaranty clause of the contract with the plaintiffs were so tainted with fraud that the plaintiffs were entitled to full relief as soon as the wrong they had suffered was discovered. It is too late in the history of law to argue successfully that reasonable reliance upon representations which turn out to be fraudulent must go without relief because the sharpest distrust might have discerned the wrong.

It is no ground for not affording relief to the plaintiffs that it would have been possible for them by constant and suspicious watching to have discovered that they were being defrauded. So long as they acted reasonably they have a right to protection. Whether the partnership might have bought machinery under the agreement with the plaintiffs without disclosure of its personal interest is of no consequence in this connection. It did not profess so to buy in most instances, but it deceived the plaintiffs by representing that it was selling as an agent, and also grossly deceived them as to the amount of stock sold.

[3, 4] 2. Wilde filed an appeal in the superior court from the decree there entered against him. He presented no brief in this court, either personally or through counsel, as required by rule 2, nor did he appear in person or by counsel to argue his appeal. It is plain that under the English chancery practice, where the appellant does not appear in the court to which the appeal is taken at the time set down for argument, the appeal is dismissed. *Martin v. D'Arcy*, 3 H. L. C. 698; *Honeyman v. Maryatt*, 6 H. L. C. 112; *Scanlon v. Usher*, 8 Cl. & F. 561; *Sherburne v. Middleton*, 9 Cl. & F. 72; *Murphy v. Conway*, 9 Cl. & F. 73. There is no statute or rule definitely covering the matter in this commonwealth. Therefore the general principles of chancery practice prevail. It was stated in argument at the bar by counsel for other defendants that Wilde was without money to prosecute his appeal. So far as we know, there has never been an instance in this commonwealth permitting an appeal in forma pauperis. Social conditions and the practice respecting costs and the bonds required as security for appeals in this commonwealth have made inapplicable the rule in this regard which still prevails in England. *Drennan v. Andrew*, L. R. 1 Ch. 300; *Biggs v. Dagnall*, [1895] 1 Q. B. 407; *Kiff v. Roberts*, 3 Ch. Div. 265.

[5, 6] We proceed to consider the appeal of Wilde upon its merits, without intending that this shall be treated as a precedent for future cases. Wilde was not a member of the partnership at the inception of the scheme by which the plaintiffs were defrauded. He is described by the master in one place in the report as a clerk in the employ of the firm, and at another place as bookkeeper. The master makes no finding as to whether he knew of the fraud upon the plaintiffs by Thorpe and Cashin, but if clerk and bookkeeper were used by the master as synonymous, the inference would be almost irresistible that he knew of it. It does not appear that he participated in any way in the management of the business. He bought one-sixth of the interest of Cashin, and he thereby became possessed of one twenty-fourth interest in the whole property, and was a beneficiary under the trust agreement, upon the basis of his interest in which shares in the

corporation were issued to him. He appears to have been treated as a partner by an entry upon the books of the partnership showing the transfer to him of the interest in the business. Although his name was omitted from the transactions incident to the transfer of the property to the corporation, this does not affect his rights, as he shared in the stock issued for it to the extent of his interest. The declaration of trust plainly indicates that the property was intended to be used in the machinery business, and all the profits accruing from it were to be distributed among the beneficiaries. Joint ownership of property, use of it in a business, sharing of profits, division of net proceeds upon dissolution constitute the part owners partners in the business and liable for its losses as well as beneficiaries of its profits in the absence of a specific agreement defining by express terms the status of the part owners.

Although a part of the frauds of which the plaintiffs complain had been perpetrated before he came into the partnership, some were consummated afterwards, and a general statement recapitulating in detail all the earlier fraudulent transactions was prepared in behalf of the firm, and made the basis of the final settlement between it and the plaintiffs after he became a partner. This statement was made about a month before the time when, under the original contract between the plaintiffs and the firm made in June, 1902, the latter was required to complete the sale and make good its guaranty of purchase. This shows that the contract was treated by the firm of which Wilde was a member as a part of its assets, and its obligations as a part of the firm liabilities. Although the master does not describe any more in detail the relation of Wilde to the business, there is enough in these circumstances and in the absence of any other limiting findings to support the decree against him. *Kingman v. Spurr*, 7 Pick. 235; *Phillips v. Blatchford*, 137 Mass. 510; *Gleason v. McKay*, 134 Mass. 419; *Hoadly v. County Com.*, 105 Mass. 519; *Williams v. Boston*, 208 Mass. 497, 94 N. E. 808.

[7] 3. The conveyance of the property to the defendant corporation was upon the express condition that it should assume and pay all the liabilities incurred by Thorpe and Cashin in the conduct of the business under the name of the Jeremiah Clark Machinery Company. This business had been conducted as a continuing entity without a break from the time it was established by the purchase of the property conveyed to Thorpe as trustee until the corporation was organized. Thorpe and Cashin were the owners who had conceived and executed the fraud upon the plaintiffs. They had been all the time, during the changes in the ownership of interests in the partnership property, the active managers of the business, which had throughout its existence been conducted under the impersonal name assumed by the corporation. If it had been the

main purpose of the instrument by which the property was transferred to the corporation to express an obligation on part of the corporation to assume all the outstanding debts, which the conduct of the business had incurred under the management of Thorpe and Cashin, assuming that the retirement of the earlier partners and the admission of Wilde had constituted different copartnerships, it would have been difficult to conceive language more apt. The plain words of the covenant include liability for all the frauds committed by the two active partners as a part of their management of the copartnership. The obligation thus incurred by the corporation was sweeping and without exception. It was made upon a valuable consideration. It is this circumstance which prevents the conveyance to it from having been made in fraud of the rights of creditors of the partnership. Without some provision looking to this end, the finding of the master was, and correctly so, that the transfer would have been a fraudulent one. It would be plainly in fraud of creditors for a debtor to convey all his property to a corporation, taking in pay therefor certificates of stock which are pledged to a specified creditor, without making any provision for the payment of general indebtedness.

[8] Under these conditions the plaintiffs can maintain a suit in equity to enforce the covenant made for their benefit, although no direct consideration moved from them, and there was no privity of contract between them and the corporation. The defendant corporation has obtained property by virtue of the conveyance, of which the covenant is a part, which in equity and good conscience ought to be held to the satisfaction of the plaintiffs' claim. *Mellen v. Whipple*, 1 Gray, 317-322; *Lincoln v. Burrage*, 177 Mass. 378, 59 N. E. 67, 52 L. R. A. 110; *Paper Stock Disinfecting Co. v. Boston Disinfecting Co.*, 147 Mass. 318, 17 N. E. 554. This is not a case where the corporation seeks to set aside a sale induced by fraudulent representations. It would be obliged then to proffer return of the property acquired by the sale. But it is a case where the corporation undertakes to retain all the property acquired by the sale and at the same time avoid the payment of the debts which it agreed to pay as a part of the purchase price simply because the amount of the debts was misrepresented. It cannot keep the advantages of the transaction and avoid its obligation. This is not one of the cases, which sometimes have been called anomalous in their nature, where the promise from the corporation to Pearson or the partnership for the benefit of the plaintiffs was sufficiently explicit to enable them to bring an action at law in their own names. *Dow v. Clark*, 7 Gray, 198; *Exchange Bank v. Rice*, 107 Mass. 37, 9 Am. Rep. 1; *Frost v. Gage*, 1 Allen, 262; *Clare v. Hatch*, 180 Mass. 194, 62 N. E. 250; *Atty. Gen. v. Am. Legion of Honor*, 206 Mass. 158-166, 92 N. E.

136; *Dean v. Am. Legion of Honor*, 156 Mass. 435, 438, 31 N. E. 1; *Union Inst. for Sav. v. Phoenix Ins. Co.*, 196 Mass. 230, 81 N. E. 994, 14 L. R. A. (N. S.) 459. Moreover, the contract for the assumption of the debt being under seal, no one save a party to it could maintain an action on it. *Boyden v. Hill*, 198 Mass. 477-487, 85 N. E. 413. It is not necessary to determine whether the terms of the conveyance definitely established a trust for the benefit of creditors, which enabled each of them to demand performance (*Boston v. Turner*, 201 Mass. 190-194, 195, 87 N. E. 634, and cases cited), nor whether the partners had an equitable lien upon the partnership assets to the extent of requiring the payment of debts, which creditors may enforce for their own benefit in the name of the partners (*Howe v. Lawrence*, 9 Cush. 553-558, 57 Am. Dec. 68; *Harmon v. Clark*, 13 Gray, 114-121). The liability of the corporation to the plaintiffs may be worked out in another way. The contract being made by the firm for the benefit of their creditors the latter may in equity enforce the rights of the copartners to compel the corporation to perform its agreement in this regard. This is a property right not subject to attachment which can be reached in equity and made available for the benefit of the creditor.

[9] It is no answer to this claim for the corporation to say that as against the partners it can set up their fraudulent representations as to the amount of the debts, and that, as this proceeding enforces the agreement made with the partnership, the same defense is open against everybody who sues under this agreement, for the reason that it holds title to the property under the terms of a contract conditional to pay all debts. It has no other title to its possession except the contract. If the corporation stands on its contractual rights it must stand on the whole of them. It cannot assert that part of the contract which turns out to be for its gain, and reject that which causes it loss. Resting its title to the property of the partnership upon a conveyance which but for the agreement for the payment of debts would be fraudulent and thus liable to be set aside, it cannot put forward as against creditors enforcing performance of this agreement damages sustained by it through misrepresentations as to the amount of debts, although this might be open to it in an action where the partners and it alone were concerned. To permit such a defense would enable the corporation to retain the property in fraud of firm creditors as effectually as if conveyed to it without any obligation to pay them. The substance of the transaction then would be a plain conveyance in fraud of creditors. Equity does not suffer itself to be circumvented by specious devices. It looks through the form to the substance, and deals with things as they are, regardless of disguises. A chain of reasoning is not sound which leads to a result claimed by the de-

defendants. An agreement induced by misrepresentations ordinarily is not enforced in equity. But where the agreement ought to be set aside as fraudulent unless specifically performed and the defendant elects to assert the validity and claim the fruits of the contract, there can be no just complaint against performance according to its terms.

It is not necessary to consider whether the sale was voidable because not in compliance with the bulk law. St. 1903, c. 415.

[10] 4. There is nothing in the argument of the corporation that the statute of frauds is a defense to it because the indenture of transfer appears not to have been signed by it, and thus it has not agreed in writing to answer for these debts, and also that the agreement was not to be performed within one year. It accepted and holds property, which was conveyed upon condition. The sale of the property cannot stand except upon performance of the condition.

[11-13] 5. The defendant corporation filed a cross-bill seeking, if it should be held liable to the plaintiffs, to establish its damages against its codefendants, Thorpe and Cashin, arising from their misrepresentations to it as to the amount of the indebtedness of the partnership, and also to establish a breach of the covenant of title in the conveyance from them through the intermediary to it, and further to be subrogated to whatever rights Cashin may have against the original plaintiffs.

It is correct practice for one defendant to bring to the attention of the court by a cross-bill any rights he may have against a codefendant as well as against the plaintiffs growing out of the subject-matter of the suit, so that justice may be done to all parties touching the cause of action in litigation by granting affirmative relief, if need be, between several defendants. *Morgan's Co. v. Tex. Central Co.*, 137 U. S. 171, 200, 11 Sup. Ct. 61, 34 L. Ed. 625. Upon the findings made by the master it is plain that Cashin has no claim against the plaintiffs. The fact that the defendant corporation is held lia-

ble for the plaintiffs' debt constitutes no breach of the warranty of title in the conveyance of the property. The defendant is entitled to relief against Thorpe and Cashin for the damages sustained by it through the misrepresentation as to the amount of the indebtedness of the partnership, and the decree should be modified to this extent. This is in accordance with the master's report.

[14] 6. The defendant corporation complains that there was error in overruling its motion that the plaintiff be required to join Mrs. Cashin as a party to the suit, in order that it might file a cross-bill against her. She was not a necessary party to the cause of action set out in the plaintiffs' bill. They asked no relief against her, and she had no interest in the subject-matter they were litigating, except such as she might have as a stockholder in the defendant corporation, and in that regard she was represented by the corporation. It is not the proper function of a cross-bill to bring in new parties not essential to the case set out in the bill of complaint. The defendant corporation can try out whatever causes of action it has against her in another proceeding without reference to these plaintiffs or to this cause of action.

[15] 7. The defendant corporation urges that the conveyance should be set aside and it allowed to assert its claim as creditor against the property for the amount for which it is held liable. Without adverting to other objections, it is enough to say that this is not within the scope of its cross-bill, and is not the theory upon which the case has been tried. Other arguments presented in defense which have not been discussed are not regarded material.

The result is that no error is disclosed, except that the portion of the decree relating to the defendant corporation's cross-bill should be modified so as to include in addition to the damages there established against Thorpe and Cashin the damages sustained by reason of their misrepresentation as to the amount of firm indebtedness assumed by it, and as so modified is affirmed with costs.

So ordered.

(45 Ind. A. 102)

**CATHCART v. NEW DURHAM TP.,
LAPORTE COUNTY.**

(Appellate Court of Indiana. Jan. 4, 1910.)

**1. HIGHWAYS (§ 95*)—PROPERTY OF ROAD
SUPERVISORS—POSSESSION.**

Under Burns' Ann. St. 1901, §§ 6839-6847 (Acts 1883, c. 56, §§ 25-33), making the road supervisor custodian of the property pertaining to his office, and requiring him, at the expiration of his term, to turn it over to his successor, a township trustee had no right to the possession of the books, etc., of the office of a road supervisor while there was a qualified supervisor acting as such in the district, and hence could not replevin such property.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 309-312; Dec. Dig. § 95.*]

**2. HIGHWAYS (§ 93*)—ROAD DISTRICTS—OF-
FICE OF ROAD SUPERVISOR.**

The change of the boundaries of his district, but leaving him residing therein, did not oust a duly qualified road supervisor from office; his term not having expired.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 304-307; Dec. Dig. § 93.*]

Appeal from Circuit Court, Laporte County; John C. Richter, Judge.

Action by New Durham Township, Laporte County, by Hiram B. Herrold, trustee, against Herbert Cathcart. From a judgment for plaintiff, defendant appeals. Reversed, and new trial ordered.

Frank E. Osborn, W. A. McVey, and Lee L. Osborn, for appellant. Weir, Weir & Darrow, for appellee.

HADLEY, J. Appellee Herrold was trustee of New Durham township, Laporte county. Appellant was road supervisor of road district No. 4. In May, 1899, Herrold re-districted his township for road purposes, whereby the boundaries of district No. 4 were changed; but appellant was left a resident of district No. 4, and with no other acting or qualified supervisor therein. Thereafter the trustee, conceiving that the change of the boundaries of district No. 4 had ousted appellant from his office, and that there was therefore a vacancy, appointed one Winters to the office of road supervisor for district No. 4, and he duly qualified. Herrold then demanded that appellant turn over to him the books, papers, and tools pertaining to the office, on the theory that he (Cathcart) was no longer road supervisor, and therefore not entitled longer to hold them. This demand was refused. Appellee then brought suit to replevin the property, on the theory that the township was the owner of the property and entitled to the possession thereof.

[1] The question is presented whether the suit is properly brought; it being in the name of the township, by appellee, as trustee. There may be some virtue in this contention. *McIlwaine v. Adams* (1874) 46 Ind. 580; *State ex rel. v. Wilson* (1888) 113 Ind.

501, 15 N. E. 596; *Vogel v. Brown Tp.* (1887) 112 Ind. 299, 14 N. E. 77, 2 Am. St. Rep. 187; *Vogel v. Brown School Tp.* (1887) 112 Ind. 317, 14 N. E. 78. But it is not necessary for us to decide this question, as, under the facts stated, it is clear that appellee ought not to recover. Under sections 6839-6847, Burns 1901 (Acts 1883, pp. 70-72, §§ 25-33), the road supervisor is made the custodian and held responsible for the care and safe-keeping of the property pertaining to his office, and is required, at the expiration of his term, to turn the same over to his successor in office; and as long as there was a legal, qualified, and acting road supervisor of the district, who was properly discharging the duties of his office, the township trustee had no right to the possession of the property, and consequently could not maintain a suit in replevin therefor.

[2] In this case the appellant was the legal road supervisor. It was shown that he was duly appointed, that he duly qualified, and that his term had not expired. The mere change of the boundaries of his district, so long as it left him within its limits as changed, did not oust him from his office. We do not hold that by redistricting, and consequently abolishing, his road district, appellee might not have vacated the office of appellant, as this is not the case here. His district was not abolished. Only the boundaries were changed. District No. 4 still remained. Appellant remained a resident of it, and his status as road supervisor of district No. 4 was not changed, and he was entitled to the possession of the property sought to be recovered, so long as he continued in his office and in the proper discharge of the duties thereof.

Judgment reversed, with instructions to grant a new trial.

(210 Mass. 8)

**JOHN HETHERINGTON & SONS, Limited,
v. WILLIAM FIRTH CO.**

(Supreme Judicial Court of Massachusetts.
Suffolk. Sept. 6, 1911.)

**1. TRIAL (§ 392*)—TRIAL BY COURT WITH-
OUT JURY—INSTRUCTIONS.**

The court, in a trial at law without a jury, when denying a request for a ruling, founded on evidence, should state, expressly or by fair implication, either that the legal proposition presented is unsound or inapplicable, or that the facts on which it is predicated are not found to be true, so that, it having been merely silently refused, and the finding for the other party having been general, and it not plainly appearing that no harm was done by the refusal, exception thereto must be sustained.

[Ed. Note.—For other cases, see Trial, Dec. Dig. § 392.*]

**2. FRAUDE, STATUTE OF (§ 103*)—ORAL AC-
CEPTANCE OF WRITTEN PROPOSITION.**

The parties having entered into a written contract, and treated it as in force, except that defendant by writing to plaintiff contended there was a mistake in it as to the term of

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

credit to be given him, and this contention having been orally accepted by plaintiff, the contract as corrected was binding on defendant, notwithstanding the statute of frauds.

[Ed. Note.—For other cases, see *Frauds, Statute of*, Cent. Dig. §§ 192-208; Dec. Dig. § 103.*]

3. CONTRACTS (§ 350*)—ANNULMENT BY CONSENT—EVIDENCE.

A vote of cancellation by the board of directors of plaintiff of a contract between it and defendant is not conclusive on the issue of the contract being annulled with its consent; there being evidence, consisting of testimony and attendant circumstances, of the vote being conditioned on the execution of a substitute contract, which was never done.

[Ed. Note.—For other cases, see *Contracts*, Dec. Dig. § 350.*]

4. CONTRACTS (§ 350*)—ANNULMENT—EVIDENCE.

The mutilation by plaintiff of its copy of its contract with defendant is not conclusive of the contract being annulled or canceled with its consent, but is only one factor to be considered with all the others on the question of intention.

[Ed. Note.—For other cases, see *Contracts*, Dec. Dig. § 350.*]

5. CONTRACTS (§ 261*)—RIGHT TO ABANDON—INABILITY OF OTHER PARTY.

Action by plaintiff, amounting at most to a determination to ascertain at what price its business could be sold for, and not warranting the inference of inability to carry on its business, or intention to sell out, and consequent inability to go on with contract for defendant to handle its manufactures, does not justify defendant in abandoning the contract.

[Ed. Note.—For other cases, see *Contracts*, Dec. Dig. § 261.*]

6. DAMAGES (§ 40*)—BREACH OF CONTRACT—LOSS OF PROFITS.

A contract by which plaintiff, a foreign manufacturer of textile machinery, gave defendant the sole right to sell its machinery in the United States and Canada, and defendant undertook to sell efficiently and to appoint representatives to regularly visit the mills in those countries for orders, such contract to continue in force five years, unless sooner terminated by plaintiff on six months' notice, in event of its being found defendant could not work the business as efficiently as its predecessor had, will be construed as not contemplating loss of profits as a measure of damages for its breach; it not having obligated plaintiff to manufacture or defendant to take any definite number of machines, not having fixed prices at which defendant should buy or sell, defendant's predecessor in the business, though its chief stockholder, not being obligated to continue in its service, and the demand for such machinery having been subject to great fluctuations.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. §§ 72-88; Dec. Dig. § 40.*]

7. DAMAGES (§ 45*)—BREACH OF CONTRACT.

For abandonment by defendant of its contract, whereby, for a certain period, it was given the sole right to sell in America plaintiff's machines, and undertook to sell efficiently and to appoint representatives to travel regularly in such country, visiting the mills for orders, plaintiff is entitled to recover its expenses of establishing another agency; such damage being a direct result of the breach, and one which should have been in the contemplations of the parties.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. §§ 92-98; Dec. Dig. § 45.*]

Exceptions from Superior Court, Suffolk County; Robert F. Raymond, Judge.

Action by John Hetherington & Sons, Limited, against the William Firth Company, for breach of contract. The court found for plaintiff, and defendant brings exceptions. Exceptions sustained in part.

Warner, Warner & Stackpole, for plaintiff. Samuel J. Elder and Frank M. Bradbury, for defendant.

RUGG, J. [1] 1. A question of practice as to trials at law before a judge sitting without a jury lies at the threshold. The defendant seasonably presented requests for rulings. It is said in the exceptions that "these requests though not expressly passed on by the court are to be treated as refused, the defendant having duly reserved its exceptions, it being understood, however, that the facts assumed or hypothetically stated in these requests are to be taken as true only in so far as sustained by the evidence herein contained and referred to." We interpret this as meaning that the requests were refused. If the court ignored them the defendant's rights can be no higher than if the court refused them. It means further that if, on any view of the evidence reported, the facts assumed in the requests can be found, then the facts are to be treated as so found. We are led to this construction of the exceptions because it is the only one which is fair to the excepting party. Otherwise it could not be determined what the view of the superior court was as to the matters covered by the prayers. The superior court judge filed no memorandum and made only a general finding for the plaintiff. One branch of the plaintiff's argument has been that the exceptions must be overruled on the ground that it must be assumed that the judge did not find the facts recited in the prayers and that so far as bald requests for correct rulings of law have been refused it must be assumed that facts have been found by the judge which made inapplicable such principles. While a case may be imagined where such an argument may prevail, it cannot ordinarily, nor in this case. When controverted issues of fact are tried without a jury, to a court which makes only a general finding, it would be manifestly unjust if the defeated party could not be assured in some way that correct rules of law have been followed. Where the facts are not agreed and no memorandum of findings is filed, commonly it cannot be certain precisely what facts are found or which witnesses are believed by the trial court in reaching his conclusions. If it were necessary for an excepting party not only to maintain the soundness of the law as stated in his requests, but also to show that the facts supposed as the groundwork of his request must have been found on the evidence, and that

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

no other facts could have been found which would make inapplicable the ruling of law asked for, parties in jury-waived cases could not know, save in comparatively rare instances, that a grievous error of law had not been committed by the trial court. When a case is tried without a jury, the court occupies a dual position; he is the magistrate required to lay down correctly the guiding principle of law; he is also the tribunal compelled to determine what the facts are. When these duties are nicely analyzed, he ought as judge to formulate the governing rules of law, and then, acting in place of the jury, he ought to follow these rules in deciding where the truth lies on conflicting evidence. In one essential particular only does he stand differently as to requests for rulings from a judge presiding over a jury trial: He may refuse to grant a request for the avowed reason that it is immaterial or inapplicable in view of the facts found by him. When a prayer is presented such as in a jury trial ought to have been given, an exception to a refusal to grant it by a judge sitting without a jury must be sustained, unless the ground of refusal is distinctly stated or plainly appears in some way on the record and is such as to show that no harm has been done by the refusal, or unless it is obvious on the whole that no rights of parties have been endangered. Mere silent refusal to grant requests under these circumstances does not raise the presumption in favor of a trial court, which exists as to findings of fact made by it. This is no new principle of practice.

The present judgment is simply an amplification of a rule inherent in the trial of jury-waived cases, which has been more succinctly announced in earlier cases. *Miller v. Robinson*, 2 Allen, 610; *Kettell v. Foote*, 3 Allen, 212; *Lowe v. Boston Five Cents Sav. Bank*, 118 Mass. 260; *Turner v. Wentworth*, 119 Mass. 459, 464. It was stated by Chief Justice Holmes, in *Clarke v. Second Nat. Bank*, 177 Mass. 257, 266, 59 N. E. 121, by Mr. Justice Loring in *Jaquith v. Davenport*, 191 Mass. 415, at 418, 78 N. E. 93, and by Mr. Justice Hammond in *Chandler v. Baker*, 191 Mass. 579, 585, 78 N. E. 387. To the same point see, also, *Maynard v. Royal Worcester Corset Co.*, 200 Mass. 1, 5, 85 N. E. 877; *Bangs v. Farr*, 209 Mass. 339, 95 N. E. 841. There is nothing inconsistent with this view in *Carnes v. Howard*, 180 Mass. 509, 63 N. E. 122. The statute upon which the court acted in *Insurance Co. v. Folsom*, 18 Wall. 237, 21 L. Ed. 827, required a procedure unlike our own. This rule does not impair the efficiency of the superior court, nor restrict its power to administer justice promptly and completely. It is not a recurrence to technicality of practice. It does not invite or justify an unreasonable number of prayers calculated rather to entrap the unwary than to elucidate the principles involved. It does not require that exceptions

be sustained when it is not apparent upon the whole that some substantial error injuriously affecting the rights of parties has been committed. It does not compel the judge to deal in detail with fragmentary or indecisive evidence, to be troubled by trivial requests, or to make a special finding, although, as was pointed out in 177 Mass. at page 264, 59 N. E. 121, often it may prove helpful if the grounds of his action are explained. But it does require him, when denying a request, founded upon evidence, to state expressly or by fair inference, either that the legal proposition presented is unsound or inapplicable, or that the facts upon which it is predicated are not found to be true. Failure in this regard affords reasonable apprehension that there has been a miscarriage of justice.

[2] 2. The defendant's requests to the effect that the plaintiff could not recover upon the contract of March 7, 1900, were refused rightly. It does not appear to have been conceded that this contract when executed was not binding upon the parties. There was ample evidence that both parties supposed that the contract continued in force until August, and treated it as if in force. The only dispute about it was that the defendant claimed that there was a mistake in it as to the term of credit to be extended to it. It might have been found that the contention of the defendant in this regard, which was expressed by it in writing to the plaintiff, was accepted orally by the latter, and as thus corrected became binding upon the defendant, and available to the plaintiff, although not signed by both parties. The statute of frauds would be no defense under these circumstances. *Beach & Clarridge Co. v. Am. Steam Gauge & Valve Mfg. Co.*, 202 Mass. 177, and cases cited at 181, 83 N. E. 924.

[3] 3. It was open for the court to find that the contract was not annulled by mutual consent. The vote of cancellation by the board of directors of the plaintiff was not decisive, and may have been found in the light of all the testimony and the attendant circumstances to have been conditional upon the execution of a new one in substitution, a condition which was never fulfilled.

[4] 4. The mutilation of a copy of the contract by the plaintiff was only one factor, not necessarily conclusive by itself, and to be considered with all the others in ascertaining the intent with which the act was done. *Atty. Gen. v. Supreme Council Am. Legion of Honor*, 206 Mass. 183, 92 N. E. 147. The general finding for the plaintiff involved the conclusions as matter of fact that the contract of March 7, 1900, as modified was binding upon the parties and had not been annulled or cancelled. In this no error appears.

[5] 5. There were no circumstances which required a finding of such inability on the part of the plaintiff to carry on its business,

or intention on its part to sell out as to justify the defendant in abandoning its contract. The action of the plaintiff at most amounted to a determination to ascertain at what price its business could be sold for. It did not fairly warrant the inference of inability to go on with the contract. *National Contracting Co. v. Vulcanite Portland Cement Co.*, 192 Mass. 247, and cases cited at page 256, 78 N. E. 414.

[6] 6. The plaintiff is a manufacturer of textile machinery in England. William Firth, for some years prior to 1900, had the exclusive sale of plaintiff's machinery in America, and early in 1900 organized in the United States a corporation, of which he was the principal stockholder, president and manager, to take over his business. Under date of March 7, 1900, a written contract was made between the plaintiff and the defendant, by which the plaintiff gave the defendant "the sole right to sell their machinery in the United States of America and the Dominion of Canada," and the defendant undertook "to sell efficiently and to appoint representatives to travel regularly in those countries, visiting the existing mills and the districts in which mills may be erected for the purpose of procuring orders for all the various machines made by" the plaintiff. The defendant further agreed not to engage in the sale of other similar machinery in the designated territory during the term of the contract, and the plaintiff agreed to do all its business in the same territory through the agency of the defendant. All the machinery was to be invoiced to the defendant as delivered, and was to be paid for by the defendant within a specified time, the defendant to conduct the business in its own name. The contract was to continue in force for five years, unless terminated sooner by the plaintiff on six months' notice "in the event of it being found that the William Firth Company cannot work the business as efficiently as it has been worked by William Firth." The contract was terminated by the defendant without justification in October, 1900. The case was tried before a judge of the superior court without a jury, and a finding was made in favor of the plaintiff apparently based on the ruling that the plaintiff was entitled to recover the loss of profits on sales of machinery occasioned by the act of defendant. We draw this inference from the refusal of the court to grant requests 16, 17, 18 and 19 of the defendant which cover this ground. The correctness of this ruling is challenged.

The fundamental principle of law upon which damages for breach of contract are assessed is that the injured party shall be placed in the same position he would have been in, if the contract had been performed, so far as loss can be ascertained to have followed as a natural consequence and to have been within the contemplation of reasonable men as a probable result of the breach, and

so far as compensation therefor in money can be computed by rational methods upon a firm basis of facts. *Leavitt v. Fiberloid Co.*, 196 Mass. 440-446, 82 N. E. 682, 15 L. R. A. (N. S.) 855; *Wertheim v. Chicoutine Pulp Co.*, [1911] A. C. 307. When a claim for prospective profits is brought to the test of this principle, recovery can be had where loss of profits is the proximate result of the breach, and is such as in the common course of events might have been expected, at the time the contract was made, to ensue from a breach, and where it can be determined as a practical matter with a fair degree of certainty what the profits would have been. But profits cannot be recovered, when the contract interpreted in the light of all its surroundings does not appear to have been made in contemplation of such damages, or when they are remote, or so uncertain, contingent, or speculative as not to be susceptible of trustworthy proof. They must be capable of ascertainment by reference to some definite standard, either of market value, established experience or direct inference from known circumstances. *Gagnon v. Sperry & Hutchinson Co.*, 206 Mass. 547, and cases cited at page 555, 92 N. E. 761; *Dennis v. Maxfield*, 10 Allen, 138. This is simply a concrete application of the wider principle, which is frequently adverted to and which pervades the determination of all legal rights, to the effect that the complaining party must establish his claim upon a solid foundation in fact, and cannot recover when any essential element is left to conjecture, surmise or hypothesis. The difficulty is not so much in the statement of the general principle as in applying it. A comparatively insignificant incident may be in such combination with others as to lead to a conclusion in one decision apparently at variance with that reached in others. Each case must be decided on its own facts under this necessarily somewhat broad and comprehensive proposition.

This contract had a double aspect. In one essential respect it created the relation of principal and agent, and in another view it contemplated as between the parties purchases and sales. Looking at the latter first, it appears that while the plaintiff was to sell its machinery in the United States and Canada only through the defendant, the defendant was the buyer and was to make its profits by gains in resales, and was not to be paid by commissions. There was no agreement for any specific amount of sales. No maximum or minimum of aggregate annual transactions was stipulated. There was no obligation on the plaintiff to manufacture or on the defendant to take any definite number of designated machines. No prices were fixed. Whether there should be any sales depended upon a meeting of minds between the parties as to each article. Each sale would depend in the ordinary course of business upon the cost to the plaintiff of manu-

facturing, the profit demanded by it, the price which could be obtained in the American market, and the margin which the defendant might need to meet its expenses and a fair return upon capital invested and reasonable profit. No measure of remunerative profit for the plaintiff was settled, either by the contract or by the custom of the trade. It appeared that sometimes it had sold machinery to the defendant at a loss. There was evidence that the selling price of the plaintiff and its actual cost of manufacture bore no settled ratio to each other. The expenses of the defendant and its fair profit contained inherently uncertain elements resting in large part upon the volumes of business done. The contract was silent as to any gauge of this, either by analogy to commissions, percentages or otherwise. All these considerations, difficult if not impossible of proof, would enter into the minds of the parties in making each sale. The reported evidence shows plainly that there was great fluctuation in the demand by American cotton manufacturers for English-made machinery. This depended in material degree upon the mechanical ingenuity and business sagacity of competing American machine makers, and upon the prosperity of American cotton manufacturers. The conditions of both these branches of industry were subject to periods of depression and activity, as to which during the time covered by this contract there was much conflicting testimony. The variation in the annual sales by the plaintiff to the predecessor of the defendant in handling its American trade during the five years before 1900 had been from £15,000 to £140,000. The number of sales which the defendant would have been able to make to its customers was problematical. It could have made none, unless the prices fixed by the plaintiff upon its machines from time to time had been such as to enable it to attract American buyers. The defendant, although taking over at its incorporation the business conducted formerly by William Firth, had as a corporation no record of commercial achievement. Although Mr. Firth was the chief stockholder in the defendant, he was under no obligation to continue in its service, and might have sold his interest in it or left its employ at any time. The contract gave to the plaintiff no assurance that his ability would be retained in the business. It is conceivable that the contract might have been faithfully performed on both sides, and yet no important sales have been made. This might have arisen from a variety of circumstances liable to occur in ordinary trade. The plaintiff rests its claim for loss of prospective profits on two classes of evidence—first, upon that showing the difference between its total sales in America for the five years next prior to the execution of the contract and its sales in America during the term of the contract, and computing upon this difference the profit which it claims it would have made; and,

second, upon testimony to the effect that immediately after the defendant's breach of contract its sales in America fell off greatly, as compared with those of the preceding seven months, until its new American agency was established. As to breaches of some contracts different in character from the one at bar and more explicit in their obligations, evidence of this nature might be important or even conclusive. *Loughery v. Huxford*, 206 Mass. 324, 92 N. E. 328. But the vagueness of this contract and the absence from it of elements vital to any binding or enforceable contract of sale have been pointed out. It must be construed as made and not reconstructed to meet an apparently unforeseen emergency. Perhaps no one of these factors by itself would be decisive. But taking them as a whole, we are of opinion that the terms of this contract show that loss of profits was not contemplated as a measure of damages for a breach, and these, together with all the circumstances, both before and since its execution and breach, furnish a basis too insubstantial for the ascertainment of profits lost by the plaintiff. Moreover the interpretation we have adopted seems consonant with what may have been the intention of the parties. A new mechanical device may render obsolete machinery previously in wide use. A change in the tariff policy of governments may seriously affect the course of international commerce. These and other contingencies may have induced a contract of such elastic and indefinite terms as to leave each party somewhat free to act in view of altered conditions as they might arise, without being bound to hard and unyielding provisions. *Noble v. Hand*, 163 Mass. 289, 39 N. E. 1020; *Todd v. Keene*, 167 Mass. 157, 45 N. E. 81; *United Press v. N. Y. Press Co.*, 164 N. Y. 406, 58 N. E. 527, 53 L. R. A. 288; *Howard v. Stillwell & Brelece Mfg. Co.*, 139 U. S. 199, 11 Sup. Ct. 500, 35 L. Ed. 147; *Eckington & Soldiers' Home Railway Co. v. McDevitt*, 199 U. S. 103, 24 Sup. Ct. 36, 48 L. Ed. 112; *Cincinnati Gas Co. v. Western Siemens Co.*, 152 U. S. 200, 14 Sup. Ct. 523, 38 L. Ed. 411; *Troy Laundry Machinery Co. v. Dolph*, 138 U. S. 617, 11 Sup. Ct. 412, 34 L. Ed. 1083; *Sapwell v. Bass* (1910) 2 K. B. 486; *Ex parte McClure*, L. R. 5 Ch. App. 737; *McCornick v. W. S. Mining Co. (C. C. A.)* 185 Fed. 748; *Connersville Wagon Co. v. McFarlan Carriage Co.*, 166 Ind. 123, 76 N. E. 294, 3 L. R. A. (N. S.) 709.

The case at bar is distinguishable from *Speirs v. Union Drop Forge Co.*, 180 Mass. 87, 61 N. E. 825. In that case the contract was to keep an entire factory employed. Many of the prices for the staple articles to be manufactured were determined. In the value of the manufacturing plant and the prices fixed were facts sufficient in the opinion of a majority of the court to support that action. But these elements are wanting in the plaintiff's proof.

[7] There is ground for the assessment of substantial damages, however, in the agency aspect of the contract. According to its terms the plaintiff was to have the active and intelligent service of the defendant, with a sufficient corps of salesmen, in pushing the sale of its products in the United States and Canada. That contract was broken by the defendant, whereby the plaintiff was deprived of that which it was entitled to receive. Thereupon it took the course, which it had a right to take in such event, of establishing another agency in the United States and conducting its business through this substituted channel. Its reasonable expense incurred in repairing the loss cast upon it by the wrongful act of the defendant, and in regaining the position acquired by it under its contract with the defendant is a legitimate element of damage and may be recovered. It is the direct result of the defendant's breach of the contract, and no doubt is capable of approximately accurate proof. It was or should have been in the contemplation of the parties as a consequence of the breach. *C. W. Hunt Co. v. Boston Elevated Railway Co.*, 199 Mass. 220, 85 N. E. 446; *Hanson & Parker, Ltd., v. Wittenberg*, 205 Mass. 319, 91 N. E. 383; *Erie County Natural Gas & Fuel Co. v. Carroll*, [1911] A. C. 105, 117. The other exceptions become immaterial in view of the grounds upon which this decision rests.

It follows that these exceptions must be sustained, but only in respect to the assessment of damages. Hence the new trial must be confined to that issue.

So ordered.

(210 Mass. 1)

JOHNSON v. CARR.

(Supreme Judicial Court of Massachusetts.
Norfolk. Sept. 6, 1911.)

1. DISMISSAL AND NONSUIT (§ 57*)—DEFECTS AS TO PROCESS—NONRESIDENT DEFENDANT—RECORD.

The writ of attachment having described defendant as of a place in the county from which the writ issued, neither the officer's return, which, after reciting that he attached defendant's real estate in said county, stated that he made diligent search for defendant, "and for his last and usual place of abode, tenant, agent, and attorney, but have been unable to find either within my precinct, and could make no further service of this writ on him," which is not a return that the defendant has no last and usual place of abode within the precinct, but only that no such abode is known to the officer, nor the recital, in the order of notice of the court for further service on defendant, that "the defendant was not an inhabitant of this commonwealth," apparently based entirely on the suggestion of plaintiff and the officer's return, shows as matter of law that at the time of the attachment defendant was a nonresident as distinguished from an absent defendant, so as to require dismissal of the action, under *Rev. Laws, c. 170, § 5*; no personal service having been had on defendant, and no notice

having been given him within a year of the entry of the action.

[Ed. Note.—For other cases, see *Dismissal and Nonsuit*, Cent. Dig. §§ 129-133; Dec. Dig. § 57.*]

2. DISMISSAL AND NONSUIT (§ 73*)—MATTERS CONSIDERED ON MOTION.

Only the record before the court is to be considered on a motion to dismiss the action.

[Ed. Note.—For other cases, see *Dismissal and Nonsuit*, Cent. Dig. §§ 167, 168; Dec. Dig. § 73.*]

3. ABATEMENT AND REVIVAL (§ 40*)—DEFECTS IN PROCESS—PLEA IN ABATEMENT.

The defense that before commencement of the action by attachment of real estate, without personal service on defendant, or notice to him within a year of entry of the action, he had become a nonresident, should be pleaded in abatement, and not in bar; it following from such facts, not that plaintiff has no cause of action, but merely that the writ should be abated.

[Ed. Note.—For other cases, see *Abatement and Revival*, Dec. Dig. § 40.*]

4. DISMISSAL AND NONSUIT (§ 80*)—BAR TO PLEA OF ABATEMENT—DECISION ON MOTION TO DISMISS.

The overruling of a motion to dismiss the action, on the ground that defendant was a nonresident when the action was commenced by attachment of real estate, without any personal service on him, or notice to him within a year of entry of the action, being a decision only on the facts appearing of record, is not a bar to a plea of abatement on the same ground, on which plea the facts can be shown.

[Ed. Note.—For other cases, see *Dismissal and Nonsuit*, Dec. Dig. § 80.*]

5. APPEAL AND ERROR (§ 1071*)—HARMLESS ERROR.

Adoption of requests for rulings assuming facts was harmless, the court having found such facts.

[Ed. Note.—For other cases, see *Appeal and Error*, Dec. Dig. § 1071.*]

Exceptions from Superior Court, Norfolk County; Loranus E. Hitchcock, Judge.

Action by Benjamin Johnson against E. Frederick Carr. Motion to dismiss was overruled, and the court found for plaintiff. Defendant brings exceptions. Exceptions overruled.

At the trial the plaintiff made the following requests for rulings:

"(1) The defendant left this commonwealth after the cause of action accrued, to wit, on or about the 10th day of August, A. D. 1898, and has never returned.

"(2) Since on or about the 10th day of August, A. D. 1898, the defendant Carr has resided out of the commonwealth within the meaning of R. L. c. 202, § 9.

"(3) As the defendant Carr resided out of the commonwealth after this cause of action accrued, the time of such residence out of the commonwealth must be excluded in determining the time limited for the commencement of this action, and therefore this action was seasonably commenced."

The trial judge found the first ruling as a fact, and adopted the second and third.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

The defendant made the following requests for rulings:

"(1) That on the record, as matter of law, the defendant is not in court, no proper service ever having been made upon him, as provided by chapter 170 of the Revised Laws, and this action cannot be maintained.

"(2) That on the record, as matter of law, no personal service ever having been made upon the defendant and no service by publication having been made upon him as ordered by the district court of East Norfolk, this action cannot be maintained.

"(3) That on the record, as matter of law, no personal service, or service by publication as ordered by the district court of East Norfolk, having been had on the defendant, and more than two years after the date of the writ a receiver having been appointed for the defendant under chapter 144 of the Revised Laws as amended by the Acts of 1903, c. 241, the plaintiff's claim cannot be adjudicated in this court. Revised Laws, c. 144, § 9; Const. U. S. Amend. 14.

"(4) That the judge of the superior court, on the hearing October 27, 1906, on the defendant's motion to dismiss, having found that the defendant was not a nonresident, the statute of limitations runs against the plaintiff's claim, and this action cannot be maintained.

"(5) That, the burden of proof being upon the plaintiff to show both a cause of action and the suing out of process within the period of limitation, the plaintiff cannot maintain his action unless he shows such an absence of the defendant from the state as to work a change of domicile. *Slocum v. Riley*, 145 Mass. 370, 14 N. E. 174; *Colleston v. Halley*, 6 Gray, 517; *Pond v. Gibson*, 5 Allen, 19, 81 Am. Dec. 724.

"(6) If the plaintiff shall show such an absence of the defendant from the state as to work a change of domicile, then the action cannot be maintained under chapter 170, § 5.

"(7) If the plaintiff shall fail to show such an absence of the defendant from the state as to work a change of domicile, then the statute of limitations is a bar, and the action cannot be maintained."

The trial judge adopted the fifth and seventh and refused to give the first, second, third, fourth and sixth of the defendant's requests for rulings, and found for the plaintiff.

Geo. W. Abele, for plaintiff. Samuel W. Mendum, for defendant.

HAMMOND, J. 1. As to the motion to dismiss: At the hearing on this motion the only evidence was the record. The court refused to grant certain rulings requested by the defendant and overruled the motion. This part of the case is before us upon the defendant's exceptions to this refusal and on his appeal from the order overruling the motion.

[1] The exceptions raise the question whether upon the record it appears that at the time of the attachment the defendant was a nonresident as distinguished from an absent defendant. If he was a nonresident, then, inasmuch as no personal service was made upon him and no notice whatever was given to him within one year of the entry of the action, the action should have been dismissed. R. L. c. 170, § 5. If, however, the defendant was merely an absent defendant as distinguished from a nonresident, then whether the action should be dismissed was within the discretion of the court. R. L. c. 170, § 6.

In the writ which issued from the district court of East Norfolk, the plaintiff was described as of "Quincy in said county of Norfolk," and the defendant as "of said Quincy." The officer's return states that he attached all the right, title and interest of the defendant in and to real estate in the county aforesaid, and further that he made diligent search for the defendant "and for his last and usual place of abode, tenant, agent and attorney, but have been unable to find either within my precinct and could make no further service of this writ upon him." This falls far short of saying that the defendant was a nonresident or of conclusively showing that he was. It is the ordinary return of an officer that he cannot find the defendant or his last and usual place of abode, or any tenant or agent of his. It is not a return that the defendant has no last and usual place of abode within the precinct of the officer, but only that no such abode is known to the officer. Beyond this his return cannot go. *Tilden v. Johnson*, 6 Cush. 354.

[2] We are in doubt whether the statement in the bill of exceptions that "the only evidence before the court was the record" means that the evidence was confined to the record of the case itself, or whether it included also the evidence of the proceedings of the probate court appointing a receiver. The parties having argued the case upon the latter theory, however, we shall consider the case in the same way, although it is to be noted that on a motion to dismiss only the record before the court is considered. Without reciting in detail the allegations of the petition for a receiver and the language of the order appointing him, it is sufficient to say that they are all perfectly consistent with the view that the absentee was still a resident of this commonwealth. Nor can the recital in the order of notice of the district court for further service that "the defendant was not an inhabitant of this commonwealth" be conclusive. It seems to be based entirely upon the suggestion of the plaintiff and an inspection of the officer's return, which of themselves are not sufficient to require such a finding.

Upon a careful inspection of the whole record the refusal to rule as matter of law that the defendant was a nonresident at the time

of the attachment was correct and the rulings requested which were based upon the theory that he was a nonresident were properly refused. On this part of the case the exceptions are overruled and the order of the court upon the motion to dismiss is affirmed.

2. As to the exceptions taken during the trial on the merits: These exceptions arise upon the refusal of the court to give certain rulings and upon certain rulings actually given. The case was tried before the court sitting without a jury. One ground of defense appears to have been the statute of limitations. By reference to the first bill of exceptions "which may be referred to for a fuller statement of the case," it appears that the causes of action set forth in the two counts of action accrued, the first in February, 1895, and the second in May, 1895. The writ was dated March 28, 1903, more than six years after the respective causes of action had accrued. Under these circumstances the court ruled in substance that as to each count the burden of proof was upon the plaintiff to prove the cause of action, and that the writ issued within the "period of limitation," and that if he failed to show such an absence of the defendant from the commonwealth as worked a change of domicile, then the statute of limitations would be a bar and the action could not be maintained. He further found as a fact that the defendant left this commonwealth on or about August 10, 1896, and never has returned. Having so ruled and found the court found for the plaintiff. The finding necessarily implies that the time during which the defendant was actually domiciled out of the commonwealth is the only time which did not run against the plaintiff, or in other words, deducting from the time between the accruing of the respective causes of action and the date of the writ, the time during which the defendant was domiciled out of the commonwealth, there must have been less than six years. The record does not state that all the evidence is therein reported, and hence we

cannot know whether it warranted such a finding. We do not understand, however, that the defendant contends the finding was not warranted.

[3, 4] The defendant's complaint is that, if his domicile was changed as found by the court, then the court should have given his sixth request, which was as follows: "If the plaintiff shall show such an absence of the defendant from the state as to work a change of domicile, then the action cannot be maintained under [R. L.] c. 170, § 5." But the answer is that no such question was before the court. The defendant had attempted to raise that question on his motion to dismiss, which being decided only upon the facts appearing of record, was disallowed. Even if the domicile had been changed, it does not follow that the plaintiff has no cause of action but simply that the present writ should be abated. This defense should be pleaded in abatement and not in bar. But it was not pleaded in abatement. The case therefore had gone beyond the stage where the question was material. Nor was the finding made upon the motion to dismiss conclusive. It was a decision made on the facts appearing of record, and was not conclusive upon the parties as to the actual facts. Notwithstanding the motion to dismiss was overruled, a plea in abatement could have been filed and the facts shown. The first, second, third, fourth and sixth requests were properly refused.

[5] Upon the findings of the judge under the fifth and seventh rulings adopted by him, the second and third rulings requested by the plaintiff and adopted by the judge could not have prejudiced the defendant.

The result is that both bills of exceptions must be overruled. But as there seems to have been no service upon the defendant we do not mean to intimate whether the judgment should be general, or whether it should be special, affecting only the property attached. That question may arise at a later stage of the case.

Exceptions overruled.

(200 Mass. 533)

HODGENS v. SULLIVAN.(Supreme Judicial Court of Massachusetts.
Suffolk. Sept. 6, 1911.)**1. CORPORATIONS (§ 121*)—SALE OF STOCK—ACTION—VARIANCE.**

That defendant's contract to deliver to plaintiff a certain number of shares of stock of "a company formed or to be formed to take over" certain mining properties for breach of which action is brought, states "above company" to be known as the E. B. Mining Company," while the name of the company actually formed, and which took over the properties, and shares in which were demanded, was the "E. B. Copper Mining Company," is an immaterial variance; such company being also known as the "E. B. Mining Company," and the "E. B.," and but one company having been formed to take over the properties.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 121.*]

2. EVIDENCE (§ 458*)—PAROL EVIDENCE—AMBIGUOUS CONTRACT—SURROUNDING CIRCUMSTANCES.

The provision of the contract for shares of stock in a company formed, or to be formed, to take over certain properties, "In case of failure of these properties being sold as at present agreed, this agreement to be null and void," being ambiguous through the words "as at present agreed," evidence of the conditions and circumstances under which the contract was entered into, and of the facts relating to it, are admissible.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2083; Dec. Dig. § 458.*]

3. TRIAL (§ 250*)—INSTRUCTIONS—IMMATERIAL MATTERS.

What are plaintiff's rights under an agreement, which he surrendered as consideration for the contract sued on, in case the contract sued on is void, as conditioned under certain circumstances to be, being immaterial in such action, a requested instruction as to what they are is properly refused.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 584-586; Dec. Dig. § 250.*]

4. CORPORATIONS (§ 121*)—SALE OF STOCK—EVIDENCE.

On the issue as to the meaning of the words "as at present agreed," in a contract of defendant to deliver to plaintiff shares of the stock in a company formed or to be formed to take over certain mining properties, providing that, "in case of failure of these properties being sold as at present agreed, this agreement to be null and void," whether they referred to negotiations then pending between defendant and H. & Co., brokers, to get financial backing for a company to take over the properties, or whether they referred to the general agreement and understanding between plaintiff and defendant whereby, options on the properties having been obtained by plaintiff for defendant and another, the properties were to be disposed of to whomsoever might be induced to purchase them, neither evidence that responsible parties were ready to furnish the money if the report of H. & Co.'s expert was satisfactory, nor evidence that after the falling through of the negotiations with H. & Co. there were additional expenses before backing was secured, is material.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 121.*]

Exceptions from Superior Court, Suffolk County; Lloyd E. White, Judge.

Action by Thomas M. Hodgins against Frank M. Sullivan. Verdict for plaintiff, and

defendant brings exceptions. Exceptions overruled.

Stebbins, Storer & Burbank, for plaintiff. Chas. E. Hellier and Wm. P. Evarts, for defendant.

MORTON, J. This is an action to recover damages for a breach of the following contract:

"December 6, 1905.

"For and in consideration of the surrender of a certain agreement dated October 13, 1905, signed by Pat. Wall in regard to the payment of a commission of \$20,000 on the sale of the Dutton Onelda Group, I hereby agree to deliver to T. M. Hodgins two thousand shares of the capital stock of a company formed or to be formed to take over said property, said stock to be delivered as soon as issued and to be fully paid up and no further payment will be required thereon from T. M. Hodgins, the receipt whereof is hereby acknowledged of the agreement above described; above company to be known as the East Butte Mining Company. In case of failure of these properties being sold as at present agreed, this agreement to be null and void.

"[Signed] Frank M. Sullivan."

There was a verdict for the plaintiff, and the case is here on exceptions by the defendant to the refusal of the court to give certain rulings that were asked for and to the exclusion of certain evidence.

There was evidence tending to show that the plaintiff had assisted the defendant and Wall in procuring options on certain mining properties known as the "Dutton Onelda group"; that for services so rendered he was to receive a commission of \$20,000 on the sale of the properties, and that he had a written agreement to that effect with Wall; that the defendant represented to him that he had "considerable more money" to pay before he could put through the deal and that he wanted him to take in lieu of the cash commission 2,000 shares in a company to be known as the East Butte Mining Company, with the privilege of subscribing for 2,000 shares more on the payment of \$5 a share; that he was certain that "the thing would go through all right and that he would make eventually perhaps the full amount of \$20,000"; that the plaintiff consented and thereupon the agreement in suit was signed by the defendant—the last part, beginning with the words "above company," being written by the defendant and the rest by the plaintiff. There was also evidence tending to show that previous to the execution of the agreement in suit a corporation had been organized under the laws of Arizona with the name of the East Butte Copper Mining Company by Sullivan and Wall with the assistance of one Bernard Noon, a lawyer in

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Butte, to which it was proposed to transfer these properties, and that after the options were secured and the corporation organized Sullivan went East to get some one to handle the matter for them, and had negotiations with a firm of Boston brokers, Hayden, Stone & Co., who proposed to organize a corporation of their own under the laws of Maine, with the name of the East Butte Mining Company, to be controlled by them. These negotiations fell through and the properties eventually were conveyed through a deal made by Sullivan with another firm of Boston brokers, Paine, Webber & Co., to the East Butte Copper Mining Company, the corporation which had been organized as aforesaid by Sullivan and Wall with the assistance of Noon, to take them over if the necessary financial backing could be obtained. The plaintiff claimed that he was entitled under the contract to 2,000 shares of stock in the East Butte Copper Mining Company to which the properties were thus conveyed, and duly demanded the same, but the shares never were delivered to him. No corporation ever was formed, so far as appears, under the name of the East Butte Mining Company for the purpose of taking over said properties. The only corporation that was organized for that purpose was the East Butte Copper Mining Company to which, as already stated, they eventually were conveyed.

[1] There was evidence tending to show that the negotiations between Sullivan and Hayden, Stone & Co. were pending at the time of the execution of the contract in suit, and one contention of the defendant is that the phrase "as at present agreed," in the concluding sentence of the contract, referred to the negotiations with Hayden, Stone & Co., and that, inasmuch as those fell through the contract became, as expressly provided, "null and void." The other contention is that the shares to be delivered were shares in the company to be known as the East Butte Mining Company, and that the shares that were demanded and to which the plaintiff claims to have been entitled were shares in the East Butte Copper Mining Company. The defendant contended that this constituted a fatal variance and asked the court so to rule, which the court declined to do subject to his exception. In regard to this exception it is to be observed that there was evidence tending to show that the East Butte Copper Mining Company was also known as the East Butte Mining Company and as the East Butte. Under the circumstances the alleged variance might well have been regarded by the court, as appears to have been done, as immaterial. The case stands differently from what it would have stood if there had been two companies, one named the East Butte Copper Mining Company and the other the East Butte Mining Company. There was also evidence which, if believed, warranted the jury in finding that the defendant had himself admitted in substance and effect that the East Butte Copper Mining Company was

the company in which the plaintiff was entitled to shares under the contract. It would have been error, therefore, for the court to instruct the jury, as variously requested by the defendant, that the demand for shares in the East Butte Copper Mining Company constituted a fatal variance, or that the plaintiff was not entitled under the contract to shares in that company.

[2] In regard to the other contention of the defendant, the plaintiff claims that the phrase in question referred not to the negotiations with Hayden, Stone & Co. but to the general agreement and understanding between the parties whereby options were to be procured and the properties disposed of to whomsoever might be induced to purchase them.

[3] The contract being ambiguous, evidence of the conditions and circumstances under which it was entered into and of the facts relating to it were properly admitted for the purpose of ascertaining if possible the true meaning of the language used by the parties. *Strong v. Carver Cotton Gin Co.*, 197 Mass. 53, 59, 83 N. E. 323, 14 L. R. A. (N. S.) 274. And it was for the jury to find as a fact under suitable instructions from the court what the agreement referred to was. This question was submitted to the jury under instructions that were not objected to and in which we discover no error. So far as the instructions requested should have been given, they were included in and covered by the charge. If the contract became "null and void" because the properties were not conveyed "as at present agreed," it was immaterial what the rights, if any, of the plaintiff were under the contract between him and Pat. Wall which had been given up when the contract in suit was signed, and the instructions relating thereto were properly refused.

[4] Evidence was offered by the defendant in connection with the proposed Hayden, Stone & Co. deal that responsible parties were ready to furnish the money called for if the report to Hayden, Stone & Co. of their mining expert was satisfactory, and had furnished a part of it, and was excluded, and we think rightly. It had no tendency to show what the agreement referred to was and was not material for any other purpose.

We also think that the evidence that was offered as to the pooling of the stock in 90 days and that there were additional expenses between December 12th, when Hayden, Stone & Co. decided to go no further with the deal, and the time when the Paine, Webber & Co. deal was entered into was rightly excluded. It had nothing to do with the main question in the case, which was, what was the agreement referred to in the phrase "as at present agreed."

The other exceptions relating to matters of evidence have not been argued and we treat them as waived.

Exceptions overruled.

(210 Mass. 33)

Ex parte FLITO.(Supreme Judicial Court of Massachusetts.
Suffolk. Sept. 13, 1911.)

HABEAS CORPUS (§ 29*)—PURPOSE OF WRIT.
Where jurisdiction is admitted, habeas corpus will not lie to release an accused because of any invalidity in the complaint and warrant for his arrest, for want of an examination on oath, before issuance of the complaint, of the complainant and his witnesses.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. § 24; Dec. Dig. § 29.*]

In the matter of the petition of Luigi Flito for habeas corpus. Petition dismissed.

Frank M. Zottoli, for petitioner. Thos. D. Lavelle, Asst. Dist. Atty., for the Commonwealth.

SHELDON, J. The petitioner does not deny that the crime which he has committed was within the jurisdiction of the municipal court of the city of Boston, or that that court properly could receive a complaint and issue a warrant against him, and try him thereon when brought in upon due process. His contention is that the complaint and the warrant were both invalid because there was not, before the written complaint was received, an examination on oath of the complainant and his witnesses. R. L. c. 217, § 22; St. 1866, c. 279, § 8; St. 1821, c. 109, § 2; Rev. St. 1836, c. 135, § 2. We do not intimate that there is anything in this contention, or that it could have availed the petitioner if it had been properly presented. R. L. c. 160, § 36; Com. v. Farrell, 8 Gray, 465. And see Com. v. Tay, 170 Mass. 192, 48 N. E. 1086; Com. v. Conlin, 184 Mass. 195, 197, 68 N. E. 207. But even if the contention were sound, this petition could not be maintained. The writ of habeas corpus is not to take the place of an appeal, a bill of exceptions, or a writ of error, in a case like this, which was within the jurisdiction of the court where it was tried, and in which the only question raised is as to the correctness of the rulings made in that court. Fleming v. Clark, 12 Allen, 191, 194; Sennott's Case, 146 Mass. 489, 492, 16 N. E. 448, 4 Am. St. Rep. 344; Com. v. Huntley, 156 Mass. 236, 80 N. E. 1127, 15 L. R. A. 839; Bishop, Petitioner, 172 Mass. 35, 51 N. E. 191; Sellers' Case, 186 Mass. 301, 71 N. E. 542.
Petition dismissed.

(250 Ill. 577)

RICHARDSON v. TRUBEY.(Supreme Court of Illinois. June 20, 1911.
Rehearing Denied Oct. 4, 1911.)**1. APPEAL AND ERROR (§ 150*)—DISMISSAL—PARTIES.**

An appeal from a decree in partition by defendant will not be dismissed on the ground that his trustee in bankruptcy was the proper appellant, where, though an intervening petition as trustee was filed, there was no evidence

that intervener was trustee, or that there was any proceeding in the federal District Court, or that he did anything in the case.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 150.*]

2. BANKRUPTCY (§ 400*)—EXEMPTION—HOMESTEAD.

A trustee in bankruptcy having no concern in exempt property, the bankrupt has the right to question an order for the sale of the homestead and the payment of its value to him, according to mortality tables.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 400.*]

3. WILLS (§ 796*)—SURVIVING HUSBAND—ELECTION.

A surviving husband is bound by his election to take under his wife's will, made by claiming a bequest after statutory notice to elect, precluding subsequent renunciation of the will.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 2064-2068; Dec. Dig. § 796.*]

4. WILLS (§ 788*)—ELECTION.

One permitted to take under a will or the statute is entitled to know the condition of the estate before making an election.

[Ed. Note.—For other cases, see Wills, Dec. Dig. § 788.*]

5. HOMESTEAD (§ 203*)—SALE.

In partition, a decree ordering sale of a homestead estate without the owner's consent, giving him its present value according to the mortality tables, is improper, though equity, to prevent injustice resulting from the occupation of the premises of much greater value by one who has an estate therein to the extent of only \$1,000, will require surrender of possession upon payment of that amount to the owner.

[Ed. Note.—For other cases, see Homestead, Cent. Dig. §§ 384-386; Dec. Dig. § 203.*]

6. CURTESY (§ 12*)—SALE OF INTEREST.

In partition, a decree ordering sale of a surviving husband's dower interest without his consent is improper.

[Ed. Note.—For other cases, see Curtesy, Dec. Dig. § 12.*]

Appeal from Circuit Court, Cook County; Jesse A. Baldwin, Judge.

Action by Jettie Richardson against Esdras B. Trubey. From the decree, defendant appeals. Reversed and remanded.

H. W. Standidge, for appellant. Louis J. Pierson and George A. Miller, for appellee.

CARTWRIGHT, J. Luella B. Trubey died on June 3, 1905, leaving a last will and testament, of which the appellee, her niece, Jettie Richardson, was executrix. On August 3, 1905, the appellant, Esdras B. Trubey, her surviving husband, filed his bill in the circuit court of Cook county to contest the will. There was a verdict, followed by a decree, sustaining the will, and that decree was affirmed by this court. Trubey v. Richardson, 224 Ill. 136, 79 N. E. 592. The appellant, as administrator to collect, also began a proceeding in the probate court of Cook county against Arthur B. Pease, to compel the delivery of personal property alleged to belong to the estate, and that litigation ended with the affirmance of the judgment of the Appellate Court, holding that the property was

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

property of the estate. *Trubey v. Pease*, 240 Ill. 513, 88 N. E. 1005. On January 24, 1908, the appellee filed her bill in this case in the circuit court of Cook county against the appellant and others for partition of the real estate devised by the will. A decree was entered, which was reversed on appeal, and the cause was remanded to the circuit court for further proceedings consistent with the views expressed in the opinion then filed. *Richardson v. Trubey*, 240 Ill. 476, 88 N. E. 1008. After the cause was reinstated in the circuit court, the appellee filed a substituted and supplemental bill of complaint, on January 25, 1910, to which bill the appellant demurred, and his demurrer being overruled he answered the bill. The issue was referred to a master in chancery to take the proofs of the respective parties and report his conclusions upon the law and the facts. The master took the evidence and made his report, recommending a decree for the assignment of homestead and dower to the appellant and a partition of the premises, and providing that, if it was not possible to assign the homestead or dower, the same should be sold and the present value of the homestead, according to the mortality tables, be paid to the appellant, and the balance of the value of the dower, above incumbrances, tax sales, and tax liens, be paid to his trustee in bankruptcy. The cause was heard on exceptions to the report, and the court entered a decree in accordance with said report, appointing commissioners to assign the homestead and dower and partition the real estate. If the premises were not susceptible of division, the commissioners were directed to report the value of each piece or parcel, and the premises were to be sold, including the homestead and dower, and the values were to be paid to the appellant and his trustee, as recommended by the master. The case has again been brought to this court by appeal.

[1] The appellee has moved to dismiss the appeal, and as grounds of the motion her counsel say that under the former decision in this case the appellant's rights are limited to homestead in the family home and dower in the residue of the real estate; that the decree appealed from gives appellant the homestead, so that he cannot appeal with respect to that part of the decree; that the remaining interest is in Harry G. Wexler, trustee in bankruptcy of the appellant, who has the sole right of appeal, if dissatisfied with the decree respecting dower; and that the abstract does not show that all the evidence upon which the decree rested is before the court. The master's report finds that the original bill was filed on January 11, 1909; that appellant filed his voluntary petition in bankruptcy on April 6, 1910; and that Harry G. Wexler was appointed trustee of his estate on May 28, 1910, and duly qualified and acted as such trustee. The decree follows the findings of the master, but they

are not supported by any evidence. The abstract of the record shows that on June 16, 1910, after the reference to the master, an order was entered, giving Harry G. Wexler leave to file an intervening petition as trustee in bankruptcy of appellant, and substituting such trustee as defendant in place of appellant. The intervening petition was filed, but the order was set aside on August 4, 1910, and appellant was ruled to answer the petition. An answer was filed, denying the appointment of Wexler as trustee or his qualification as such, and disputing his right as trustee for appellant. On August 15, 1910, Wexler filed exceptions to the answer of appellant and nothing further appears. There was no evidence that Wexler was trustee in bankruptcy, or that there was any proceeding in the District Court of the United States. So far as appears, the trustee did nothing in the case, and he filed no objections before the master and made no contest before the court.

[2] The right to dower, as well as homestead, is by the record in appellant; but if there was a trustee appellant has a right to question the order of the court for the sale of his homestead without his consent, and the payment of its value to him, according to mortality tables, since the trustee in bankruptcy has no concern with exempt property. The abstract shows the report of the master before whom the cause was heard, and it is a part of the record without any certificate of evidence. The suggestion that it is not shown that no oral testimony was heard before the court is without force, for the reason that none could have been heard. The motion to dismiss the appeal is denied.

[3] After the cause was reinstated in the circuit court, the appellant, on July 7, 1909, filed in the office of the clerk of the probate court the renunciation of the will provided by section 12 of the dower act (Hurd's Rev. St. 1909, c. 41) and elected to take in lieu of dower one-half of all the real and personal estate which should remain after the payment of just debts and claims. The court found that this attempted renunciation was void, and it is contended that the court erred, because we held on the former appeal that appellant could still renounce the will, and the cause was remanded for further proceedings consistent with that view. Counsel misinterprets the opinion in which we held that appellant took by the will and not by the statute, and in explanation stated what his rights would have been, if he had made an election under the dower act. We did not decide that he could still renounce the provisions of the will, and his right to election had already been barred. The letters testamentary were issued to appellee on or about July 19, 1905. She served on appellant a written notice, on February 24, 1906, that all claims against the estate as filed and allowed in the probate court had been fully paid, and that he should make his election to take

under the will, or renounce its provisions within two months from the service of the notice. All claims against the estate had been paid, and no other claims were filed in the probate court until December, 1909, nearly four years after the notice, and which could only participate in after-discovered property. The notice was in compliance with the statute, and the appellant did not avail himself of the right to make an election. Afterward, on June 29, 1907, he filed in the probate court a sworn answer to a petition for a surrender of specific property in his possession, and he set up that under the terms of the will the property was bequeathed to him, and he claimed possession by virtue of the bequest. He could not claim that property under the will and reject the remainder and claim under the statute. *Lessley v. Lessley*, 44 Ill. 527.

[4] One who is permitted to take under a will or the statute is entitled to know the condition of the estate before making an election, and it is the intention of the statute that such should be the case; but here the appellee not only complied with the statute, but appellant, knowing the condition and the amount of the estate, elected to take under the will by claiming the property given to him by it. He was the surviving husband of the testatrix and had been her agent in the management of her property, and after her death was administrator to collect, and carried on the contest of the will and litigation with Pease, and he is bound by his election. *Stone v. Vandermark*, 146 Ill. 312, 34 N. E. 150.

[5] In the decree which was reversed on the former appeal, the commissioners were not specifically directed to set off the homestead. In the present decree they are so directed, but if they find the premises are not susceptible of division they are to report the value, and the homestead premises are to be sold. In case of a sale and confirmation of the report, the appellant is ordered forthwith to surrender possession, and is to be paid the value of his homestead, according to the mortality tables. There is no warrant in the law for selling a homestead estate and giving to the owner its present value without his consent. If the owner chooses to do so, he may, by written assent filed in the court where the proceedings for partition are pending, agree to the sale of his estate with the rest of the property, and in such case the estate is sold for its present value, which the owner receives. *Merritt v. Merritt*, 97 Ill. 243. It does not appear that the appellant filed his consent, in writing, to the sale of his homestead estate, and the court had no right to order a sale of the same and to require the appellant to surrender possession on the confirmation of the sale. It is true that courts of equity, in order to prevent injustice resulting from the

occupation of premises of much greater value by one who has an estate therein to the extent of only \$1,000, have required the surrender of possession by the one entitled to the homestead upon payment of \$1,000 to such owner, but he cannot be required to sell it and receive the present value without his consent. What he is entitled to is the occupation of a homestead of the value of \$1,000, and, by analogy to cases where a homestead may be sold under execution or to satisfy liens, a court of equity will order the payment to him of that sum of money, which will enable him to acquire another homestead, and thereby have what he is entitled to. *Powell v. Powell*, 247 Ill. 432, 93 N. E. 432. To take a homestead from one entitled to it and give him what it sells for, without his consent to such arrangement, would be to defeat the purpose of the statute and give to the party money, instead of a right to occupy exempt property.

[6] With respect to dower, the last decree directed an accounting, and in case of a sale the payment of the value of the dower to Wexler, as trustee in bankruptcy. There was no evidence that he was trustee or had any right to the money, but, as was said with reference to the former decree respecting dower, the directions of the present one are not authorized by our laws. When property in which one has dower cannot be divided, so as to assign the dower without great injury to the whole, proceedings may be had under section 39 of the dower act, but there is no warrant in the statute for selling the dower interest without the consent of the one entitled to dower, given as provided in Partition Act, § 32 (*Hurd's Rev. St. 1909*, c. 106). As there was no consent to the sale of the dower interest, the court erred in ordering a sale of the same.

The decree is reversed, and the cause is remanded for further proceedings consistent with the views expressed in this opinion.

Reversed and remanded.

(250 Ill. 584)

NATIONAL SAFE DEPOSIT CO. v.

STEAD, Atty. Gen., et al.

(Supreme Court of Illinois. June 20, 1911.

Rehearing Denied Oct. 4, 1911.)

1. WAREHOUSEMEN (§ 10*)—RELATION OF PARTIES—LEASE OF SAFETY DEPOSIT BOX.

Where a safety deposit company leases a box or safe, and the lessee takes possession and places valuables therein, the relation of bailor and bailee is created, though the deposit company has no knowledge of the character or description of the property, and is not expected to know and cannot open the safe except by the use of its key in connection with another key in the possession of the lessee.

[Ed. Note.—For other cases, see *Warehousemen*, Cent. Dig. §§ 11-14; Dec. Dig. § 10.*]

2. WAREHOUSEMEN (§ 25*)—LESSOR OF SAFETY DEPOSIT BOX—DUTIES.

Since the relation between the lessor and lessee of a safety deposit box is that of bailor

and bailee, the lessor is in the legal custody and control of the contents of the box, and bound to use ordinary care for its safety while the lessee is living, and on his death to deliver the property only to the person or persons on whom the law casts the title with the right to possession.

[Ed. Note.—For other cases, see Warehousemen, Cent. Dig. §§ 38-47; Dec. Dig. § 25.*]

3. DESCENT AND DISTRIBUTION (§ 1*)—RIGHT TO TAKE PROPERTY—NATURE—REGULATION.

The right to take property, real or personal, by inheritance, bequest, or devise, is purely statutory, resting entirely on legislative enactment, and hence the state in its sovereign capacity may regulate the devolution of property after the owner's death by appropriate legislation, and may impose reasonable conditions thereon.

[Ed. Note.—For other cases, see Descent and Distribution, Cent. Dig. §§ 1-8; Dec. Dig. § 1.*]

4. TAXATION (§ 856*)—"INHERITANCE TAX"—NATURE AND EFFECT.

An "inheritance tax" is a tax on the right of succession, and not a tax on the property itself; the right thereto vesting in the state on the death of the prior owner.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1673; Dec. Dig. § 856.*]

For other definitions, see Words and Phrases, vol. 4, p. 3609.]

5. TAXATION (§ 859*)—INHERITANCE TAX—STATUTES—VALIDITY.

Since the state under Inheritance Tax Act July 1, 1909 (Hurd's Rev. St. 1909, c. 120), has a vested right in the property of a deceased person in so far as is necessary to pay the inheritance tax properly leviable thereon, section 9, providing that a safety deposit company shall give to the State Treasurer and Attorney General's office 10 days' notice of the time when property held for a deceased lessee of a safety deposit box or safe is to be surrendered and removed from the company's custody and delivered to the personal representative, heir, or devisee of the decedent, and requiring, under certain circumstances, a retention by the company of an amount sufficient to pay the inheritance tax properly levied thereon, and making the company in case of default itself liable for the amount of the tax, is not a violation of its constitutional rights in so far as it applies to property belonging to a deceased sole lessee, or to property contained in boxes rented to two or more persons jointly in the case of the death of one of such lessees, whether the property is kept separate or mingled, or, in the case of boxes, rented to partners on the death of one of the partners, since in each case it was feasible by an accounting and an examination of the contents of the box to determine the value of the property belonging to the deceased person on which the inheritance tax was assessable.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1674; Dec. Dig. § 859.*]

6. PARTNERSHIP (§ 244*)—DEATH OF PARTNER—DUTY OF SURVIVING PARTNER.

On dissolution of a partnership by the death of a partner, the surviving partner is required to inventory the partnership estate, to have it appraised, file a list of liabilities, and make a full showing of the partnership estate, so that the interest of the deceased partner may be ascertained and distributed.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. § 511; Dec. Dig. § 244.*]

7. CONSTITUTIONAL LAW (§ 129*)—WAREHOUSEMEN (§ 2*)—CONTRACT RIGHTS—VIOLATION.

Inheritance Tax Act July 1, 1909 (Hurd's Rev. St. 1909, c. 120), providing that a safety

deposit company on the death of a lessee of a box or safe shall not deliver the contents to the lessee's heirs or personal representatives until after 10 days' notice of the time and place to the State Treasurer and Attorney General, and requiring under certain circumstances a retention of a sufficient amount of the assets to pay an inheritance tax legally assessable on the property found in the box on pain of imposition of liability for the tax on the deposit company, was not unconstitutional as violating the charter of a deposit company providing that it was organized to provide a suitable building or buildings with vaults and safes with especial regard to protection against loss by fire, robbery, or otherwise, and to carry on the business of safety deposit and storage, as such section does not deprive the corporation of the right to construct and rent its vaults, or to act as a depository for hire, but at most imposes certain duties on the termination of the relation created between it and a lessee, since deceased, before surrender of the property contained in the box.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 296, 301, 362-413; Dec. Dig. § 129; Warehousemen, Dec. Dig. § 2.*]

8. CONSTITUTIONAL LAW (§§ 296, 240*)—DUE PROCESS OF LAW—EQUAL PROTECTION OF LAW.

Inheritance Tax Act July 1, 1909 (Hurd's Rev. St. 1909, c. 120), requiring that a safety deposit company shall not without notice to the state deliver the property which it has received into its vaults, where the owner or part owner has died since its receipt, and in case the property is subject to an inheritance tax shall not deliver the same without the state's consent until the tax is paid, is not unconstitutional as depriving a safety deposit company of its property and liberty without due process of law, or as depriving it of the equal protection of the law.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 825-846, 688-699; Dec. Dig. §§ 296, 240.*]

9. TAXATION (§ 859*)—INHERITANCE TAX—SAFETY DEPOSIT COMPANY—STATUTES—VALIDITY.

Inheritance Tax Act July 1, 1909 (Hurd's Rev. St. 1909, c. 120), is not invalid as making a safety deposit company a trustee for the state against its will, since the fact that it is required to perform certain acts to assist the state in collecting its inheritance tax on the property of a deceased lessee of a safe did not change the deposit company's relation as bailee of the property deposited.

[Ed. Note.—For other cases, see Taxation, Dec. Dig. § 859.*]

10. SEARCHES AND SEIZURES (§ 7*)—INHERITANCE TAX—EXAMINATION OF PROPERTY IN DEPOSIT VAULTS.

Inheritance Tax Act July 1, 1909 (Hurd's Rev. St. 1909, c. 120), providing that safety deposit companies shall not without notice to the state deliver property which it has received into its vaults for an owner or part owner, since deceased, and, in case the property is subject to an inheritance tax, shall not deliver the same without the state's consent until the tax is paid, is not unconstitutional as subjecting the property of the lessee to unreasonable searches and seizures.

[Ed. Note.—For other cases, see Searches and Seizures, Cent. Dig. § 5; Dec. Dig. § 7.*]

11. EMINENT DOMAIN (§ 2*)—PROPERTY DEVOTED TO PUBLIC USE WITHOUT COMPENSATION.

Inheritance Tax Act July 1, 1909 (Hurd's Rev. St. 1909, c. 120), providing that safety deposit companies shall not without notice to the state deliver property received into its

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

vaults where the owner or part owner has died, and, in case the property is subject to an inheritance tax, shall not deliver the same without the consent of the state until the tax is paid, is not unconstitutional as devoting the property of the deposit company to public use without just compensation in so far as it requires the company to retain the property after the lessee's death until the inheritance tax is paid, since it must be presumed that the company when it leased the box took into consideration the possibility of its being compelled as bailee to retain the property for some time after the termination of the bailment pending its ability to surrender the same to the person entitled thereto.

[Ed. Note.—For other cases, see *Eminent Domain*, Cent. Dig. §§ 3-12; Dec. Dig. § 2.*]

Farmer, Vickers, and Cooke, JJ., dissenting.

Appeal from Circuit Court, Cook County; Richard S. Tuthill, Judge.

Bill by the National Safe Deposit Company against William H. Stead and others. From a decree sustaining a demurrer to the bill, complainant appeals. Affirmed.

This was a bill in chancery filed by the National Safe Deposit Company, the appellant, against William H. Stead, Attorney General, Andrew Russel, State Treasurer, and Walter K. Lincoln, inheritance tax attorney, the appellees, in the circuit court of Cook county, to restrain said officers from enforcing against the appellant, and all other corporations, firms, and individuals similarly situated and who are engaged in the business of renting safety deposit boxes and safes for hire, the provisions of section 9 of an act entitled "An act to tax gifts, legacies, inheritances, transfers, appointments and interests in certain cases and to provide for the collection of the same, and repealing certain acts therein named," approved June 14, 1909, in force July 1, 1909 (*Hurd's St. 1909*, p. 1897), on the ground that said section of the act is unconstitutional and void. A general demurrer was interposed to the bill and sustained, and the bill was dismissed for want of equity, and the record has been brought to this court by the complainant by appeal for further review.

Section 9 reads as follows: "If a foreign executor, administrator or trustee shall assign or transfer any stock or obligations in this state standing in the name of a decedent or in trust for a decedent, liable to any such tax, the tax shall be paid to the treasurer of the proper county on the transfer thereof. No safe deposit company, trust company, corporation, bank or other institution, person or persons having in possession or under control securities, deposits, or other assets belonging to or standing in the name of a decedent who was a resident or nonresident or belonging to, or standing in the joint names of such a decedent and one or more persons, including the shares of the capital stock of, or other interests in, the safe deposit company, trust company, corporation,

bank or other institution making the delivery or transfer herein provided, shall deliver or transfer the same to the executors, administrators or legal representatives of said decedent, or to the survivor or survivors when held in the joint names of a decedent and one or more persons, or upon their order or request, unless notice of the time and place of such intended delivery or transfer be served upon the State Treasurer and Attorney General at least ten days prior to said delivery or transfer; nor shall any such safe deposit company, trust company, corporation, bank or other institution, person or persons deliver or transfer any securities, deposits or other assets belonging to or standing in the name of a decedent, or belonging to, or standing in the joint names of a decedent and one or more persons, including the shares of the capital stock of, or other interests in, the safe deposit company, trust company, corporation, bank or other institution making the delivery or transfer, without retaining a sufficient portion or amount thereof to pay any tax or interest which may thereafter be assessed on account of the delivery or transfer of such securities, deposits or other assets, including the shares of the capital stock of, or other interests in, the safe deposit company, trust company, corporation, bank or other institution making the delivery or transfer, under the provisions of this article, unless the State Treasurer and Attorney General consent thereto in writing. And it shall be lawful for the State Treasurer, together with the Attorney General, personally or by representatives, to examine said securities, deposits or assets at the time of such delivery or transfer. Failure to serve such notice or failure to allow such examination, or failure to retain a sufficient portion or amount to pay such tax and interest as herein provided shall render said safe deposit company, trust company, corporation, bank or other institution, person or persons liable to the payment of the amount of the tax and interest due or thereafter to become due upon said securities, deposits or other assets, including the shares of the capital stock of, or other interests in, the safe deposit company, trust company, corporation, bank or other institution making the delivery or transfer, and in addition thereto, a penalty of one thousand dollars; and the payment of such tax and interest thereon, or of the penalty above described, or both, may be enforced in an action brought by the State Treasurer in any court of competent jurisdiction."

The sole object in filing this bill was to test the constitutionality of said section 9 of the inheritance tax law of 1909. The allegations of the bill are, in substance, as follows: That appellant was in 1881 incorporated under the laws of this state for the express purpose of providing a suitable building or

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

buildings with vaults and safes, with a special regard to protection against loss by fire, robbery or otherwise, and to carry on the business of safety deposit and storage, and has ever since been engaged in carrying out such purposes; that it has succeeded in building up a large and profitable business, consisting chiefly of renting for hire safe deposit boxes or safes specially constructed for that purpose in its vaults for the safe keeping of money, securities, and valuables, one provision in the contract between appellant and each box renter being that no one except the renter or his deputy, to be designated in writing on the books of the company, or, in case of death, his legal representatives, shall have access to the box or safe; that appellant now has in its vaults 13,291 safes or safe deposit boxes, of which 9,702 are under contracts of rental; that of the latter number 4,104 are rented to and held jointly by more than one individual, each of whom has access to the box of which he is a joint renter and the right to keep property therein, and 316 are rented to and held by business copartnerships, and that the demand for joint rentals is constantly increasing. The bill further alleged that in the ordinary course of business the safes and boxes can be opened only by the use of two keys, one of which is held by the lessee and the other by appellant, and that it requires the joint act of the customer and appellant to secure access to the contents of a box or safe; that appellant retains no means of access to the box or safe by itself alone, nor does it possess any knowledge or information, or means of knowledge or information, as to the ownership of the contents of the box or safe; that the appellant never by its own act opens a box or safe rented to a customer unless the lessee loses his key or abandons the box or safe; that, in case of the loss of the key, appellant, in the presence of the lessee, drills out the lock on the safe or box and replaces it with a new lock and key, and in case of the abandonment of a box or safe by a renter, evidenced by his failure to renew the lease or pay the rent, appellant by the contract of leasing reserves, and sometimes exercises, the right, after reasonable notice to the lessee to withdraw the contents of the box and surrender the key, to open the box by drilling out the lock, to withdraw the contents, and hold them subject to the order and disposition of the renter. The bill further alleged that upon the death of the lessee of a box or safe, and before letters of administration have been issued, appellant permits the next of kin having the key to open the box; in the presence of appellant's agents, for the purpose only of ascertaining whether decedent has left a will in the box, which, if found, is deposited in the probate court by appellant, and in some instances where the next of kin have represented that they could not find the key to the box the lock has been drilled out and changed, at

their request and in their presence, in order to look for such will, but in neither case does appellant permit the removal of anything other than the will from the box. The bill further alleged that appellees claim that under the provisions of section 9 of the inheritance tax law of 1909 they have the right to compel appellant and similar institutions to deny to the personal representatives of deceased box renters, and to the survivor or survivors of joint box renters, and to surviving partners of copartnership box renters, control over and liberty to remove the contents of the safe deposit boxes, or any part thereof, unless notice of the time and place of the intended removal is served upon the State Treasurer and Attorney General at least 10 days prior to such removal, and unless the State Treasurer and Attorney General consent, in writing to such removal, or a sufficient portion or amount of such contents be retained by appellant to pay any tax and interest which may thereafter be assessed, on account of the taking possession of the contents of such box by the personal representatives of the decedent, or by the survivor or survivors among joint box holders, or by the surviving partners of the decedent if the box was held in the name of a copartnership; that appellees also claim the right to examine the contents of any such safe deposit box at the time of the removal or taking possession of the contents by the person legally entitled thereto, all of which claims appellant insists are in conflict with the terms and obligations imposed upon it by its contracts with box renters and with the constitutional rights of box renters and their legal representatives, and especially with the constitutional rights of surviving joint or partnership box renters, as said section 9 is in violation of section 10 of article 1 of the Constitution of the United States, and of article 4 and of section 1 of article 14 of the amendments to the Constitution of the United States, and is also in violation of sections 2, 6, 13, and 14 of article 2 of the Constitution of this state, and is therefore in the particulars above set forth unconstitutional and void. The bill also contains allegations intended to show the jurisdiction of a court of equity to take cognizance of the matter in order to prevent multiplicity of suits and to prevent irreparable injury to appellant's business.

It is contended by the appellant that its constitutional rights, both state and federal, are infringed upon by said section of the statute in the following particulars: (1) That it impairs the obligations of its charter; (2) that it deprives it of liberty and property without due process of law; and (3) that it deprives it of the due protection of the law. It is also insisted that its lessees, in addition to being deprived of liberty, property, and the equal protection of the law, have (1) their property subjected to unreasonable searches and seizures, and (2) that

their property is devoted to a public use without just compensation. And it is further urged that it is (1) forced to become a trustee and to perform the duties of a trustee without its consent, and that it is (2) required to perform the duties of a tax assessing and tax collecting officer without its consent.

George Packard, Vincent J. Walsh, and John J. Peckham (Orville Peckham, of counsel), for appellant. W. H. Stead, Atty. Gen., and Walter K. Lincoln (Charles E. Woodward, of counsel), for appellees.

HAND, J. (after stating the facts as above). The right of appellant to maintain this bill has not been challenged by the appellees, and it will therefore be assumed without argument, for the purpose of this appeal, that the allegations of the bill are sufficient to show that a property right of the appellant was involved in the court below, and that the bill could be maintained to avoid a multiplicity of suits. *Craft v. Indiana, Decatur & Western Railway Co.*, 166 Ill. 580, 46 N. E. 1132; *Cragg v. Levinson*, 238 Ill. 69, 87 N. E. 121, 21 L. R. A. (N. S.) 417; *Pelton v. National Bank*, 101 U. S. 143, 25 L. Ed. 901; *Cummings v. National Bank*, 101 U. S. 153, 25 L. Ed. 903; *Hills v. Exchange Bank*, 105 U. S. 319, 26 L. Ed. 1052; *Union Pacific Railway Co. v. Ryan*, 113 U. S. 526, 5 Sup. Ct. 601, 28 L. Ed. 1098.

The counsel for the appellant and the counsel for the state differ widely and fundamentally upon the relation which the appellant sustains towards its lessees, and the property which its lessees place in the safety deposit boxes and safes which they rent from the appellant, and as to the interest of the state in the property situated in a safety deposit box or safe, placed there by a lessee, upon the death of the lessee, when the property is subject to the payment of an inheritance tax. We think, for the proper decision of this case, the exact relation which the appellant sustains to a person to whom it rents a safety deposit box or safe, and the property placed in such box or safe by the lessee, and the interest which the state has in the property of a lessee remaining in such safety deposit box or safe upon his death, if such property is subject to an inheritance tax, must necessarily be determined as a preliminary question, as, according to our view, the correct determination of those questions will simplify many of the questions discussed in the briefs and eliminate others, and place the case in such a situation that a rational solution of the question here involved, whose determination is vital to a correct decision of this case, may readily be determined.

[1] We think it clear that where a safety deposit company leases a safety deposit box or safe, and the lessee takes possession of the box or safe and places therein his secu-

rities or other valuables, the relation of bailee and bailor is created between the parties to the transaction as to such securities or other valuables, and that the fact that the safety deposit company does not know, and that it is not expected it shall know, the character or description of the property which is deposited in such safety deposit box or safe does not change that relation, any more than the relation of a bailee who should receive for safe-keeping a trunk from a bailor would be changed by reason of the fact that the trunk was locked and the key retained by the bailor, although the obligation resting upon the bailee with reference to the care he should bestow upon the property in the trunk might depend upon his knowledge of the contents of the trunk. Obviously the bailee would be in possession of the trunk and its contents, and no amount of argument would demonstrate that, while the trunk was in possession of the bailee, its contents were in the possession of the bailor, solely by reason of the fact that the bailor of the trunk retained the key, and the bailee did not have access to the trunk. We are of the opinion that the relation of bailee and bailor exists between the appellant and its lessees, and that the deposit of the securities and valuables by its lessees in rented safety deposit boxes or safes is a bailment, and that the law applicable to bailments generally applies to such transaction and to such property.

In *Mayer v. Brensinger*, 180 Ill. 110, 54 N. E. 159, 72 Am. St. Rep. 196, the appellee rented from the appellant a safety deposit box in his safety deposit vault, in which he deposited cash. During the illness of the appellee the cash was removed from the box, and suit was brought and a recovery was had. In that case, as in this, the appellee retained the key to the box. The court, on page 113 of 180 Ill., on page 160 of 54 N. E., 72 Am. St. Rep. 196, said: "The relation which the appellant bore to the appellee was that of a bailee or depositary for hire. As such bailee or depositary for hire the appellant was bound to exercise ordinary care and diligence in the preservation of the property intrusted to him by the appellee. Ordinary care in such cases is such care as every prudent man takes of his own goods, and ordinary diligence in the preservation of such goods is such diligence as men of common prudence usually exercise about their own affairs. *Chicago & Alton Railroad Co. v. Scott*, 42 Ill. 132. Although one who hires a box in the vaults of a safety deposit company may keep the key himself, yet the company, without any special contract to that effect, will be held to at least ordinary care in keeping the deposit."

In the case of *Lockwood v. Manhattan Storage & Warehouse Co.*, 28 App. Div. 68, 50 N. Y. Supp. 974, it appeared that the defendant, among other things, maintained at its warehouse safe deposit vaults, con-

taining separate safe deposit boxes or safes. Plaintiff had, for a consideration paid, rented a safe deposit box of defendant. One key to the box was held by the plaintiff and one by the defendant. Access to the box could be gained only by the use of said two keys. The plaintiff deposited in her box certain sums of money, which, when she returned some days later, she found had disappeared. Suit was brought to recover the value of the property abstracted. That defendant was not in the possession of plaintiff's property was urged upon the court. In disposing of the case the court said: "It is urged upon the part of the defendant that it was not the bailee because it was not in possession of the plaintiff's property. If it was not, it is difficult to know who was. Certainly the plaintiff was not, because she could not obtain access to the property without the consent and active participation of the defendant. She could not go into her safe unless the defendant used its key first and then allowed her to open the box with her own key, thus absolutely controlling the access of the plaintiff to that which she had deposited within the safe. The vault was the defendant's and was in its custody, and its contents were under the same conditions. As well might it be said that a warehouseman was not in possession of silks in boxes deposited with him as warehouseman because the boxes were nailed up and he had no access to them." See, also, *Cussen v. South California Savings Bank*, 133 Cal. 534, 65 Pac. 1099, 85 Am. St. Rep. 221; *Roberts v. Safe Deposit Co.*, 123 N. Y. 57, 25 N. E. 294, 9 L. R. A. 438, 20 Am. St. Rep. 718; *Safe Deposit Co. v. Pollock*, 85 Pa. 391, 27 Am. Rep. 660.

[2] We think the above authorities clearly sustain the position that the appellant in law is in possession of the property of its lessees deposited in the safety deposit boxes or safes which it rents to them; and, while it may not have knowledge of the character, amount, or quantity of the property which its lessees have deposited in the safety deposit boxes or safes leased from it, nevertheless it is in the legal custody and control of such property. True, while a lessee is living, by the terms of the lease with the appellant he has access to the box or safe, and upon his death the duty devolves upon the appellant to hold the contents of his box or safe and to deliver them to those persons only to whom they belong or to whom the law directs they shall be delivered, and such delivery must be made at the appellant's peril. We conclude, therefore, upon the death of a lessee of a safety deposit box or safe the contents of such box or safe are in the possession and control of the appellant, and the same duty rests upon it as rests upon every other bailee who finds himself in the possession of property that belongs to a bailor who has died during the exist-

ence of the bailment; that is, to deliver the bailment to the party or parties upon whom the law casts the title, with the right of possession.

[3] The law is also well settled that the right to take property either real or personal, by inheritance or by bequest or devise, is purely a statutory right and one which rests wholly within legislative enactment, and the state, acting in its sovereign capacity, by appropriate legislation may regulate and control the devolution of property after the death of the owner. *Evans v. Price*, 118 Ill. 593, 8 N. E. 854; *Wunderle v. Wunderle*, 144 Ill. 40, 33 N. E. 195, 19 L. R. A. 84; *Kochersperger v. Drake*, 167 Ill. 122, 47 N. E. 321, 41 L. R. A. 446; *Billings v. People*, 189 Ill. 472, 59 N. E. 798, 59 L. R. A. 807; *In re Estate of Speed*, 216 Ill. 23, 74 N. E. 809, 108 Am. St. Rep. 189; *In re Petition of Mulford*, 217 Ill. 242, 75 N. E. 345, 1 L. R. A. (N. S.) 341, 108 Am. St. Rep. 249; *In re Estate of Graves*, 242 Ill. 212, 89 N. E. 978. In the *Kochersperger Case*, on page 125 of 167 Ill., on page 321 of 47 N. E. (41 L. R. A. 446), the court said: "The laws of descent and the right to devise and take under a will within the state of Illinois owe their existence to the statute law of the state. The right to inherit and the right to devise being dependent on legislative acts, there is nothing in the Constitution of this state which prohibits a change of the law with reference to those subjects at the discretion of the lawmaking power. The laws of descent and devise being the creation of the statute law, the power which creates may regulate and may impose conditions or burdens on a right of succession to the ownership of property to which there has ceased to be an owner because of death, and the ownership of which the state then provides for by the law of descent or devise." And in the *Graves Case*, on page 216, of 242 Ill., on page 979 of 89 N. E., it was said: "The descent of property in this state, whether by inheritance or devise, is regulated entirely by statutory provisions."

[4] It has been decided by this court that an inheritance tax is a tax upon the right of succession and is not a tax upon the property itself. *Kochersperger v. Drake*, supra; *Estate of Merrifield v. People*, 212 Ill. 400, 72 N. E. 446. It is obvious that the money received by the state in the form of inheritance taxes constitutes a part of the public revenue of the state, and by numerous adjudicated cases it has been determined that the right of the state to such taxes is a vested right, and that such right vests, in point of time, at the time the estate vests; that is, upon the death of the decedent. *In re Estate of Graves*, supra. The state, therefore, has a vested financial right in the estate of every decedent in this state which is subject to the payment of an inheritance tax, and that right is equal in degree to that

of the personal representative, the heir, or devisee of the decedent, and it vests at the same moment of time that the interest of the personal representative, heir, or devisee vests. In the *Graves Case*, on page 216 of 242 Ill., on page 979 of 89 N. E., this court said: "All the property owned by any person at his decease passes either under the statute of descent, to the persons mentioned in that statute, or under the statute of wills, to his devisees. In either event it passes subject to the indebtedness of the decedent and the expenses of administration, and to no other charges. The inheritance tax law provides that all property so descending, whether under the statute of wills or the statute of descent, shall be subject to a tax, at certain specified rates, at the fair market value thereof, which shall be due at the death of the decedent. The tax is not upon the estate of the decedent, but upon the right of succession, and it accrues at the same time the estate vests; that is, upon the death of the decedent. Questions may arise as to the persons in whom the title vests, and such questions may affect the amount of the tax and the person whose estate shall be chargeable with it; but, when those questions are finally determined, their determination relates to the time of the decedent's death. No changes of title, transfers, or agreements of those who succeed to the estate, among themselves or with strangers, can affect the tax. All questions concerning it must be determined as of the date of the decedent's death."

In *Matter of the Estate of Stanford*, 126 Cal. 112, 54 Pac. 259, 58 Pac. 462, 45 L. R. A. 788, the court had under consideration a statute of the state of California which, in part and in effect, surrendered to the beneficiary all the tax which had accrued in certain cases under a prior law. The Constitution of California prohibited the Legislature from releasing or extinguishing, in whole or in part, the indebtedness, liability, or obligations of any corporation or person to the state. As to estates which had become subject to the tax under the prior law but in which the tax had not been paid, the court held that the amendatory act under consideration was invalid, as infringing the constitutional provision above referred to. The court placed its holding upon the ground that the state, upon the death of the decedent, acquired a vested interest in the tax due the state. Upon that point the court said: "This being so, and the Legislature in this case having determined that 95 per cent. of the decedent's estate may go to his heirs and beneficiaries and that five per cent. be retained to the state, it is too clear for argument that this 5 per cent. vested in the state at the same time that the 95 per cent. vested in the heirs or other beneficiaries. An estate is vested when there is an immediate right of present enjoyment

or a present fixed right of future enjoyment.' Kent's Com. 202. The state here, from the death of the decedent, has a present fixed right of future enjoyment to the five per cent. of his estate. This is property or a thing of value belonging to the state."

[5] It is clear, therefore, that the state has an interest in every estate that is subject to the payment of an inheritance tax, and in all such proceedings the Attorney General, or some other designated officer, is the representative of the state. *People v. Sholem*, 238 Ill. 203, 87 N. E. 390. We think, therefore, that the conclusion from what has been said logically and necessarily follows that, where a lessee of the appellant dies leaving property in one of the safety deposit boxes or safes of the appellant, the state, by its proper representative, has the right to be advised whether or not it shall ultimately be established that it has an interest in such property and of the time when the property will be surrendered and delivered by the appellant to the personal representative, heir or devisee of the decedent, for the purpose of becoming informed as to whether the succession to such property is subject to an inheritance tax. If such were not held to be the law, all moneys, securities, or other valuables held by appellant in its safety deposit boxes or safes for its lessees, upon the death of a lessee, might be transferred to parties other than the state or its representatives and immediately removed to a foreign state or country or concealed or otherwise disposed of, and the true owner of the property in part—that is, the state—be deprived of all right to enjoy the use and possession of such property. It therefore legitimately follows, we think, that the provisions of section 9 which require the representative of the state to have notice of the time when property held by safety deposit companies, the former owners of which are deceased, is to be surrendered and removed from the custody of the safety deposit company and delivered to the personal representative, heir, or devisee of the decedent, are not an unreasonable measure to protect the state from loss of property in which it has a vested right. Neither do we think, as will hereafter be shown, that the appellant or the personal representative, the heir, or the legatees of the decedent is deprived of any constitutional right by requiring that the representative of the state be given notice of such surrender and delivery. Nor can we see that the appellant will be deprived of any of its constitutional rights by making it liable for the amount of the inheritance tax in case it violates the clear mandate of the law and parts with the possession of such property without giving notice to the state of such removal and delivery, or in being penalized for so doing. It is obvious, should doubts arise as to whether an inheritance tax is due on the succession of prop-

erty held by a safety deposit company whose former owner is dead, or as to the amount of such tax, the courts will always be open, upon the application of the safety deposit company, the state or those interested, to adjudicate upon such questions as may arise and solve the doubt, so that the appellant's expressed fear that it might be wrongfully required to pay an inheritance tax upon property which it had supposedly properly surrendered and delivered, or be penalized for the infraction of the statute and mulcted in costs, is, we think, a groundless fear.

From what has been decided it follows that it is our view that section 9 of the act of 1909 is a valid enactment so far as it covers property held by a safety deposit company, and which had been deposited in a safety deposit box or safe, in a case where the sole lessee of such safety deposit box or safe had died leaving his property in a safety deposit box or safe and in the custody of and under the control of the appellant, it being our view that, in consideration of such enactment, the appellant has no more right, under the Constitution, either state or national, to ignore the property rights of the state and to surrender and deliver property thus situated by turning it over to the personal representative, heir, or devisee of the decedent than it would have to deliver the same to the state to the entire exclusion of the rights of the personal representative, heir or devisee of the deceased. All the parties in interest for whom the appellant, as a safety deposit company, holds property thus situated, are under the law entitled to be informed of the condition and amount of such property so found in safety deposit boxes or safes before the appellant parts with the possession thereof. This would be the law which would govern any other bailee under like circumstances if the statute had not been enacted, and we think no valid reason is or can be assigned why such should not be held to be the law in view of said statute governing safety deposit companies.

It is contended by the appellant that, even though the constitutionality of section 9 of the act of 1909 should be sustained when applied to property found in a safety deposit box or safe where the sole lessee of such receptacle is dead, it is clearly unconstitutional when applied to property found in a safety deposit box or safe where there are joint lessees and one of the lessees is dead, even though the lessees were not jointly interested in the contents of such safety deposit box or safe and the property was not commingled in the safety deposit box or safe; that the enforcement of the statute would be far more objectionable, on constitutional grounds, where one of two or more lessees was deceased and the property found in a safety deposit box or a safe was owned jointly by the lessees, or where the lease was

made by a copartnership and the property belonged to the copartnership and one of the copartners had died and the surviving joint owner or the surviving partner or partners were seeking to have the joint property or copartnership property surrendered and delivered to such joint owner or surviving partner or partners. As to the case of the death of one of two or more joint lessees, where the property of such joint lessees was deposited in the safety deposit box or safe, but the property of the several lessees had not been commingled and the property of the surviving lessee could be readily separated from the property of the deceased lessee, we see no difficulty in the way of the enforcement of the statute. All that would be necessary for the appellant to do to protect the rights of the surviving lessee would be to deliver to him his property and protect the parties representing the deceased by holding the property which belonged to the deceased lessee. If inconvenience arises, it would arise out of the joint relation of the parties, and might as readily arise between the appellant, the surviving lessee, and the personal representative or heir of the decedent as between the appellant and the surviving lessee and the state. Whatever inconvenience to the appellant or to the surviving lessee would be caused by the joint occupancy of the safety deposit box or safe would be necessarily an inconvenience which they must have contemplated when they entered into the joint relation, and would, we think, place each of them in a position where they could not object to the owners of the property who succeeded to the rights of the deceased joint lessee (which would include the state) from obtaining their full rights in the property of the deceased lessee found in such safety deposit box or safe. We therefore conclude that there is no constitutional objection to the enforcement of the statute as to property owned jointly by a deceased lessee and another and deposited in a safety deposit box or safe, where the property of the several lessees has not been commingled by the acts of the parties but has been kept separate. We think it can be said that where the property of joint lessees has been commingled or is jointly owned by the lessees, upon the death of one of the joint lessees, the parties who succeeded to the rights of the deceased joint lessee (which would include the state) would have the right, as against the appellant and the surviving lessee, to have the amount, character, and value of the property deposited jointly in such deposit box or safe determined before the property is surrendered or delivered by the appellant, and to have the property belonging to the parties who succeeded to the rights of the deceased lessee valued and determined, and that the appellant and the surviving joint owner who had assisted in creating such joint relation

could not complain of the enforcement of the statute, which was enacted for the determination of the rights of the parties (which would include the state) who succeed, in part, to the rights of such deceased owner. Clearly, when the joint relationship was formed, it was known to all joint owners who entered into the relation, as well as to the appellant, that, if the death of one of the joint owners intervened before the joint relationship was terminated, it would be necessary to determine the question of each joint owner's interest in the property. We think the same course of reasoning which controls where property is found in a safety deposit box or safe which was leased jointly, and where the property of each lessee has been kept separate and apart, must, in favor of the state and all others interested in the property, be applied as against the appellant and the joint surviving owner who has commingled his property with a joint lessee who has died, and that the statute can be enforced in the same manner against the appellant and the joint surviving lessee who has voluntarily commingled his property, as against appellant and a joint lessee who has kept his property separate. We therefore hold the act constitutional in the latter as well as the former case.

A more difficult question is presented when the safety deposit box or safe has been leased by a copartnership and one member of the copartnership has died leaving copartnership property remaining in such safety deposit box or safe. We think, however, if it be borne in mind that the copartnership by the death of a copartner is dissolved, and that while the assets may be lawfully retained by the surviving member or surviving members of the copartnership, they ultimately must account to the personal representative of the deceased partner for his share, and that the inheritance tax will only be assessed upon the succession to what may remain after the partnership debts are paid, it must be held that the statute applies to a copartnership lease and to copartnership assets. We can see no objection to the personal representative of the deceased partner, and all other persons who have or will have an interest in his estate (which would include the state), being informed as to the amount, character, and value of the copartnership assets in a leased copartnership safety deposit box or safe at the time of the dissolution of the partnership by the death of a partner. In the *Graves Case*, supra, it was held that while questions may arise as to the persons in whom the title rests, and such questions may affect the amount of the inheritance tax and the persons whose estate shall be chargeable with it, still, when those questions are finally determined, their determination relates back and becomes fixed as of the date of the death of the decedent. It cannot be legitimately urged that the true object of the organization of the safety

deposit company is to furnish receptacles where parties may secrete their property from the eye of the tax assessing and tax collecting officer of the state with a view of escaping taxation, or that when property is found in the possession of a safety deposit company which formerly belonged to a person who has since died or in which he is interested it should not be taxed, and we think no valid reason can be suggested why every person interested in property thus found (which would include the state) has not the right, whether it be held individually or jointly or by a copartnership, to know the amount, value, and kind of such property.

[6] When a partnership is dissolved by the death of a partner, the law requires the surviving partner or partners to inventory the partnership estate, to have it appraised and to file a list of liabilities—in short, to make a full showing of the partnership estate. It has never been thought that statutes of that character were unconstitutional by reason of the fact that the surviving partners were required thereby to disclose the partnership assets or spread upon the records of the county court the secrets of the business of the partnership. The whole scope and object of section 9 is to require a disclosure of the assets of the deceased person, not alone those which are deposited in safety deposit vaults, but such as are held by trust companies, corporations, banks, or other institutions or by any person or persons; and there is no valid reason why, when assets are deposited in the safety deposit boxes or safes of a safety deposit company for safe-keeping, the state, and every other person having a property right in such deposit, upon the death of the depositor should not be permitted, at the time such assets are withdrawn from the vaults of the safety deposit company, to be informed of their character, value, and amount. We are fully convinced that the statute legitimately places the state in the same position as any other owner in regard to its right to be informed as to the value of the assets of a deceased lessee, and that the right of the state to secure such information rests on valid constitutional grounds.

We will now consider in detail some of the objections which are specifically urged by counsel for the appellant against the constitutionality of section 9.

[7] It is first contended that the section impairs the obligation of the charter of the appellant. The charter of the appellant, which is its contract with the state, provides that it is organized "for the express purpose of providing a suitable building or buildings with vaults and safes, with a special regard to protection against loss by fire, robbery or otherwise, and to carry on the business of safety deposit and storage." In pursuance of its corporate powers, it has provided a building and entered upon the business of renting safety deposit boxes and safes, and

we are unable to ascertain wherein section 9 impairs, takes from, or infringes any of the powers of the appellant granted to it by its charter. Section 9 in no way deprives the appellant of the right of constructing or renting a building, vaults, etc., or of renting its safety deposit boxes or safes, or deprives it of its right to act as a depository for hire and to receive and accept for deposit all securities or other valuables which may be delivered to it by its lessees, or prevents it from delivering to the rightful owner or owners of or persons entitled to all or any of such securities or other valuables as may have been delivered to it, upon the termination of the relation which is created between it and its lessees. The utmost that can be said is that upon the termination of the relation which has been created between the appellant and a lessee by the death of such lessee it cannot part with the possession of or surrender the securities or other valuables which have been placed in its safety deposit box or safe without pursuing the method contained in section 9, to the end that, if there is due upon the succession of the property deposited with it an inheritance tax, the amount of such inheritance tax may first be determined and collected. The law has always been that a bailee must deliver the bailment to the person to whom it belongs, upon the termination of the contract of bailment, and all the Legislature has done is to pass a statute which vests the state with an interest in the estate of a deceased person which is subject to an inheritance tax, and which provides that, where the bailment is terminated by the death of the lessee and the property is to be surrendered by the safety deposit company, the state shall be treated as a part owner of such bailment and receive notice, through its appropriate officer, of the proposed surrender, to the end that it may receive and be paid its proper proportion of the property so deposited with appellant. This, as has heretofore been determined, is not an unreasonable or unconstitutional regulation. That the state has the right to modify, regulate, or impose conditions upon the right of succession, by inheritance or by will to property which was owned by a person who has died there can be no question. In re Estate of Speed, *supra*. The right to take property in pursuance of descent or will is wholly statutory, and that such right may be changed by the Legislature is unquestioned. *Kochersperger v. Drake, supra*; In re Estate of Speed, *supra*; In re Petition of Mulford, *supra*. The right to bequeath or devise property by will or to take by inheritance can be enjoyed only because such right is conferred by statute. *Evans v. Price, supra*; *Wunderle v. Wunderle, supra*. The proposition that the state has the right to provide for an inheritance tax and to levy the tax upon the right of the succession to property, and to provide that the state shall take a

vested interest in the estate immediately upon the death of the deceased, has become in this state axiomatic. We do not think, therefore, that a law which, in fact, only requires that the appellant shall not, without notice to the state, deliver the property which it has received into its vaults where the owner or part owner of such property has died since its receipt by the appellant, and, if it is subject to an inheritance tax, not deliver the same, without the consent of the state, until the tax is paid, can rightfully be said to infringe upon the charter rights of the appellant.

[8] It is also contended that the appellant is deprived of property and liberty without due process of law, and that it is deprived of the due protection of the law by said section 9. Having heretofore reached the conclusion that a safety deposit company is in possession and control of the securities and other valuables delivered to it by its lessees, and that the relation of bailee and bailor exists between the safety deposit company and its lessee, and that upon the contingency of the death of a lessee who is an owner, in whole or in part, of property in the possession of the safety deposit company the safety deposit company may rightfully hold such deposit, and must hold it, until it can deliver it to the true owner, and that the state is a part owner of the deposit in case it is subject to the payment of an inheritance tax, we think by the terms of section 9 the appellant's right of contract is not infringed upon and that it is not deprived of liberty, property or the due protection of the law. In short, that section 9 provides, first, for the determination of the question, Is the property subject to an inheritance tax?—and, if it is, that it must be paid before the appellant can rightfully part with the possession of the property. In this connection the objection to the statute that the appellant is made a trustee and tax gatherer without its consent may be considered, and the answer to these propositions will, we think, demonstrate the fallacy of the argument that the appellant has been deprived, by the statute, of liberty, property, and the due protection of the law.

[9] The appellant is not a trustee in the ordinary sense, but a bailee, and the fact, if it were a fact, that it is used, in part, as a tax assessing and tax collecting officer, would not invalidate the statute. Numerous statutes have been passed by the Legislatures of this and other states which require banks, trustees, executors, administrators, and agents to return for taxation property in their possession, and such statutes frequently provide that, if the banks, trustees, executors, administrators, and agents holding such property surrender the same without the tax thereon being paid, they shall be liable for the tax. *Walton v. Westwood*, 73 Ill. 125; *Ottawa Glass Co. v. McCaleb*, 81 Ill. 556; *Lockwood v. Johnson*, 106 Ill. 334; *Warren*,

v. Cook, 116 Ill. 199, 5 N. E. 538; People's Loan & Homestead Ass'n v. Keith, 153 Ill. 609, 39 N. E. 1072, 28 L. R. A. 65; Scott v. People, 210 Ill. 594, 71 N. E. 582. In many instances the corporations have been made collecting officers by being required to deduct the taxes from the stockholders' interests and pay them over to the state. Haight v. Pittsburg, Ft. Wayne & Chicago Railroad Co., 73 U. S. 15, 18 L. Ed. 818; United States v. Baltimore & Ohio Railroad Co., 84 U. S. 322, 21 L. Ed. 597; National Bank v. Commonwealth, 76 U. S. 353, 19 L. Ed. 701; Minot v. Philadelphia, W. & B. R. R. Co., 85 U. S. 230, 21 L. Ed. 888; Maltby v. Reading & O. R. R. Co., 52 Pa. 140. In Citizens' Nat. Bank v. Kentucky, 217 U. S. 443, 30 Sup. Ct. 532, 54 L. Ed. 832, the revenue law of Kentucky, which charged the banks with the duty of collecting the taxes on shares, was sustained. Mr. Cooley, in his work on Taxation (volume 2 [8d Ed.] p. 832), in discussing this subject, says: "For the most part, the taxes levied by the state are collected of the persons taxed or enforced against the property in respect to which they are imposed. In a few cases, however, in which such a course could not work injustice, the state may reach the party taxed by indirection, and collect, in the first instance, from some one else, who, in turn, will become collector from the person on which the tax is really imposed. The reason for this is that in such cases it is more convenient to the state and perhaps makes more certain the collection, and it could be resorted to only when the case is such that injustice could result to no one. A case of the kind is where a tax is imposed on the dividends or other receipts of shareholders from the profits of corporations, or upon their shares, or upon the interest paid by indebted corporations, and where the corporation is required to make the payment, which it would then deduct from the payment to be made to shareholders or to the holders of the evidences of indebtedness. There is no doubt of the right to do this, except as to payments to be made to nonresidents, nor even as to them if the statute under which their interests were acquired provided for the levying and collecting of taxes in that manner. Other instances are where a tax is required under a lease the amount of which tax may be deducted from the rent, or where the person having the custody of distilled spirits is obliged to pay the tax thereon; he being given a lien on them for what he so pays." We conclude the appellant is not deprived of its liberty, property, or due protection of the law or wrongfully made a trustee or tax-gathering agent against its will.

[10] It is also urged that the property of the lessees of appellant is subject to unreasonable searches and seizures. In the case of *People ex rel. Hatch v. Reardon*, 184 N. Y. 431, 77 N. E. 970, 8 L. R. A. (N. S.) 814,

112 Am. St. Rep. 628, and *People ex rel. Ferguson v. Reardon*, 197 N. Y. 236, 90 N. E. 829, 27 L. R. A. (N. S.) 141, 134 Am. St. Rep. 871, the constitutionality of a statute was sustained which required the transferee of corporate stocks to keep a record of such transfer or transfers for the information of the tax-levying and tax-gathering officers, and in the corporation tax cases (*Flint v. Stone-Tracy Co.*, 220 U. S. 107, 174, 31 Sup. Ct. 343, 358, 55 L. Ed. 889) the Supreme Court of the United States sustained the constitutionality of a statute which required the corporations which fell within the purview of the statute then under consideration to keep a record for the inspection of the revenue officer which showed the net income of such corporations. In the *Flint Case*, Mr. Justice Day, who spoke for the court, in the course of his opinion, said: "It is urged in a number of the cases that in a certain feature of the statute there is a violation of the fourth amendment of the Constitution, protecting against unreasonable searches and seizures. This amendment was adopted to protect against abuses in judicial procedure under the guise of law, which invade the privacy of persons in their homes, papers, and effects, and applies to criminal prosecutions and suits for penalties and forfeitures under the revenue laws. *Boyd v. United States*, 116 U. S. 632, 6 Sup. Ct. 524, 29 L. Ed. 751. It does not prevent the issue of search warrants for the seizure of gambling paraphernalia and other illegal matter. *Adams v. New York*, 192 U. S. 585, 24 Sup. Ct. 372, 48 L. Ed. 575. It does not prevent the issuing of process to require attendance and testimony of witnesses, the production of books and papers, etc. *Inter-State Commerce Commission v. Brimson*, 154 U. S. 447, 14 Sup. Ct. 1125, 38 L. Ed. 1047, 4 Interst. Com. R. 545; *Inter-State Commerce Commission v. Baird*, 194 U. S. 25, 24 Sup. Ct. 563, 48 L. Ed. 860. Certainly the amendment was not intended to prevent the ordinary procedure in use in many, perhaps most, of the states, of requiring tax returns to be made, often under oath." In the cases heretofore referred to, the assessed corporations or individuals were required to keep a record for the information of the tax assessing and tax collecting officers, while the statute under consideration here requires only that notice to be given, and that the representatives of the state be permitted to be present at the time the property is surrendered. The representative of the state, in this instance, gets the information first hand, while in the instances covered by the *Reardon* and *Flint Cases* the tax officers obtained the information from a record which those statutes required to be kept for their information. If the Legislature or Congress may require such record to be kept, we see no reason why the information, which is the important thing, may not be required to be given direct to the tax officer.

[11] It is finally contended that the property of the appellant and its lessees is devoted to a public use without just compensation, in this: That it is held pending the notice to the officers of the state required by the statute and pending the time of the determination by such officers of the liability to the succession or the property to be subjected to an inheritance tax. If the required notice is lawful and the determination of the question whether the succession to the property in the possession of the safety deposit company is subject to the payment of an inheritance tax is proper, then there is no infringement upon the constitutional provision, either state or national, which forbids property to be taken for public use without just compensation. In the very nature of things, in the settlement of estates of deceased persons there must be some delay in determining who is entitled to receive the estate, and as we have heretofore held, when the appellant leases its safety deposit boxes and safes, it and its lessees must necessarily have contracted with reference to the inevitable fact that some of its lessees will die pending the continuation of their leases. This being true, we think it manifestly follows that appellant's leases are made and the rent therefor is fixed upon the contingency that in case of the death of a lessee pending the lease there will be some delay in the delivery of the property of the lessee to the true owner by the appellant. The only damage that the appellant could incur in such cases would be the loss of box or safe rent during the time of said delay, which, upon a safety deposit box or safe which rents for \$5 a year, would be inconsiderable, and we must conclude, as to the appellant, that the question of box rent or safe rent is a matter that was taken into consideration when the lease was executed. As the lessee is dead, he clearly will be deprived of nothing by reason of such delay. Those persons who are to succeed to his estate take what they get only by force of the statute of descent and statute of wills, and, as the inheritance or bequest which they receive comes to them burdened with the inheritance tax which the law places upon their right of succession, they necessarily take their inheritance or bequest subject to the costs, expenses, and damages accruing out of the delays which must intervene before they may enjoy their inheritance or bequest. We therefore conclude that neither the appellant nor its lessees are, within the meaning of the law, deprived of property for a public use without just compensation.

We have given this case the patient care which its importance demands, and have reached the conclusion that section 9 of the inheritance tax law of 1909 is a valid and constitutional enactment.

The decree of the circuit court will be affirmed.

Decree affirmed.

FARMER, VICKERS, and GOOKE, JJ., dissenting.

(250 Ill. 613)

PEOPLE v. LEWY BROS. CO. SAME v. CAHN, BLOCK & CO. SAME v. STRAUS & SCHRAM.

(Supreme Court of Illinois. June 20, 1911.
Rehearing Denied Oct. 4, 1911.)

TAXATION (§ 317*)—ASSESSMENT—CORPORATIONS.

Under Hurd's Rev. St. 1909, c. 120, § 108, expressly prohibiting the state board of equalization from assessing the capital stock of mercantile corporations, such assessment must be made by the local assessor.

[Ed. Note.—For other cases, see Taxation, Dec. Dig. § 317.*]

Error to Municipal Court of Chicago; William N. Gemmill, Judge.

Separate suits by the People against the Lewy Bros. Company, against the Cahn, Block & Co., and against Straus & Schram. There were judgments, and defendants bring error. Judgment in each case reversed and remanded, with directions.

Louis J. Behan, for plaintiffs in error.
Gustavus J. Tatge, Co. Atty., and William F. Struckmann, for the People.

FARMER, J. Separate suits were brought in the municipal court of the city of Chicago in the name of the people against the Lewy Bros. Company, Cahn, Block & Co., and Straus & Schram, mercantile corporations organized under the laws of Illinois, to recover the personal property taxes assessed against said corporations, respectively, for the year 1909.

In the Lewy Bros. Company suit the tax sought to be recovered consisted of three items, viz.: First, a tax upon tangible personal property, amounting to \$298.01, based upon an assessment of tangible property by the board of assessors; second, a tax of \$223.50, based upon an assessment of the capital stock of the corporation made by the state board of equalization; and, third, another tax of \$521.52, based upon an assessment of the same capital stock of the corporation made by the board of assessors. The first item is conceded to be a valid tax, and there is no dispute as to it. The municipal court rendered judgment in favor of the people for all three of the items; but it is agreed judgment should not have been rendered for both items of taxes based upon an assessment of the capital stock of the corporation, and that either the assessment of the capital stock by the state board of equalization or by the board of assessors was illegal.

The suit against Cahn, Block & Co. was

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

for taxes amounting to \$509.58, which consisted of two items, viz.: First, a tax upon the corporation's tangible property of \$286.08, based upon an assessment made by the local assessors; and, second, a tax of \$223.50, based upon an assessment of the corporation's capital stock made by the state board of equalization. Judgment was rendered for plaintiff below for both taxes.

In the suit against Straus & Schram judgment was rendered against the corporation for \$441.90 taxes, which consisted of two items, viz.: First, a tax of \$196.40, based upon a tangible property assessment; and, second, a tax of \$225.50, based upon a capital stock assessment made by the state board of equalization.

Each of said corporations sued out a separate writ of error to review said judgments; but, except as to the double capital stock tax in the Lewy Bros. Company Case, the questions involved in all three of the cases are the same, and the three cases will be disposed of in one opinion:

No question of the validity of the tax based upon the tangible property assessment is raised in either of these cases, and the right of the people to a judgment for the amount based on that assessment against each of said corporations is not disputed. In all three of the cases judgment for the tax based upon the capital stock assessment made by the state board of equalization is resisted on the ground that the state board of equalization did not deduct from the assessed value of the capital stock and franchises of the corporations the assessed value of their tangible property as made by the local assessors, in accordance with clause 4 of section 3 of the revenue act (Hurd's Rev. St. 1909, c. 120).

Any discussion of this question is unnecessary, in view of the recent decision in *People v. National Box Co.*, 248 Ill. 141, 93 N. E. 778. In that case it was held that as the capital stock of a corporation is property, and taxable, it must be assessed for taxation; but as section 108 of chapter 120 of Hurd's Statutes of 1909 expressly prohibits the state board of equalization from assessing the capital stock of corporations of the character of the plaintiffs in error, the assessment of their capital stock should be made by the local assessor. It follows, therefore, that the court erred in rendering judgment against each of plaintiffs in error for the tax based upon the capital stock assessment made by the state board of equalization.

The judgment against the Lewy Bros. Company should have been for the amount of the tangible property tax and the capital stock tax based upon the assessment of capital stock made by the board of assessors. The judgments against Cahn, Block & Co. and Straus & Schram should have been for

the amount of the tax against them, respectively, based upon the tangible property assessment. No assessment of their capital stock was made by the board of assessors, and, as the state board of equalization had no authority to assess their capital stock, the assessment made by that body is invalid.

The judgment in each case will therefore be reversed, and the cases remanded to the municipal court, with directions to that court to render judgment in each case as directed in this opinion.

Reversed and remanded, with directions.

(250 Ill. 616)

WALLACE v. FOXWELL et al.

(Supreme Court of Illinois. June 20, 1911.
Rehearing Denied Oct. 4, 1911.)

1. POWERS (§ 30*)—PERSONS ENTITLED TO EXECUTE—SURVIVORSHIP.

Where, under a power coupled with an interest discretionary power is vested in two or more persons, the interest survives the death of one of them, and the power may be executed by the survivor.

[Ed. Note.—For other cases, see Powers, Cent. Dig. §§ 82-98; Dec. Dig. § 30.*]

2. TRUSTS (§ 191*)—POWER OF SALE—POWER COUPLED WITH INTEREST.

Where under a will the legal title to the property vested in the trustees with power to sell, invest the proceeds, and pay the income to the persons designated, the power was one coupled with an interest.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 243; Dec. Dig. § 191;* Powers, Cent. Dig. §§ 82-98.]

3. WILLS (§ 439*)—CONSTRUCTION—INTENTION OF TESTATOR.

The intention of the testator must govern in the construction of a will.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 952-957; Dec. Dig. § 439.*]

4. WILLS (§ 441*)—CONSTRUCTION—EVIDENCE.

In the construction of wills, courts will endeavor to read their provisions in the sense intended by the testator, and for that purpose may consider a will in the light of the circumstances surrounding the testator when the will was made.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 958; Dec. Dig. § 441.*]

5. WILLS (§ 629*)—CONSTRUCTION.

The rule that the law favors the vesting of estates will not be permitted to defeat testator's intention.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1461, 1462; Dec. Dig. § 629.*]

6. WILLS (§ 674*)—SPENDTHRIFT TRUSTS—REQUISITES.

To constitute a valid spendthrift trust, the will need not specifically provide that the income shall not be subject to the payment of the liabilities of the beneficiary.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1585; Dec. Dig. § 674.*]

7. WILLS (§ 674*)—SPENDTHRIFT TRUSTS.

To create a valid spendthrift trust, it is not necessary that the beneficiary be denominated a spendthrift in the will, or that testator give his reasons for creating it, nor that the will in express terms contain all the restrictions and qualifications incident to such trusts.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1585; Dec. Dig. § 674.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

8. WILLS (§ 674*) — CONSTRUCTION — SPENDTHRIFT TRUSTS.

Testator, knowing that his son, 29 years old and married, with one child, was heavily indebted, and had been unsuccessful in business, devised to his trustees his entire estate, with power to sell the real estate, collect the rents and profits, etc., and pay to testator's widow the income during her life, further providing that after the widow's death the trustees should pay to testator's son and his wife one-half the net income, in such proportions as they should see fit, and on the son's decease to pay one-half of the estate to his right heirs. The will further provided that the trustees might on the death of testator's widow convey to the son one-half of the estate at such time as might seem best for them to do so. *Held*, that a spendthrift trust for the son's benefit was created.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1585; Dec. Dig. § 674.*]

Error to Superior Court, Cook County; George A. Dupuy, Judge.

Bill by James D. Wallace, as trustee, against Mabel H. Foxwell, the Second National Bank of St. Paul, and others. There was a decree, and the bank brings error. Affirmed.

Defendant in error, James D. Wallace, as trustee, filed a bill in the superior court of Cook county, at the November term, 1909, to construe the last will and testament of Samuel G. Spaulding, deceased. The bill alleged that Samuel G. Spaulding departed this life on or about the 5th day of September, 1893, leaving a last will and testament, as follows:

"I, Samuel G. Spaulding, of the city of Chicago, in the county of Cook and State of Illinois, being of sound mind and memory, do make and declare this my last will and testament, hereby revoking all former wills by me made.

"I will that all my just debts and funeral expenses be paid.

"I give, devise and bequeath unto Clarence W. Marks and James D. Wallace, and to their successors in trust, all my estate, both real, personal and mixed, of whatever kind and wherever situate, to be held by them in trust for the uses and purposes hereinafter named and designated, in trust:

"First—To enter upon any and all my real estate, to collect the rents and profits and to have the entire management and control of the same: to reduce to possession, to receive and collect any and all bonds, notes, money, mortgages, stocks and other evidence of indebtedness due me, with the interest on the same; to convert the same into cash, at their discretion; to re-invest and re-sell the same in such manner as may seem best to them, but not to invest the same upon mere personal security or upon second mortgage security; to sell and convey, by good and sufficient deed, any and all my real estate; to re-invest and re-sell the proceeds of such sale, but not to invest the same upon mere personal security, but upon first mortgage security on real estate, or in stocks or

bonds, or in real estate, as may seem best to them.

"Second—To pay over to my wife, Marcia I. Spaulding, the entire net income of my estate during her lifetime.

"Third—Upon the decease of my said wife, Marcia I. Spaulding, to pay over to my daughter, Mabel H. Foxwell, one-half of the net income of my estate during her lifetime, and upon the decease of my said daughter, Mabel H. Foxwell, to convey one-half of my estate to the right heirs of my said daughter.

"Fourth—Upon the decease of my said wife, Marcia I. Spaulding, to pay over to my son, Howard H. Spaulding, and to his wife, Florence B. Spaulding, one-half of the net income of my estate in such proportions as they may see fit, paying more or less to the one or the other, as they may deem best, during the lifetime of my son, Howard H. Spaulding, and upon the decease of my said son, Howard H. Spaulding, to convey one-half of my estate to the right heirs of my son, Howard H. Spaulding.

"Fifth—To convey to my son, Howard H. Spaulding, after the decease of my wife, Marcia I. Spaulding, one-half of my estate at such time as may seem best for them to do so.

"I hereby appoint Clarence W. Marks and James D. Wallace executors of this my last will and testament, and request that no bond be required of them for the faithful performance of their duties as such executors.

"In witness whereof I have hereunto set my hand this seventh day of August, A. D. 1893.

Samuel G. Spaulding."

The bill alleged that said will was admitted to probate and letters testamentary issued to complainant and Clarence W. Marks, as executors; that the said executors duly qualified and entered upon the discharge of their duties; that afterwards said Clarence W. Marks refused to act as trustee under said will, and on December 1, 1896, by decree of the circuit court of Cook county, Marcia I. Spaulding, the widow of testator, was appointed a cotrustee to act with the complainant, with full power and authority to carry out the terms and provisions of said will, as successor to said Clarence W. Marks. The bill alleged that on December 11, 1896, complainant and Clarence W. Marks filed their final report and account as executors, which were duly approved and said executors discharged; that, upon the discharge of said executors, complainant and Marcia I. Spaulding took charge of the estate, and acted as trustees under said will until on or about the 26th day of March, 1909, when the said Marcia I. Spaulding died, since which time complainant has acted, and continues to act, as the sole surviving trustee under said will. The bill alleged that complainant has collected the rents under said trusteeship, has invested the same, and has accounted to and paid over the income to the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

said Marcia I. Spaulding during her lifetime, that since the death of said Marcia I. Spaulding complainant has accounted to Mabel H. Foxwell for one-half of the net income from said estate, and that he has elected to pay to Florence B. Spaulding the other half of the net income. The bill further alleged that on the 19th day of April, 1899, the said Howard H. Spaulding filed his petition in bankruptcy in the United States District Court for the Northern District of Illinois; that he was adjudged a bankrupt, and on July 26, 1899, was discharged as such; that in the schedule filed in the bankruptcy proceedings the provisions of the will of Samuel G. Spaulding, deceased, concerning the interest of said Howard H. Spaulding, were set out, followed by the statement, "Petitioner is advised that he has no interest in the trust estate or any part thereof." The bill alleged that the State Bank of Chicago was appointed trustee in bankruptcy, and filed a petition to sell all the right, title, and interest of said Howard H. Spaulding under and by virtue of said will, and that said sale was made and confirmed; that S. R. Flynn purchased the interest of Howard H. Spaulding under said will, and afterwards conveyed the same to the Second National Bank of St. Paul. The bill further alleged that said Samuel G. Spaulding left surviving him his widow, Marcia I. Spaulding (now deceased), his son, Howard H. Spaulding, and his daughter, Mabel H. Foxwell, as his only heirs at law; that the said Mabel H. Foxwell is a widow and has one child, Frances Foxwell; that said Howard H. Spaulding and his wife, Florence B. Spaulding, have two children, Lester Carter Spaulding and Howard Henry Spaulding, Jr., both minors; that the said Marcia I. Spaulding died March 26, 1909; and that Howard H. Spaulding has been appointed executor of her estate. The bill alleged that the Second National Bank of St. Paul claims an interest in said estate, and prays that the will may be construed and the interests and rights of the various parties in and to said estate be determined and that said trustee be directed concerning his rights, powers, and duties in the premises.

The answer of Mabel H. and Frances Foxwell admits all the allegations of the bill, but denies that there is any necessity for construing the will, and denies that they should be charged with any costs and attorneys' fees.

The answer of the Second National Bank of St. Paul sets forth the proceedings in bankruptcy, the sale of the interest of Howard H. Spaulding in said estate, the purchase by S. R. Flynn, and the transfer of the same by Flynn to the Second National Bank of St. Paul. The answer neither admits nor denies that the complainant has elected to pay over to Florence B. Spaulding one-half the net income of the estate of Samuel G. Spaulding, deceased, since the death of Marcia I. Spaul-

ding, but denies that he has the power to make such election under the provisions of the will. The answer sets up that by virtue of the fifth clause of said will, immediately upon the death of the testator, there vested in said Howard H. Spaulding an equitable estate in fee of one-half of all the residue of the real and personal estate of the said testator, subject only to the equitable life estate of Marcia I. Spaulding, and that anything in the fourth clause conflicting with that interpretation is void; that by virtue of the bankruptcy proceedings and sale and conveyance said bank now is the sole owner of all the right, title, and interest which passed to the said Howard H. Spaulding under and by virtue of said will. The answer of Howard H. Spaulding, individually and as executor of the last will and testament of Marcia I. Spaulding, and of Florence B. Spaulding, admits substantially all the allegations of the bill, but denies that it is necessary to construe the will, and further denies that the Second National Bank of St. Paul has any right, title, or interest in or to the estate of Samuel G. Spaulding, deceased, or any part thereof. A formal answer was filed by James H. Wilkerson, who was appointed guardian ad litem of Lester Carter Spaulding and Howard Henry Spaulding, Jr., minors.

A hearing was had upon the bill, answers, and replications, and a decree was entered July 14, 1910, finding that James D. Wallace is now, and has been for a long time past, the duly authorized and acting trustee under said will of Samuel G. Spaulding, deceased, and that he has full authority to execute the powers conferred by the will; that the title to the property held in trust for the benefit of Howard vested in the trustees; that the provision made for said Howard was intended by the testator as, and is in law, a spendthrift trust; that neither Howard nor plaintiff in error has, or ever had, any vested interest in the property in the hands of the trustee, and that no right or estate therein passed to the trustee in bankruptcy or to the purchaser at the bankrupt sale or to plaintiff in error. The decree also found that there is no repugnancy between the fourth and fifth paragraphs of the will. To reverse this decree a writ of error has been sued out of this court by the Second National Bank of St. Paul.

Rosenthal & Hamill (Charles H. Hamill and Nicholas R. Jones, of counsel), for plaintiff in error. Paul Brown and William H. Gruver, for defendant in error Wallace. Tenney, Coffeen, Harding & Sherman, for defendants in error Spaulding and others. Wilkerson & Cassels, for minor defendants in error, and guardian ad litem.

FARMER, J. (after stating the facts as above). Plaintiff in error has furnished us with an elaborate and learned brief and argument in support of the proposition that the

discretionary power conferred by the will upon the trustees indicated personal confidence in the donees and the power could not be exercised by one of the trustees alone, and that upon the death of one of the trustees the power lapsed. It is also contended by plaintiff in error that, considering the fourth paragraph of the will separately, Howard took an equitable freehold estate, and, the fee being limited to his heirs, the rule in Shelley's Case applies, and Howard took an equitable remainder in fee in the real estate and an equitable estate in one-half the personality during his life, with remainder in fee in the personality to such persons as shall be Howard's heirs at the time of his death. It is further contended that, considering the fifth paragraph independently of the fourth, it vests in Howard a remainder in fee, and, if the fourth paragraph cannot be given the construction contended for, then the fourth and fifth paragraphs are repugnant and the fifth must prevail, and (assuming the power of the trustees to appoint having lapsed) plaintiff in error, having succeeded to Howard's rights, is entitled to a conveyance of one-half of the estate, both real and personal.

Under the construction we place upon the will, it will be unnecessary to pass upon all the questions raised growing out of other possible constructions of that instrument. We will first consider the contention that one of the trustees having declined to accept the trust, and, having since died, the power conferred did not vest in the survivor, but lapsed.

If the power was a mere naked power or rested in personal confidence in the donees, then, according to the authorities, it could not be executed by a survivor. The nature of the power is to be determined from a consideration of the purpose and intent of the testator appearing from an examination of the entire will. While certain discretionary powers were conferred upon the trustees, it does not appear to have been the intention of the testator to limit the execution of the powers to the persons named as trustees, for the will confers the same powers upon their successors in trust. Who should be successors and how such successors should be appointed is not provided for in the will. The reasonable inference, we think, is that the testator had in mind the possible death of one or both of the trustees named in the will before the trusts were terminated, and intended, in the event of the death of both, that the successor named should have authority to execute the powers conferred. The powers conferred were powers attaching to the office of trustees rather than powers conferred in personal confidence in the donees.

[1] Furthermore, the power given by the will is not a mere naked power, but is a power coupled with an interest, and the rule in such cases is that, although discretionary power is vested in two or more persons as trustees, if the power is coupled with an in-

terest, the interest survives, and therefore the power survives and may be executed by the survivor.

[2] The legal title vested in the trustees with power to sell and convey, invest the proceeds, manage the estate, and pay the income to the persons designated. The power was therefore coupled with an interest. *White v. Glover*, 59 Ill. 459; *Peter v. Beverly*, 10 Pet. 532, 9 L. Ed. 522; *Osgood v. Franklin*, 2 Johns. Ch. (N. Y.) 1, 7 Am. Dec. 513. In such cases a surviving trustee takes the estate with the duty annexed to the power, and may execute the power. *Perry on Trusts* (6th Ed.) § 505; *Lewin on Trusts* (11th Ed.) pp. 746, 747; *Peter v. Beverly*, supra; *Loring v. Marsh*, 6 Wall. 337, 18 L. Ed. 802. *French v. Northern Trust Co.*, 197 Ill. 30, 64 N. E. 105, is not in conflict with this view.

If the decree of the chancellor is correct that it was the intention of the testator to, and that his will does, create a spendthrift trust in favor of Howard and his family, it follows that no estate vested in Howard and the rule in other cases has no application. It is very ably contended by plaintiff in error that the decree in this respect is erroneous.

[3] Whatever of hostility there may be on the part of some courts to spendthrift trusts, their validity has been repeatedly approved by this and many other courts. The oft-repeated cardinal rule that it is the intention of the testator that must govern in the construction of a will, and in determining the intention the whole will and all its provisions must be considered and given effect, if possible, does not require the citation of authority.

[4] It is also a familiar rule that in the construction of wills courts will endeavor to read their provisions in the sense intended by the testator, and for that purpose the court may consider a will in the light of the facts and circumstances surrounding the testator at the time the will was made. *Perry v. Bowman*, 151 Ill. 25, 37 N. E. 680; *Wallace v. Noland*, 246 Ill. 535, 92 N. E. 956. Construing this will in the light of these rules, we are of the opinion the decree of the chancellor is correct.

The proof shows the will was executed in August, 1893, and the testator died in September following. At the time the will was executed, and at the time of his death, the testator owned real estate of the value of \$52,000 and personal property of the value of \$93,000. He left surviving him his widow, Marcia I. Spaulding, a daughter, Mabel H. Foxwell, and a son, Howard H. Spaulding, as his only heirs at law. At the time the will was executed Howard was 29 years old, was married, and had one child. He had been unsuccessful in business, was indebted in the sum of \$48,000, upon a part of which judgment had been rendered against him in the circuit court of Cook county. All these things were known to the testator when he executed his will. He devised to the trus-

lees named, and to their successors in trust, his entire estate, real and personal, with power to sell and convey the real estate, collect the rents and profits, to collect and reduce to possession all moneys owing to the testator, to reinvest the same, and pay to the widow the entire net income during her life. Upon her death one-half the net income was directed to be paid to Mabel H. Foxwell during her life, and upon her death one-half of the estate was to be conveyed to her "right heirs." By the fourth paragraph, after the death of the widow, one-half the net income from the estate was directed to be paid to Howard and his wife, Florence, "in such proportions as they [the trustees] may see fit, paying more or less to the one or the other, as they may deem best, during the lifetime of my son, Howard H. Spaulding, and upon the decease of my said son, Howard H. Spaulding, to convey one-half of my estate to the right heirs of my son, Howard H. Spaulding." The fifth paragraph is as follows: "To convey to my son, Howard H. Spaulding, after the decease of my wife, Marcia I. Spaulding, one-half of my estate at such time as may seem best for them to do so."

We are of opinion that, properly read and construed, there is no repugnancy in the will. No particular significance is to be attached to the numbering of paragraphs 4 and 5. The evident meaning and purpose of the testator was to provide for the payment of the income from one-half of his estate, after the death of his widow, to Howard and wife until the death of Howard, with authority in the trustees to terminate the trust by conveying the estate to Howard during his lifetime, if the trustees thought it best to do so. If it was thought unwise to make the conveyance to Howard, the trustees could retain the property and pay the income to Howard and his wife in such proportions as they deemed best to carry out the purpose of the testator until Howard's death. For some reason, the testator saw fit to make a distinction between the devise for the daughter's benefit and that for the benefit of the son. In the provision made for the son's benefit he was given the right to no definite portion of the income, but it was left to the trustees to determine whether he should receive the greater part or half the income, or whether it should substantially all be paid to his wife. The proof shows the trustee elected to pay the entire income to the wife of Howard. The reason for the difference in the provisions made for the daughter and the son is not set out in the will itself, but, as we have seen, we are not confined to the written words of the will alone in determining the intention of the testator. Considering, in connection with the will, the financial condition of Howard, which was known to his father, and the fact that Howard was a married man 29 years old and then had one child, we find reasons why the testator might

have desired to conserve the property by placing it beyond the reach of Howard's creditors and leaving it so his family might receive the income from it. The language used in the will is apt language to effect that purpose, and such purpose is not prohibited by any rule of law. It appears to us there is no escape from the conclusion that for reasons personal to Howard the testator intended that no estate should vest in him, and such intention will be given effect. *Dee v. Dee*, 212 Ill. 333, 72 N. E. 429; *Armstrong v. Barber*, 239 Ill. 389, 88 N. E. 246.

[5, 6] True, the law favors the vesting of estates, but this rule will not be permitted to defeat the intention of the testator. To constitute a valid spendthrift trust, it is not necessary that the will should specifically provide that the income shall not be subject to the payment of the debts and liabilities of the cestui que trust. It is sufficient if the will, considered as a whole and viewed in the light of the circumstances under which it was made, discloses an intention on the part of the testator to provide for the support and maintenance of his child and to secure the fund against his improvidence. The testator had a legal right to dispose of his property in this manner if he desired to do so, and if such was his intention, as appears from the will, it is the duty of the court to give effect to such intention.

The validity of a spendthrift trust was before this court the first time in *Stelb v. Whitehead*, 111 Ill. 247. In that case the court referred to conflicting authorities upon the subject, and decided to follow those holding valid provisions giving, through a trustee, the net income from property to a child of a testator and at the same time placing it beyond the control of the beneficiary's creditors. The court said that view was in accordance with its convictions of right and a sound public policy.

In *Bennett v. Bennett*, 217 Ill. 434, 442, 75 N. E. 339, 341, 4 L. R. A. (N. S.) 470, there was a bequest of \$3,000 to a trustee to invest and pay the interest semiannually to the testator's son until he was 40 years old, at which time, if the testator's widow was living, the said \$3,000 was to be paid to and become the property of the son absolutely, but, if the widow was not then living, the trustee was to retain the principal sum and continue to pay the interest to the son until he was 50 years old, at which time the \$3,000 was to be paid to him if living, and in case of the son's death before payment to him of said principal sum it was to go to his heirs. The court held no title to the \$3,000 vested in the son of the testator until the period arrived at which the trustee was to pay it to him, and said: "In determining the character of the trust here created, whether a spendthrift trust or not, we may look to the provisions of the will and the condition of the parties as disclosed by the bill. Kaufman

v. Breckinridge, 117 Ill. 305 [7 N. E. 666]. It is usual in such trusts to find a provision against alienation of the trust fund by the voluntary act of the beneficiary or in invitum by his creditors. 'It is not necessary that an instrument creating a spendthrift trust should contain an expressed declaration that the interest of the cestui que trust in the trust estate shall be beyond the reach of his creditors, provided such appears to be the clear intention of the testator or donor as gathered from all parts of the instrument construed together in the light of the circumstances.' 26 Am. & Eng. Ency. of Law (2d Ed.) p. 141; *Stambaugh's Estate*, 135 Pa. 585 [19 Atl. 1058]; *Appeal of Grothe, Id.*; *Baker v. Brown*, 148 Mass. 369, 15 N. E. 783; *Patten v. Herring* [9 Tex. Civ. App. 640], 29 S. W. 388. The fact that a trustee was appointed and vested with the estate and the beneficiary was given the income only is a circumstance from which the intention of the testator to create a spendthrift trust may be inferred. *Stambaugh's Estate*, supra."

In *Wagner v. Wagner*, 244 Ill. 101, 91 N. E. 66, the subject of spendthrift trusts was again considered, and the court, on page 111, quoted with approval from the American and English Encyclopedia of Law (volume 26, p. 138): "'Spendthrift trust' is the term commonly applied to those trusts that are created with a view of providing a fund for the maintenance of another and at the same time securing it against his own improvidence or incapacity for self-protection. The provisions against alienation of the trust fund by the voluntary act of the beneficiary, or in invitum by his creditors, are the usual incidents of such trusts." And further said: "Such trusts are now generally recognized as valid by the courts of this country, and have been sustained by this court in *Steib v. Whitehead*, 111 Ill. 247; *Bennett v. Bennett*, 217 Ill. 434, 75 N. E. 339, 4 L. R. A. (N. S.) 470; *King v. King*, 168 Ill. 273, 48 N. E. 582, and *Chapman v. Cheney*, 191 Ill. 574, 61 N. E. 368."

[7] "To create a valid spendthrift trust, it is not necessary that the cestui que trust should be denominated a spendthrift in the will, or that the testator should give his reasons for the creation of it, nor is it necessary that the will shall in express terms contain all the restrictions and qualifications incident to such trusts. If, upon a consideration of the will, it appears the intention of the testator was to create such a trust, effect will be given to that intention. *Baker v. Brown*, 148 Mass. 369, 15 N. E. 783; *Bennett v. Bennett*, supra."

[8] In our opinion the provisions of the will for Howard's benefit were intended to, and did, constitute a spendthrift trust within the meaning of the law as held in the de-

cisions above referred to. It necessarily follows, therefore, that plaintiff in error acquired no title by virtue of the bankruptcy sale; and the decree of the superior court is affirmed.

Decree affirmed.

(251 Ill. 23)

DEVANEY v. OTIS ELEVATOR CO. et al.

(Supreme Court of Illinois. June 20, 1911.

Rehearing Denied Oct. 4, 1911.)

1. LIMITATION OF ACTIONS (§ 127*)—ADDITIONAL CAUSE OF ACTION—AMENDMENT.

When a cause of action is stated for the first time in an amended or additional count, the suit, as far as limitations as to such cause of action are concerned, is regarded as having been commenced at the time the amendment was filed.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 543-547; Dec. Dig. § 127.*]

2. NEGLIGENCE (§ 1*)—CAUSE OF ACTION—ELEMENTS.

The essential elements of a cause of action for negligence are the existence of a duty on the part of the person complained of to protect the complaining party from the injury received, failure to perform such duty, and injury resulting therefrom.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 1; Dec. Dig. § 1.*]

3. NEGLIGENCE (§ 32*)—DANGEROUS PREMISES—DUTY OF OWNER OR OCCUPIER.

The owner or occupant of premises, who, directly or by implication, invites persons to come thereon, is bound to exercise reasonable care to see that the premises are in a reasonably safe condition, so that persons acting on his invitation shall not be injured while using the premises with reasonable care for the purpose for which the invitation was extended.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 42-44; Dec. Dig. § 82.*]

4. LIMITATION OF ACTIONS (§ 127*)—PLEADING—NEW COUNT ADDED BY AMENDMENT.

Where, in an action for injuries to plaintiff by the alleged defective condition of defendant's premises, a count, added by amendment after the period of limitations had run, alleged the same facts as in the original count, except that it charged that defendant occupied the premises, and said nothing concerning the title or defendant's right of occupancy, which were specifically alleged in the original count, it did not charge a new or different cause of action, and was therefore not subject to a plea of limitations.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 543-547; Dec. Dig. § 127.*]

5. NEGLIGENCE (§ 136*)—DANGEROUS PREMISES—INJURIES TO INVITEE—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.

In an action for injuries to an invitee on defendant's premises by the slipping of a case of iron from a platform connected with defendant's building, caused by its permitting the platform to remain covered with ice, due to condensed steam from an exhaust pipe above it, whether defendant, in the exercise of ordinary care, should have adopted a different method of construction or means to remove the accumulation of ice from the platform, and whether plaintiff and his fellow servants selected a dangerous method of lowering the case, and should

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

have used a tackle alleged to have been available, was for the jury.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 277-353; Dec. Dig. § 136.*]

6. RELEASE (§ 29*)—JOINT WRONGDOERS.

Plaintiff sued his master, the O. Company, and defendant S. Company for injuries sustained from the defective condition of the premises of the S. Company while plaintiff was assisting to remove goods therefrom in the course of his employment. The O. Company, in consideration of plaintiff's covenant not to further prosecute the suit against it, paid him \$375, and was dismissed. *Held*, that an instruction that, in estimating plaintiff's damages, if he was entitled to recover, the jury should deduct the amount so paid by the O. Company, provided the jury believed it was jointly guilty, from the verdict found against the S. Company was erroneous, as such sum could not be considered as a part of plaintiff's damages, nor was it proper to submit the question of the O. Company's negligence; it not being a party to the suit.

[Ed. Note.—For other cases, see Release, Cent. Dig. §§ 64-70; Dec. Dig. § 29.*]

7. APPEAL AND ERROR (§ 1033*)—INSTRUCTIONS—PREJUDICE.

Such instruction, though erroneous, was favorable to the S. Company.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4052-4062; Dec. Dig. § 1033.*]

8. TORTS (§ 22*)—JOINT TORT-FEASORS—RESPONSIBILITY—APPORTIONMENT OF DAMAGES.

As between joint wrongdoers, there can be no apportionment of damages; each being responsible for the whole damage.

[Ed. Note.—For other cases, see Torts, Cent. Dig. §§ 29, 31; Dec. Dig. § 22.*]

9. TRIAL (§ 236*)—INSTRUCTIONS—CREDIBILITY OF WITNESSES.

An instruction that the jury is not bound to believe anything to be a fact simply because a witness has stated it to be so, providing the jury believe from all the testimony that the witness is mistaken or has testified falsely, was not objectionable as authorizing the jury to disregard the testimony of a witness, if he has testified falsely, without requiring that the testimony be "knowingly and willfully" false.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 531-533; Dec. Dig. § 236.*]

10. TRIAL (§ 253*)—INSTRUCTIONS—IGNORING DEFENSE.

In an action for injuries resulting from alleged dangerous premises occupied by defendant, an instruction to find defendant guilty, if the jury believed plaintiff was injured by or in consequence of defendant's negligence, as charged in the declaration, and that plaintiff, just before and at the time of the injury, was in the exercise of ordinary care for his own safety, was not objectionable as ignoring the defenses that defendant had made the ice on the alleged defective platform safe to walk on, and had provided a safe means to lower the crate with which plaintiff was working; such defenses being mere general denial that the premises were unsafe.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 613-623; Dec. Dig. § 253.*]

Error to Appellate Court, First District, on Appeal from Circuit Court, Cook County; Thomas G. Windes, Judge.

Action by Michael Devaney against the Otis Elevator Company and others. Judgment for plaintiff affirmed by the Appellate

Court, and defendant Standard Company brings error. Affirmed.

Morse Ives, for plaintiff in error. B. J. Wellman, for defendant in error.

VICKERS, J. This is an action for personal injury, originally brought by Michael Devaney against the Otis Elevator Company. By an amendment the Standard Company and E. T. Harris were joined as defendants. In consideration of \$375 the plaintiff gave the Otis Elevator Company a covenant not to further prosecute suit against that company. The suit thereafter proceeded against the Standard Company and E. T. Harris.

The original declaration, consisting of one count, alleged that E. T. Harris was the owner in fee simple of a certain factory building located at or near the northwest corner of Fifteenth and Laflin streets, in the city of Chicago, and that the Standard Company was engaged in the manufacture of ornamental iron, and had its office and place of business in a part of the aforesaid building leased from E. T. Harris, who furnished the steam power by which the Standard factory was operated. The declaration alleges that on the north side of said factory building, in the second story thereof, there is a large door out of which the goods sold by the Standard Company were delivered to its customers, and that about two feet underneath said door the defendant company, prior to the injury complained of, erected a stationary platform extending out from the said building about two feet, for the purpose of enabling its patrons to load heavy crates or boxes of ornamental iron into wagons which were driven outside and underneath said door; that about 12 feet from said platform the defendants allowed to remain and exist a steam exhaust pipe, out of which large quantities of steam are emitted, and had been for a long time prior to the injury complained of. The declaration charges that the steam from the exhaust pipe, in cold and freezing weather, would fall on the platform and freeze, thereby covering said platform with a solid coating of slippery ice, sloping off to the edge of the platform; that said ice thus formed upon the platform made it dangerous and unsafe to take large boxes or crates out of said door. The declaration alleges that the defendants knew of the dangerous condition of said platform, or should have known of it in the exercise of reasonable care, and failed and neglected to remove said ice or said steam exhaust pipe, or to provide any way by which said platform could be closed or turned up when not in use, and thus prevent the accumulation of ice thereon. It is charged that Michael Devaney was, on the 19th day of January, 1902, employed by the Otis

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Elevator Company; that said company had purchased a crate of ornamental iron from the Standard Company, and that the plaintiff, with other employes, was ordered to go to the Standard Company's factory and get said crate; that said crate was lowered from the door to said platform by three of the servants of the Otis Elevator Company, while the plaintiff and two other men, also employes of the Otis Elevator Company, were in the wagon for the purpose of receiving said crate and lowering it onto the wagon; that when said crate was lowered from the door to the platform the end of the crate slipped upon the ice on said platform and fell upon the plaintiff, knocking him out of the wagon and severely injuring him, while the plaintiff was in the exercise of due care for his own safety. Subsequently the suit was dismissed as to E. T. Harris, and, on October 24, 1907, an additional count was filed against the Standard Company alone. This additional count is substantially the same as the first count, except that it alleges that the Standard Company was engaged in carrying on its business in a certain building, and the additional count does not disclose who the owner of the building was. To the additional count the Standard Company filed a plea of not guilty and a special plea of the statute of limitations. A demurrer was sustained to the special plea, and upon a trial the plaintiff obtained a verdict for \$2,000. A motion for a new trial was made and overruled, and judgment entered upon the verdict. The judgment having been affirmed by the Appellate Court for the First district, the record has been brought to this court for review by certiorari.

The alleged errors relied upon for a reversal in this court are: (1) That the original declaration did not state a cause of action, and that the court erred in sustaining the demurrer to the plea of the statute of limitations to the additional count filed after the period of limitation had run; (2) that the court erred in not instructing the jury to find the defendant in error not guilty, first, because the evidence did not show that the plaintiff in error was guilty of any negligence; and, second, because the injury was caused by the defendant in error and his associates selecting an unsafe way of lowering the said crate to the wagon when the plaintiff in error had provided a safe method and safe appliances for doing that work; (3) that the court erred in giving certain instructions to the jury. These alleged errors will be considered in the order in which they are stated above.

[1] First. The first error complained of is that the court erred in sustaining the demurrer to the plea of the statute of limitations. The rule is familiar that when a cause of action is stated for the first time in an amended or additional count the suit is regarded, as to such cause of action, as

having been commenced at the time when such amended or additional count is filed, and, if the period fixed by the statute of limitations has run when such a count is filed, the plea setting up the statute is a proper plea and a good defense for such newly stated cause of action (*McAndrews v. Chicago, Lake Shore & Eastern Railway Co.*, 222 Ill. 232, 78 N. E. 603); but when the amended or additional count is a restatement, in different form, of the cause of action previously stated in counts filed within the time prescribed by the statute of limitations, a plea of the statute of limitations presents no defense to such restatement of the cause of action, and is therefore bad on demurrer. The question raised by the demurrer to the special plea is whether the original count stated a cause of action, and, if so, is the additional count a restatement of the same cause of action. The substance of the original count has been stated above. From such statement it will be noted that the defendant in error rests his right to recover on the alleged violation of the duty which the plaintiff in error owed to keep the premises which it used and occupied in a reasonably safe condition for the use of persons who, in the exercise of reasonable care, might lawfully be thereon, by the express or implied invitation of the plaintiff in error, for the purpose of transacting business with it.

[2] The essential elements of a cause of action for negligence are: (1) The existence of a duty on the part of the person charged to protect the complaining party from the injury received; (2) a failure to perform that duty; and (3) an injury resulting from such failure. When these elements concur, they together constitute a cause of action for negligence, and the absence of any one of these would render the pleading bad. 2 Cooley on Torts (3d Ed.) 1411; *Chicago Union Traction Co. v. Giese*, 229 Ill. 260, 82 N. E. 232.

[3] The law imposes the duty upon the owner or occupier of premises, who, directly or by implication, invites persons to come upon his premises, to take reasonable care to see that his premises are in a reasonably safe condition, so that persons who come there upon his invitation shall not be injured while using such premises with reasonable care for the purpose for which the invitation was extended. *Lake Shore & Michigan Southern Railway Co. v. Bodemer*, 139 Ill. 596, 29 N. E. 692, 32 Am. St. Rep. 218; *Hart v. Washington Park Club*, 157 Ill. 91, 41 N. E. 620, 29 L. R. A. 492, 48 Am. St. Rep. 298.

[4] The original declaration stated facts from which the law would impose a duty on the plaintiff in error to use reasonable care to maintain the premises in question in a reasonably safe condition, and alleged a violation of that duty, with a resulting injury, while the defendant in error was in

the exercise of reasonable care for his own safety. These averments were sufficient to constitute a cause of action. The additional count filed, to which the statute of limitations was pleaded, was substantially the same as the original count. The only difference between the two counts that we have been able to discover is that in the original count it is charged that the plaintiff in error occupied a part of the premises, and that E. T. Harris was the owner and landlord; while in the additional count it is charged that the plaintiff in error occupied the premises in question, and nothing is said as to the title, or by what means, the plaintiff in error claims a right to occupy such premises. These differences in the two counts are of no consequence. Nothing is omitted from either count that is essential to the cause of action. There was no error in sustaining the demurrer to the plea of the statute of limitations.

[5] Second. Plaintiff in error next contends that the court should have instructed the jury to find a verdict of not guilty. Under this assignment of error, two points are argued:

(a) It is contended that the evidence did not show any negligence on the part of the Standard Company. The evidence tends to prove that the Standard Company was engaged in the manufacture of ornamental iron, and that the Otis Elevator Company was one of its customers. The Standard Company occupied all of the second floor of the premises located at Fifteenth and Laffin streets. On the north side of said building, there was a large door out of which crates of manufactured products were received by the Otis Elevator Company. About two feet below the door, a rigid platform extended from the wall out about two feet. At one end of the platform an iron ladder was placed to enable the men to reach the second floor from the ground. Some 12 feet from the platform there was a steam exhaust pipe, out of which escaped large quantities of steam. The evidence shows that the steam from the exhaust pipe would blow down about the door and platform, and when the weather was cold enough this steam would condense and form ice on the loading platform. The evidence also tends to show that the dirt swept out of the door would fall on the platform, giving the ice a black appearance; that on the 19th day of January the Otis Elevator Company sent the defendant in error and five other men, including Peter Gustafson, their foreman, with a wagon and team, for the purpose of getting a large crate of iron. The wagon was driven into the alley, under the edge of the platform below the door. The crate of iron which was wanted was about one foot thick and five feet wide and seven feet long, and weighed between 800 and 900 pounds. The crate was several feet south of the door on the second floor. It was placed on a "dolly" and rolled

over to the open door. It was then stood upright near the edge of the door and two men held it, while the four others were in the wagon for the purpose of receiving the crate and placing it in the wagon. The expectation was that the crate would slide down until one end would rest on the platform, and then be tilted over, and the other end would come down against the standards of the wagon. When the crate was tipped over from the door and came against the platform, it continued to slip on the ice and fell upon the standards of the wagon and against the defendant in error. The evidence shows that the crate did not make any stop after it struck the platform, but continued to slide with increasing velocity until it came to rest on the wagon. The evidence shows that it had been the custom of the employees of the Otis Elevator Company to take similar crates out of the building in the same manner that this one was being handled. The evidence does not, however, show that the defendant in error had ever assisted in this particular work before the day on which he was hurt. The evidence shows that the platform had been used in taking crates out of the building during all of the time that the plaintiff in error had been in the building, which was several years before the accident. There were no means used by the plaintiff in error to remove or prevent the accumulation of ice on this platform. There was no serious conflict in the evidence, except as to matters of detail in respect to the situation of these premises and the circumstances connected with the injury. The evidence sustains the charge in the declaration. We think it was a fair question of fact for the jury to determine whether or not, under the circumstances stated, the plaintiff in error was guilty of negligence in maintaining this platform with an accumulation of ice upon it. It seems to us that the injury of the defendant in error was one that might reasonably be expected from the condition of the premises and the manner in which they were intended to be used. It is shown that the difficulty could have been easily removed by constructing the platform so that it would fold up against the side of the building when not in use. Whether or not the plaintiff in error should, in the exercise of reasonable care, have adopted this method of construction or some other means to remove the dangerous accumulation of ice upon the platform was a question of fact, under the circumstances, for the jury to determine.

(b) The second argument presented by the plaintiff in error in support of this assignment of error is that the defendant in error and his associates selected an unsafe and dangerous method of lowering the crate to the wagon, when other and safer means and appliances were furnished by the plaintiff in error. The facts and circumstances upon which this contention is based are that there

was a beam 10 inches square extending from the top of the door out over the platform, which was placed there for the purpose of handling heavy crates by the use of hoisting tackle, consisting of hooks, pulleys, and chains. There is no controversy about the beam being in place as claimed, but there is serious conflict in the evidence as to there being hoisting tackle visible about the premises. A number of witnesses testify that they were there at the time of the accident and assisted in lowering the crate, and that they saw no tackle of any kind. It is also proven by the defendant in error's foreman, and others, that they had often gotten crates down from that door and had never used any tackle, and had never seen any used for such purpose. Some of the witnesses for the plaintiff in error testify that the hoisting tackle was hanging on a hook behind the door at the time of the accident. The evidence as to the tackle being there for use is conflicting. If the jury believed that there was no tackle there, then the argument of the plaintiff in error on this point cannot avail in this court, since we must assume that every controverted question of fact is settled by the judgment of the Appellate Court in favor of the defendant in error; but we think that, even if it be conceded that the tackle was on the premises, as claimed by the plaintiff in error, still, in view of the uncontradicted evidence that no use had ever been made of such tackle by the men who were handling this crate, and the further fact that they had always taken out similar crates in the same way as this one was being handled, it was still a fair question for the jury to say whether there was contributory negligence in failing to use the tackle on the occasion of the accident. There was no error committed by the trial court in refusing to direct a verdict of not guilty.

[6] Third. Plaintiff in error complains that the court erred in giving instruction No. 2 for defendant in error. This instruction, after stating the rule for estimating the damages in case the defendant in error was entitled to recover, proceeds to inform the jury that from the amount of actual damages sustained should be deducted \$375 paid by the Otis Elevator Company, provided the jury believe that the Otis Elevator Company was jointly guilty with the plaintiff in error of the negligence that caused the injury; and the jury were also informed that, if the Otis Elevator Company was not guilty of negligence which approximately contributed to the injury, the \$375 should not be deducted from the actual damages sustained by the defendant in error. This instruction had no proper place in this case and should not have been given. It improperly submits to the jury the issue as to whether the Otis Elevator Company was guilty of negligence in connection with the injury, when no such issue was made in the pleadings. The Otis Elevator Company was not a party to this

suit, and it was improper to submit the question of its responsibility for the injury to the jury by this instruction. The \$375 paid the defendant in error by the Otis Elevator Company was not paid as part compensation for the injury he received. It was paid for a covenant not to further prosecute the suit against that company. The jury had nothing to do with that question, and the instruction should not have been given. The \$375 paid by the Otis Elevator Company could not be considered by the jury in part payment of defendant in error's damages.

[7] While this instruction is erroneous for the reason stated, we cannot see how it could have misled the jury to the prejudice of the plaintiff in error. It told the jury that under certain circumstances the \$375 should be deducted from the amount of damages plaintiff had sustained. If the jury found the facts upon which this instruction is predicated as therein stated, the effect of the instruction was to reduce the damages \$375, and in this view it would be favorable to the plaintiff in error. If, on the other hand, the jury considered that the Otis Elevator Company was not jointly guilty of negligence with plaintiff in error, they were instructed to disregard the payment of \$375. This part of the instruction simply told the jury what they should have done independently of the question of the participation of the Otis Elevator Company in the wrong complained of.

[8] The rule in regard to joint tort-feasors is that each wrongdoer is responsible for the whole amount of damages, and that there is no such thing as apportioning the damages among joint wrongdoers. This instruction was improper and should not have been given, but we are of the opinion that it ought not to lead to a reversal of the judgment.

[9] Instruction No. 10 is complained of by the plaintiff in error. That instruction tells the jury that "the jury is not bound to believe anything to be a fact simply because a witness has stated it to be so, provided the jury believe, from all the testimony, that such a witness is mistaken or has testified falsely." The criticism made upon this instruction is that it authorizes the jury to disregard the testimony of a witness, if he has testified falsely, without the limitation, "knowingly and willfully testifies falsely," which this court held, in *Perkins v. Knisely*, 204 Ill. 275, 68 N. E. 486, and in other cases, to be necessary before the jury would be warranted in disregarding the entire testimony of the witness. The instruction given in this case is unlike the instruction in the *Knisely* Case, which purported to state the conditions under which the jury might disregard the entire testimony of a witness. The instruction here under consideration simply tells the jury that they are not required to believe anything to be a fact, because a witness has stated it to be so, provided the jury believe, from all the testi-

mony, that such witness is mistaken or has testified falsely; that is to say, if the jury believe that the witness is mistaken as to the particular fact, or has stated such fact falsely, the jury are not required to believe it. If a witness, through mistake or a disregard for the truth, or for any other reason, states a fact which, from a consideration of all of the evidence, the jury believe to be untrue, the jury are not required to believe the statement of such witness as to that particular fact, but the jury would not be warranted in disregarding the entire testimony of such witness under the conditions stated in this instruction. The instruction is not open to the criticism made upon it.

[10] The plaintiff in error next complains that the court erred in giving instruction No. 13. That instruction directs the jury to find the defendant guilty, if they believe from the evidence that the plaintiff was injured by or in consequence of the negligence of the defendant, as charged in the declaration, and that the plaintiff, just before and at the time of the injury, was in the exercise of ordinary care for his own safety. Instructions similar to this one have often been before this court. In the case of *Krieger v. Aurora, Elgin & Chicago Railroad Co.*, 242 Ill. 544, 90 N. E. 266, many of the previous cases in which this instruction was considered are referred to, and the conditions under which it has been approved or disapproved are there pointed out. The objection that has usually been urged against this form of an instruction is that it refers the jury to the declaration to determine what the issues are. This was the complaint made against the instruction in the *Krieger* case, and the only one there considered. The objection made to the instruction in this case is that it ignores the defenses that the plaintiff in error had made the ice safe to walk on, and had provided a safe means to lower the crate. This objection is not tenable. The charge in the declaration which the instruction requires the jury to believe, before they can find the plaintiff in error guilty, is that the platform was in an unsafe and dangerous condition by reason of the ice being thereon. The defenses which are supposed to have been ignored by the instruction were merely negative in character, and amount to a general denial that the platform was unsafe. By the very nature of things, the jury could not find that the platform was unsafe, without considering the evidence which tended to show that it was safe. The same observation applies to the contention that plaintiff in error had provided a safe means of lowering the crate. This contention manifestly is based upon the controverted question of fact in reference to the hoisting tackle. The instruction requires the jury to believe that the defendant in error was, before and at the time of the acci-

dent, in the exercise of due care. He could not have been in the exercise of due care, if he deliberately undertook to lower the crate in a dangerous manner, when by the use of appliances at hand a safe method of lowering the crate could have been adopted. The objection made to this instruction is only available where some affirmative defense is not negatived by the averments of the declaration. *Kirk & Co. v. Jajko*, 224 Ill. 338, 79 N. E. 577. That condition does not exist in this record.

Plaintiff in error also complains that the court erred in giving instructions Nos. 14, 18, and 21. We have examined the instructions and considered the objections made to them, but fail to find any error therein that requires a reversal of this judgment.

The judgment of the Appellate Court for the First District is affirmed.

Judgment affirmed.

(251 Ill. 18)

PEOPLE v. APFELBAUM.

(Supreme Court of Illinois. June 20, 1911.
Rehearing Denied Oct. 4, 1911.)

1. STATUTES (§ 47*)—CERTAINTY—REVOCATION OF PHYSICIAN'S LICENSE—GROUNDS.

Medical Practice Act (Laws 1899, p. 275) § 6, which authorizes a revocation of the license of a physician who has by false and fraudulent representations obtained or sought to obtain practice, or by false representations of his practice has obtained money, or who has advertised under a name other than his own, or for any other unprofessional or dishonorable conduct, is not void for uncertainty, in that it does not specify every act justifying a revocation.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 47; Dec. Dig. § 47.*]

2. STATUTES (§ 159*)—REPEAL BY INCONSISTENT STATUTES.

A later act will not be held to repeal a prior statute, unless the two are irreconcilable.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 229; Dec. Dig. § 159.*]

3. PHYSICIANS AND SURGEONS (§ 2*)—STATUTES—REPEAL BY INCONSISTENT ACTS—REVOCATION OF LICENSE.

Medical Practice Act (Laws 1899, p. 275) § 6, which provides, among other grounds, that a physician's license may be revoked for advertising under a name other than his own, is not impliedly repealed by Act May 11, 1901 (Laws 1901, p. 238), which makes it unlawful for any physician to practice medicine in another physician's name, or to hold himself out as another physician by advertisement, for the purpose of defrauding, under penalty of fine and imprisonment, since there is no such inconsistency in the two acts that both cannot stand.

[Ed. Note.—For other cases, see Physicians and Surgeons, Dec. Dig. § 2.*]

4. PHYSICIANS AND SURGEONS (§ 1*)—POWER TO REGULATE PRACTICE.

The state has the power to prescribe the qualifications of persons practicing medicine, and to punish unqualified persons engaging in such practice.

[Ed. Note.—For other cases, see Physicians and Surgeons, Cent. Dig. § 1; Dec. Dig. § 1.*]

5. CONSTITUTIONAL LAW (§ 52*)—PHYSICIANS AND SURGEONS (§ 2*)—DISTRIBUTION OF POWERS—ENCROACHMENT ON JUDICIARY—STATE BOARD OF HEALTH.

Neither the granting nor the revocation of a physician's license by the state board of health, assuming to act under Medical Practice Act (Laws 1899, p. 275) § 6, is the exercise of judicial power as that term is understood in reference to the constitutional distribution of the powers of government.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 50-85; Dec. Dig. § 52; *Physicians and Surgeons, Dec. Dig. § 2.*]

6. CONSTITUTIONAL LAW (§ 67*)—DISTRIBUTION OF POWERS—NATURE OF "JUDICIAL POWER."

"Judicial power" implies the construction of laws and the adjudication of legal rights.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 123; Dec. Dig. § 67.*]

For other definitions, see Words and Phrases, vol. 4, pp. 3860-3864.]

7. PHYSICIANS AND SURGEONS (§ 11*)—REVOCATION OF LICENSE—POWER TO REVOKE.

The state board of health, under Medical Practice Act (Laws 1899, p. 275) § 6, has power to revoke its own license to practice medicine, on grounds declared by the statute to be a disqualification for practice.

[Ed. Note.—For other cases, see Physicians and Surgeons, Cent. Dig. § 15; Dec. Dig. § 11.*]

8. CONSTITUTIONAL LAW (§ 82*)—PERSONAL RIGHTS IN GENERAL.

Medical Practice Act (Laws 1899, p. 275) § 6, which makes advertising under a false name a reason for refusing or revoking a physician's certificate from the state board of health, is not in conflict with Const. art. 2, § 1, which guarantees the right to life, liberty, and the pursuit of happiness.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 149; Dec. Dig. § 82.*]

9. CONSTITUTIONAL LAW (§ 90*)—PERSONAL AND CIVIL RIGHTS—FREEDOM OF SPEECH AND OF THE PRESS.

Medical Practice Act (Laws 1899, p. 275) § 6, which makes advertising under a false name a reason for the refusal or revocation by the state board of health of a physician's certificate to practice medicine, is not in violation of Const. art. 2, § 4, which grants freedom of speech and of the press.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 172; Dec. Dig. § 90.*]

10. CONSTITUTIONAL LAW (§ 205*)—PRIVILEGES AND IMMUNITIES.

Medical Practice Act (Laws 1899, p. 275) § 6, which makes advertising under a name other than his own a reason for the refusal or revocation by the state board of health of a physician's certificate to practice, is not in conflict with Const. art. 4, § 22, which prohibits special legislation and the granting of special privileges and immunities.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 591-624; Dec. Dig. § 205.*]

11. CONSTITUTIONAL LAW (§ 275*)—DUE PROCESS OF LAW—REVOCATION OF PRACTICE OF MEDICINE—PENALTIES.

The authority of the state board of health, under Medical Practice Act (Laws 1899, p. 275) § 6, to refuse or revoke a license to practice medicine for the reason that one has advertised under a name other than his own, is not violative of the due process of law secured

by Const. Ill. art. 2, § 2, and by the fourteenth amendment to the federal Constitution.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 843-846; Dec. Dig. § 275.*]

12. CONSTITUTIONAL LAW (§ 251*)—"DUE PROCESS OF LAW."

"Due process of law" does not necessarily imply judicial proceedings, and while orderly proceedings according to established rules which do not violate fundamental right must be observed, there is no vested right in any particular remedy or form of proceeding. A general law administered in its regular course according to the form of procedure suitable and proper to the nature of the case, conformable to the fundamental rules of right and affecting all persons alike, is due process.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 732; Dec. Dig. § 251.*]

For other definitions, see Words and Phrases, vol. 3, pp. 2227-2256; vol. 8, p. 7644.]

13. PHYSICIANS AND SURGEONS (§ 11*)—REVOCATION OF LICENSES—GROUNDS AND PROCEEDINGS.

The power of the state board of health to revoke a physician's license, under Medical Practice Act (Laws 1899, p. 275), § 6, is not arbitrary or beyond the investigation of the courts, but where the record of the board shows that defendant was given notice to appear and answer to the specific charge of advertising under a name other than his own, and to show cause why his license should not be revoked for the unprofessional conduct set out in the charge, and where defendant did not ask for a more specific charge, admitted the charge, and was found guilty, and his license revoked, the action of the board is valid.

[Ed. Note.—For other cases, see Physicians and Surgeons, Cent. Dig. § 15; Dec. Dig. § 11.*]

14. PHYSICIANS AND SURGEONS (§ 6*)—PRACTICING AFTER REVOCATION OF LICENSE—PENALTY—"WITHOUT A CERTIFICATE."

Under Medical Practice Act (Laws 1899, p. 275), § 6, which imposes a penalty for practicing medicine "without a certificate" issued by the state board of health, an action for penalty may be maintained after revocation of a license, since one whose certificate has been revoked is without a certificate as much as one to whom no certificate has been issued.

[Ed. Note.—For other cases, see Physicians and Surgeons, Cent. Dig. §§ 6-11; Dec. Dig. § 6.*]

Error to Municipal Court of Chicago; William N. Cottrell, Judge.

Action for penalties by the People of the State of Illinois against David Apfelbaum. Judgment for plaintiff, and defendant brings writ of error. Affirmed.

Elijah N. Zoline and Moses, Rosenthal & Kennedy (Burres & McKinley, Walter Bachrach and Sidney S. Stein, of counsel), for plaintiff in error. Charles Alling, Jr. (Charles G. Hoffman, of counsel), for the People.

DUNN, J. This writ of error has been sued out to reverse a judgment for \$100 rendered against the plaintiff in error by the municipal court of Chicago as a penalty for practicing medicine without a license.

The plaintiff in error received the degree

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.

of doctor of medicine and surgery from the College of Physicians and Surgeons, and after having passed an examination received from the state board of health a license to practice medicine. June 21, 1910, the state board of health revoked this license, and, having practiced medicine thereafter, he was sued for the penalty provided by law. The license was revoked by virtue of section 6 of the medical practice act, for advertising under a name other than his own, and other unprofessional and dishonorable conduct. The plaintiff in error contends that this section is void for uncertainty; was repealed by implication by an act of May 11, 1901; is unconstitutional, because it confers judicial powers on the state board of health; violates sections 1, 2, and 4 of the Bill of Rights, section 22 of article 4 of the Constitution, and the fourteenth amendment to the Constitution of the United States. He also insists that the record of the state board of health does not show sufficient cause for the revocation of the license, and that section 9, which makes it penal to practice medicine without a license, prescribes no penalty for practicing after the revocation of the license.

[1] Section 6 is not void for uncertainty. It authorizes the refusal of the license for certain specific reasons, and also generally for unprofessional and dishonorable conduct, and provides that the license may be revoked for the same reasons. The reasons particularly named are certain enough, but it would scarcely be possible for the statute to catalogue specifically every act of unprofessional or dishonorable conduct which would justify the refusal or revocation of a license. In any event, the plaintiff in error here was found guilty of the specific offense of advertising under another name than his own, and as to this charge the statute is not uncertain.

[2, 3] The medical practice act, containing section 6 above mentioned, was passed in 1899. On May 11, 1901, an act of two sections was passed, providing that it should be unlawful for any physician to practice medicine in another physician's name, or to hold himself out as another physician by advertisement, for the purpose of imposing upon or defrauding any other person, under penalty of fine and imprisonment. It is insisted that this act modifies, and by implication repeals, that part of section 6 of the medical practice act which prohibits advertising by a physician under a name other than his own. A later act will not be held to repeal a prior statute, unless the two cannot be reconciled. There is no such inconsistency between these two acts that both cannot stand. The one deals with the case of a physician who practices under a false name, whether that of another physician or not, and without regard to his motive, the penalty for which is the refusal or revocation of his license. The other deals with the physician who for fraudulent purposes prac-

tices under the name of another physician, or holds himself out as another physician; the penalty being fine and imprisonment. The one act deals with the licensing of physicians to practice, and does not create or define any criminal act; the other deals with the practice of physicians, and declares that certain acts shall constitute criminal offenses.

[4-6] Neither the granting nor the revocation of a license to practice medicine is the exercise of "judicial power," as that term is understood in reference to the distribution of the powers of government. It is not contended that the state has not the power to prescribe the qualifications of physicians practicing medicine and to punish unqualified persons engaging in such practice, and the existence of such power is not debatable. *People v. Blue Mountain Joe*, 129 Ill. 370, 21 N. E. 923; *Williams v. People*, 121 Ill. 84, 11 N. E. 881; *Reetz v. Michigan*, 188 U. S. 506, 23 Sup. Ct. 390, 47 L. Ed. 563; 22 Am. & Eng. Ency. of Law (2d Ed.) 780. The possession of the required qualifications must be ascertained by some authority, and the Legislature has imposed this duty upon the state board of health. In the administration of the law the state board of health necessarily exercises discretion and judgment in determining whether or not an applicant possesses the required qualifications, and to that extent its action is judicial in character, but it is not the action of a court or action appropriate for a court. It is similar in its nature to the acts of assessors in valuing property for taxation; of boards of review in reviewing such valuations; of clerks of courts and of sheriffs in approving bonds taken by them; of commissioners of highways in laying out and opening roads; of city councils in granting or revoking licenses to keep dramshops, or of superintendents of schools in granting or revoking teachers' certificates. In none of these cases does the tribunal engaged in the execution of the law exercise judicial power within the meaning of the Constitution. "The power exercised is ministerial, only, although, as an incident to its exercise, the board is required to do a judicial act, or, rather, an act which is in its nature judicial. No law is construed or applied by the board, and no legal rights are submitted to and adjudicated by it, without which, we have seen, judicial power is not exercised." *Owners of Lands v. People*, 113 Ill. 296. In that case are cited many cases illustrative of the distinction between the exercise of judicial power and of judgment and discretion in the performance of administrative or ministerial functions.

Reetz v. Michigan, supra, was a prosecution for a violation of the statute of Michigan of 1899 (Pub. Acts 1899, No. 23'), prohibiting the practice of medicine by unregistered persons. It was objected that the board of registration was given authority to exercise judicial powers, inasmuch as it might refuse a certificate of registration if

it should find that no sufficient proof was presented that the applicant had been legally registered under an act of 1883 (Pub. Acts 1883, No. 167). The court overruled this contention, and in doing so quoted with approval the following language from the opinion in the case of *People v. Hasbrouck*, 11 Utah, 291, 39 Pac. 918: "The objection that the statute attempts to confer judicial power on the board is not well founded. Many executive officers, even those who are spoken of as purely ministerial officers, act judicially in the determination of facts in the performance of their official duties, and in so doing they do not exercise judicial power, as that phrase is commonly used and as it is used in the organic act in conferring judicial power upon specified courts. The powers conferred on the Board of Medical Examiners are nowise different in character in this respect from those exercised by the examiners of candidates to teach in our public schools, or by tax assessors or boards of equalization in determining, for purposes of taxation, the value of property. The ascertainment and determination of qualifications to practice medicine by a board of competent experts appointed for that purpose is not the exercise of a power which appropriately belongs to the judicial department of the government." To the same effect, also, are *Wilkins v. State*, 113 Ind. 514, 16 N. E. 192; *State v. Hathaway*, 115 Mo. 36, 21 S. W. 1081; and *France v. State*, 57 Ohio St. 1, 47 N. E. 1041.

[7] This court has never passed upon the power of the state board of health to revoke its certificates, though the existence of such power was plainly intimated in *People v. McCoy*, 125 Ill. 289, 17 N. E. 786, and *State Board of Health v. Ross*, 191 Ill. 87, 60 N. E. 811. In *State v. Medical Examiners*, 34 Minn. 387, 26 N. W. 123, it was held that there is no distinction between refusing to grant a license and revoking one already granted; that each is an exercise of the police power and the object in each case is identical—to exclude an incompetent or unworthy person from the practice of medicine. Therefore the same body which may be vested with power to grant or refuse to grant a license may be vested with power to revoke it. So it was held in *Meffert v. Medical Board*, 66 Kan. 710, 72 Pac. 247, 1 L. R. A. (N. S.) 811, and *Traer v. State Board*, 106 Iowa, 559, 76 N. W. 833. The revocation of the license is not intended as a punishment for any offense committed, but for the protection of the public by the police power of the state. The statute has declared certain acts to constitute a disqualification for the practice of medicine, and, when one has been ascertained to have done these acts, the body which is charged with the ascertainment and determination of the qualifications to practice medicine may deprive him of his license, either by refusing it or revoking it, as the circumstances may

require. The power given the mayor to revoke a license to sell oil from wagons in the city of Chicago upon proof of violation of the ordinances of the city was held not to be a judicial power, but one which might be properly conferred. *Splegler v. City of Chicago*, 216 Ill. 114, 74 N. E. 718. The removal from office of a county treasurer by a county board is not the exercise of judicial power. *Donahue v. County of Will*, 100 Ill. 94; *Stern v. People*, 102 Ill. 540.

[8-11] The part of section 6 which makes advertising under a false name a reason for refusing or revoking a certificate does not violate sections 1, 2, or 4 of article 2 or section 22 of article 4 of the state Constitution or the fourteenth amendment of the federal Constitution. A citizen may advertise his business in any legitimate manner, but it is a legitimate exercise of the police power in protecting the public against the deception and fraud practiced by irresponsible pretenders and quack doctors to require every physician to have the license of the state board of health granted in his own name, and to practice or advertise under no other.

[12] Due process of law does not necessarily imply judicial proceedings. Orderly proceedings according to established rules which do not violate fundamental right must be observed, but there is no vested right in any particular remedy or form of proceeding. A general law, administered in its regular course according to the form of procedure suitable and proper to the nature of the case, conformable to the fundamental rules of right and affecting all persons alike, is due process. *Den v. Hoboken Land & Improvement Co.*, 18 How. 272, 15 L. Ed. 372; *Kelly v. Pittsburgh*, 104 U. S. 78, 26 L. Ed. 658; *Ex parte Wall*, 107 U. S. 265, 2 Sup. Ct. 569, 27 L. Ed. 552.

[13] The power of revocation given to the state board of health is not arbitrary or beyond the investigation of the courts. The board cannot, from mere caprice or without cause, revoke a certificate fairly issued upon sufficient evidence of the applicant's qualifications. *People v. McCoy*, supra. The statute itself requires notice and a hearing, before any certificate can be refused or revoked.

The record of the state board of health shows that the plaintiff in error, upon notice given him, appeared before the board and a hearing was had upon charges of advertising under another name than his own, and of using the United States mail for fraudulent purposes. The notice was given by the state board of health, and required the plaintiff in error to show cause why the certificate issued to him by the board and authorizing him to practice medicine should not be revoked for the unprofessional and dishonorable conduct particularized in these charges. It sufficiently appears from this notice that the charges were made against

the plaintiff in error in his profession as a physician. He did not ask for a more specific charge, but admitted that he had advertised under the name of Dr. Hoffman. The board found the plaintiff in error guilty under both charges, and revoked his certificate for unprofessional and dishonorable conduct. This record shows a specific charge, notice, hearing, and the determination of the board thereon, and is sufficient to sustain the action taken.

[14] In regard to the objection that section 9, which makes it penal to practice medicine "without a certificate issued by" the state board of health, does not apply to the case of one who has had a certificate issued to him, it seems sufficient to say that one whose certificate has been revoked is without a certificate as much as one to whom no certificate was ever issued.

Judgment affirmed.

(261 Ill. 54)

PEOPLE v. MAY et al.

(Supreme Court of Illinois. June 20, 1911.

Rehearing Denied Oct. 6, 1911.)

1. CLERKS OF COURTS (§ 74*)—BOND—BREACH.

It is a breach of official duty for a clerk of the circuit court to approve a nonresident as the sole surety on an appeal bond, though the practice act (Hurd's Rev. St. 1909, c. 110) does not expressly require the surety to be a resident.

[Ed. Note.—For other cases, see Clerks of Courts, Cent. Dig. §§ 127-134; Dec. Dig. § 74.*]

2. OFFICERS (§ 114*)—JUDICIAL POWER—LIABILITY FOR EXERCISE.

Official action which is the result of judgment or discretion is judicial in its nature, and an officer clothed with judicial power will not be held liable in damages for an act within the scope of his jurisdiction, done in good faith in the exercise of such power.

[Ed. Note.—For other cases, see Officers, Cent. Dig. §§ 187-192; Dec. Dig. § 114.*]

3. CLERKS OF COURTS (§ 74*)—BREACH OF DUTY—APPROVAL OF BOND.

A nonresident not being eligible as surety on an appeal bond, a clerk of the circuit court cannot avoid liability on his official bond for approving such a surety, on the ground that his act in approving the security was judicial.

[Ed. Note.—For other cases, see Clerks of Courts, Cent. Dig. §§ 127-134; Dec. Dig. § 74.*]

4. OFFICERS (§ 103*)—"MINISTERIAL DUTY."

Official duty is ministerial, when it is absolute, certain, and imperative, involving merely execution of a specific duty arising from fixed and designated facts.

[Ed. Note.—For other cases, see Officers, Cent. Dig. §§ 163-172; Dec. Dig. § 103.*]

For other definitions, see Words and Phrases, vol. 5, pp. 4525, 4526.]

5. OFFICERS (§ 114*)—NATURE OF DUTIES.

Though the same officer may be charged with the performance of judicial as well as ministerial duties, the judicial privilege will not protect him in exercising ministerial functions only.

[Ed. Note.—For other cases, see Officers, Cent. Dig. §§ 187-192; Dec. Dig. § 114.*]

Error to Appellate Court, Fourth District, on Error to Municipal Court of East St. Louis; W. J. N. Moyers, Judge.

Action by the People of the State of Illinois against Thomas May, Jr., and others. From a judgment of the Appellate Court (158 Ill. App. 596), affirming a judgment for defendants, plaintiff brings certiorari. Reversed and remanded.

C. H. Burton, for the People. Wise, Keefe & Wheeler (R. B. Hendricks, of counsel), for defendants in error.

DUNN, J. The declaration in this case was upon the official bond of Thomas May, Jr., as clerk of the circuit court of St. Clair county. It alleged the recovery by Edward Gobin, in that court, of a judgment, from which the defendant prayed an appeal. By the order of the court the clerk was directed to approve the security upon the appeal bond, and the breach alleged is that he accepted as sole surety on such bond a nonresident of the state of Illinois who was wholly insufficient. A demurrer to the declaration was sustained, and judgment was rendered in favor of the defendants. The record of the Appellate Court, by which this judgment was affirmed, has been brought here by certiorari for review.

The single count of the amended declaration did not aver that the surety, at the time he was accepted, was insolvent, or had not property of such value that he could be compelled to respond to the amount of the bond; but the averment is that the clerk did not make due inquiry and use proper means to ascertain the qualification and financial standing of the surety and to ascertain the amount of his property, and that without properly informing himself he "carelessly and negligently accepted the said D. J. Mackey, a nonresident of the state of Illinois, as aforesaid, and wholly insufficient as surety upon said appeal bond, as sole surety thereon." The insufficiency of the surety, therefore, seems to be based, not upon his want of property, but upon his nonresidence.

[1] The practice act (Hurd's Rev. St. 1909, c. 110) does not expressly provide that the surety upon an appeal bond must be a resident of the state, yet it is manifest that the security required was intended to be such as may be enforced in the courts of the state. A writ of error cannot be sued out or any other action brought unless a resident of the state becomes liable for the costs. If every action, even for a trifling amount, requires that the defendant shall have the liability of a resident of the state as security for his costs, it certainly was not intended that an appeal, which may operate as a supersedeas to any amount, could be prose-

cuted without such security. So far as the courts of this state are concerned, a bond signed only by a nonresident surety is not a bond with security. The order of the court to the clerk to approve the security offered on the bond was equivalent to an order authorizing the clerk to approve a surety resident in this state or authorized by statute to be a surety upon such bond. The order conferred no authority upon the clerk to approve a nonresident surety, and his act in doing so was a breach of his official duty.

[2] It is argued by the defendants in error that the act of the clerk in approving the security on the bond was judicial in its character, and cannot be made the basis of a civil liability, unless done maliciously or corruptly. Official action which is the result of judgment or discretion is judicial in its nature, and an officer clothed with judicial power will not be held liable in damages for an act within the scope of his jurisdiction, done in good faith in the exercise of such power.

[3] If it be conceded that this principle applies to the act of a clerk in determining, from his own investigation and judgment, the financial responsibility of a proposed surety—a question upon which the decisions are not uniform—still it has no application here, where the objection is that the surety was a nonresident, and could not, under any circumstances, be accepted. The question committed to the judgment of the clerk was the sufficiency of the security. The

law, as we have held, required the surety to be a resident of the state. As to this requirement there was no discretion.

[4] The duty of the clerk was fixed and certain, and was therefore ministerial. Official duty is ministerial, when it is absolute, certain and imperative, involving merely the execution of a specific duty arising from fixed and designated facts.

[5] Though the same officer may be charged with the performance of judicial as well as ministerial duties, the judicial privilege will not protect him in the exercise of his ministerial functions only. *People v. Bartels*, 138 Ill. 322, 27 N. E. 1091. The fact that the clerk may be required to ascertain whether the proposed surety is a resident of the state does not affect the ministerial nature of his duty. In the case cited the court quotes with approval from the case of *Grider v. Tally*, 77 Ala. 422, 54 Am. Rep. 65, as follows: "That a necessity may exist for the ascertainment, from personal knowledge or by information derived from other sources, of the state of facts on which the performance of the act becomes a clear and specific duty, does not operate to convert it into an act judicial in its nature. Such is not the judgment or discretion which is an essential element of judicial action."

The circuit court erred in sustaining the demurrer. Its judgment, as well as that of the Appellate Court, will be reversed, and the cause will be remanded to the circuit court.

Reversed and remanded.

(176 Ind. 217)

MARTIN v. STATE. (No. 22,004.)

(Supreme Court of Indiana. Oct. 6, 1911.)

CRIMINAL LAW (§ 112*)—VENUE—BURGLARY—STATUTES.

Bill of Rights, § 13, provides that accused shall have a public trial in the county in which the offense shall have been committed. Burns' Ann. St. 1908, § 1867, declares that every criminal action shall be publicly tried in the county in which the offense was committed, except as otherwise provided in the act; and section 1875 provides that when property taken in one county by burglary, robbery, larceny, or embezzlement has been brought into another county the jurisdiction is in either county. *Held*, that section 1875 had reference only to the offense of bringing stolen property from one county into another, and did not authorize the prosecution of accused for burglary in a county other than that where the burglary was committed, by reason of the fact that he subsequently brought some of the stolen property into such other county.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 220-226, 230; Dec. Dig. § 112.*]

Appeal from Criminal Court, Marion County; Joseph T. Markley, Judge.

Cordia Martin was convicted in Marion county of burglary committed in Hancock county, and he appeals. Reversed.

Holtzman & Coleman and Cook & Cook, for appellant. Thomas M. Honan, Atty. Gen., Thomas N. Branamon, Edwin Corr, and Jas. E. McCullough, for the State.

JORDAN, C. J. The state instituted this prosecution by an affidavit filed in the Marion criminal court, in Marion county, Ind. This affidavit charged appellant with having committed the crime of burglary at the county of Hancock, state of Indiana, on December 29, 1910, with the felonious intent of stealing and carrying away divers goods and chattels belonging to the persons mentioned. It is further charged therein that appellant, after breaking into and entering the business house therein named, did unlawfully, feloniously, etc., "take, steal, and carry away from said Hancock county the sum of six thousand six hundred and six dollars and fifty cents (\$6,606.50) in money, the personal property, goods and chattels of certain persons named, and that thereafter he unlawfully and feloniously did bring said money as aforesaid into the county of Marion and state of Indiana, contrary to the provisions of the statutes," etc.

Appellant moved to quash the affidavit for various reasons, among which were, first, that the court had no jurisdiction to try appellant upon the charge presented, because the affidavit shows that the offense was committed in Hancock county and not in Marion county; second, because the affidavit did not charge a public offense; but his motion was overruled. There was a trial by jury and a verdict returned against appellant, finding him guilty of burglary, as charged in the

affidavit, and that he was 30 years of age. Over his motion for a new trial, wherein various reasons were assigned, the court rendered a judgment, ordering and adjudging that for the offense committed he be imprisoned in the Indiana State Prison for the term of not less than 10 nor more than 20 years, and that he be disfranchised and rendered incapable of holding any office of profit or trust for a period of 10 years.

In addition to the motion to quash, the jurisdiction of the lower court to try appellant on the charge presented was also sought to be raised by instructions tendered by appellant and refused by the court. Appellant has assigned as error in this court: (1) That the court had no jurisdiction of the offense charged. (2) That it had no jurisdiction of the person of appellant. (3) That the affidavit does not state a public offense. (4) That the court erred in overruling appellant's motion to quash the affidavit on each ground separately and severally stated. (5) Overruling the motion for a new trial.

Various questions are argued by appellant's counsel, but the cardinal one is, Had the state the right to try and convict appellant, over his objections, in the Marion criminal court, for the offense of burglary committed in another county in this state?

Section 13 of the Bill of Rights of the Constitution of this state provides: "That in all criminal prosecutions the accused shall have the right to a public trial by an impartial jury in the county in which the offense shall have been committed. * * *" Section 1867, Burns 1908, provides: "That every criminal action shall be tried publicly in the county in which the offense shall have been committed, except as otherwise provided in this act." Section 1875, Burns 1908, provides: "When property taken in one county by burglary, robbery, larceny or embezzlement, has been brought into another county, the jurisdiction is in either county."

We are not in this appeal called upon to deal with a case where the accused party has been convicted of the offense of bringing property stolen in Hancock county into Marion county, but, as the Attorney General, on behalf of the state, admits, the simple proposition is, Can the Marion criminal court take jurisdiction of and try an accused person, without his consent, for the crime of burglary committed by him in Hancock county, Ind., merely because certain property feloniously taken and stolen at the time the burglary was committed was subsequently brought by the accused party into Marion county? The Attorney General further states in his brief: "That the offense of burglary, with which the appellant is charged, is a breaking and entering of a business house in Hancock county, with the intent to commit a felony. That was an offense fully consummated in Hancock county, and it

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

seems in violation of the Constitution to say that Marion county has jurisdiction of that offense." He admits that the Legislature of this state, in view of the provision of our Constitution, hereinbefore set out, has no power to authorize a prosecution for the crime of burglary, in the absence of a change of venue, taken at the instance of the defendant, to be tried in a county other than that in which the burglary was committed. In this view of the learned Attorney General, we concur.

A statute of the state of Missouri, which authorized a prosecution for the crime of burglary to be had in a county of that state other than the one in which the offense was committed, was held by the Supreme Court to be invalid, because it was antagonistic to a provision of the state Constitution, which prohibited the prosecution of a person charged with the commission of a felony in a county other than the one in which the offense was committed. *State v. McGraw*, 87 Mo. 161.

Prosecutions authorized by section 1875, Burns, supra, in a case where property has been taken in one county and brought into another by the thief, are upheld upon the distinct ground that a taking of stolen property from one county into another constitutes a new or fresh theft; and therefore, under the circumstances, it may be said that the prosecution for such offense is in the county in which it was committed, and falls within the requirement of section 13 of our Bill of Rights. *State v. Smith*, 66 Mo. 61, and authorities there cited; *State v. McGraw*, supra.

No such interpretation can be accorded to section 1875, Burns, supra, as will authorize a prosecution for the crime of burglary in a county other than the one in which the offense was committed, merely because the property stolen and taken at the time of and upon the occasion of the burglary has been brought into such county. It is manifest that the section in question is not dealing with the offense of burglary, but with that of bringing stolen property from one county into another.

The affidavit in this case shows upon its face that appellant is charged in the Marion criminal court with the crime of burglary committed in Hancock county. It therefore follows that the lower court had no authority to try him as it did for such offense, and his conviction of the same was unlawful. For this reason alone, the judgment must be reversed. Of course, if the state desires to prosecute appellant for the crime committed by him in bringing the stolen money into Marion county, it may do so in the Marion criminal court; but, if it desires to also prosecute him for the crime of burglary committed in Hancock county, it must do so in the latter county.

For the reasons stated, the judgment is reversed, and cause remanded to the Marion criminal court, and a new trial ordered. The clerk of this court will issue the proper notice to the warden of the Indiana State Prison for the return of appellant to the sheriff of Marion county.

(176 Ind. 234)

HOFFMAN v. STATE (No. 21,763.)

(Supreme Court of Indiana. Oct. 3, 1911.)

1. INDICTMENT AND INFORMATION (§ 87*)—ALLEGATIONS—TIME OF OFFENSE.

An indictment for rape, charging that the offense was committed on a blank day of July, 1908, was not defective for failure to set out the day of the month; time not being an ingredient of the offense; and the date specified being sufficient to show that it was committed within the five-year limitation prescribed by Burns' Ann. St. 1908, § 2063.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 244-255; Dec. Dig. § 87.*]

2. INDICTMENT AND INFORMATION (§ 43*)—ORDER BOOK ENTRIES.

That the order book entry of an indictment did not show that it was indorsed, "a true bill," and was signed by the foreman, was not ground for a motion to quash, under the rule that objections to defects in order book entries of the court only challenged the indictment for defects appearing on its face, under Burns' Ann. St. 1908, § 2065.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. § 154; Dec. Dig. § 43.*]

3. CRIMINAL LAW (§ 1186*)—APPEAL—RULINGS ON EVIDENCE—PREJUDICE.

Alleged technical errors relating to the evidence and instructions in a criminal prosecution are not ground for reversal, where they could not have affected the result.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 1186.*]

Appeal from Circuit Court, Allen County; Edw. O'Rourke, Judge.

Henry Hoffman was convicted of rape, and he appeals. Affirmed.

Samuel M. Hench, for appellant. Thomas M. Honan, Atty. Gen., Thomas H. Brannaman, Edward M. White, and Jas. E. McCullough, for the State.

MORRIS, J. This is an appeal from a judgment on a verdict of a jury, finding appellant guilty of the crime of rape, as defined in Burns' Stat. 1908, § 2250.

[1] The indictment charges that "on the — day of July, 1908," appellant did "unlawfully and feloniously have carnal knowledge of * * * a female child, who was then under 16 years of age, and who was then of the age of 15 years." The indictment was returned on September 23, 1908, and on the back of it was indorsed the following: "State of Indiana v. Henry Hoffman. Indictment for rape. A true bill. Thomas A. Wilkinson, Foreman." A motion to quash the indictment was overruled. It is claimed this action was erroneous, because the day

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Ind.-nes

of the month of July, 1908, is not stated. This was unnecessary. Time was not an ingredient of the offense. July, 1908, was within the statutory limitation of five years prescribed by statute for prosecutions for rape. Burns' Stat. 1908, §§ 1887, 2046, 2063.

[2] It is also insisted that the indictment was defective, because the order book entry does not show that it was indorsed "a true bill," and signed by the foreman; that it was necessary that the order book of the court should show that the indictment was returned into court indorsed, "a true bill," etc., before the clerk was warranted in copying into the record the indorsement of the indictment. Objections to defects in order book entries of the court cannot be raised on a motion to quash the indictment. Such motion can challenge the indictment for such defects only as appear on the face thereof. Burns' Stat. 1908, § 2065; Ford v. State, 112 Ind. 373, 14 N. E. 241, and cases cited. No error was committed in overruling the motion to quash.

[3] The appellant contends that the court committed various errors in improperly admitting in evidence certain testimony, and also in excluding evidence claimed to have been admissible; and, further, that in several instances the court erred in giving to the jury certain instructions of its own motion, and in refusing to give proper instructions tendered by appellant's counsel. If it should be conceded that the lower court erred in each instance, as contended for by appellant, the fact remains that such alleged errors were quite technical, and did not prejudice the substantial rights of the accused; and in such case it is the duty of this court to disregard them. No action, nor failure to act, of the trial court, in any manner of which complaint is made, could have affected the result. It is not necessary nor desirable to set out the nauseating details of the evidence. The defendant was a married man, 24 years of age. In the faithful discharge of its duty, the jury could not have returned a different verdict.

Judgment affirmed.

(176 Ind. 236)

KOHR v. TOWN OF NORTH MANCHESTER. (No. 21,997.)

(Supreme Court of Indiana. Oct. 3, 1911.)

1. MUNICIPAL CORPORATIONS (§ 514*)—PUBLIC IMPROVEMENTS—ASSESSMENTS FOR BENEFITS—STATUTES—REPEAL.

The amendment of Acts 1905, c. 129, § 111 (Burns' Ann. St. 1908, § 8716), authorizing a reassessment by appraisers of benefits for public improvements pending a reassessment, by Acts 1909, c. 172, § 4, without a saving clause, took away the power of the appraisers to proceed further under the provisions so amended.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 514.*]

2. MUNICIPAL CORPORATIONS (§ 514*)—PUBLIC IMPROVEMENTS—ASSESSMENTS—APPEAL.

A petition for the appointment by the circuit court of appraisers to reassess benefits for public improvements, under Acts 1905, c. 129, § 111 (Burns' Ann. St. 1908, § 8716), is not an appeal to the court from the assessment complained of, and the court had no jurisdiction over the same, and on an amendment of such section by Acts 1909, c. 172, § 4, there was no proceeding pending to which such amendment could apply.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 514.*]

Appeal from Circuit Court, Wabash County; A. H. Plummer, Judge.

Proceedings by Levi Kohr against the Town of North Manchester for reappraisal of assessments and benefits from a public improvement. From a judgment denying relief, petitioner appealed, and the cause was transferred from the Appellate Court under Acts 1901, c. 259 (Burns' Ann. St. 1908, § 1406). Affirmed.

Lesh & Lesh, for appellant. Sayre & Hunter, for appellee.

MONKS, J. Appraisers were appointed by the court below upon appellant's petition under section 111 of the act of 1905, concerning municipal corporations (Acts 1905, pp. 292-294, section 8716, Burns' 1908), to reassess benefits to his property on account of a certain street improvement. After the appointment of the appraisers, but before they filed their report, the Legislature passed an act amending said section 111 (section 8716, Burns' 1908), which took effect on March 8, 1909, by virtue of section 8 therein, which declared an emergency. Acts 1909, pp. 423-426, 430. Section 111, as amended, provided that the owner of lots assessed for such improvements should have the right to appeal to the circuit or superior court of the county in which the city or town was located, and that such court should reassess said benefits without the intervention of a jury, instead of having the benefits reassessed by three appraisers appointed by the courts, as provided in the section before it was amended. On April 19, 1909, after said amendment took effect, the appraisers reported that they were "unable to agree upon the amount of benefits which said property will receive by virtue of said improvement," and were discharged by the court. Appellant thereupon requested the court to grant him a trial of said cause, and assess the benefits to said property without the intervention of a jury as provided in said section 111, as amended by the act of 1909 (Acts 1909, pp. 423-426), which request the court denied. Appellant then asked the court to appoint other appraisers under said section 111, as enacted in 1905 (Acts 1905, pp. 292-294, being section 8716, Burns' 1908). This request the court denied, and rendered judgment against

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

appellant for cost. These rulings of the court are assigned as errors.

[1] As the right of appellant to have a reassessment of the benefits to his real estate by three appraisers appointed for that purpose depended wholly upon certain provisions in said section 111 of said act of 1905 (section 8716, Burns' 1908), the repeal of said provisions by the Legislature by amending said section without a saving clause took away all power of the appraisers to proceed further under the provisions so repealed. *Taylor v. Strayer*, 167 Ind. 23, 28, 78 N. E. 236, 119 Am. St. Rep. 469, and cases cited; *Zintsmaster v. Alken*, 173 Ind. 269, 88 N. E. 509, 90 N. E. 82, and cases cited. It is evident, therefore, that the court did not err in refusing appellant's request to appoint new appraisers under section 111 of the act of 1905, for the reason that there was no law in force authorizing their appointment when said request was made.

[2] Appellant insists that the court erred in refusing to try said cause without the intervention of a jury, under section 111 as amended in 1909 (Acts 1909, pp. 423-426). This contention is based upon the theory that the petition of the "owner of any parcel or lot of land assessed with benefits" to the circuit or superior court of the county for a reassessment of benefits under the provisions of section 111, Acts 1905, pp. 292-296 (section 8716, Burns' 1908), is an appeal to such court from the assessment complained of, and that, as such court had jurisdiction of such appeal for the reassessment of benefits, said jurisdiction continued under the forms directed by the amendatory act of 1909, amending said section 111 of the act of 1905, which authorized the court in case of appeal thereto to reassess the benefits without the intervention of a jury. If the filing of a petition in the circuit or superior court by a landowner assessed with benefits under said section 111 of the act of 1905 constituted an appeal to such court, and gave it jurisdiction as a court over such reassessments as claimed by appellant, it might be claimed upon the authority of *Pittsburgh, etc., R. Co. v. Oglesby*, 165 Ind. 542, 76 N. E. 165, and the cases there cited, that such jurisdiction continued in the court below under the forms directed by the section of the act of 1909 amending said section 111 of the act of 1905. But it was held by this court that such application for a reassessment of benefits was not an appeal to such court, and that the court had no judicial power or jurisdiction over the same, but only acted in a ministerial, and not in a judicial, capacity under said section 111 of said act of 1905; that such court was not authorized to hear any appeal from or review any act of, or give any direction to, the body where said proceeding was pending; that the pro-

ceeding for such reassessment of benefits was before the appraisers appointed by the court whose jurisdiction was exclusive; and that a report of the appraisers was final and conclusive, and such court had no power or control over the same. *City of Indianapolis v. State*, 172 Ind. 472, 88 N. E. 687, and cases cited. It follows that when said act of 1909, which amended section 111 of the act of 1905, took effect, there was no proceeding pending in the court below for the reassessment of benefits to appellant's real estate, but that the same was pending before said appraisers appointed by the court, whose power and authority ended when said act of 1909 took effect. It follows that the court did not err in refusing to try said cause and reassess said benefits under said section 111, as amended by said act of 1909. Judgment affirmed.

(176 Ind. 703)

SPITZER v. TOWN OF NORTH MANCHESTER. (No. 21,996.)

(Supreme Court of Indiana. Oct. 5, 1911.)

Appeal from Circuit Court, Wabash County; A. H. Plummer, Judge.

Petition by Emma C. Spitzer against the Town of North Manchester for the appointment of appraisers to reassess benefits for public improvements. From a judgment denying relief petitioner appealed, and the cause was transferred from the Appellate Court under Acts 1901, c. 259 (Burns' Ann. St. 1908, § 1405). Affirmed.

Lesh & Lesh, for appellant. Sayre & Hunter, for appellee.

MONKS, J. The questions presented in this case are the same as those presented in *Kohr v. Town of North Manchester* (No. 21,997, this term) 95 N. E. 1003, and upon the authority of that case the judgment in this case is affirmed.

(176 Ind. 650)

COMMERCIAL LIFE INS. CO. v. SCHROYER. (No. 21,952.)

(Supreme Court of Indiana. Oct. 4, 1911.)

INSURANCE (§ 392*)—AVOIDANCE—FALSE REPRESENTATIONS—RETURN OF PREMIUMS.

A life policy providing that fraudulent and false answers concerning occupation and prior applications for insurance should render the insurance void, and work a forfeiture of all premiums paid by insured, was not rendered absolutely void by breach of warranty or by false answers to such questions affecting the risk, but was only voidable at the election of the insurer, so that, before a defense on such ground could defeat a recovery by the beneficiary, the insurer must have exercised its election to rescind the contract, and tender a return of the premiums received, notwithstanding the provisions for forfeiture thereof.

[Ed. Note.—For other cases, see *Insurance*, Cent. Dig. §§ 1041-1070; Dec. Dig. § 392.*]

Myers, J., dissenting.

Appeal from Circuit Court, Fayette County; George L. Gray, Judge.

Action by Anna Schroyer against the Commercial Life Insurance Company. Judgment

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

for plaintiff, and defendant appealed to the Appellate Court, from which the case was transferred to the Supreme Court under Acts 1901, c. 259 (Burns' Ann. St. 1908, § 1405). Affirmed.

Wm. A. Pickens, Connor, Connor & Chrisman, and Pickens, Cox & Kahn, for appellant. McKee, Frost & Elliott, for appellee.

COX, J. Appellee, being a beneficiary in a policy of insurance issued by appellant upon the life of her husband, brought this action following his death against appellant to recover thereon. From a judgment for appellee this appeal is prosecuted, and error on the part of the trial court in overruling appellant's motion for a new trial is relied on for a reversal.

Under this assignment of error, it is contended that the verdict was not sustained by the evidence, and that the court erred in giving and refusing to give instructions. Appellant answered the complaint by a general denial, and by a second and third paragraph of answer. In the second paragraph the execution of the policy was admitted, but it was alleged that the policy was void and of no effect, and in no way binding on appellant, for the reason that the insured in his application for the insurance made certain statements as to his occupation, and declared and warranted them to be true; that the statements were false, and made by insured to deceive appellant and to induce it to issue the policy; that appellant did not know and had no means of knowing the truth or falsity of the statements, but relied on them, and issued thereon the policy in suit. The allegations of the third paragraph are identical with the second, except that the false statements alleged therein were in regard to former applications of insured for insurance in other companies and rejections by them. Appellee replied specially to the third paragraph of answer, admitting that the statements of the insured set forth therein were false, but averring that the appellant had knowledge of their falsity before it issued the policy, and received the premium thereon. It is not contended by counsel for appellant that the evidence does not sustain a verdict for appellee on the general issue, or that on such issue there was any error in giving or refusing to give instructions. Appellant's whole defense proceeds upon the theory that its second and third paragraphs of answer were good, and that the evidence given thereunder made a case entitling it to a verdict. These answers were not good. They fail to allege that appellant upon the discovery of the alleged fraud took any steps to rescind the contract by tendering back and offering to return the premium paid by insured or otherwise. No evidence was given or offered that appellant had done this. It is conceded that it had not, and it is contended that it was not necessary for it to do so. The contract of in-

surance involved provides that fraudulent and untrue statements such as those pleaded shall render the insurance void, and work a forfeiture of all premiums paid by insured.

The rule as settled by the decisions of the courts of this state is that contracts of insurance with such provisions are not rendered absolutely void by a breach of warranty or by reason of false answers to questions affecting the risk contained in the application as a part of the contract of insurance, such as are involved in this case, but that they are voidable at the election of the insurer; that, before a defense on such ground can defeat a recovery by the beneficiary in a suit on the policy, the insurer must take proper steps to exercise its election to avoid and rescind the contract; and that tendering back the premiums received is one of the necessary steps in making the election to rescind. *Glens Falls Ins. Co. v. Michael* (1906) 167 Ind. 659, 74 N. E. 964, 79 N. E. 905, 8 L. R. A. (N. S.) 708; *American Cent. L. Co. v. Rosenstein* (App. 1910) 92 N. E. 380; *State Life Ins. Co. v. Jones* (App. 1910) 92 N. E. 879. See, also, 18 *Harvard Law Review*, 364. Answers to a complaint to recover on a policy in such cases must, to be sufficient, allege the facts showing the condition, its breach, and the election to avoid or rescind the contract; and to defeat a recovery by reason thereof proof must be made of the facts so alleged.

But counsel for appellant contend that the rule as laid down in the cases cited above does not apply to this because of the provision in the contract here that the insured shall in such case forfeit premiums paid. Of course, it is obvious that, if the insurer elect to avoid or rescind the policy, it is as if no contract had been made. The termination of the contract in case the insurer elects to rescind it does not date from the time of the election, but from the breach of the condition. In this case the breach was before the consummation of the contract, and at the election of the insurer the contract became null from its inception, leaving no obligation resting upon either party to it. Appellant could not renounce the contract for the purpose of refusing to pay the amount it called for to the beneficiary, and in the same breath claim it to be in force for enabling it to retain the premium paid.

Finding no error in the record warranting a reversal, the judgment of the lower court is affirmed.

MYERS, J. (dissenting). I concur in the result reached in the majority opinion on the ground of election by appellant after notice of the alleged false answer, but I am impelled to dissent from so much of the opinion as in effect holds that even though a contract of insurance is procured by fraud of the insured and the insurer is in ignorance, and the risk attaches, the premium must be returned where the defense is interposed in

an action at law upon the policy. The rule may be otherwise in case of an action in equity to cancel the policy upon the ground of the requirement that the moving party shall do equity, and the ground of the distinction between actions in equity and actions at law on the policy has been lost sight of, and much confusion has thereby arisen.

It seems to me no answer to say when there is an action on the policy that the contract becomes noneffective from the beginning, and hence no risk attaches. That depends upon the fact as to whether there is a discovery, so that there may be ground for an election to rescind, for, until discovery, some risk necessarily attaches, even though it should not be the full risk contracted for, and, in addition, the fact that there is a necessary expense in procuring the contract. It is not wholly unilateral. Some risk necessarily attaches as an element of nondiscovery itself, and from the fact of issuance of the policy, but the contract is none the less fraudulent, though there be no discovery, and, so long as any risk attaches, it becomes in effect a wagering contract, and it seems to me in such case, even though there is discovery of the fraud, there should be no recovery of the premium, and this court has held that, so long as any risk attaches, there can be no recovery of premiums on the ground that there can be no apportionment risk. *American, etc., Co. v. Bertram*, 163 Ind. 51, 70 N. E. 258, 64 L. R. A. 935; *Continental, etc., Co. v. Houser*, 111 Ind. 266, 12 N. E. 479; *Standley v. Northwestern, etc., Co.*, 95 Ind. 254. The Appellate Court has held the same. *American, etc., Co. v. Mead*, 39 Ind. App. 215, 79 N. E. 526; *Metropolitan Co. v. Bowser*, 20 Ind. App. 557, 50 N. E. 86; *Metropolitan, etc., Co. v. McCormick*, 19 Ind. App. 49, 49 N. E. 44, 65 Am. St. Rep. 392. If it be said that it is a wagering contract on the part of the insurer, then the law should leave the parties where they place themselves. It seems to me that any other rule invites wagering contracts, deception, and perjury, and that a wise public policy would be subverted in the rule I suggest, which has been held by many of the courts. *Taylor v. Grand Lodge*, 96 Minn. 441, 105 N. W. 408; 3 L. R. A. (N. S.) 114; *Ronald v. Mutual Life Ass'n*, 132 N. Y. 378, 30 N. E. 739; *Thompson v. Travelers', etc., Co.*, 11 N. D. 274, 91 N. W. 75; *Id.*, 13 N. D. 444, 101 N. W. 900; *Stringham v. Mutual, etc., Co.*, 44 Or. 447, 75 Pac. 822; *Blaesser v. Mechanics', etc., Ass'n*, 37 Wis. 31, 19 Am. Rep. 747; *Georgia, etc., Co. v. Rosenfield*, 95 Fed. 358, 37 C. C. A. 96; *United States Co. v. Smith*, 82 Fed. 503, 34 C. C. A. 506; *Lewis v. Phoenix, etc., Co.*, 39 Conn. 100; *Hoyt v. Willman*, 8 Mass. 336; *Insurance Co. v. McTague*, 49 N. J. Law, 587, 9 Atl. 766, 60 Am. Rep. 661; *Joyce on Insurance*, 1406. The

rule of requiring the return of premiums paid applies in case of actions in equity to cancel the policy, and not in actions at law upon the policy, is asserted in numerous well-reasoned cases, which seem to me to declare the true rule. *United States Co. v. Smith, supra*; *National, etc., Co. v. Duncan*, 44 Colo. 472, 98 Pac. 634, 20 L. R. A. (N. S.) 340; *Provident, etc., Co. v. Whayne*, 131 Ky. 84, 93 S. W. 1049; *Venner v. Sun Life Co.*, 17 Can. S. C. 394.

It can scarcely be questioned that, although the contract provides that fraud shall render the policy void, they are universally held not to be void, but voidable at the election of the insurer, and for that reason alone a risk attaches, subject to be defeated at the election of the insurer, and hence the reason for the rule of requiring tender of the premiums when equity is appealed to to cancel the policy, while, on the other hand, when an action is brought on the law side of the court on the policy, the insurer may stand on his legal defense, and the law leaves the insured where he has placed himself by his own fraud, from which he is not permitted to take advantage, or speculate upon the fact of his having paid money on a contract rendered fraudulent by his own conduct.

(176 Ind. 298)

BROOKS v. MUNCIE & P. TRACTION CO. (No. 21,880.)

(Supreme Court of Indiana. Oct. 5, 1911.)

1. RAILROADS (§ 348*)—INTERURBAN RAILWAY—CROSSING ACCIDENT—CONTRIBUTORY NEGLIGENCE—EVIDENCE.

In an action for death of a traveler at an interurban railway crossing, evidence held to warrant a finding that the death of plaintiff's intestate was proximately caused by his own contributory negligence.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 1144–1149; Dec. Dig. § 348.*]

2. RAILROADS (§ 337*)—INTERURBAN RAILWAY—CROSSING ACCIDENT—NEGLIGENCE—FAILURE TO WHISTLE.

Failure of the motorman of an interurban railway car to sound the whistle while the car was approaching a crossing at which decedent was killed, at a distance of not more than 100 or less than 80 rods from the crossing, was not the proximate cause of the accident where the whistle was sounded when the car was about 60 rods east of the crossing, and was not heard.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. § 1094; Dec. Dig. § 337.*]

3. RAILROADS (§ 348*)—INTERURBAN RAILWAY—CROSSING ACCIDENT—WILLFUL INJURY—EVIDENCE.

Evidence held to warrant a finding that decedent's death at an interurban railway crossing was not willfully inflicted by defendant's servants.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. § 1150; Dec. Dig. § 348.*]

4. TRIAL (§ 228*)—INSTRUCTIONS—"APPROXIMATELY"—EFFECT TO MISLEAD—"PROXIMATELY."

An instruction on contributory negligence, in an action for death at an interurban rail-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexer

way crossing, was not defective in the use of the word "approximately," instead of "proximately"; the two words being so closely allied in meaning that the use of the former, in a clause requiring such negligence to have "approximately" contributed to the injury, could not have misled the jury.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 500-512; Dec. Dig. § 228.*]

For other definitions, see Words and Phrases, vol. 1, p. 477; vol. 6, p. 5769.]

5. TRIAL (§ 296*)—INSTRUCTIONS—CONSTRUCTION AS A WHOLE.

An instruction on contributory negligence, in an action for death at an interurban railway crossing, was not erroneous for failure to require that decedent's negligence must have "materially" contributed to decedent's death; the court having expressly so charged in other instructions.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 705-713; Dec. Dig. § 296.*]

6. RAILROADS (§ 327*)—CROSSING ACCIDENT—LOOK AND LISTEN RULE.

Decedent was killed at an electric interurban railway crossing by an express car weighing 32 tons, and equipped with 75 horse power motors, air brakes, whistle, and gong, and geared to run 50 to 55 miles per hour. At the point of the accident, the car running 10 miles an hour, under ordinary conditions, could have been stopped in 40 feet, and, at a speed of 40 to 50 miles an hour, in 450 feet. *Held* that, while the rule requiring a traveler to stop, look, and listen is not fully applicable to a city crossing, it is applicable to a country road crossing the private right of way of an electric line.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1043-1056; Dec. Dig. § 327.*]

7. TRIAL (§ 280*)—REQUEST TO CHARGE—INSTRUCTIONS GIVEN.

It was not error to refuse a request to charge covered by instructions given.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 651; Dec. Dig. § 280.*]

8. TRIAL (§ 252*)—INSTRUCTIONS—APPLICATION TO EVIDENCE.

Where in an action for death at an electric railway crossing, decedent was driving at the time, the court did not err in refusing an instruction that the negligence of the driver of a vehicle in which a passenger is being carried cannot be imputed to the passenger, when he does not control the actions of the driver.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 598-612; Dec. Dig. § 252.*]

9. RAILROADS (§ 351*)—INTERURBAN RAILWAY—CROSSING ACCIDENT—SPEED.

There being no statute regulating the speed of interurban railway cars, the court did not err, in an action for death at an interurban railway crossing, in charging that it is not negligence in itself for an electric traction car to pass over a highway crossing in a country at any rate of speed consistent with the safety of persons and property carried on such cars, in connection with other instructions, leaving to the jury the right to determine whether defendant's servants exercised reasonable care under the circumstances in running the car in question at the speed shown.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1193-1215; Dec. Dig. § 351.*]

10. APPEAL AND ERROR (§ 1068*)—REVIEW—PREJUDICE—INSTRUCTIONS.

Errors committed in instructions are not ground for reversal, as expressly provided by

Burns' Ann. St. 1908, §§ 407, 700, where the verdict was clearly right under the evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4225; Dec. Dig. § 1068.*]

11. EXECUTORS AND ADMINISTRATORS (§ 456*)—ACTIONS BY ADMINISTRATOR—WRONGFUL DEATH—COSTS—LIEN ON ASSETS.

Where an administrator sued for wrongful death for the exclusive benefit of decedent's widow, as authorized by Burns' Ann. St. 1908, § 285, and a judgment was rendered against him for costs, such judgment was not a lien on the assets of decedent's estate, but was against plaintiff suing as administrator.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 1941-1907; Dec. Dig. § 456.*]

Appeal from Circuit Court, Delaware County; James G. Leffler, Judge.

Action by George W. Brooks, as administrator, etc., against the Muncie & Portland Traction Company. Judgment for defendant, and plaintiff appeals. Case transferred from the Appellate Court under Act of 1901, c. 259 (Burns' Ann. St. 1908, § 1405). Affirmed.

Geo. H. Koons, for appellant. Snyder & Smith and Rollin Warner, for appellee.

MORRIS, J. The appellant, George W. Brooks, as administrator of the estate of Sanford L. McKinney, deceased, instituted this action against appellee for damages, for the alleged negligent killing of appellant's decedent.

There was a trial by jury and verdict for defendant. A motion for a new trial was overruled, and judgment was rendered for defendant. From this judgment, plaintiff appeals. The assigned errors are the overruling of the motion for a new trial, and rendering judgment against appellant for costs.

The grounds assigned for a new trial were that the verdict was contrary to law, and was not sustained by sufficient evidence; that the court erred in the giving of certain instructions to the jury; that it also erred in refusing to give to the jury certain instructions requested by plaintiff. Interrogatories submitted by the court were answered by the jury, and returned with the general verdict.

The first and second paragraphs of complaint alleged that the death of plaintiff's decedent was caused by defendant's negligence; the third paragraph alleged that the death of decedent was caused by injuries willfully inflicted by defendant's servants.

[1] The errors assigned here require this court to determine the sufficiency of the evidence to support the verdict. The following facts are supported by the evidence: In August, 1906, when the fatal accident occurred, defendant was operating an interurban electric railway on its right of way, which ran from the northeast to the southwest. The accident occurred at the intersection of defendant's track by a public high-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

way, running north and south. On the east side of the highway, there was a cornfield, extending south to defendant's right of way; the corn in the field was thick, and about 10 feet high, and obstructed the view to the east. The point of the cornfield farthest south was about 40 feet north of the railway track. The railroad was about three feet higher than the level of the highway, and was ballasted with broken stone, and this broken stone extended about eight feet north of the track; the three feet of incline commenced eight feet north of the track. The cornfield extended east about 1,400 feet, and north to Caleb Reed's residence. East of the cornfield was a woods. Caleb Reed lived on the east side of the highway, about 400 feet north of the crossing. From his residence south to the railway there is a gentle decline. In driving south along the highway, after passing the cornfield, there was nothing to obstruct the view of a car approaching from the east, except wooden trolley poles, 12 to 15 inches in diameter, and 34 feet high, located 100 feet apart, on a line 6 to 7 feet north of the track. These poles did not obstruct the view until the traveler approached to within 8 feet of the track, and ceased to obstruct the view of one within 6 feet thereof.

The decedent was familiar with the crossing. On the afternoon of the accident, decedent, with his brother-in-law, Frank H. Young, were riding south on the highway, in a spring wagon. Decedent was on the east side of the seat, driving the horse. The horse which drew the spring wagon was trotting slowly, four or five miles per hour. When the spring wagon was passing the Reed residence, both decedent and Young spoke to Reed. When they were passing Reed's, some pigs ran out of Reed's lot onto the highway, and ran in front of the spring wagon. Reed went into the highway, watching the pigs in front of the wagon, and observed decedent and Young up until the time of the accident. The horse continued in the slow trot, with the pigs running ahead of the vehicle. When the spring wagon reached the rock ballast that leads up onto the track, both decedent and Young were leaning forward in the wagon, with their heads laid together. There was a lunch pail in the wagon. When the wagon was about 100 feet north of the crossing, Reed saw a car approaching from the east, about 400 to 450 feet away. When the rig started onto the rock, about eight feet north of the rail, Reed shouted a warning to decedent and Young, but the warning was not heard. At that time the horse changed its gait from a trot to a walk. Neither Young nor decedent looked to the east before the accident. The spring wagon was struck by the approaching car, and decedent was instantly killed. A very short time before the accident, a passenger car had passed over the crossing, going west. This was observed by

Young and decedent, as they approached the crossing.

The car which struck decedent was an express car, and approached the crossing at a speed of from 45 to 50 miles per hour. The car was equipped with a whistle, which was sounded when the car was about 1,000 feet east of the crossing. The whistle was not sounded, except the one time, during the approach of the car from a point 100 rods east of the crossing. When about 250 feet east of the crossing, the motorman saw the horse approaching the crossing, and immediately set the emergency brakes on the car, and endeavored to sound the whistle, but failed. When about 75 feet from the crossing, the motorman shouted, to attract the attention of the occupants of the vehicle. The hearing and eyesight of both decedent and Young were good.

[2] Under the above facts, we cannot say that the jury was not warranted in finding for the defendant, by reason of decedent's contributory negligence. Nor can we say that defendant's negligence in failing to sound the whistle while the car was approaching at a distance of not more than 100, nor less than 80, rods from the crossing was the proximate cause of the injury. The whistle was sounded when about 60 rods east of the crossing, but was not heard. It is less likely that a sound of the whistle 80 to 100 rods away would have been heard.

[3] The jury found, by answers to proper interrogatories, that the injury to decedent was not willfully inflicted by defendant's servants. The evidence supports the jury's finding in this particular. The verdict of the jury was sufficiently supported by the evidence.

[4] Appellant claims the court erred in giving the following instruction: "Even though you should find that the defendant was negligent, as charged in the first and second paragraphs of the amended complaint, yet, if it also appears from a fair preponderance of the evidence, whether from that introduced by the plaintiff or by the defendant, or both, that the plaintiff's decedent was also negligent, in any matter approximately contributing to his injury, such negligence on his part would defeat his cause of action, stated in those paragraphs, and he could not recover thereon." The word "approximately" is used in this instruction, instead of "proximately." The words in meaning are so closely allied that the use of the former, in the connection in which it appears in this instruction, could not have misled the jury, especially in view of other instructions given. *Pledger v. Chicago, etc., R. Co.*, 60 Neb. 456, 95 N. W. 1057.

[5] It is further claimed that the instruction was erroneous, because the court failed to charge the jury that such negligence of plaintiff must "materially" contribute to

his injury. In support of this contention, appellant cites Indianapolis, etc., Transit Co. v. Edwards (1905) 36 Ind. App. 202, 74 N. E. 533. Conceding the correctness of appellant's claim, the omission is harmless.

In instruction No. 5, given by the court, the jury was told the plaintiff's right of recovery would not be defeated, "unless you should believe from the evidence that the plaintiff was guilty of contributory negligence which materially contributed to his injuries." The jury was likewise instructed in the thirteenth, twenty-second, and thirty-sixth instructions given in the court.

[6] In its twenty-fifth instruction, the court told the jury that it was the duty of a traveler, about to cross a railroad track, to listen for signals, and look up and down the track; that if decedent could have seen an approaching car, in time to escape, it will be presumed, in case of injury, either that he did not look or, if he did, that he did not heed what he saw. This instruction is vigorously assailed by counsel for appellant, who contends that the "look and listen" rule, adopted generally by the courts in railroad crossing cases, has no place in accidents occurring at crossings of electric interurban railroads with country highways; that electric cars are light and easily controlled; that the same company usually, as in this case, occupies the streets of cities and towns, and there operates a street railway; that an interurban railway, in its operation, resembles a street railway, and the same rule should be applied to it as applies to street railways in cities.

It has been held by our courts, and generally by the courts of other states, that the rule in steam railroad crossing cases is not fully applicable to crossing accidents on street railways in towns and cities. Indianapolis St. R. Co. v. Marschke (1906) 166 Ind. 490, 77 N. E. 945; Indianapolis Traction Co. v. Kidd (1906) 167 Ind. 402, 79 N. E. 347, 7 L. R. A. (N. S.) 143; Indianapolis St. R. Co. v. Schmidt, 35 Ind. App. 202, 71 N. E. 663, 72 N. E. 478; 36 Cyc. 1539; Pilmer v. Boise Traction Co. (1908) 14 Idaho, 327, 94 Pac. 432, 15 L. R. A. (N. S.) 254.

The defendant was operating an electric railway between Muncie and Portland, and in each of the cities ran its cars over some of the streets thereof. Every hour of each day, from 5 o'clock a. m. to 11 o'clock p. m., a passenger car started from each of the cities, destined for the other. The passenger cars weighed about 30 tons, and were 14 feet high. Between the two cities, the defendant operated an express car, which made two round trips per day. This car, which collided with plaintiff's decedent, was 45 feet long, 14 feet high, weighed 32 tons, had 75 horse power motors, and was equipped with whistle and gong, and Westinghouse air brakes, and was propelled by electricity, transmitted through an overhead trolley.

The car was geared to run at a speed of from 50 to 55 miles per hour.

The accident happened in the daytime, on defendant's privately owned right of way, in the country, about four miles northeast of Muncie. At that point, running at a speed of 10 miles per hour, the car could, under ordinary conditions, have been stopped in 40 feet; at a speed of 25 miles per hour, in 300 feet; at a speed of 45 to 50 miles per hour, in about 450 feet.

Electric interurban railroads, to transport passengers and property, are authorized by our laws. Burns' Stat. 1908, § 5675. They have been accorded practically the same rights, and been subjected to the same restrictions, as have steam railroads. The General Assembly has not seen fit to limit the speed of their cars while running through the country.

The momentum of an electric car, weighing 30 tons, running at a speed of 45 to 50 miles per hour, is not so great as that of the ordinary freight or passenger train running on a steam road, at a lower rate of speed; but it is such that the danger to the traveler on the highway crossing is practically as great in the one case as in the other, and we see no reason why the "look and listen" rule, applied almost universally to accidents at steam road crossings, should not apply to the facts in issue here; and in our opinion the lower court did not err in its twenty-fifth instruction. Cable v. Spokane, etc., R. Co., 50 Wash. 619, 97 Pac. 744, 23 L. R. A. (N. S.) 1224, and notations; Phillips v. Washington, etc., R. Co., 104 Md. 455, 65 Atl. 422; Robinson v. Rockland, T. & C. Street R. Co., 99 Me. 47, 58 Atl. 57; Folkmire v. Michigan, etc., R. Co., 157 Mich. 159, 121 N. W. 811; Heltman v. Pacific Elec. R. Co., 10 Cal. App. 397, 102 Pac. 15. It does not follow that in all cases, and under all conditions, the crossing of an interurban electric railway is to be governed by the rules applied to steam railways, but the rule in controversy is applicable to the situation here considered.

[7] Plaintiff requested an instruction informing the jury that contributory negligence was not a defense to the third paragraph of complaint, which alleged a willful injury. Error is predicated on the court's refusal to give the instruction. The point was covered in instruction No. 39 given, wherein the court informed the jury that "contributory negligence is not a defense to an action for willful injury, or willful killing."

[8] Appellant requested certain instructions informing the jury, in substance, that the negligence of a driver of a vehicle in which a passenger is being carried cannot be imputed to the passenger, when he does not control the actions of the driver. Assuming the correctness of these instructions as abstract propositions of law, the court right-

fully refused to give them, because they were not applicable to the facts. The evidence shows beyond controversy that decedent was doing the driving.

[9] Instruction No. 27, given by the court, is as follows: "I instruct you that there is no statute regulating the rate of speed at which an interurban car, or electric traction car, may pass over a highway crossing in the country, and it is not negligence, in itself, for such cars to be run over highway crossings, in the country, at any rate of speed consistent with the safety of the persons and property carried on such cars." Appellant's counsel asserts this was erroneous. In *Lake Shore, etc., R. Co. v. Barnes*, 166 Ind. 7, 76 N. E. 629, 8 L. R. A. (N. S.) 778, this court held that it was not negligence per se to run a train, over an ordinary country highway crossing, at any speed consistent with the safety of the persons and things being carried. It is generally held that, in the absence of statutory regulation, railways may use their discretion in establishing the speed of their trains. 33 Cyc. 971. This does not, however, excuse railway companies from the common-law duty of exercising care for the safety of persons traveling on highways crossing their tracks; and the rate of speed to be used in a given case depends on the nature of the crossing and other circumstances surrounding the alleged injury. The instruction given was not erroneous, coupled, as it was, with other instructions, which left to the jury the right to determine whether or not defendant exercised reasonable care and prudence, under the particular circumstances of the case, in running the car in question at the speed shown by the evidence.

[10] Appellant complains of the action of the court in refusing to give other instructions requested. It is sufficient to say that such of these as were applicable to the evidence were substantially covered by other instructions given. There were objections to other instructions given by the court, not discussed in the opinion, but we are of the opinion that the court committed no error therein harmful to appellant. Besides, the verdict of the jury is clearly right under the evidence, and if there were any errors committed in instructing the jury, they did not affect any substantial right of appellant, and in such case intervening errors, if any, should be disregarded. *Burns' Stat.* 1908, §§ 407, 700; *Terre Haute, etc., R. Co. v. Salmon*, 34 Ind. App. 564, 73 N. E. 268.

[11] The judgment rendered was as follows: "It is therefore considered by the court that the plaintiff take nothing by his action herein, and that the defendant have and recover of and from the plaintiff its costs in this behalf laid out and expended, taxed at \$——." The appellant asserts that decedent's estate has no interest what-

ever in the result of the suit, and the assets thereof are not liable for costs, and a judgment cannot be properly rendered against the estate for such costs. This action was brought under *Burns' Stat.* 1908, § 285, for the exclusive benefit of decedent's widow, by the administrator. The judgment is not a lien on the assets of decedent's estate, but is against plaintiff suing in the capacity provided for in section 285, *Burns' Stat.*, supra. *Lake Erie, etc., R. Co. v. Charman*, 161 Ind. 95, 67 N. E. 923. There is no error.

Judgment affirmed.

(176 Ind. 312)

FULLENWIDER v. GOBEN. (No. 21,889.)
(Supreme Court of Indiana. Oct. 6, 1911.)

1. **BROKERS (§ 43*)—COMMISSION—ORAL CONTRACT OF EMPLOYMENT—STATUTES.**

Under *Burns' Ann. St.* 1908, § 7463, which provides that no contract for the payment of a commission for procuring a purchaser for real estate shall be valid unless in writing, signed by the owner, there can be no recovery on a quantum meruit upon an oral agreement to execute a contract to pay a commission for selling real estate.

[Ed. Note.—For other cases, see *Brokers*, Cent. Dig. § 44; Dec. Dig. § 43; * *Frauds*, Statute of, Cent. Dig. § 131.]

2. **BROKERS (§ 43*)—COMMISSION—ORAL CONTRACT OF EMPLOYMENT—PERSONALTY.**

An oral contract of employment to procure a purchaser for hotel property or a lender upon the security of the hotel property and furniture, void as to the realty under the statute of frauds (*Burns' Ann. St.* 1908, § 7463), is not enforceable as a separate contract for the sale of personal property, since, being void as to the real estate, it is void as to the personal property.

[Ed. Note.—For other cases, see *Brokers*, Cent. Dig. § 44; Dec. Dig. § 43.*]

3. **BROKERS (§ 79*)—ACTION FOR COMPENSATION—NATURE AND FORM OF ACTION.**

A broker who had no written contract of employment to procure a purchaser for real estate, as required by *Burns' Ann. St.* 1908, § 7463, cannot recover for his expenditure of time and money in procuring a purchaser in an action in which his complaint sounds in tort for fraud and deceit.

[Ed. Note.—For other cases, see *Brokers*, Dec. Dig. § 79.*]

Appeal from Circuit Court, Fountain County; I. E. Schoonover, Judge.

Action by John C. Fullenwider against John L. Goben. Judgment for defendant, and plaintiff appeals. Affirmed.

Transferred from the Appellate Court under section 1405, *Burns' Ann. St.* 1908.

H. D. Van Cleave and C. B. Marshall, for appellant. Johnston & Johnston, for appellee.

MYERS, J. Appellant instituted an action in two paragraphs in the Montgomery circuit court, where a demurrer was sustained to the second paragraph, and overruled as to the first. A change of venue was taken to the Fountain circuit court, where a de-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

murrer was sustained to the first paragraph, and error is here assigned upon the alleged error of the Montgomery circuit court, and upon the action in setting aside the ruling of that court, and sustaining the demurrer to the first paragraph, in the Fountain circuit court. Neither of the paragraphs or the substance of either are set out separately in the briefs, but there is one statement set out embracing the substance of each, and not challenged by appellee.

The complaint is quite lengthy, but the substance of it is that in December, 1905, appellee, for the purpose of deceiving, misleading, and defrauding appellant, falsely represented to him that he was the owner in fee of certain described real estate, including a hotel property situate thereon, of the value of \$80,000, together with furniture and fixtures in the hotel of the value of \$15,000; that he was in possession of the property, lived with his family in the hotel, as did a son and his family, and was running the hotel; that appellant believed and relied upon his statement as true, and appellee knew it was false, and knew that appellant relied upon it as true; that for the purpose of deceiving, cheating, and defrauding him, and causing him to spend money and much valuable time, in behalf of appellee, the latter deceitfully, falsely, and fraudulently represented to appellant that, if he would find him a purchaser or trade for the real estate and personal property, he would pay him \$1,000, and prior to closing the sale or trade would execute to him a written contract to that effect; that at the time of making such representations appellee never intended to pay appellant, or to execute such contract; that appellant, relying upon his representations and promises, and believing them to be true, spent \$160.50 in money at the appellant's special instance and request in railroad fares, hotel expenses, telephone and telegraph bills, and transportation, and spent 41 days of time of the value of \$840; that he did furnish a customer to defendant who traded for the hotel; that, when the transaction came to be closed, appellee claimed that, before he could close, it would be necessary that he procure a loan of \$13,000 on the hotel property and furniture, unless the purchaser would take the property subject to a \$13,000 mortgage, and that appellant procured the purchaser to agree to do so; that defendant, for the purpose of defrauding plaintiff, deceitfully, fraudulently, and falsely represented to him that, if he would procure him a loan of \$15,000 on the real estate, he would pay him \$100 in addition to the \$1,000 agreed to be paid for furnishing a customer for the hotel; that relying upon, and being misled by the representations, believing them to be true, he set about to procure such loan, procured an appraisal of the property, and submitted applications to various loan com-

panies, in and about which he spent \$25 in money, and 10 days time, of the value of \$200, when he for the first time discovered that appellee had no title to the real estate, and no loan could be procured; that during all that time appellee knew he had no title; that appellee then agreed with him that, if he would procure the purchaser to execute a first mortgage on the property for \$13,500 and a second mortgage for \$45,000, he would pay \$1,000 in cash for procuring the agreement to execute said notes, and that he at the time had no intention to pay plaintiff, but that plaintiff, relying on his promise, did procure the purchaser to consent to execute the notes as requested by defendant, and, for the purpose of cheating and defrauding plaintiff, appellee caused the property to be conveyed to the purchaser by the owner, and the purchaser executed the notes and mortgage in accordance with the agreement procured by appellant; that appellant has frequently demanded that appellee reimburse him for the money so paid out, and that he execute to him the contract to pay the \$1,000 for procuring the purchaser, all of which was refused; that appellant was unacquainted with appellee and his financial condition, and during all the time appellee represented himself to be a wealthy man, and as having large unincumbered holdings of real estate in Arkansas, Missouri, and Illinois, which was false; that he was, in fact, insolvent, and appellant relied upon his representations, believing them to be true, and was thereby damaged in the sum of \$2,500, "for which he demands judgment in tort." Appellant claims his theory of this complaint to be an action for damages for deceit and fraud, while appellee urges that the allegations as to false representations, fraud, deceit, etc., are mere characterizations, to obviate the statute of frauds with respect to a verbal contract for a commission for the sale of real estate. As the parties have taken no care to point out the difference, if any, between the two paragraphs, and have treated them as being alike, we so treat them.

[1] In so far as the complaint can be said to sound in contract, it is clearly insufficient. If parties were permitted to prove a parol agreement to enter into a written agreement for the sale or exchange of real estate as a basis for recovery of damages, the statute would be evaded, and that would be done by indirection which is positively forbidden to be done by direction, and the very object of the statute thwarted. Burns, 1908, § 7463. There can be no recovery upon the contract under a quantum meruit. *Zimmerman v Zehendner* (1905) 164 Ind. 466, 73 N. E. 920; *Phillips v. Jones* (1907) 89 Ind. App. 626, 80 N. E. 555; *Beahler v. Clark* (1903) 32 Ind. App. 222, 68 N. E. 613.

[2] Neither can the complaint be supported upon the theory of its being in part a

contract for the sale of personal property. The contract is entire, and cannot be separated or apportioned. Beside, to uphold it would be to let in oral proof to establish a contract as separate, and would not only be to make a contract which the pleadings show the parties did not make on the one hand, and, on the other, to uphold a contract as an entirety, which the law forbids. Being void as to the real estate, it is void as to personal property. *Pond v. Sheean*, 132 Ill. 312, 323, 23 N. E. 1018, 8 L. R. A. 414; *Meyers v. Schemp*, 67 Ill. 469.

[3] Appellant disclaims any right of recovery upon contract, and seeks to ground his action as for fraud and deceit, by virtue of which he was induced to expend money and devote time to an attempt to procure a purchaser, in which he was successful. In so far as he alleges the expenditure of money and time in and about the procurement of a purchaser, he must fail. He was bound to know as a matter of law that without a written contract agreeing to pay him a commission he could not recover a commission, or for any time or money expended in the attempt. It must be assumed that he would have spent time and money if he had had a written contract. That would have been a part of the consideration for the contract, yet in that event he would have been relegated to his contract, and could not have recovered for time and money spent.

As appellant's theory of his complaint is that it sounds wholly in tort, the judgment must be affirmed. We express no opinion as to the allegations of the complaint as to his having been employed by appellee under an agreement to pay him to procure a loan for him, or as to the agreement to pay him for procuring the purchaser of the property to execute certain notes and mortgages as his action is not based on that agreement.

The judgment is affirmed.

(176 Ind. 239)

INDIANA UNION TRACTION CO. v. MAHER. (No. 21,888.)

(Supreme Court of Indiana. Oct. 4, 1911.)

1. INFANTS (§ 93*)—CONTRACTS—AVOIDANCE—PLEADING.

A reply to an answer of settlement of a claim and payment by check, which alleges the minority of plaintiff, nonpresentment and tender of the check received, coupled with the bringing of an action on the original cause of action, constituted disaffirmance of the settlement.

[Ed. Note.—For other cases, see *Infants*, Cent. Dig. §§ 282-287; Dec. Dig. § 93.*]

2. CARRIERS (§ 321*)—INJURY TO PASSENGERS—MISLEADING INSTRUCTIONS.

Where, in an action for injuries to a street car passenger in a collision, the complaint alleged negligent overcrowding of the car and the negligent running of cars in dangerous proximity to each other, without any provision for signals, and the evidence showed that the failure

to provide signals was the proximate cause of the accident, and that the overcrowding merely increased the severity of the injury, and the court charged that the burden of overcoming the presumption of negligence arising from the collision and the injury was on defendant, and that plaintiff must prove the material allegations of the complaint, a charge that, if the evidence established a liability as to either charge of negligence, a recovery could be had on the charge supported by the evidence was not misleading, as leading the jury to understand that the overcrowding of the car was actionable negligence.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 1326-1337; Dec. Dig. § 321.*]

3. CARRIERS (§ 316*)—INJURIES TO PASSENGERS—PRESUMPTIONS.

A collision between street cars, causing injury to a passenger on one of them, raises a presumption of actionable negligence.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 1261, 1262, 1283-1294; Dec. Dig. § 316.*]

4. APPEAL AND ERROR (§ 1064*)—HARMLESS ERROR—ERRONEOUS INSTRUCTIONS.

Where, in an action for personal injury, plaintiff relied on infancy to avoid a settlement of the claim, and the evidence showed that the check paid for the settlement was tendered back before the commencement of the action, and that nothing had been received on account of it or the settlement, and that the check was brought into court for the benefit of defendant, the error in a charge that the agreement was void because of infancy, arising from the failure to refer to the subject of disaffirmance, was not prejudicial.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4219-4224; Dec. Dig. § 1064.*]

5. CARRIERS (§ 321*)—INJURIES TO PASSENGERS—INSTRUCTIONS.

Where, in an action for injuries to a street car passenger in a collision, the evidence showed negligent failure to provide signals to prevent collisions between cars running in close proximity to each other, a charge that, where cars were run in unusual proximity to each other and a danger arose therefrom, it was the carrier's duty to warn passengers of such danger, if opportunity existed therefor, properly submitted to the jury the issue whether the circumstances required warning, and an opportunity to give it.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 1326-1337; Dec. Dig. § 321.*]

6. CARRIERS (§ 321*)—PASSENGERS—ACTIONS FOR INJURIES—INSTRUCTIONS.

Where, in an action for injuries to a street car passenger in a collision, the defense was that the injuries complained of were caused from attending parties and dances, a charge that if the passenger was injured without her fault by a collision, the presumption was that the collision and injury resulted from negligence of the carrier, and it must prove, to avoid liability, that it exercised the highest practical care, was not objectionable, but properly coupled together the occurrence of the collision and consequent injury to raise the presumption of negligence.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 1326-1337; Dec. Dig. § 321.*]

Appeal from Circuit Court, Howard County; James F. Elliott, Judge.

Action by Alice Maher, by her next friend, against the Indiana Union Traction Com-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

pany. From a judgment for plaintiff, defendant appeals. Affirmed.

James A. Van Osdol, Kittinger & Diven, and Blacklidge, Wolf & Barnes, for appellant. Overson & Manning and Kirkpatrick & Morrison, for appellee.

MYERS, J. This cause was transferred from the Appellate Court, under section 1403, Burns 1908, and is an action by appellee for personal injuries. The alleged errors presented are in overruling appellant's demurrer to the second paragraph of reply, and in overruling the motion for a new trial.

The complaint charges negligence of appellant, on September 3, 1906, in permitting a car to collide from the rear with a car upon which appellee was a passenger, alleging that she was at the time 17 years of age. There was an answer in general denial, and a special paragraph, alleging settlement by written agreement, and payment by check for \$15, on September 11, 1906, the agreement being signed by appellee, and her father and mother, to which she replied by general denial; and by a second paragraph, that appellee was, on September 11, 1906, and was at the time of filing her complaint, and is now, a minor, and under the age of 21 years; that on the — day of January, 1907, she tendered appellant said check and order enumerated in defendant's second paragraph of answer; that she did not receive any money or thing of value by reason of the execution of the said check and order, and did not indorse the said check or order, and that the said tender was made prior to the filing of her complaint, and that plaintiff has ever since held the said check and order for the said defendant, and subject to the control of the defendant, and hereby tenders and brings the said check and order into court for the defendant. The question is that of disaffirmance by a minor.

[1] The case nearest in point is *St. Louis, etc., Co. v. Higgins*, 44 Ark. 293, where it was held that a reply of minority, to avoid an answer of settlement and payment for personal injuries, where the money had been retained, was sufficient, and that the bringing of the suit was an unequivocal disaffirmance, and this will be found to have been held in a number of cases cited in the note to *Craig v. Van Bebber* (100 Mo. 584, 13 S. W. 906) 18 Am. St. Rep. 569, note at page 667, to which we add *Englebert v. Troxell*, 40 Neb. 195, 58 N. W. 852, 26 L. R. A. 177, 42 Am. St. Rep. 665, and cases cited. In *Clawson v. Doe*, 5 Blackf. 300, *Doe v. Abernathy*, 7 Blackf. 442, and *Law v. Long*, 41 Ind. 583, it was held that at common law the commencement of an action was not a disaffirmance, referring to executed contracts, and that there must be notice, or some affirmative act evincing an intention to disaffirm. These cases grew out of actions in respect to real estate, or some interest therein, when the law was that one out of

possession could not convey, and the cases cited in the note above referred to support the doctrine that the tender in this case, coupled with the suit, is a sufficient disaffirmance. Page on Contracts, § 886, states the modern rule to be "that no set form of disaffirmance is necessary, but that the infant's intention to disaffirm, together with any conduct on his part which makes this intention clear, constitutes a sufficient disaffirmance." So, to an answer of settlement and "payment by check," it is sufficient to reply minority, and the nonpresentment and nonpayment and tender of the check, coupled with a suit brought, to constitute a disaffirmance.

[2] By the third instruction, the jury were informed that, "Where there is more than one charge of negligence in a complaint, either of which is sufficient to base a recovery upon, it is not necessary, in order for the plaintiff to recover, to prove all of the several charges of negligence, but a recovery may be had upon either charge, which is sufficiently supported by the evidence. So if the evidence in this case should establish a liability upon the part of the defendant, as to either of the particular charges of negligence, a recovery may be had upon the charge which is supported by the evidence." The objection urged to this instruction is that, by the use of the words "either of which is sufficient to base a recovery upon," the court invaded the province of the jury, and instructed them that the charges made against appellant constituted negligence, when the question of what constituted negligence is for the jury. Also that the words "which is sufficiently supported by the evidence" informed the jury that, if the facts are as recited in the complaint, negligence is proven, and that the remainder of the instruction invaded the province of the jury, in telling them that the facts recited in the complaint constituted negligence, and relieved them from determining that question.

The negligence charged in the complaint is that defendant wholly failed and neglected to provide sufficient car service for the safe and comfortable transportation of its traffic and passengers, and carelessly and negligently ran its overcrowded cars in such proximity to each other as to be dangerous to its passengers. That, by reason of the mechanism becoming out of order on the car upon which appellee was a passenger, the car was stopped near the north end of a sharp curve, which was cut through an embankment 30 feet deep, and on a downgrade to the north. The plaintiff and the passengers upon the car were not informed of the nature, or extent of the injury to the car, or the reason of its becoming stationary. That plaintiff and the passengers were not requested by the agents and employes of defendant then in charge of the car to leave the same, and that plaintiff and the other passengers in the car remained seated there-

in during the time when the car remained stationary, until the collision occurred. That the car while so stopped was being followed by a heavy, rapidly moving car, and that defendant and its agents carelessly and negligently failed, neglected, and refused to give proper warning, or set any signal, in order that a car approaching from the southward might be apprised of the presence upon defendant's track of said stationary car, and left the car wholly unguarded from collision by approaching cars, whereby, without warning to the plaintiff or the passengers on the stationary car, and without slackening or checking speed, the following car, running at a high and dangerous rate of speed, collided with the car upon which appellee was carried, by reason of which she was thrown to the floor and injured. That the injuries were caused by the carelessness, recklessness, and negligence of defendant in running its said cars in close and dangerous proximity to each other, in heavily overcrowding the same, and in the failure to place any warning or signal at a proper distance from the disabled stationary car, in order to give warning of its presence. In one part of the complaint, it is alleged that appellee was standing, and in another that she was seated, when the collision occurred, but the evidence shows her to have been standing, and to have been thrown to the floor of the car. The alleged overcrowded condition of the car is not pleaded as a proximate cause of the injury, and to characterize the overcrowded condition of the car as negligence was of no force, except that being upon her feet, for want of a place to be seated, was an incident possibly increasing the injury. It was not an allegation of independent negligence, but of dependent and concurring negligence, and while the instruction is possibly subject to criticism, owing to its failure to point out the specific actionable negligence charged, yet we do not think the jury could have been misled by it, under the facts in this case, where the collision is unquestioned, and the proximate cause of the injury clearly the failure to provide warning or signals, and the overcrowded condition of the car could be of no consequence, except as increasing the severity of the injury, for no injury arose from the condition, as a proximate cause. The collision was sufficient to raise a presumption of negligence. *C. C. & St. L. Co. v. Hadley*, 170 Ind. 204, 82 N. E. 1025, 84 N. E. 13, 16 L. R. A. (N. S.) 527; *Pittsburgh, etc., Co. v. Higgs*, 165 Ind. 694, 76 N. E. 299, 4 L. R. A. (N. S.) 1081; *Indianapolis, etc., Co. v. Schmidt*, 163 Ind. 360, 71 N. E. 201; *Louisville, etc., Co. v. Miller*, 141 Ind. 533, 37 N. E. 343; *Louisville, etc., Co. v. Hendricks*, 128 Ind. 462, 28 N. E. 56; *Louisville, etc., Co. v. Faylor*, 126 Ind. 126, 25 N. E. 869; *Louisville, etc., Co. v. Thompson*, 107 Ind. 442, 8 N. E. 18, 9 N. E. 357, 57 Am. Rep. 120. So that,

whilst negligence, among other things, is alleged in overcrowding the cars, so that appellee had to stand, there is no evidence that the overcrowded condition of the car caused the collision or injury.

[3] In another instruction, the jury were informed that, if they found that appellee was injured "by an accident arising from a collision of the car upon which she was being carried with another car on its railroad, without fault on her part, as charged in the complaint, then the legal presumption is that the collision occurred, and injuries of the plaintiff, if any, were sustained as the result of some negligent act or omission of the defendant, and the burden of overcoming this presumption of negligence arising from the evidence of the occurrence of such collision and injury, if any, is upon the defendant." Another instruction covered the requirement that the material allegations of the complaint must be proven by appellee by a fair preponderance of the evidence. Taking the instructions together, the jury could not have been misled, or understood that the mere fact of the car being overcrowded created actionable negligence, or that the negligence relied on need not be proven.

[4] Instruction No. 4, after setting out the substance of the answer and reply, informs the jury that if appellee was a minor, she was not bound by the agreement. The jury are in effect told that the agreement is void, without any qualifications or reference to the subject of disaffirmance, while the law clearly is that it was avoidable. The evidence was that the check had been tendered back before the suit was brought, and that nothing had been received on account of it or the agreement, and it was brought into court, with the filing of the reply, for the benefit of appellant. The instruction under the evidence could not harm appellant, because it could mean no more than that the agreement under the facts shown was not binding upon appellee, and might be repudiated, and, as we have held as to the reply, that the tender of the check and bringing suit was a sufficient disaffirmance. Appellant was not harmed by the instruction.

[5] The sixth instruction was as follows: "A corporation operating a line of Interurban electric railroad, and carrying passengers for hire, extends to every person paying the stipulated fare an invitation to go upon its cars and be carried, and such company undertakes that its track, cars, and appurtenances are reasonably safe for the purpose of carrying passengers. If the car is run in an unusual manner, or cars are run in unusual proximity to each other, and a danger arises therefrom which does not ordinarily exist, it is the company's duty to warn passengers of such danger, in case time and opportunity exist to give such warning before an injury occurs. A passenger has the right to presume, in the absence of knowledge or

warning to the contrary, that all necessary precautions have been and will be taken for his safe transportation. If a danger arises of which the passengers are ignorant, they should be notified, so they may take steps to avoid it, in case time and opportunity exist before the accident occurs." The objection urged to this instruction is that it informs the jury that, if cars are run in unusual proximity, and a danger arises therefrom, it is the duty of the railroad to warn passengers of the danger before an injury occurs; but this statement is qualified by the language used, that if danger arises from thus running the cars, and by the phrase, "in case time and opportunity exist to do so." This instruction fairly leaves it to the jury to determine whether the circumstances are such as to require warning, and an opportunity to give it; it involves the question whether danger was reasonably to be apprehended in running cars in unusual proximity, and whether they were so run, and if there was such danger, and appellee was ignorant of it, there was a legal duty to give warning, if there was an opportunity to do so. *Citizens' Co. v. Hoffbauer*, 23 Ind. App. 614, 56 N. E. 54. In *Indianapolis Co. v. Horst*, 93 U. S. 291, 23 L. Ed. 898, it is said: "The highest degree of carefulness and diligence is expressly exacted. * * * The standard of duty should be according to the consequences that may ensue from carelessness." The question whether it was negligence, under the circumstances shown, to fail to give warning was fairly left to the jury.

[8] Objection is made to the seventh instruction, which charges, in effect, that, if appellee, without fault on her part, was injured by a collision, the presumption is that the collision and injury resulted from some negligent act or omission of appellant, and in order to overcome that presumption it would be necessary for it to prove that the collision could not have been avoided by the exercise of the highest practical care and diligence on its part. The specific objections are that the jury are instructed that if appellee was injured the injuries were the result of appellant's negligence, and that the burden of proof was upon appellant to overcome the presumption both of negligence and injury; the claim being made that appellee's injuries were caused from attending parties and dancing. The instruction is not fairly open to these objections. The occurrence of the collision, and the consequent injuries to appellee therefrom, are coupled together, which necessarily must concur, in order that the negligent act shall give rise to a cause of action. The evidence was fully heard upon the question as to whether the claims for damages arose from the accident, or from attending parties and dancing, and the amount of the judgment indicates that the

jury were somewhat careful in restricting the recovery to the injuries arising directly from the accident.

We find no error in the record, and the judgment is affirmed.

(48 Ind. App. 383)

DUNN v. MEANS. (No. 7,308.)

(Appellate Court of Indiana. Oct. 3, 1911.)

ADOPTION (§ 23*)—INHERITANCE FROM ADOPTED CHILD—RIGHTS OF ADOPTIVE FATHER.

Burns' Ann. St. 1908, § 3027, provides that when a wife dies intestate, leaving no child, but a widower and a father, surviving her, then her property, real or personal, shall descend three-fourths to the widower and one-fourth to the father. Section 870 declares that after adoption of a child it shall be entitled to and receive all the rights in the estate of the adopting father or mother, provided that, should the child die intestate, without leaving wife or husband, issue or their descendants, surviving him or her, seized of any property which may have come to such child by gift, devise, or descent from such adopting father or mother, such property, on its death, shall descend to the heirs of the adopting father or mother. Section 871 provides that after the adoption of such child the adopting father or mother shall occupy the same position towards the child that he or she would if the natural father or mother. *Held* that, where an adopted child inherited property from her adoptive mother, and died without issue, leaving a husband, her natural father and mother, and her adoptive father her surviving, the adoptive, and not the natural, father was entitled to one-fourth of the property so left, under section 3027, though at the time of the intestate's death it was not impressed with any ancestral quality; it having been purchased, however, with the proceeds of the inheritance from her adoptive mother.

[Ed. Note.—See other cases, see Adoption, Cent. Dig. § 42; Dec. Dig. § 23.*]

Appeal from Circuit Court, Johnson County; James E. McCullough, Special Judge.

Action by John C. Dunn against Ora W. Means. Judgment for defendant, and plaintiff appeals. Reversed, with directions.

Wm. Featherngill, for appellant. Miller & Barnett, for appellee.

ADAMS J. This action was brought by the appellant against the appellee for the partition of a certain lot in the city of Franklin, and for the appointment of a commissioner to sell the same and distribute the proceeds, one-fourth to the appellant and three-fourths to the appellee.

The question presented by this appeal arises upon an exception to the conclusions of law, stated by the court upon the special finding of facts. The facts, as disclosed by the finding, are briefly: That on the 30th day of September, 1886, John C. Dunn, the appellant, and his wife, Elizabeth F. Dunn, on their joint petition to the Johnson circuit court, and by the order and judgment of said court, adopted a minor child, Lily B. Littell, as their own child, who thereupon took the name of Lily B. Dunn; that at the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

time of said adoption the natural parents of said child were George M. Littell and Mary J. Standiford; that Elizabeth F. Dunn, prior to her marriage with appellant, had received into her keeping said child, a few days after her birth, and continued to keep her until the time of her marriage with appellant, which occurred when said child was about nine years of age; that soon after the marriage of appellant and said Elizabeth said child was adopted as the child of John C. and Elizabeth F. Dunn; that she remained a member of the family of said Dunn until the 9th day of May, 1900, when she intermarried with one Ora W. Means, the appellee; that said Lily B. Dunn had no property at the time of her adoption, and never received any property from her natural parents; that on July 24, 1901, Elizabeth F. Dunn died intestate, at Johnson county, the owner of certain real estate and personal property in said county; that she left surviving her, as her only heirs at law, the appellant and said adopted daughter, Lily B. Means; that Lily B. Means inherited from her adoptive mother the undivided two-thirds of 25 acres of land, and received from the the administrator of the estate of Elizabeth F. Dunn United States bonds of the value of \$5,600, a check for \$1,437.78, also a check for \$84.28, the amount of debts of the decedent paid by her; that the bonds were sold, the checks were cashed, and the whole amount, aggregating \$7,122.06, deposited in the Citizens' National Bank of Franklin to the credit of Lily B. Means, and so remained until checked out by her; that subsequently Lily B. Means purchased of appellant his interest in the 25 acres inherited by him from his wife; that said Lily sold said 25 acres for \$6,000, which was also placed to her credit in the Citizens' National Bank of Franklin; that in December, 1901, said Lily B. Means purchased the lot in the city of Franklin, which is the subject of this action, paying therefor the sum of \$5,000, payment being made in part by a check received for the sale of the real estate, and by her own personal check, drawn against her account in the Citizens' National Bank; that said Lily B. Means had no other property at the time of the purchase of said lot, except that herein noted; that on April 14, 1907, she died intestate, and left surviving her no child or children, or the descendants of any child or children, but left her husband (the appellee), her adopted father (the appellant), her natural father, George M. Littell, and her natural mother, Mary J. Standiford; that at the time of the death of Lily B. Means she was the owner in fee simple and in possession of said lot in the city of Franklin, and that said property was not susceptible of division, without injury to the owner thereof; that on October 14, 1907, George M. Littell, his wife joining therein, and Mary J. Standiford, executed quitclaim deeds to the appel-

lee, releasing to him whatever interest they had in said lot.

Upon the facts found, the court stated as conclusions of law that the appellant had no interest in the real estate of which Lily Means died the owner, was not entitled to partition thereof, and that the appellee was entitled to have his title quieted. The appellant having excepted to the conclusions of law, and assigned said conclusions as error, the question presented for determination is, whether or not the adoptive father inherited the undivided one-fourth of said real estate from Lily B. Means, or whether said undivided one-fourth was inherited by her natural father and mother, and passed to appellee by quitclaim deed?

Section 3027, Burns 1906, as applied to the facts before us, provides that when a wife dies intestate, leaving no child, but leaving a widower and a father surviving her, then her property, real and personal, shall descend three-fourths to the widower and one-fourth to the father. Section 870, Burns 1906, provides that after the adoption of a child "it shall take the name in which it is adopted, and be entitled to and receive all the rights and interest in the estate of such adopting father or mother, by descent or otherwise, that such child would if the natural heir of such adopting father or mother: Provided, however, that should such adopted child die intestate, without leaving wife or husband, issue or their descendants, surviving him or her, seized of any real estate, or owning any personal property which may have come to such child by gift, devise or descent from such adopting father or mother, such property so coming to such adopted child shall, on its death, descend to the heirs of said adopting father or mother, the same as if said child had never been adopted." Section 871, Burns 1906, provides that, "after the adoption of such child, such adopting father or mother shall occupy the same position towards such child that he or she would if the natural father or mother, and be liable for the maintenance, education and every other way responsible as a natural father or mother."

The manifest purpose of the statutes relating to the adoption of children cannot be construed to impose duties and obligations alone upon the adopting parents, but should be held to establish a reciprocal relation between adoptive parents and adopted children. At common law, the adoption of children by legal process was unknown, and we have borrowed the principle of adoption, incorporated into our statutes, from the civil law, which made an adopted child the child of the adopting parent for all legal purposes; and by our statutes the legal status of an adopted child is fixed. No distinction is made between the rights of an adopted child in the estate of the adopting father or mother and a natural child.

The findings in the case at bar disclose that the deceased wife of the appellee, and adopted daughter of the appellant, inherited from her adoptive mother, who was the wife of appellant, real estate and personal property of the value of more than \$10,000, all of which was changed from the form in which it was inherited by the intestate during her lifetime, but with the money realized from the property inherited the intestate purchased the real estate in suit. This property, at the time of the intestate's death, was not impressed with any ancestral quality, although all the property possessed by such intestate at the time of the purchase came to her from her adoptive mother.

The immediate question for determination is, Who is meant by the father and mother, in a case such as disclosed by the facts before us? It has been held by this court that the purpose of adoption is to fix the status of an adopted child as nearly as possible that of a natural child, and to give it the position in the family and all the rights and privileges of a child of both the husband and wife. The name of the child is changed; its identity merged into that of the adopting parents; and it becomes their child in all but blood. While the rule is that statutes in derogation of the common law will be strictly construed, the statutes of adoption will not be strictly construed as to defeat their purpose. *Bray v. Miles*, 23 Ind. App. 432, 436, 54 N. E. 446, 55 N. E. 510. That courts will look to the legislative intention in the interpretation of these statutes abundantly appears by the decisions of the Supreme Court. In *Davis v. Krug*, 95 Ind. 1, 10, it is said: "If we are right in our interpretation of the legislative intention in the enactment of our law for the adoption of heirs, then it must be that the adopting father or mother, or his or her heirs, will inherit from the adopted child all such property, real or personal, as came to such child by gift, devise, or descent from the adopting parent or parents, whenever he, she or they would have inherited such property, if the adopted child had been the natural child of the adopting father or mother. In such case and as to such property, we are of opinion that the adopting father or mother, or his or her heirs, will inherit from the adopted child to the entire exclusion of the natural heirs of such child."

That the equities of the case will occupy a large place in construing the statutes in question is fully established by the opinion of Judge Elliott, in the case of *Humphries v. Davis*, 100 Ind. 274, 50 Am. Rep. 788, in which it is said: "The equity of the case is with the surviving husband, and against the natural mother, who gave up her child, surrendering all maternal ties, and suffering a stranger to take a mother's place. The husband, who enabled his wife to acquire or preserve her property, has infinitely stronger claims than the natural mother, who cast

aside her child. Rules of law are intended to secure justice, and justice requires that the husband, who has maintained the wife, should be preferred to the mother of a child, which was the child of his wife only by adoption. Equity is natural justice, and natural affection and natural right make a strong equity in the husband's favor." Again, at page 281 of 100 Ind. (50 Am. Rep. 788), it is said: "As the status of the surviving husband and adoptive father is that of father, his interest in the land which the deceased child held in virtue of the rights vested in it by adoption is that of a father, since it is of that property, as the subject, that the status of parent and child is predicated. This is a just, as well as a logical, result. It is not to be presumed that the Legislature meant to violate logical rules by creating the legal relation of child, without the corresponding one of parent, nor that they meant to thrust out the surviving husband and father for the benefit of a person that was a stranger to the ancestor, who was the source of title. * * * To produce uniformity and harmony, it must be held, as we now hold, that the death of the adoptive child casts the inheritance which came to him through the joint adoption back to the adoptive father, and not upon the natural mother, who was an utter stranger to the person from whom the title flowed."

In *Paul v. Davis*, 100 Ind. 422, 423, the court said: "The adoptive child does become the stirps or stock of inheritance; but to whom does it sustain this relation as to the property acquired by inheritance from the adoptive parents? Doubtless this relation exists between such a child and its children; they are of the original stock of descent, for they bear the relation of grandchildren to the adoptive parents. The legal relation does not end with the death of the adoptive child, and so the line of descent goes back, in default of wife or children, to the source from which the property came. This is strictly equitable and in harmony with principle. The natural mother is not of the stock from which the property came to the child, which was given in adoption to others, and between her and that stock there is a gap which is not bridged by any statute or by any principle of justice. It is strictly consistent with justice, with principle, and with our statutory scheme of descents to prefer the adoptive father to the natural mother, in cases where the adoptive father was of the original stock of inheritance. The natural mother is as to that stock an utter stranger, and, as to property descending from that stock, has suffered another to fully occupy the status of parent, with all of its legal incidents. Where the adoptive child dies under circumstances such as would, in a similar case, cast the inheritance upon the father of a natural child, the adoptive father inherits the property which the adoptive child

acquired by virtue of the status fixed by the act of adoption."

While these cases are predicated upon a state of facts different from the facts at bar, the principle declared, that the adoptive father inherits the property of the adoptive child acquired by virtue of the status fixed by the act of adoption, is general, and, we think, includes the case made out by this appeal.

In support of the judgment below, counsel for appellee cite the case of *Roundtree, Administrator, v. Pursell*, 11 Ind. App. 522, 39 N. E. 747, a case which we think was properly decided, and which was followed in the later case of *Gray v. Swerer*, 94 N. E. 725; but both cases call for a construction of the clauses of section 2994, Burns 1908. These cases hold where the intestate dies without leaving husband or wife, and without direct heirs in the ascending or descending line, but with collateral heirs on both the paternal and maternal side, that the inheritance, if it came by gift, devise, or descent from the paternal line, shall go to the paternal heirs, and if from the maternal line the same shall go to the maternal heirs; but if the estate came to the intestate otherwise than by gift, devise, or descent, one-half shall go to the paternal and one-half to the maternal kindred. These cases further hold that, in order to descend exclusively to the paternal or maternal kindred, the inheritance at the time it passed to the intestate must be in specie, and descend from the intestate in the same form in which it was inherited. This rule, which requires the perfect identification of the property, in order to pass to one line of kindred exclusively, is a wise provision, for, while the maternal and paternal kindred may be of the same blood, and of equal degrees of kinship to such intestate, yet, if the inheritance clearly and unmistakably came from one line, and was not changed by the intestate during his lifetime, at his death it would pass to the line from which it came. The case at bar does not call for a construction of section 2994, *supra*.

In the case before us, the natural parents were strangers to the blood of the woman from whom intestate inherited all that she had, and, while the form was changed, the substance remained the same, and there was no confusion by the intermingling of the inheritance with property acquired from other sources. If, as we have seen, the statutes for the adoption of children, and the distribution of property incident to such adoption, are to be construed to secure justice, and in favor of the strong equities of the case presented by this appeal, then we believe that in this case the appellant must be deemed to be the father, as the word is used in section 3027, *supra*. To hold otherwise and to reward the natural parents, by casting upon them the fruits of the industry of strangers

to their blood, and to take all interest in the property from the surviving husband of the woman who took intestate within a few days after her birth, raised her, and richly endowed her, would be violative of every principle of right and natural justice, and would be opposed to public policy, which favors natural family life, and does not favor those who seek to escape the responsibilities of parenthood. With this view of the case, we think the court erred in stating its conclusions of law.

The judgment is therefore reversed, with instructions to the lower court to restate its conclusions of law in accordance with this opinion, and such further proceedings not inconsistent herewith.

LAIRY, C. J., and HOTTEL, IBACH, FELT, and MYERS, JJ., concur.

(30 Ind. App. 161)

COURT OF HONOR v. RAUSCH.¹

(No. 7,306.)

(Appellate Court of Indiana. Oct. 3, 1911.)

INSURANCE (§ 719*)—FRATERNAL INSURANCE—CHANGE OF BY-LAWS—EFFECT.

The laws of a mutual benefit order, at the time of the issuance of a certificate, provided that the certificate should be incontestable after two years, and thereby made the defense of suicide, committed two years after the issuance of the certificate, unavailable. Before the expiration of the two years, the order repealed the incontestable clause, and adopted a percentage basis, in case of violations of the laws of the order. The member lived for more than five years after the issuance of the certificate. *Held*, that under the rule that amendments of by-laws may not change contracts made, so as to modify the obligations created thereby, the order could not repeal the incontestable clause, so as to make the defense of suicide available.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1855; Dec. Dig. § 719.*]

Appeal from Superior Court, Vanderburgh County; Alexander Gilchrist, Judge.

Action by Elizabeth Rausch against the Court of Honor. From a judgment for plaintiff, defendant appeals. Affirmed.

Chas. L. Wedding and W. B. Risse, for appellant. Chas. B. Harris, for appellee.

IBACH, J. The complaint in the case in substance alleges that appellant, the defendant in the trial court, is a mutual benefit society, duly organized and engaged in the business of insuring the lives of its members; that on the 8th day of May, 1903, George Rausch became a member of the society, and it issued to him a certificate of membership, whereby it promised to pay, on his death, the sum of \$1,000 to his wife, to whom the certificate was made payable at the date of its issue; that on the 11th day of September, 1908, the said George Rausch died, and up to the time of his death he had performed all the conditions required of

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes
¹Rehearing denied. Transfer to Supreme Court denied.

him by the terms of his certificate and by his contract of insurance; and that the appellee had also done everything required of her by the terms of such certificate and contract of insurance. It is also averred that on the 6th day of October, 1908, proof of the death of said George Rausch was made, and that the amount of the certificate was due to appellee on the 6th day of January, 1909.

The demurrer to the complaint being overruled, appellant filed answer, averring that the said George Rausch, in his application for membership in the appellant order, agreed to conform to the constitution, laws, and rules of the order then in force and which might thereafter be adopted; that he committed suicide on the 11th day of September, 1908, which was in violation of the laws of the order, and which violation fixed the amount payable on the certificate at 5 per cent. per annum for each year of membership; that in accordance with such laws the amount due the appellee was \$266.67, which amount had been tendered her.

Appellee replied to the answer, saying that at the time of the application for membership and the issuing of the certificate sued on there was in force a provision among the laws of the order that the certificate should be incontestable after two years, upon certain conditions therein set forth, and that such provision was in force until July 1, 1903, when the repeal thereof, which was made on May 27, 1903, became effective. A demurrer to the reply for want of facts was overruled. Upon the issues thus formed, the case was tried, and appellee obtained judgment for \$1,000 and interest, less the amount of the tender which had been made and paid into court.

The errors relied upon by appellant for reversal are: (1) The overruling of the demurrer to the reply, and (2) overruling the motion for a new trial.

It will be observed that this appeal presents very much the same question determined in this court in the case of *Court of Honor v. Hutchens*, 43 Ind. App. 321, 82 N. E. 89. With the exception of the names of the member and the appellee in that case, the amount of the insurance, the date of the issue of the certificate, and the date of the member's death, the pleadings are substantially the same as in the case before us. Appellant's counsel, however, insists that there is a difference in the two cases, in that in the *Hutchens* Case the insured had held his certificate for more than two years before the incontestable clause was repealed, and in this case the insured had held the certificate less than two years before the incontestable clause was repealed. It is true that the insured in the case at bar was in possession of his certificate less than two years when appellant repealed the incontestable clause contained therein, but his death did not occur for more than five years after the issue of the certificate to him. There is no

legal difference between the two cases: The terms of the contract made by the parties fix their respective legal rights, and, so far as we are able to discover, the contract entered into between *Hutchens* and the insurance association is identical with that made by *Rausch* and the same association, appellant in the present case; and the decision of the *Hutchens* Case is controlling here. We can only emphasize what is determined by the court in that case.

After the expiration of two years, the defense of suicide became unavailable, and the contract of insurance contained in the certificate became incontestable for any reasons, except those stated in the incontestable clause, which in this case are two, namely, failure to pay assessments, and violating the law of the order. The certificate under consideration was issued to the insured more than five years before his death. It has long been settled, not only by the *Hutchens* Case, but by numerous cases determined by the courts of this state and others, that amendments to by-laws which may be adopted by societies, such as appellant, cannot in any way change the terms of contracts previously made, so as to impair or modify the obligations created in contracts of insurance. Compliance with future by-laws has reference to such by-laws as may be adopted at some future time, pertaining to the duties of the members, but cannot affect the rights granted such members by virtue of the contract of insurance. We therefore hold that the appellant could not repeal the incontestable clause of *Rausch's* policy, and pass a 5 per cent. per annum by-law, and thereby lessen the liability contained in the policy when issued to him at a previous date, and thereby defeat appellee's right to recover the full amount of \$1,000.

Counsel for appellant urge that the decision of the case of *Court of Honor v. Hutchens*, supra, is in conflict with the decision of the Supreme Court, in the case of *Supreme Lodge v. Knight*, 117 Ind. 489, 20 N. E. 479, 3 L. R. A. 409. While there are points of similarity in the two cases, the *Hutchens* Case and the case at bar can be readily differentiated from the *Knight* Case by reference to the following words of Judge Elliott, in his opinion (117 Ind. 498, 20 N. E. 484 [3 L. R. A. 409]), as well as on other grounds: "It is to be constantly kept in mind that the contract does not bind the society to pay a designated sum absolutely and at all events, but, on the contrary, the contract, by its express terms, limits the beneficiary to a specific fund derived from assessments." The contracts in the present case and in the *Hutchens* Case bind the society to pay a designated and certain sum, and not a contingent sum.

The judgment is affirmed.

LAIRY, C. J., and FELT, ADAMS, HOTTEL, and MYERS, JJ., concur.

(48 Ind. App. 392)

HARVEY et al. v. HAND et al. (No. 7,460.)
(Appellate Court of Indiana, Division No. 1.
Oct. 3, 1911.)

1. PLEADING (§ 225*)—DEMURRER—AMENDMENT—EFFECT.

Where several complaints and paragraphs thereof all state the same cause of action, and were filed after successive demurrers had been sustained to each, with no election to stand on either, but with leave taken to amend before the filing of the last paragraph, such paragraph would be held to constitute the only complaint before the court, and would be considered an amended complaint without reference to the manner in which it was entitled, and the filing thereof a waiver of alleged errors in sustaining demurrers to the previous complaints.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 575-583; Dec. Dig. § 225.*]

2. PLEADING (§ 192*)—FORM—REPETITION.

Where, in a suit to reform a deed, the facts alleged were sufficient to enable a person of common understanding to know what was intended, it was not subject to demurrer because it would have been subject to motion to strike certain parts thereof as repetition.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 408-427; Dec. Dig. § 192.*]

3. PLEADING (§ 72*)—COMPLAINT—CAUSE OF ACTION.

Where a complaint states facts which entitle plaintiff to any relief, though not to all the relief prayed for, it is sufficient.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 143, 144; Dec. Dig. § 72.*]

4. REFORMATION OF INSTRUMENTS (§ 16*)—GROUNDS OF RELIEF—MISTAKE.

Equity in a proper case has jurisdiction to reform a deed or written contract between the parties whenever, through mutual mistake or mistake of one of the parties accompanied by fraud of the other, the instrument does not, as reduced to writing, correctly express the agreement of the parties.

[Ed. Note.—For other cases, see Reformation of Instruments, Cent. Dig. § 68; Dec. Dig. § 16.*]

5. REFORMATION OF INSTRUMENTS (§ 36*)—TRUST—CREATION—PLEADING—FRAUDULENT INTENT.

Burns' Ann. St. 1908, § 4017, provides that, when a conveyance for valuable consideration is made to one person and the consideration is paid by another, no use or trust results in favor of the latter, but title vests in the former, subject to the next two sections. Section 4019 declares that the provisions of section 4017 shall not extend to cases where the alienee shall have taken an absolute conveyance in his own name without the consent of the person with whose money the consideration was paid, or where such alienee, in violation of some trust, shall have purchased the land with moneys not his own, or where it shall be made to appear that by agreement and without any fraudulent intent the party to whom the conveyance was made, or the party in whom title shall vest, shall hold the land or some interest therein in trust for the party paying the purchase money or some part thereof. *Held*, that section 4019 referred to resulting trusts only; and hence, in a suit to reform a deed so as to make it evidence an express trust as to a portion of the property, it was not essential under such section that the complaint state that the agreement to hold in trust was without any fraudulent intent.

[Ed. Note.—For other cases, see Reformation of Instruments, Dec. Dig. § 36.*]

6. REFORMATION OF INSTRUMENTS (§ 8*)—DEEDS—ANTECEDENT CONTRACTS.

In a suit to reform a deed because of mistake, it is essential that the antecedent contract on which the reformation is based be founded on a valuable consideration, and that it also appear that those seeking a reformation are not mere volunteers.

[Ed. Note.—For other cases, see Reformation of Instruments, Cent. Dig. §§ 21, 22; Dec. Dig. § 8.*]

7. REFORMATION OF INSTRUMENTS (§ 36*)—DEEDS—EXPRESS TRUST.

In a suit to reform a deed so that it would evidence an express trust as to a portion of the property, it is proper for the purpose of determining the validity of the trust created by the reformation to consider the instrument as reformed.

[Ed. Note.—For other cases, see Reformation of Instruments, Dec. Dig. § 36.*]

8. REFORMATION OF INSTRUMENTS (§ 8*)—COMPLAINT—CONSIDERATION.

Where, in a suit to reform a deed, absolute on its face, so as to evidence an express trust as to a portion of the land, it was alleged that the deed expressed a consideration of \$2,000, and it was also averred that it was a part of a family settlement, and that plaintiffs had helped to clear up and make the fact of which the land was a part, the complaint alleged sufficient consideration for the conveyance to support the action.

[Ed. Note.—For other cases, see Reformation of Instruments, Cent. Dig. §§ 21, 22; Dec. Dig. § 8.*]

9. TRUSTS (§ 365*)—ESTABLISHMENT—RIGHT TO RELIEF—LACHES.

An absolute deed sought to be reformed so as to evidence an express trust as to part of the land was executed to defendant by her parents August 8, 1893. The antecedent contract leading up to the deed and which plaintiffs claimed should have been carried into it provided that the grantor should retain a life estate in all the land conveyed, and plaintiff's interests therein were postponed until the grantor's death. Plaintiff alleged that the deed was recorded with the understanding and belief by all interested therein that all the terms of the parol contract had been carried into the deed. The grantor did not die until January 4, 1905, and plaintiffs had no knowledge until after his death that the deed did not contain the provisions of the parol contract, when they made demand on the grantee that she carry out the contract which she refused, after which suit was brought. The situation of the parties had not changed in the meantime, and no interest of a third party had intervened, nor had defendant been induced by the delay to incur any expense on the land, or to do anything to her detriment. *Held*, that complainants were not barred from relief by laches.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 568-573; Dec. Dig. § 365.*]

10. FRAUDS, STATUTE OF (§ 142*)—EXPRESS TRUST—REFORMATION OF INSTRUMENTS.

In a suit to reform a deed so as to evidence an express trust alleged to have been omitted therefrom by mistake, the antecedent contract will be considered as written under the rule that equity deems as done that which the parties to the contract had agreed and intended to do, and hence the contract was not within the statute of frauds.

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. § 343; Dec. Dig. § 142.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

11. FRAUDS, STATUTE OF (§ 142*)—WRITTEN INSTRUMENTS—MISTAKES IN DESCRIPTION.

The statute of frauds has no application to mistakes in description in written instruments.

[Ed. Note.—For other cases, see *Frauds, Statute of*, Cent. Dig. § 343; Dec. Dig. § 142.*]

Appeal from Circuit Court, Boone County; W. H. Parr, Judge.

Action by Stephen Harvey and another against Mary Hand and another to reform a deed. Demurrers having been sustained to the amended complaint, plaintiffs appeal. Reversed, with instructions.

Hanly, McAdams & Artman, Henry C. Cox, and P. H. Dutch, for appellants. A. J. Shelby and Shirts & Fertig, for appellees.

HOTTEL, J. Action by the appellants to reform a deed made to appellee Mary J. Hand by her parents, Andrew Harvey and wife. The deed sought to be reformed is absolute on its face, and conveys to Mary J. Hand the fee-simple title to 93½ acres of land in Boone county, Ind. By this action appellants seek to reform the deed so as to make it conform to an alleged antecedent contract or agreement between said Mary J. Hand and her parents, which appellants claim was intended to be incorporated in the deed, and by the terms of which it was agreed between said parties that such deed should convey the title to 53½ acres of said land so conveyed to Mary J. Hand in trust for these appellants, and that the grantor should retain a life estate in all the land conveyed. The transcript contains numerous complaints, original, amended, and additional, to all of which demurrers were sustained, and these rulings constitute the errors assigned.

Appellees first insist that, because of these numerous complaints and the failure of appellants to properly number their paragraphs, the record is in such a confused state that no question is presented to this court as to the sufficiency of any paragraph. An examination of the record, however, leads us to a different conclusion, and one that is in accord with the second contention of appellee, namely, that "the paragraph of complaint last filed, though styled 'additional paragraph,' having been filed after demurrers sustained to each preceding paragraph, should be treated as an amended complaint, and as a waiver of all previous exceptions."

[1] The transcript herein discloses that said several complaints and paragraphs thereof all state the same cause of action, that successive demurrers were filed and sustained to each, with no election to stand upon either, but with leave taken to amend before the filing of the last paragraph. Under such circumstances, the last paragraph filed "constituted the only complaint that was then before the court, * * * and was in legal effect an amended complaint without regard to the manner in which it was entitled," and the al-

leged errors in sustaining the demurrers to the previous complaints were waived by not electing to stand upon either, and by taking leave to amend and pleading further. This position of appellees is supported by authority and conceded by appellants. *Scheiber v. United Telephone Co.*, 153 Ind. 609, 55 N. E. 742; *Hargrove v. John*, 120 Ind. 285, 22 N. E. 132; *Hormann v. Hartmetz*, 128 Ind. 353, 27 N. E. 731.

It is next insisted by appellee that this amended complaint is so uncertain, and contains so many repetitions, that it does not comply with the second subdivision of section 343, Burns' 1908, and for this reason might have been stricken out, and that inasmuch as the same result has been reached by the ruling on the demurrer, no available error is thereby presented.

[2] The complaint is not a model, and violates the letter of the clause of the section of statute referred to in the matter of repetition, and parts of the same should have been stricken out upon proper motion in the court below; but the complaint falls clearly within the requirements of the section cited, in that the cause of action attempted to be stated therein is stated "in such a manner as to enable a person of common understanding to know what is intended," and should not, therefore, on account of the infirmities mentioned, be held insufficient as against demurrer, if it be in other respects sufficient to state a cause of action. In the prayer of this paragraph appellants, in addition to seeking the reformation of the deed, also ask that the title to the 53½ acres be quieted, and appellee insists that the complaint is not good upon this theory, and that, therefore, there was no error in sustaining the demurrer thereto. Appellants concede that the paragraph lacks the essential elements of a complaint to quiet title, and insist that it does not proceed upon that theory, but that its sole theory is the reformation of the deed in question, and that a complaint which shows that the plaintiffs are entitled to some relief, though not entitled to all the relief prayed for, is sufficient.

[3] It is clear that the controlling, if not the sole, theory of this complaint is the reformation of the deed, and appellants' position that where the complaint states facts that entitle the plaintiff to any relief, though not to all, the relief prayed for is sufficient, is abundantly supported by authority. *Shepardson v. Gillette*, Audr., 133 Ind. 125, 31 N. E. 788; *Linder v. Smith*, 131 Ind. 147, 30 N. E. 1073; *Gowdy Gas Well, etc., Co. v. Patterson*, 29 Ind. App. 261, 64 N. E. 485. The only question remaining to be considered, and the real question in the case, is whether or not the complaint states facts sufficient to entitle the plaintiffs to the reformation of the deed in question.

The complaint is too lengthy to set out in

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

detail, and we will set out only that part necessary to an intelligent understanding of the decision of the question here involved and the grounds upon which this opinion is based. It alleges, in substance, that Andrew Harvey and his daughter, Mary J. Hand, entered into an antecedent parol contract, by the terms of which the father and his wife agreed to convey to appellee the 93½ acres of land described in the deed; that 40 acres of the same were to be held by appellee in her own right, and 53½ acres particularly set out and described in the complaint were to be held by her in trust for the appellants; that the entire tract was to be held by her subject to the life estate of the grantor; that appellee agreed to accept such deed, and perform its terms and conditions. The complaint then alleges that said deed was actually executed, a copy of which is set out in the complaint; that by the mutual mistake of all the parties to the deed, and of the scrivener who drew the same, there was not inserted in such deed that part of said parol contract which provided that appellee should take and hold 53½ acres of the said real estate in trust for appellants, nor that part of said contract which reserved to the grantor the life estate in the said lands; that the grantor caused the deed to be recorded the day after its execution; that he at the time of the execution of the deed and thereafter, up to the time of his death, always believed and understood that such deed expressed the terms of said parol agreement; and that the appellee Mary J. Hand accepted the deed, understanding and believing that it so expressed said antecedent contract, pursuant to which it was executed; that the appellants did not know until after their father's death that said deed did not so express said contract entered into between him and his daughter.

Upon the subject of the relation of the parties and the consideration that entered into the making of the deed, the complaint alleges the following facts: "That the defendant Harvey Hand is the husband of Mary J. Hand. That the plaintiffs Stephen * * * and Noah Harvey are sons * * * of Andrew Harvey, deceased. That, besides the said children, Malinda Dodson and George W. Harvey are the children of Andrew Harvey, but are not defendants in this suit. That Andrew Harvey died on the 4th day of January, 1905, intestate. That on the 8th day of August, 1893, said Andrew Harvey was the owner in fee simple of 172 acres of land * * * situate in Boone county, Ind. * * * (and personal property of the value of not to exceed \$300). That on the said * * * day he made a division of all of his land among his children, to Malinda Dodson, 40 acres, to George Harvey, 40 acres, and to Mary J. Harvey, now Mary J. Hand, 93½ acres, 53½ of the said 93½ acres to said * * * Mary J. Hand in trust for said Stephen * * * and Noah Harvey, plain-

tiffs, and 40 acres of said 93½ acres absolutely to * * * Mary J. Hand. * * * That said Andrew * * * was old and infirm. * * * That * * * plaintiffs had helped to clear up and make said farm * * * so deeded to his children. It was not the intention of said Andrew * * * to make any difference among his children as to what they should have of his estate. * * * That the plaintiffs in this suit had already paid a fair consideration for said 53½ acres. * * * Said Andrew * * * intended to make * * * Mary J. Hand equal with said Stephen * * * and Noah Harvey in conveying said real estate. * * * He desired * * * to retain possession, rentals, and profits on said lands during his lifetime. That the consideration for said land was natural love and affection, together with the consideration stated in the deed." The consideration expressed in the deed is \$2,000.

[4] That a court of equity may in a proper case be invoked to reform and correct an instrument, and make it correctly state the true agreement of the parties when it falls so to do is well settled. The rule in such cases is: "Equity will reform a written contract between the parties whenever, through mutual mistake or mistake of one of the parties accompanied by the fraud of the other, it does not as reduced to writing correctly express the agreement of the parties." *Citizens' National Bank v. Judy*, 146 Ind. 322-340, 43 N. E. 259, 264. See the authorities in this case collected and cited.

[5, 6] Appellee insists, however, that this complaint is bad (1) because it fails "to aver that the alleged agreement to hold in trust was without any fraudulent intent." To support this position counsel cite section 4019, Burns' R. S. 1908, and authorities under note 3 thereof. This section of statute which makes necessary such an allegation in seeking the enforcement of a trust in certain instances relates to a resulting trust mentioned and provided for by the statute, while the trust sought to be created by the reformation of the instrument here sought to be reformed is an express trust created, not by operation of a statute, but by the express contract of the parties, and the statute relied upon and the authorities cited thereunder by appellee have no application. (2) Appellee insists that this complaint is bad because it fails to aver "that there was any consideration moving from appellants to support the alleged trust," and that a "donee or volunteer cannot set up a resulting trust and have reformation nor in any manner secure specific performance." In actions of this character, seeking the reformation of an instrument in a court of equity, it is the law, and so conceded by appellants, that the antecedent contract upon which the reformation is based must be founded upon a valuable considera-

tion, and those seeking the reformation must not be mere volunteers. *Baker et al. v. Pyatt*, 108 Ind. 61-71, 9 N. E. 112; *Pearson v. Pearson*, 125 Ind. 841, 25 N. E. 342; *Peterson v. Boswell*, 187 Ind. 211, 36 N. E. 845; *Mason et al. v. Moulden*, 58 Ind. 1; *Citizens' National Bank of Attica v. Judy*, 146 Ind. 322, 43 N. E. 259.

[7] Appellants, however, insist that the allegations of this complaint clearly show a consideration, and in this connection insist that in considering the allegations of the complaint upon this subject we must treat the deed sought to be reformed as reformed, and that, when so reformed, it will show a consideration moving not from appellee alone, but from the appellants also. While it is true that for the purpose of determining whether or not the instrument sought to be reformed would when reformed express a valid and enforceable trust, it is proper that the instrument should be considered as reformed; yet we question whether this same rule would apply in determining whether or not the complaint alleges a consideration for the trust in the absence of any allegation in the pleading, or the unreformed instrument showing any such consideration moving from the plaintiffs, and in the absence of the complaint showing any relation between the parties tending to support such consideration. In determining the validity of the trust created by the reformation, it is proper to consider the instrument as reformed because the theory of the action makes its validity rest upon the reformation, and the complaint in such cases is required to allege the antecedent agreement or contract upon which the reformation is predicated. No such reason exists for reading into the instrument such reformation in determining whether or not the complaint alleges a consideration for the estate or interest in the land sought to be created by the reformation; but, in view of the other allegations of this complaint, we deem it unnecessary to decide this question.

[8] In addition to the consideration of \$2,000 expressed in the deed which is set out in the complaint it is alleged, there was the further consideration of love and affection, and that the appellants had helped to clear up and make the farm; that they had already paid a consideration for said deed. There are allegations, also, that in effect show that the making of this deed was a part of a family agreement and settlement. As throwing light upon the force and effect that should be given to these allegations in determining the sufficiency of the complaint upon this question, we quote from 12 Am. & Eng. Enc. of Law (2d Ed.) p. 875, which is quoted in several cases by our Supreme Court with approval. "Family agreements and settlements are treated with especial favor by the courts of equity, and equities are administered in regard to them which are not applied to agreements generally, and this on

the ground that the honor and peace of families make it just and proper to do so." *Emmons v. Harding*, 162 Ind. 154-163, 70 N. E. 142; 12 Am. & Eng. Enc. L. (2d Ed.) 875; *St. Clair v. Marquell*, 161 Ind. 56-66, 67 N. E. 693; *Baker v. Pyatt*, 108 Ind. 68, 69, 9 N. E. 112; *Wright, Adm'r, v. Jones*, 105 Ind. 17-27, 4 N. E. 281. "A deed by a father to a son in consideration of services already rendered and love and affection may be reformed. * * * It is settled that equity will not intervene for the reformation of a deed which is purely voluntary, resting upon no valuable consideration whatever. * * * On the other hand, if there is any valuable consideration, no difference how small, supplemented by the consideration of love and affection, a mistake in a deed may be reformed." *Citizens' National Bank v. Judy*, 146 Ind. 332, 43 N. E. 262; *Mason v. Moulden*, 58 Ind. 1; *Baker v. Pyatt*, supra. The language of the court used in this last case at page 64 is applicable and controlling in this case. We quote: "So far as the conveyance was based upon love and affection, it may be said to have been a gift, but there is a positive averment that the conveyance was made, not only in consideration of love and affection, and by way of dividing the land among the children, but also in consideration of \$2,600 paid to the grantor. The averments, taken together, we think are sufficient upon the subject of consideration to make the paragraph good as against the demurrer." These authorities we think make clear the fact that the allegations of the complaint in this case upon the subject of a consideration are sufficient.

[9] Appellee's next objection to this complaint is that it discloses such a lapse of time between the making and recording of the deed and the bringing of this suit that the "cause of action, if any ever existed, has been lost by laches." It must be remembered, however, in this connection that the complaint also alleges, in substance, that by the terms and provisions of the antecedent parol contract which it is alleged should have been carried into the deed that the grantor was to retain a life estate in all of said real estate conveyed, and the appellants' interest therein was postponed until his death; that said deed was placed of record with the understanding and belief by all interested therein that all the terms of said parol contract had been carried into said deed; that the said grantor did not die until the 4th day of January, 1905; that appellants never knew until after his death but that such deed so recorded contained the provisions of said parol contract; that, when such alleged omission was brought to their attention, demand was made of appellee that she carry out said contract, and she refused. It should be added, also, that, so far as the allegations of this complaint show, the situation of appellee has in no sense changed during this period, the in-

terest of no third party has intervened, appellee has not been by the delay induced to incur any expense on the land or to do anything to her detriment, but the delay has been to her benefit rather than to her injury.

While it is true that "equity aids the vigilant, not those who slumber on their rights," yet courts of equity have not and cannot fix any definite or specific periods of delay that, like the statutes of limitations, bar the right to relief in such courts, and each particular case must be determined from its own facts and circumstances, "but in every case, if an argument against relief which otherwise would be just is founded upon mere delay, that delay, of course, not amounting to a bar by any statute of limitations, the validity of that defense must be tried upon principles substantially equitable." *Citizens' National Bank of Attica v. Judy*, supra; *Lindsay Petroleum Co. v. Hurd*, L. R. 5 P. C. 221; *Earl v. Van Natta*, 29 Ind. App. 532, 64 N. E. 901; *Koons, Guardian, v. Blanton*, 129 Ind. 383, 387-389, 27 N. E. 334. The application of the principles announced in these cases relieve the complaint in this case from the charge that it shows upon its face such laches as amounts to a defense to the cause of action otherwise stated therein.

[10] Lastly, appellee insists that this complaint is bad because it makes a case within the statute of frauds. This is not an action to enforce a parol contract for the sale of real estate or any interest therein, but is an action to so reform a written contract that it will contain and express that which was agreed upon and intended by the parties. In such case the contract is in all intents and purposes written, and "equity deems as done that which the parties to the contract had agreed and intended to do." *Citizens' National Bank v. Judy*, supra, page 331 of 146 Ind., page 261 of 43 N. E. Under this rule and the allegations of this complaint, the deed in question should have contained, and in equity does contain, an express grant to appellee of 53½ acres of the land conveyed by said deed to have and to hold the same in trust for appellants. This is an express trust in writing in no manner affected by the statute of frauds.

[11] The statute of frauds "does not apply to mistakes in description" in written instruments. *Morrison v. Collier*, 79 Ind. 417-421. We think the amended complaint in this case contains all the essential elements of a complaint for the reformation of a written instrument, and that the demurrer thereto should have been overruled.

Judgment reversed, with instructions to the court below to overrule the demurrer to the last-amended complaint, entitled "Additional paragraph of complaint," and for further proceedings in accord with this opinion.

(48 Ind. App. 412)

MEYER BROS. COFFEE & SPICE CO. v. PAULEY. (No. 7,311.)

(Appellate Court of Indiana, Division No. 2. Oct. 4, 1911.)

1. APPEAL AND ERROR (§ 1011*)—FINDINGS—CONCLUIVENESS.

A finding on conflicting evidence cannot be disturbed on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3983-3987; Dec. Dig. § 1011.*]

2. LIVERY STABLE KEEPERS (§ 6*)—CARE OF HORSES—COMPENSATION—EVIDENCE.

An owner of a livery stable who receives a horse of defendant, the latter agreeing to pay regular board for it, must, to recover for the board, show that the owner agreed to pay a particular price, or show the reasonable value of the board.

[Ed. Note.—For other cases, see Livery Stable Keepers, Dec. Dig. § 6.*]

Appeal from Superior Court, Marion County; Vinson Carter, Judge.

Action by the Meyer Bros. Coffee & Spice Company against Harry H. Pauley. From a judgment for defendant on his counterclaim, plaintiff appeals. Reversed, and new trial ordered.

Clarke, Clarke & Holderman, for appellant. R. N. Miller, for appellee.

LAIRY, C. J. Appellant purchased a horse from appellee, who was in the livery business in the city of Indianapolis, for the price of \$115. Appellant used the horse in its business for some time, when it became lame, and the humane officers notified it not to work the animal longer. Thereupon, as claimed by appellant, it returned the horse to appellee, and demanded the return of the purchase price, upon the ground that the appellee, in the sale of the horse, had represented him to be sound, when, in fact, he had a disease known as "ringbone," which resulted in the lameness and rendered him of little value. Appellee refused to return the purchase price, but the horse was left at his livery stable, where it was fed and cared for until January 18, 1907, at which time appellee sold him for \$75, and gave appellant credit for that amount on the bill for board. This action was brought by the appellant to recover the purchase price of the horse, upon the theory that the contract of sale was tainted with fraud, and had been rescinded on that ground. The appellee filed a general denial to the complaint, and also filed a counterclaim, in which he demanded judgment in the sum of \$158 for board and care of the horse during the time he remained at the livery stable of appellee. To this counterclaim there was a general denial. No question is presented as to the form or sufficiency of the pleadings. The case was tried by the court and resulted in a judgment in favor of

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep't Indexes

appellee on his counterclaim for the sum of \$78.90.

[1, 2] Appellant seeks a reversal of the judgment on the ground that the evidence is insufficient to sustain the judgment. Upon the issues of fraud and rescission presented by the complaint and the answer thereto, the evidence is conflicting, and therefore the findings of the trial court cannot be disturbed on appeal. This is conceded by appellant, but it contends that the evidence is insufficient to sustain the finding and judgment in appellee's favor on the counterclaim. The judgment in favor of appellee is based upon the allegations contained in the counterclaim that appellant was indebted to appellee in the sum of \$158.90 for boarding horse, horseshoeing, and horse hire furnished at the special instance and request of appellant, and upon the evidence tending to support these allegations. The evidence shows that the horse was at the livery stable of appellee from May 1, 1906, to January 18, 1907, and that the appellant agreed to pay the regular board for him, but there is no evidence that appellant agreed to pay any particular price for board of the horse, and there is no evidence showing or tending to show what it was reasonably and fairly worth to board and care for a horse at a livery stable in Indianapolis during the time this horse was so boarded. If there were any evidence showing or tending to show the ordinary or usual price for boarding horses in Indianapolis at the time, the judgment could be sustained, but, in the absence of such evidence, we are compelled to reverse it. Counsel for appellee has failed to call our attention to any evidence upon this branch of the case, and we have carefully searched the record in a vain attempt to discover such evidence.

The motion of appellee for a new trial should have been sustained. The judgment of the trial court is therefore reversed, with directions to grant a new trial.

(251 Ill. 13)

JUSTICE v. WILKINS et al.

(Supreme Court of Illinois. June 20, 1911.

Rehearing Denied Oct. 4, 1911.)

1. EXECUTORS AND ADMINISTRATORS (§ 17*)—ADMINISTRATION—APPOINTMENT.

Administration Act (Hurd's Rev. St. 1909, c. 3) § 19, subd. 8, provides that, if a decedent leaves neither children, father, mother, brothers, sisters, or grandchildren, then administration shall be granted to the next of kin, or any competent person nominated by them, and that only such persons as are entitled to administer under the act shall have the right to nominate, and, when several are claiming and are equally entitled to administer, the court may grant letters to one or more of them, preferring relatives of the whole to those of the half blood. *Held*, that the statute was mandatory, and that where intestate died without children, or descendants of children, parents, brothers, or sisters, leav-

ing as his next of kin some 16 nephews and nieces, the court had no jurisdiction to appoint a stranger to the class, nominated by one of the nieces, unless the others in the same class who were equally entitled to administer waived their rights, since, when any one heir of a class waives his right and nominates another, the one nominated does not displace other heirs of the same class with equal rights to administer, unless the person nominating is the only heir of the class.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 43-59; Dec. Dig. § 17.*]

2. EXECUTORS AND ADMINISTRATORS (§ 32*)—NEW ADMINISTRATOR—APPOINTMENT—DELIVERY OF ESTATE.

Where a nominee of a member of a class entitled to administer a decedent's estate has been appointed, and thereafter a member of the class equally entitled and competent insists on his right to administer and is appointed, the court in turning over the estate to him may make all necessary orders for its protection, and for the compensation of the person previously appointed.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. § 195; Dec. Dig. § 32.*]

3. EXECUTORS AND ADMINISTRATORS (§ 18*)—APPOINTMENT—DISCRETION.

The office of administrator should not ordinarily be committed to one who has a special interest opposed to the interests of the other heirs, if any choice is permitted by the statute.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. § 66; Dec. Dig. § 18.*]

4. EXECUTORS AND ADMINISTRATORS (§ 18*)—APPOINTMENT—QUALIFICATION—INTEREST.

Where the nominee of a niece of decedent for the position of administrator had for several years prior to decedent's death practically the entire control of his property, and it was insisted by the other heirs that he had not returned a property inventory of the estate, but had in his possession assets belonging to the estate, his appointment as administrator, if such charges were true, would be an improper exercise of the court's discretion; his interest being opposed to that of the other heirs.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. § 66; Dec. Dig. § 18.*]

Error to Appellate Court, Fourth District, on Appeal from Circuit Court, Marion County; Samuel L. Dwight, Judge.

Judicial settlement of the estate of Sea Bird Wilkins, deceased. From an order appointing Demallan Justice administrator, Hugh C. Wilkins and others appeal to the circuit court, and, that court with the Appellate Court having sustained the appointment [158 Ill. App. 504], objectors bring error. Reversed and remanded.

Kagy & Vandervort, for plaintiffs in error. C. H. Holt, E. D. Telford, and W. F. Bundy, for defendant in error.

CARTER, C. J. Sea Bird Wilkins died intestate in Marion County on June 4, 1908. He was a bachelor, and left no child or descendants of children, parents, brothers, or sisters. The next of kin and only heirs at law were some 16 nephews and nieces residing

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes 95 N.E.—65

In this state and a number in other states, and a number of grandnephews and grandnieces in this and other states. He left some \$30,000 or \$40,000 in personal property and about 1,000 acres of land in Illinois. About 8 o'clock on June 6, 1908, the morning after the funeral, S. Catherine Justice, one of the nieces residing in Marion county, appeared in the county court, waived her right to administer, and nominated in her place her son, Demallian Justice. The petition did not mention any of the other heirs. The court appointed the administrator in accordance with the prayer of the petition. About an hour afterwards a number of nephews and nieces appeared and filed two petitions in the same court, representing that there was a large number of heirs of said Wilkins, and more than three-fourths of them desired the appointment of Roy Wilkins as administrator, and on behalf of themselves and the other heirs they requested time in which to present proper petitions. They further requested that the county court give full hearing as to who was the proper person to administer and that it set aside the order appointing Demallian Justice. Later on a number of other nephews and nieces filed petitions for the appointment of Roy Wilkins. The county court proceeded to enter orders, in due course, upon the administration as awarded to Demallian Justice, appointing appraisers, fixing claim day, and granting leave to sell the personal property. Objections in various forms and an application for change of venue were made by plaintiffs in error to the proceedings. Plaintiffs in error appealed from the order appointing Demallian Justice administrator to the circuit court, and that court and the Appellate Court have sustained the appointment. The case is brought to this court on a petition for certiorari for further review.

Section 18 of the administration act (Hurd's Rev. St. 1909, c. 8) reads, in part, as follows: "Administration of the estate of all persons dying intestate shall be granted to some one or more of the persons hereinafter mentioned and they are respectively entitled to preference thereto in the following order: First, to the surviving husband or wife or any competent person nominated by him or her." Then follow clauses as to (2) children; (3) father; (4) mother; (5) brothers; (6) sisters; (7) grandchildren—in each instance adding, "or any competent person nominated by them," or by him or her, as the case may be. The eighth clause read as follows: "To the next of kin or any competent person nominated by them." It is further provided: "Only such persons as are entitled to administer under this act shall have the right to nominate. When several are claiming and are equally entitled to administration, the court may grant letters to one or more of them, preferring relatives of the whole to those of half blood." The

decision of this case turns upon what is the proper construction of said eighth clause.

[1, 2] Any one of the nephews and nieces residing in this state, and otherwise qualified, was entitled to be appointed as administrator, and the court might have granted letters to any one or more of them. Could he legally appoint a stranger to the class, nominated by one of these nephews or nieces, unless the others who were equally entitled to administer waived their rights? We think not. In our judgment the statute is mandatory to appoint one or more of the next of kin residing in the state, who were otherwise qualified, unless they waived their rights. *O'Rear v. Crum*, 135 Ill. 294, 25 N. E. 1097; *Judd v. Ross*, 146 Ill. 40, 34 N. E. 631. When any one heir of a class waives the right and nominates another, the one so nominated is not to stand in the place of the other, with equal rights to administer as against the other heirs of the class, unless the person nominating is the only heir of that class. If all of those who appear of the class entitled to administer waive that right and another person is appointed at his, her, or their request, if one of the others of the class who are equally entitled to administer appears "within sixty days from the death of intestate" and insists upon his right to administer in person, and if he is a competent person, we are of the opinion that it would be the duty of the court to appoint him, provided, however, in turning over the estate the court may make all necessary orders for its proper protection, and for the compensation of the person theretofore appointed.

The statute uses the singular "him" or "her" whenever it refers to a class composed of but one, and "them" when referring to a class which may be composed of more than one. Said section 18 was amended to read as it now does in 1905. Previous to the amendment, it provided that the administration should be granted to certain persons "if they will accept the same, or the court may grant letters of administration to some competent person who may be nominated to the court by either of them," etc. The Legislature, by changing the language in the amendment and using in some clauses the word "him" or "her," and in others, including clause 8, the word "them," clearly intended by clause 8 to give the right to nominate to the class and not to one of the class. If no qualified heir of the class desires to be appointed, then the fair and reasonable method, when there is no unanimous nomination, is, everything else being equal, for the court to appoint the nominee of the majority of the class. Whether these provisions of the statute are wise or unwise is not for this court to decide.

[3] In passing upon the application of two or more persons equally entitled to administer, a large discretion must necessarily be left to the court appointing. The office of administrator is one of trust and confidence,

and should not ordinarily be committed to one, if any choice is permitted by the statute, who has a special interest opposed to the interests of the other heirs. *Heward v. Slagle*, 52 Ill. 336; *Stearns v. Fiske*, 18 Pick. (Mass.) 24; *In re Schmidt's Estate*, 183 Pa. 129, 38 Atl. 464; *Bridgman v. Bridgman*, 30 W. Va. 212, 3 S. E. 580; *In re Drew's Appeal*, 58 N. H. 319; *Moody v. Moody*, 29 Ga. 519; 1 *Woerner on Law of Administration* (2d Ed.) § 235.

[4] It is insisted by appellants that the present administrator for several years before the death of Sea Bird Wilkins had practically entire control of the property of the deceased. It is also insisted that he has not returned a proper inventory of the estate, and that he has in his possession assets belonging to the estate. If the facts support these contentions, Demallan Justice is not a proper person to administer the estate. *Heward v. Slagle*, supra.

The question whether we can review the facts as well as the law in this case, in view of our holding, need not be decided. Our views on similar questions are fully set forth in *Zeigler v. Illinois Trust and Savings Bank*, 245 Ill. 180, 91 N. E. 1041, 28 L. R. A. (N. S.) 1112, and cases cited.

The judgments of the Appellate Court and of the circuit court will be reversed and the cause remanded to the circuit court for further proceedings in accordance with the views herein expressed.

Reversed and remanded.

(251 Ill. 58.)

CHICAGO & N. W. RY. CO. et al. v.
MILLER et al.

(Supreme Court of Illinois. June 20, 1911.
Rehearing Denied Oct. 6, 1911.)

1. EMINENT DOMAIN (§ 177*)—CONDEMNATION PROCEEDINGS—PARTIES.

Where petitioner sought to take a lot and all interests therein for public use, it was its duty to bring into court as defendants all persons having any interest in the property, but it was not bound to decide on the validity of the titles of the contending claimants.

[Ed. Note.—For other cases, see *Eminent Domain*, Cent. Dig. §§ 478, 480, 481, 483, 485; Dec. Dig. § 177.*]

2. EMINENT DOMAIN (§ 177*)—PROCEEDINGS—CONFLICTING INTERESTS.

Though one having an interest in property sought to be condemned, if not made a defendant, will not be affected by the judgment, one defendant cannot, by disputing the title of another or raising a controversy as to their respective interests, eliminate another defendant from the proceeding.

[Ed. Note.—For other cases, see *Eminent Domain*, Cent. Dig. §§ 478-485; Dec. Dig. § 177.*]

3. EMINENT DOMAIN (§ 223*)—CONDEMNATION PROCEEDINGS—SEPARATE INTERESTS—ASSESSMENT OF DAMAGES.

The statute providing for the condemnation of land and the oath of the jury contemplates

the assessment of damages for separate interests, when that can be done, and, where awards are so made, it is the duty of the jury to first fix the value of the entire property as between the petitioner and all the defendants, and then, if possible, divide the award according to the respective interests of the defendants.

[Ed. Note.—For other cases, see *Eminent Domain*, Cent. Dig. §§ 568-573; Dec. Dig. § 223.*]

4. EMINENT DOMAIN (§ 158*)—ISSUES—DISPUTES BETWEEN DEFENDANTS.

In condemnation proceedings, the question of title is preliminary to an assessment of damages; the court on a proper issue being authorized to determine disputes between the different defendants after payment of the award to the county treasurer.

[Ed. Note.—For other cases, see *Eminent Domain*, Cent. Dig. §§ 428-432; Dec. Dig. § 158.*]

5. EMINENT DOMAIN (§ 158*)—TRIAL—FINAL ADJUDICATION.

Petitioner in proceedings to condemn land is not required to delay condemnation because of a dispute between defendants as to the share of each in the total award, where it is impossible to have a final adjudication before trial.

[Ed. Note.—For other cases, see *Eminent Domain*, Cent. Dig. §§ 428-432; Dec. Dig. § 158.*]

6. EMINENT DOMAIN (§ 243*)—CONDEMNATION PROCEEDINGS—CONCLUSIVENESS OF AWARD.

Where the owners of certain leaseholds in property sought to be condemned were joined by the petition, and the petition was never dismissed as to them, their failure to participate in the trial and offer evidence as to the total value of the property did not prevent the award for the total value of the lot and all interests therein from being conclusive against them.

[Ed. Note.—For other cases, see *Eminent Domain*, Cent. Dig. §§ 627-629; Dec. Dig. § 243.*]

7. EMINENT DOMAIN (§ 263*)—REVERSAL—PROCEEDINGS AFTER REMAND—NEW PLEADINGS.

Where an order in condemnation proceedings, holding that certain claimants under leaseholds had no interest in the property, was reversed, the court holding that the leases were valid in equity and that the claimants were entitled to damages by the taking of the property, it was error for the court on remand to permit the owner of the fee to dismiss her cross-petition and order new pleadings raising a new issue as to whether such lessees had any legal or equitable rights under their leases, and to render judgment against them on their refusal to file new petitions, since no subsequent proceedings would be in accordance with the prior determination of the Supreme Court except a finding that the leases were valid in equity and a trial of the question of damages.

[Ed. Note.—For other cases, see *Eminent Domain*, Cent. Dig. § 687; Dec. Dig. § 263.*]

8. EMINENT DOMAIN (§ 263*)—CONDEMNATION PROCEEDINGS—INTEREST IN FUND.

Where claimants in condemnation proceedings under leaseholds established their validity in equity on an appeal, and the court directed a portion of the fund to be paid to the county treasurer until further order of the court, their rights were protected by such order and were not waived by their refusal after remand to file new petitions against the fund; they having objected, on the dismissal of their claim because of such refusal, to payment of the balance of the fund to the prior owner of the fee.

[Ed. Note.—For other cases, see *Eminent Domain*, Cent. Dig. § 687; Dec. Dig. § 263.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

9. JURY (§ 19*)—PROCEEDINGS—JURY TRIAL. In proceedings to condemn land, a trial by jury for the purpose of assessing damages is a matter of right.

[Ed. Note.—For other cases, see Jury, Cent. Dig. §§ 116-119; Dec. Dig. § 19.*]

Appeal from Superior Court, Cook County; Ben M. Smith, Judge.

Condemnation proceedings by the Chicago & Northwestern Railway Company to secure certain lands owned by one Phoebe F. Clark, in which Averill H. Miller and another claim damages for loss of leasehold. From an order dismissing their petition, they appeal. Reversed and remanded, with directions.

Harris F. Williams (Eldon M. Votaw, of counsel), for appellants. Wilson, Moore & McIlvaine, for appellee Chicago & N. W. Ry. Co. Moses, Rosenthal & Kennedy (Joseph W. Moses and Edward D. Wallace, of counsel), for appellee Phoebe F. Clark.

CARTWRIGHT, J. In the petition filed by the Chicago & Northwestern Railway Company, one of the appellees, in the superior court of Cook county, to ascertain the compensation to be paid for property to be taken for a passenger station, Phoebe F. Clark, the other appellee, was named as owner of the fee of a certain lot, and numerous persons, including Averill H. Miller and Ernest F. Scheldeln, were stated to be in possession of the building located on the lot and having or claiming interests therein, as tenants or otherwise. An order was entered requiring any defendants whose interests were adverse to present their claims for adjudication by a day fixed in the order. On April 20, 1907, Mrs. Clark filed her cross-petition, alleging that Miller claimed a right to possession under a lease expiring April 30, 1911, and Scheldeln claimed under a lease expiring April 30, 1909, which leases were executed by certain persons without authority in writing from her, and that they had not been ratified in writing and were therefore void. Miller and Scheldeln answered, claiming to be tenants under the leases, and upon a hearing the court held the leases to be void and that Miller and Scheldeln were not entitled to any compensation. From that order Miller and Scheldeln appealed to this court. The condemnation suit proceeded, but Miller and Scheldeln say that they did not participate in the proceedings after their appeal. The record recites the appearance at the trial of all the parties interested in the property named in the petition; but as the court had held that Miller and Scheldeln had no right, title, or interest therein, the recital cannot be interpreted as including them. There was a verdict awarding to the owner or owners of the lot \$55,000, and judgment was entered on the verdict on December 24, 1907, order-

ing payment of the compensation to the county treasurer of Cook county for the benefit of the owner or owners of the property. Payment was made in accordance with that order. The record of the appeal showed that there had been such part performance of the leases as would take them out of the statute of frauds, and, as equitable rights in real estate are property equally with legal rights and have equal protection under the statute and laws, we held that the court erred in holding the leases void and denying to Miller and Scheldeln a right to their pecuniary value, if they had any. The order was reversed, and the cause was remanded to the superior court for further proceedings in accordance with the views expressed in the opinion filed. Chicago & Northwestern Railway Co. v. Miller, 233 Ill. 508, 84 N. E. 683. On May 25, 1908, the proceeding on the cross-petition of Mrs. Clark and the answer of Miller and Scheldeln was redocketed in the superior court, and the court ordered the payment of \$22,700 out of the money held by the county treasurer to the holder of a mortgage on the property, and recited in the order that Mrs. Clark was entitled to the remainder of the compensation, subject to the rights and claims of Miller and Scheldeln. Mrs. Clark asked for an order for the payment of the balance of the money to her, and the court ordered the payment of \$25,300, but on the motion of Miller and Scheldeln ordered the county treasurer to retain the balance of \$7,000, without prejudice to the rights of Miller and Scheldeln against the petitioner and Mrs. Clark, or either of them. On November, 9, 1910, Miller and Scheldeln moved the court to call a jury and proceed with the trial against the petitioner for the purpose of assessing and awarding to them their compensation and damages on account of the taking of the property; but the court denied the motion. Mrs. Clark moved the court for leave to dismiss her cross-petition and file a new petition instant, and that Miller and Scheldeln be ruled to each file his petition within five days, setting forth what interests they claimed, and in default thereof be barred from any right or claim to compensation or damages. The court allowed the motion of Mrs. Clark and ordered that a hearing should first be had upon the petitions so ordered to be filed, to determine whether Miller and Scheldeln had any legal or equitable rights under their leases, and, if it should be found that they had any such rights, a jury should be called for the purpose of assessing and awarding their damages against the fund in the hands of the county treasurer. Mrs. Clark filed her petition in accordance with her motion and the order of the court, praying for payment to her of the balance of the fund. Miller and Scheldeln excepted to the order and refused to file new

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

petitions. Thereupon the court entered default against them and ordered that they be forever barred and foreclosed from any right or claim to or participation in the distribution of the sum remaining with the county treasurer and ordered payment of said sum forthwith to Mrs. Clark. Miller and Scheldeln excepted and again appealed to this court.

[1] In the proceeding to condemn the lot, it was not some particular interest that the petitioner sought to take, but the lot itself and all interests therein. *Stubbings v. Village of Evanston*, 136 Ill. 37, 26 N. E. 577, 11 L. R. A. 839, 24 Am. St. Rep. 300. To accomplish that purpose it was the duty of the petitioner to bring into the court as defendants all persons having any right, title, or interest in the property; but it was not bound to decide upon the validity of the titles of contending claimants. *Thomas v. St. Louis, Belleville & Southern Railway Co.*, 164 Ill. 634, 46 N. E. 8.

[2] If one having an interest in property is not made a defendant, the petitioner will not acquire that interest; but, when the petitioner has named all parties having interests, one defendant cannot, by disputing the title of another or raising a controversy as to their respective interests, eliminate another defendant from the proceeding.

[3] The statute and the oath of the jury contemplate assessments of damages for separate interests where that can be done, and where awards are so made it is the duty of the jury to first fix the value of the entire property as between the petitioner and all the defendants, and then to divide the same according to the respective interests of the defendants. *Chicago, Burlington & Quincy Railroad Co. v. Reisch & Bros.*, 247 Ill. 350, 93 N. E. 383. There are instances, however, where it is impossible for the jury to determine the amount of compensation for a particular interest because of an unsettled controversy between the defendants, and the General Assembly could not have contemplated separate awards where they could not be made. Provision is made for the payment of compensation to the county treasurer, and in case of unsettled disputes the parties may still be heard on their claims against the fund.

[4] The question of title is preliminary to an assessment of damages, and on a proper issue the court may determine disputes between the defendants. *Chicago & Milwaukee Electric Railroad Co. v. Diver*, 213 Ill. 26, 72 N. E. 758; *Sanitary District v. Pittsburgh, Ft. Wayne & Chicago Railway Co.*, 216 Ill. 575, 75 N. E. 248.

[5] It may be impossible, as it was in this case, to have a final adjudication before the trial, and it would be against public policy and the spirit and intent of the eminent domain act to hold that a petitioner must delay condemnation because of a dispute be-

tween defendants as to what share each should have of the total award. If a controversy had been pending between Mrs. Clark and Miller and Scheldeln when the petition to condemn was filed, the conflicting claimants would all have been necessary parties, and the award would have been disposed of afterward according to the final determination of that controversy. That was the situation in *Eddleman v. Union County Traction & Power Co.*, 217 Ill. 409, 75 N. E. 510, where the title to property condemned was in litigation in a pending chancery suit. It was, of course, impossible to have binding, separate awards by the jury to contending claimants, and it was held to be the proper practice to order the compensation paid to the county treasurer to abide the result of the chancery suit. In *Colehour v. State Savings Institution*, 90 Ill. 152, there was a foreclosure suit and also a condemnation proceeding, and the mortgage was held to be transferred to the fund awarded as compensation. In *Metropolitan Elevated Railway Co. v. Eschner*, 232 Ill. 210, 83 N. E. 809, some of the defendants claimed compensation for tax titles, and, the question not having been settled preliminary to the trial, it was decided that the court could protect the parties by ordering payment to the county treasurer, and it would be the duty of the court to decide upon their rights in ordering payment of the compensation to them.

[6] The petitioner brought into court all the parties having an interest in the lot, as it was bound to do in order to acquire their interests, and none of them ever ceased to be defendants to the petition. Miller and Scheldeln were never dismissed out of the suit and had a right to appear and offer testimony at the trial as to the value of the property, including their interests, or to show the extent and value of their interests as a part of the whole. If there was any damage to them which would not have been included in the award of the total value of the property if they had not been defendants, the court could, and doubtless would, have protected their rights and interests in some appropriate manner. Their failure to participate in the trial and offer evidence was not the fault of the petitioner, and the award was for the total value of the lot and of all interests therein. The petitioner had not the slightest interest in the controversy between them and Mrs. Clark and was not concerned in the appeal. That was decided in a similar appeal in the same condemnation suit, where it was held that the appeal did not involve the condemnation of the property or the rights of the petitioner; that the petitioner's case ceased upon payment of the compensation allowed by the jury for the property; and that it was not a party to the appeal. *Chicago & Northwestern Railway Co. v. Garrett*, 239 Ill. 297,

87 N. E. 1009, 130 Am. St. Rep. 229. The railway company contends that, as petitioner, it paid the entire compensation for the lot and all interests therein, and that the claims of defendants, as between themselves, are against the fund and that the controversy between Mrs. Clark and Miller and Scheldeln does not concern it. Counsel for Mrs. Clark agree with the railway company in that position, and contend with much energy and elaboration of argument that, if Miller and Scheldeln are entitled to any compensation, it is to be taken out of the money that would otherwise come to their client. It will be seen from what has been said that their view on that question is correct.

[7] The matter in issue under the cross-petition and answers thereto was remanded to the superior court for further proceedings in accordance with the views expressed in the opinion filed. In that opinion it was held that the leases of Miller and Scheldeln were valid in equity, and that the court erred in holding them to be void and denying to the lessees the right to prove damages to them by taking the property. No subsequent proceedings would be in accordance with those views except a finding that the leases were valid in equity and a trial of the question of damages. The court therefore erred in holding that another hearing must first be had upon a new issue to be made whether Miller and Scheldeln, or either of them, had any legal or equitable rights under their leases. Neither had the court any power to order new petitions filed. It was the privilege of Mrs. Clark to dismiss her cross-petition if she saw fit to do so and not contest the claim of Miller and Scheldeln; but she could not get rid of that claim by such proceedings, and there was no occasion for ordering new pleadings. There was no new issue nor any change in the issue, and no plausible reason for allowing Mrs. Clark to withdraw her petition and instantly file another claiming the funds. All that the superior court was authorized to do was to determine the amount of compensation and damages, if any, to which Miller and Scheldeln were entitled.

[8] The railway company contends that Miller and Scheldeln, by their objection to the payment of the balance of the fund to Mrs. Clark, asserted their right to a share of it and elected to resort to the fund, while counsel for Mrs. Clark insist that by their refusal to file new petitions against the fund they have elected not to assert any right against it, and that the court properly ordered the balance to be paid to their client for that reason. They did object to the payment to Mrs. Clark of the balance of the fund, and their rights against it were preserved by the order that the county treasurer retain it until the further order of the

court. They also asked for a trial against the railway company, to which they were not entitled, and refused to file new petitions against the fund, which we hold they were not required to do. The substantial, meritorious claim made by them is that they have a right to compensation, and we do not see how their refusal to obey an unauthorized order could work a forfeiture of that right.

[9] Mrs. Clark, one of the appellees, has assigned as a cross-error that the court, in the order appealed from, directed that a jury be called for the purpose of assessing and awarding to Miller and Scheldeln their damages, if any were proved, and her counsel say that a jury trial was not a matter of right. Such a trial is a matter of right in a case of this kind.

The order of the superior court is reversed, and the cause is remanded to that court, with directions to try the question of the amount of compensation and damages, to be awarded to Miller and Scheldeln for their leasehold interests, and, if they are found to be entitled to any sum, to order payment of the same out of the fund in the hands of the county treasurer.

Reversed and remanded, with directions.

(251 Ill. 42)

LIEBNOW v. WISCONSIN LIME & CEMENT CO.

(Supreme Court of Illinois. June 20, 1911.
Rehearing Denied Oct. 6, 1911.)

1. MASTER AND SERVANT (§ 270*)—INJURIES TO SERVANT—NEGLIGENCE—EVIDENCE—ADMISSIBILITY.

Where, in an action for injuries to a teamster caused by the hinged driver's seat turning toward the horses while he dismounted from the wagon, the evidence showed that the seat was hinged, so that it could be turned forward to get to the front of the box of the wagon, and that there was an adjustable canopy top on the seat, testimony of a former driver of the wagon that while the canopy was set forward or one occasion a gust of wind tipped the canopy over toward the horses, that in getting off the wagon at one time he had grabbed the canopy and pulled it forward, but let it go and shoved it back, and that he had tied a piece of rope around the seat afterward at the suggestion of the master's foreman, was inadmissible against the master.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 916, 919; Dec. Dig. § 270.*]

2. MASTER AND SERVANT (§ 105*)—SAFE APPLIANCES—DUTY OF MASTER.

A master must exercise ordinary care to furnish appliances reasonably safe, and a master furnishing a teamster a wagon with a seat of a kind in common use in the neighborhood for at least 10 years by people generally, and by every one, including the most careful and prudent, is not guilty of negligence in failing to furnish reasonably safe appliances.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 185-191; Dec. Dig. § 105.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

3. MASTER AND SERVANT (§ 152*)—INJURIES TO SERVANT—NEGLIGENCE—FAILURE TO INSTRUCT SERVANT.

An employer, furnishing to an adult teamster of 4 or 5 years' experience a wagon with a seat hinged so that it could be turned forward, may assume that the teamster could handle the team and drive the wagon with safety; and the failure to inform the teamster of the conditions is not actionable negligence, the wagon and seat having been in common use for at least 10 years.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 313; Dec. Dig. § 152.*]

4. MASTER AND SERVANT (§ 109*)—INJURIES TO SERVANT—ACTION—NEGLIGENCE.

An employer furnished to an experienced adult teamster a wagon with a seat hinged so that it could be turned forward to get to the front of the box of the wagon. There was an adjustable canopy top on the seat. Such seats were never made with any lock to prevent their being turned forward in use, and if necessary to turn the seat forward the canopy top could be adjusted by turning it backward, so that there would be no danger of its striking the horses or frightening them. The seat would not turn over without the application of considerable force. A teamster was injured while dismounting from the wagon in consequence of the seat turning forward. *Held* not to show actionable negligence of the employer in having a canopy top without a strap around the seat to fasten it.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 204; Dec. Dig. § 109.*]

Error to Branch Appellate Court, First District, on Appeal from Superior Court, Cook County; Willard M. McEwen, Judge.

Action by Charles Liebnow against the Wisconsin Lime & Cement Company. There was a judgment of the Appellate Court, affirming a judgment for plaintiff, and defendant brings error. Reversed and remanded.

F. J. Canty and J. C. M. Clow, for plaintiff in error. F. W. Jaros and Francis J. Woolley, for defendant in error.

CARTWRIGHT, J. Charles Liebnow, defendant in error, obtained a judgment in the superior court of Cook county against the Wisconsin Lime & Cement Company, plaintiff in error, for \$2,250 damages on account of injuries received by him while working for the plaintiff in error as a teamster, and the Branch Appellate Court for the First District affirmed the judgment. The record is in this court in return to a writ of certiorari.

The injuries resulted from the hinged driver's seat turning forward toward the horses while the plaintiff was dismounting from the wagon, and the charge of the declaration was that the defendant was guilty of negligence in providing the seat, which was alleged to have been improperly, insufficiently, and insecurely fastened and in a dangerous condition.

The plaintiff was about 45 years old, and had been working as a teamster for 4 or 5 years. The defendant was engaged in the lime and cement business, and the plaintiff commenced work at half past 6 o'clock in

the morning of the day of the accident. He was given a wagon with a large box, 3 or 4 feet deep, on top of which were flaring sides or wings. At the front of the box there was a seat, about 2½ feet wide, for the driver, with a canopy top, and there was a foot-board on the outside of the box. There were two standards for the seat in the front of the box, to which wooden supports were framed, extending back in the box at right angles. On the tops of these horizontal pieces of wood there were similar pieces, and the two were fastened together at the front with hinges. On the top of the upper pieces there was a leaf spring, on which the seat rested, and there were board sides, about six inches high, at the back and sides of the seat. The seat was hinged, so that it could be turned forward to get to the front of the box. Such seats were in common use, and it was the usual method of making wagons for hauling coal, lime, and other materials of that kind. They had been in general use for wagons employed in hauling lime and in similar uses for at least 10 years, and were never made with any device to fasten or lock the seat. The seat was about 18 inches above the top of the box and it was 7 feet and 6 inches from the seat to the ground. There was a canopy top on the seat with three bows; the canopy being held up by the middle one of the three bows, and the others attached to it about six inches above the seat. The top was adjustable, so that it could be turned down horizontally, or at any angle, either forward or back, as the driver might choose. The wagons were not built with canopy tops, but the defendant had a lot of them, which the men could put on the wagons in the summer time if they saw fit.

The plaintiff hitched one of the defendant's teams to the wagon and drove to a freight car, where he climbed over the seat into the box, and from the box into the car, and, with others, loaded the wagon with lime. The plaintiff then got back on the seat and drove about a mile to the place of delivery. He then went to the back end of the wagon and shoveled the lime out of the wagon box, after which he got out of the wagon and had his ticket signed, and then got back into the wagon and on the seat, and drove back to defendant's office to get an order for his next load. It was then about 11 o'clock, and the plaintiff started to climb off the wagon to get his order. He testified at the trial that he was with one foot on the wheel, and had stepped down another step, and the horses gave a little jerk; that he had one foot on the doubletree, and tried to step down another step, and the top started to fall over, and he made a grab, and grabbed the middle bow of the shade; and that, when the horses made the jerk, it started over right away, before he grabbed it. The accident happened on July 18, 1906,

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

and he had made a written statement of the circumstances on September 5, 1905. In that statement he said that he grabbed hold of the top, swung to the wheel with one foot, and just as he was about to step to the ground the top and seat fell forward over the front of the wagon. There were other things in the statement which he did not remember, but he did remember making that statement at the time the writing was made. Although he remembered giving that account of the transaction, he made no explanation of how it came to be made, if not correct, and when his attention was called to it did not say that it was not accurate and true.

A witness for the defendant testified that when the plaintiff got off the wagon he took hold of the canopy with his left hand, and swung around to get off, and in that way he tipped the seat forward. The statement that the seat was caused to tip forward by a little jerk of the heavy freight wagon by the horses would be contrary to the operation of natural laws, as a slight jerking of the wagon would have a tendency to throw the canopy top back, if either way. Considering his whole testimony, the reasonable conclusion is that he got hold of the canopy top to sustain himself in swinging down from the front of the wagon, and in that way brought the seat over forward. The team started forward, and the plaintiff was crowded between the wagon and a car. He hung onto the wagon for about 50 feet, when he fell off and the wheels ran over his ankle. The plaintiff testified that he did not know the seat was a hinged seat; but seats of that kind had been in common use during all the time that he had been a teamster, and everything about the wagon and the seat was open, plain, and visible to any person. There was evidence for the plaintiff that the bolt through the hinge was worn, and not tight, so that the hinge would work easier than if it had been tight and new; but that fact did not make the seat in any way unsafe or insecure, the only effect being that it would be easier to turn it over forward.

[1] The plaintiff produced a witness who was permitted to testify, against the objection of the defendant, that he had driven this wagon previously; that he had been driving toward the sun, and tipped the canopy forward, so as to protect his face from the sun; and that while the canopy was in that position, and he was shoveling lime off the wagon, a gust of wind came up and tipped the top over toward the horses. The canopy was adjustable, and the driver had turned it over in such a way that a gust of wind would catch it; and, the conditions not being the same, the fact had no tendency to prove that the top was liable to tip over when the canopy was vertical. The same witness was also allowed to testify that in getting off the wagon he made a mistake, and grabbed the canopy and pulled it for-

ward, but let go and shoved it back. Of course, the driver could turn the seat over forward, since that was the purpose of the hinge, and drivers were in the habit of turning them forward to get to the front of the box, or to keep them from getting wet when it rained. The same witness testified that he tied a piece of rope around the seat afterward at the suggestion of the foreman; but neither what he did as a protection against his forgetfulness or another mistake, nor the advice of the foreman, was competent evidence against the defendant. The court erred in ruling on the admission of evidence, and the rulings were prejudicial to defendant.

[2] The defendant asked the court, at the close of the evidence, to direct a verdict of not guilty, which the court refused to do. The standard of duty of the employer is to exercise ordinary care to furnish appliances of reasonable safety for the employé; but absolute security against accidents cannot be attained, and the employer is not an insurer against them. The defendant would be liable for the consequences of its own negligence, but for nothing else; and it furnished to the plaintiff a wagon with a seat of a kind which had been in common use in the same city for at least 10 years, not only by people generally, which would include the careless and negligent, but by every one, including the most careful and prudent.

[3] The defendant had a right to assume that a teamster of the age of the plaintiff and with his knowledge and experience would be able to handle the team and drive such a wagon with safety. Everything about the seat and the manner in which it was attached to the uprights, and the fact that it was a hinged seat, were as plain and obvious as anything could be, and the failure to inform an adult of average intelligence of such facts was not negligence. It did not require a minute inspection by the plaintiff to discover what he could not help seeing, and the argument that he was not required to inspect the hinges is without force, because they did not create any tendency of the seat to tip forward, which could only occur when some force was applied.

[4] It is argued, however, that the defendant was negligent in having a canopy top on the seat, without a rope or strap around the seat to fasten it. The evidence shows that such seats are never made with any lock, fastening, or device to prevent their being turned forward in use, and, if necessary or advisable to tip the seat forward, the canopy could be adjusted by turning it backward, so that there would be no danger at all of its striking the horses or frightening them. It would be impossible for a heavy seat, constructed as this one was, to turn over without the application of considerable external force. There was no evidence fairly tending to prove negligence on the part of the de-

fendant, and the court erred in refusing to direct the verdict of not guilty.

The judgments of the Appellate Court and the superior court are reversed, and the cause is remanded to the superior court.

Reversed and remanded.

(251 Ill. 80)

RUPPE v. GLOS et al.

(Supreme Court of Illinois. June 20, 1911.

Rehearing Denied Oct. 6, 1911.)

1. EQUITY (§ 419*)—COSTS (§ 93*)—ORDERS PRO CONFESSO—VACATION.

Where a pro confesso order has been entered, the effect of thereafter filing an amended bill, or an amendment to the bill, is to vacate the order, and the defendants theretofore defaulted are admitted to answer as though an order pro confesso had not been entered, making the defendants liable for costs arising after entry of such order.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 972-985; Dec. Dig. § 419.* Costs, Cent. Dig. §§ 369-375; Dec. Dig. § 93.*]

2. PROCESS (§ 68*)—EQUITY (§ 290*)—JUDICIAL PROCEEDINGS.

A defendant, once brought into court, must take notice of every step thereafter taken, including granting of leave to amend a bill.

[Ed. Note.—For other cases, see Process, Cent. Dig. § 52; Dec. Dig. § 68;* Equity, Cent. Dig. § 549; Dec. Dig. § 290.*]

3. QUIETING TITLE (§ 52*)—DECREE—CONSISTENCY OF FINDINGS.

In a suit to set aside a tax deed, that the decree found that complainant acquired title from a certain person by deed, and that at the date of the deed the premises were and have since been unimproved, unoccupied, and vacant, and that for more than nine successive years, complainant had paid all taxes against the property, under such color of title, does not vitiate findings of a decree that he derived his title from the government.

[Ed. Note.—For other cases, see Quieting Title, Cent. Dig. §§ 88, 102, 103; Dec. Dig. § 52.*]

Appeal from Superior Court, Cook County; George A. Dupuy, Judge.

Bill by Peter Ruppe, Jr., against Jacob Glos and others to set aside a tax deed. Decree for complainant, and defendants appeal. Affirmed.

John R. O'Connor, for appellants. Vincent D. Wyman and Otto W. Jurgens, for appellee.

COOKE, J. This is the second appeal in this case. The opinion on the first appeal is reported in 243 Ill. 414, 90 N. E. 744. Upon being remanded to the superior court on the first appeal, it was heard upon the same bill, and, as there is no certificate of evidence here, reference is had to the former opinion for a statement of the allegations contained in the bill. The decree entered on this hearing contained the same findings as the former decree, and in addition found that appellee derived his title by mesne conveyances from the government of the United States, all of which were duly recorded in

Cook county, Ill.; that the government patented the premises to one Hubbard on October 1, 1839, and that by mesne conveyances from Hubbard to appellee the government title became and was vested in appellee. Appellants urge as reasons for a reversal of this decree that costs were erroneously taxed against D. Arnold, one of the appellants; that there are no allegations in the bill to support the findings in the decree that appellee derived his title by mesne conveyances from the government; and that the findings as to appellee's title are the same as those found to have been insufficient in the former appeal.

[1] The ground for the first objection is that after the filing of the original bill herein, and on January 15, 1909, Arnold was defaulted and an order pro confesso entered against him; that thereafter, on April 3, 1909, and at a subsequent term of the superior court leave was given appellee to amend his bill by showing that prior to the commencement of the suit a tender had been made to Arnold in excess of the amount due him, the contention being that the order pro confesso entered against Arnold was a final adjudication of the suit as to him, and that appellee did not have the right, at a subsequent term, to so amend his bill as to materially affect the interests of Arnold. Where a pro confesso order has been entered, the effect of thereafter filing an amended bill, or an amendment to the bill, is to vacate such order, and the defendants theretofore defaulted are admitted to answer as though an order pro confesso had not been entered. *Gibson v. Rees*, 50 Ill. 383. Upon the filing of this amendment the order defaulting Arnold was set aside and a rule entered requiring him to answer the amended bill, and upon his failing to do so he was again defaulted.

[2] Where a defendant is once brought into court, he is required to be present and take notice of every step taken in the progress of the cause. *Mix v. Beach*, 46 Ill. 311. Appellant Arnold was compelled to take notice of the fact that by leave of court appellee might make any amendment necessary to sustain the cause of action for which his suit was intended to be brought. By the service of summons he was brought into court, where it was his duty to be and appear until the case was disposed of, and he was entitled to no further notice or service under the practice in this state. *Niehoff v. People*, 171 Ill. 243, 49 N. E. 214. The court did not err in assessing costs against appellant Arnold.

[3] As to the second contention, appellee's bill alleges that he is the fee-simple owner of the premises, and that he acquired title to the same by deed dated May 6, 1892, from Annie Lehmann and others, and the decree finds that he is such fee-simple owner, and also that he acquired his title by mesne con-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

veyances from the government of the United States, which was in addition to the finding in the former decree. As we said in *Ruppe v. Glos*, 243 Ill. 414, 90 N. E. 744: "It would not have been necessary, to a finding in the decree that appellee's grantors had title by regular chain from the government, to have found and recited all the conveyances and proof offered in evidence to prove that title; but, if appellee's title depended upon proof of record title in his grantors, it was necessary that the decree contain some recital showing that the court heard proof upon the subject and of its conclusion drawn from that proof." This decree finds from the proof presented that appellee derived his title from the government and that all of the conveyances in the chain of title were duly recorded in Cook county. The fact that the decree, in addition, finds also that appellee acquired his title from Annie Lehmann by deed of May 6, 1892, and that at the date of said deed the premises were, and have since been, unimproved, unoccupied, and vacant, and that for more than nine successive years thereafter appellee had paid all taxes and assessments levied or assessed against said premises under claim and color of title made in good faith and acquired as aforesaid, does not, as appellants claim, vitiate the finding of the decree that appellee derived his title from the government. It is apparent from the findings in the decree that the conveyance from Annie Lehmann to appellee was one of the conveyances in the chain of title from the government, and the finding that the premises, at the time of the making of that deed, were, and since have been, vacant and unoccupied, and that appellee had paid all taxes and assessments levied upon the premises under claim and color of title, in no respect destroys or impairs the finding that appellee was the fee-simple owner of the premises by virtue of his title derived by mesne conveyances from the government.

The decree of the superior court, removing the tax deed of appellants as a cloud upon the title of appellee, is affirmed.

Decree affirmed.

(251 Ill. 42.)

VOODRY v. TRUSTEES OF UNIVERSITY OF ILLINOIS et al.

(Supreme Court of Illinois. June 20, 1911.
Rehearing Denied Oct. 10, 1911.)

1. WILLS (§ 300*)—SUIT TO CONTEST—PROPO-NENTS' PRIMA FACIE CASE.

The prima facie case required in the first instance of proponents, in a suit to contest a will by proper proof of execution of the will and of the mental capacity of testatrix, is made out, where the bill alleges, and the answer admits, its execution, leaving for contest only the question of mental capacity, by one of the attesting witnesses called by proponent testifying to

execution of the will, and other witnesses testifying to testatrix's mental capacity.

[Ed. Note.—For other cases, see *Wills*, Dec. Dig. § 300.*]

2. WILLS (§ 53*)—SUIT TO CONTEST—EVIDENCE OF MENTAL SOUNDNESS—LIMITS OF TIME.

Though proponents in a suit to contest a will are required to show the mental soundness of testatrix only at the time the will was executed, they may show it before and after such time, as bearing on it at that time.

[Ed. Note.—For other cases, see *Wills*, Cent. Dig. §§ 111, 112, 120-130; Dec. Dig. § 53.*]

3. WILLS (§ 400*)—REVIEW—VERDICT—SUIT TO CONTEST WILL.

The verdict in a contested will case, arising under the statute, has the same force and effect as a verdict in a case at law under a like state of facts, so that, not being manifestly against the weight of evidence, the court is bound by it in the same manner and to the same extent as if it were a case at law.

[Ed. Note.—For other cases, see *Wills*, Cent. Dig. § 872; Dec. Dig. § 400.*]

4. EVIDENCE (§ 478*)—TESTAMENTARY CAPACITY—OPINION.

Witnesses in a suit to contest a will may give their opinions as to whether testatrix had mind enough, during the time they were acquainted with her, to know what property she had, or who her relatives were.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 2242-2244; Dec. Dig. § 478.*
Wills, Cent. Dig. §§ 113-115.]

5. APPEAL AND ERROR (§ 1066*)—HARMLESS ERROR—INSTRUCTIONS.

The giving of instructions, though there was nothing calling therefor, was harmless; they being but correct statements of the provisions of the will contested by the suit; and the will being in evidence and taken by the jury on retirement.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 4220; Dec. Dig. § 1066.*]

Error to Circuit Court, McLean County; Colostin D. Myers, Judge.

Suit by Earl O. Voodry against the Trustees of the University of Illinois and others. Decree was adverse to complainant, and he brings error. Affirmed.

Barry & Morrissey, for plaintiff in error. Stone, Oglevee & Franklin, for defendants in error. O. A. Harker, for trustees.

COOKE, J. Plaintiff in error, Earl O. Voodry, filed his bill in the circuit court of McLean county to set aside the last will and testament of his mother, Anna J. Voodry, on the ground that she lacked testamentary capacity at the time she executed her will. The bill alleged the execution of the instrument, the death of Mrs. Voodry, and the probate of the will. The answers of the defendants in error admitted all the allegations of the bill, except those charging lack of testamentary capacity. An issue of fact was made up, and two trials were had. On the first trial the jury disagreed, and on the second a verdict was returned, finding the instrument to be the last will and testament of

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes

Anna J. Voodry, and a decree was entered accordingly.

The will in question was executed in Bloomington, on September 18, 1907. Mrs. Voodry owned some real estate at Crown Point, Ind., and a little over \$5,000 in personal property. She was a widow, and plaintiff in error was her only child and only heir at law. By her will, after making various small bequests to relatives, she bequeathed the remainder of her household goods to plaintiff in error, and then devised the residue of her estate, real and personal, to Paul F. Belch, as trustee, to invest and manage the same and to pay the net income therefrom to plaintiff in error during his lifetime, and at his death the trust estate was devised to the trustees of the University of Illinois, to be held by them in trust and to be by them converted into money and held as a fund to be perpetually invested, the income of which was to be used for the purpose of providing free scholarships for deserving young men who are unable to pay their own tuition at the University of Illinois.

On the trial one of the witnesses to the will, who had also acted as the scrivener, testified to its execution and to the soundness of mind of the testatrix at the time of the execution of the instrument. The will was admitted in evidence, and a number of witnesses testified, on behalf of proponents, to the mental soundness of the testatrix at the time of the execution of the instrument. The other witness to the will was not called by proponents, but was called on the part of the contestant, and testified to the execution of the will, and that in his opinion Mrs. Voodry, at the time she executed said instrument, was not of sound mind and memory. It is contended by plaintiff in error that by this evidence proponents did not make out such a prima facie case of the execution of the will and of the mental capacity of the testatrix as is required, and to support his position relies upon the fact that the certificate of the oath of the witnesses at the time of the first probate was not offered in evidence, and but one of the attesting witnesses was called by proponents.

[1] It is always incumbent upon the proponents in suits to contest wills to make out a prima facie case, in the first instance, by proper proof of the execution of the will and of the mental capacity of the testator or testatrix. In this case the execution of the will was alleged in the bill and was admitted by the answer, leaving to be contested only the question whether the testatrix was of sound and disposing mind and memory. One of the attesting witnesses testified to the execution of the instrument, and that, together with the allegations of the bill and the testimony of the other witnesses as to the mental capacity of the testatrix, was sufficient to establish the prima facie case required. But, had the testimony of the other subscribing witness been necessary, it was

supplied by the contestant, who called him and by him proved the execution of the instrument.

[2] It is insisted that the court erred in permitting the proponents to prove, over the objection of the plaintiff in error, by witnesses called in chief, that the testatrix was of sound mind and memory two years and more before the execution of the instrument; those witnesses not having seen her since that time. It is true that it is only incumbent upon the proponents to show the mental soundness of the testatrix at the time of the execution of the will, but neither party is confined to that particular time in making his proof. It is proper to show the mental condition of a testator both before and after the execution of the purported will, in suits to contest wills, in order to determine his mental condition at the time the will was executed, and in this case it cannot be said that proof of the mental condition of the testatrix two years before she executed the instrument in question was too remote in time. At the request of the plaintiff in error, the court specifically instructed the jury that, while evidence had been admitted bearing on the mental condition of Mrs. Voodry both before and after the execution of the instrument, the question to be determined was whether or not she was of sound mind and memory when she executed the purported will.

[3] It is argued strenuously that the verdict of the jury was against the weight of the evidence. Eleven witnesses testified on the part of the proponents as to the mental capacity of Mrs. Voodry and 15 on the part of the contestant. The witnesses for the proponents all testified positively that they believed Mrs. Voodry was of sound mind and memory and capable of transacting ordinary business. On the other hand, while the witnesses called on the part of the contestant all believed her to have been of unsound mind, a number of them, while testifying that she was not capable of transacting ordinary business, on cross-examination admitted that she was able to comprehend the nature and extent of her property, to know who her relatives were, and to transact such business as dealing with tradespeople for such articles as she was in need of. It cannot be said, from an examination of this record, that the evidence clearly preponderates for one side or the other. The evidence is such that a court would not be justified in disturbing the verdict of the jury, had it been either for or against the contestant. In contested will cases arising under our statute, the verdict of the jury is to have the same force and effect as is given to a verdict in a case at law under a like state of facts, and when the verdict in such case is not manifestly against the weight of the evidence, the court is bound by it in the same manner and to the same extent as if it were a case at law. *Calvert v. Carpenter*, 96 Ill.

63; Moyer v. Swygart, 125 Ill. 262, 17 N. E. 450; Hill v. Bahrns, 158 Ill. 314, 41 N. E. 912; Smith v. Henline, 174 Ill. 184, 51 N. E. 227; Hurley v. Caldwell, 244 Ill. 448, 91 N. E. 654.

[4] Plaintiff in error contends that the court erred in permitting the witnesses for proponents and the witnesses for contestants, on cross-examination, to give their opinions as to whether or not Mrs. Woodry had mind enough to know what property she had, or who her relatives were, during the time the witnesses were acquainted with her, and urges that by allowing the witnesses to so testify they were permitted to take the place of the jury and to determine the very issue which the jury were sworn to try. In this contention they rely upon the case of Baker v. Baker, 202 Ill. 595, 67 N. E. 410. The questions here asked are not to the same effect as those to which the court sustained objections in Baker v. Baker, supra. In that case the witnesses were asked "whether or not the testator, at the time of making the alleged will, had sufficient mind and memory to understand the will in question," "whether or not he was able to carry in his mind and memory the nature and extent of his property," and "whether or not he was able to understandingly execute the will." It needs no extended discussion to point out the difference between the opinions there sought to be elicited and the opinions here secured. It is from the testimony of witnesses who knew the testatrix personally and who gave their opinion, based upon their knowledge and observations, that the testatrix was or was not of sound mind and memory, that she was or was not insane, or that she did or did not have mind enough to comprehend the scope and extent of her property, or to realize who her relatives were and the claims they had upon her bounty, that the jury are able to determine whether or not she was of sufficient mentality to execute a last will and testament and to understand the business then in hand. The evidence complained of was properly admitted.

[5] It is complained that the court erred in instructing the jury that the will provided free scholarships for the benefit of deserving young men who were unable to pay their own tuition at the university, and that the University of Illinois is not a beneficiary under the will and gets none of the property. We have discovered nothing in the record that would call for the giving of these instructions, although it is claimed they were given because of certain statements made by counsel for the plaintiff in error in his opening statement to the jury. Be that as it may, we are of the opinion that no harm could have resulted from the giving of these instructions, for the reason that they correctly state the provisions of the will, and the will itself was in evidence and was taken

by the jury, together with the other exhibits, upon their retirement.

Complaint is made of the giving of certain other instructions, but the points raised by counsel in that connection have already been discussed, and it will not be necessary to notice them further.

The verdict of the jury and the decree of the court being amply supported by the evidence, and there being no reversible error in the record, the decree of the circuit court is affirmed.

Decree affirmed.

(261 Ill. 67)

PEOPLE v. WHITE.

(Supreme Court of Illinois. June 20, 1911.
Rehearing Denied Oct. 10, 1911.)

1. HOMICIDE (§ 169*)—EVIDENCE—ADMISSIBILITY.

In a trial for killing a restaurant keeper, who was called to his place of business on account of a disturbance created by accused, testimony as to what happened before decedent entered the place was properly admitted; such disturbance constituting the only trouble between the parties.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 341-350; Dec. Dig. § 169.*]

2. WITNESSES (§ 268*)—CROSS-EXAMINATION—SCOPE.

The companion of one accused of murder, having testified that neither was intoxicated, he was properly cross-examined as to where and how he spent the part of the night immediately preceding the killing, and what he drank.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 931-948; Dec. Dig. § 268.*]

3. WITNESSES (§ 352*)—CROSS-EXAMINATION—SCOPE.

A bartender employed by one accused of murder, having given material testimony in his defense, it was proper to cross-examine him as to his occupation, though it necessarily tended to show that accused ran a gambling house.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 1152; Dec. Dig. § 352.*]

4. HOMICIDE (§§ 218, 219*)—DYING DECLARATIONS—PROVINCE OF COURT AND JURY.

The question whether alleged dying declarations are made under such circumstances as to render them admissible in evidence is to be determined by the court upon preliminary proof, and if admitted their credibility is exclusively for the jury, whose province it is to consider the circumstances and give them such credit as they may think they deserve.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 458-460; Dec. Dig. §§ 218, 219.*]

5. HOMICIDE (§ 203*)—DYING DECLARATIONS—ADMISSIBILITY.

That decedent was in actual danger of impending death, was suffering intense pain, had difficulty in speaking, was informed of his doctor's belief that he could not recover and stated that he did not expect to recover, and in fact died next morning, sufficiently showed that his declaration was made in contemplation of death.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 430-437; Dec. Dig. § 203.*]

6. WITNESSES (§ 102*)—COMPETENCY—PROSECUTING ATTORNEYS.

Objection to the testimony of an assistant state's attorney in a murder trial as to what

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

decedent said and what occurred when decedent's dying declaration was made, because the attorney was engaged in the prosecution, went to his credibility, and not his competency.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 410, 413; Dec. Dig. § 102.*]

7. HOMICIDE (§ 209*)—DYING DECLARATIONS—ADMISSIBILITY.

A dying declaration reduced to writing was not objectionable because the names of two nurses were signed as witnesses to decedent's signature, on the theory that the jury would infer that the nurses were witnesses to the facts stated in the paper, which occurred at another time and place.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 441; Dec. Dig. § 209.*]

8. CRIMINAL LAW (§ 769*)—INSTRUCTIONS—DYING DECLARATIONS.

In a murder trial, it was proper to refuse to instruct that nothing said or done by the trial judge must be taken to indicate that he had any opinion as to whether a statement was decedent's dying declaration.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1803-1806; Dec. Dig. § 769.*]

9. CRIMINAL LAW (§ 823*)—INSTRUCTIONS—REASONABLE DOUBT.

An instruction that, if the jury believed accused to be innocent of murder, or entertained a reasonable doubt on that question, but believed that he unlawfully killed decedent, and the other conditions named in the statute and the instruction existed, they should convict of manslaughter was not objectionable as omitting requirement that the evidence must establish the facts beyond a reasonable doubt, where other instructions stated that he could not be convicted, if the jury had a reasonable doubt.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1990, 1991; Dec. Dig. § 823.*]

10. HOMICIDE (§ 300*)—INSTRUCTIONS—SELF-DEFENSE.

In a murder trial, an instruction requiring proof that the killing was absolutely necessary, or apparently necessary, was not erroneous as not limiting the appearances to accused, and as failing to state to whom the killing must appear to be necessary.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 614-632; Dec. Dig. § 300.*]

11. WITNESSES (§ 317*)—CREDIBILITY—FALSUS IN UNO.

If a jury believes that accused is not telling the truth, they need not give any credence to his testimony.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1080-1083; Dec. Dig. § 317.*]

12. HOMICIDE (§ 340*)—HARMLESS ERROR—INSTRUCTIONS.

In a murder trial, instructions on self-defense under conditions other than those shown by the evidence were harmless error, where the issue was whether accused or decedent shot first.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 715-720; Dec. Dig. § 340.*]

13. CRIMINAL LAW (§ 1137*)—APPEAL—INVITED ERROR.

An instruction, given at the request of defendant, that the testimony of one credible witness is entitled to more than the testimony of several others under certain conditions, instead of stating that it may be entitled to more

weight, though erroneous, is not ground for reversal.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3007-3010; Dec. Dig. § 1137.*]

14. HOMICIDE (§ 250*)—MANSLAUGHTER—EVIDENCE—SUFFICIENCY.

Evidence held to sustain a conviction of manslaughter.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 515-517; Dec. Dig. § 250.*]

15. CRIMINAL LAW (§§ 941, 945*)—NEW TRIAL—CUMULATIVE TESTIMONY.

A new trial asked on account of cumulative, and not conclusive newly discovered, evidence is properly refused.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2324-2330; Dec. Dig. §§ 941, 945.*]

16. HOMICIDE (§ 213*)—DYING DECLARATIONS—STATE OF DECEDENT'S MIND.

That decedent was given a hypodermic injection of morphia the morning when he made his dying declaration does not overcome testimony that his mind was clear when he made the declaration.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 445-447; Dec. Dig. § 213.*]

Error to Circuit Court, La Salle County; Samuel C. Stough, Judge.

Lawrence White was convicted of manslaughter, and he brings error. Affirmed.

Browne & Wiley and Walter A. Panneck, for plaintiff in error. William H. Stead, Atty. Gen., and Charles S. Cullen, State's Atty. (Harold L. Richolson, of counsel), for the People.

CARTWRIGHT, J. In the early morning of Monday, May 9, 1910, Lawrence White, plaintiff in error, assaulted one of the night waiters in the day and night restaurant of Harry Levy, in the city of Ottawa, and sugar bowls, salt cellars, and other articles of crockery on the lunch counter were thrown to the floor and their contents scattered, either by being thrown at the waiter or knocked off. The waiter called Levy, who was sleeping in his residence on the second floor of an adjoining building, and he came downstairs in answer to the call, partly dressed, with an undershirt, trousers, and shoes on, and inquired the cause of the trouble. There was some talk about the affair between him and the plaintiff in error, and the plaintiff in error shot him; the bullet entering the lower part of the left breast. Levy died from the gunshot wound on Wednesday, May 11th, at half past 10 o'clock in the forenoon, and the plaintiff in error was indicted for murder in the circuit court of La Salle county. The only defense at the trial was self-defense, and the plaintiff in error was found guilty of manslaughter and sentenced to confinement in the penitentiary.

[1] The defendant objected to any evidence of what had occurred before Harry Levy entered the restaurant, on the ground that it was wholly unconnected with the killing

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

of Levy and would tend to prejudice the jury against the defendant. The evidence in any case should be confined to the issue being tried, but where there is a logical and natural connection between two acts, or where they form but one transaction, proof of both is proper. In this case the property of Levy had been thrown about the restaurant and some of it destroyed, and his servant had been assaulted in his place of business. He came down when he was called, acting within his rights, to investigate the affair, and it was solely concerning that matter that there was any trouble between him and the defendant. In view of the defense made, it was especially necessary to know whether Levy was an aggressor or making a proper inquiry in reference to a transaction in his own restaurant and in relation to his own property. The transactions were directly associated with each other by a perfectly natural connection, and the circumstances were such that the jury would not understand the situation or be able to decide the case intelligently without knowledge of what had occurred. The evidence was properly admitted.

There was no material controversy as to what happened between the defendant and the waiter. The defendant, who was a saloon keeper, came from his saloon with his bartender, William Hallowell, at half past 5 o'clock in the morning to the restaurant, and they each ordered a ham and egg sandwich and a cup of coffee. The night men were still on duty, consisting of Loanke, the cook, and Reinert and Anderson, two waiters. Anderson waited on the defendant and his companion, and they ate their lunch at the lunch counter. The defendant asked for a fork, and Reinert gave him one and afterward came around the end of the counter and sat down on a stool next the defendant, either voluntarily or at the invitation of the defendant. It is uncertain just what was said between the defendant and Reinert, but there was nothing said on either side which would provoke an assault. Whatever it was, Reinert jumped up and ran around back of the counter. The defendant reached across the counter and got hold of him, and, Reinert attempting to get away, they struggled along the counter. There were three or four groups of dishes on the counter, consisting of a sugar bowl, salt cellar, vinegar cruet, and the like, and the testimony for the prosecution was that whenever they reached a group of those things the defendant would let go of Reinert with one hand and throw the things at him. The defendant claimed that they were pushed off the counter in the scuffle. At any rate, those things and coffee cups were thrown on the floor and sugar and salt scattered about. When they got along part way to the kitchen, Reinert got loose from the defendant and ran into the kitchen. The defendant then went back to his overcoat,

which was either hanging on a hook at the washroom door or lying over the cigar case, and put it on. There was a revolver in one of the pockets, and the cook testified that the defendant then came to the door of the kitchen with the revolver, looking for Reinert, but Reinert had gone upstairs and called the proprietor, Levy, who came down into the restaurant, back of the counter. At this point the first substantial difference between the witnesses began. The testimony for the prosecution was that Anderson was sweeping up sugar, broken saucers, and cups, and things that were behind the counter; that Levy asked what the trouble was about, and the defendant said that he was not to blame, but the waiter was, and that the waiter must be crazy; that Levy asked him to leave, and White became angry, talking loudly and calling Levy a "sheeny bastard," and said if he did not want to let Reinert go he could go to hell; that Levy told White several times to go out of the restaurant, and that the defendant then shot Levy and backed out of the restaurant door, and that Levy, after being shot, picked up a revolver from under the counter and shot at the defendant three times but did not hit him. The defendant and Hallowell testified that the defendant told Levy the difficulty was not his fault and sought to excuse himself; that Levy said to the defendant that if it was trouble he was looking for he would give him all he wanted of it; that Levy was pointing a revolver at defendant, and Hallowell said to Levy to put down the gun and he would get the defendant out, but the defendant, who was standing with his hands in his trousers pockets, said "Let him shoot!" and Levy shot, and that after Levy shot defendant took the revolver out of his overcoat and shot him, and Levy shot at the defendant twice afterward.

[2] This is the substance of the testimony, and, as the question to be determined by the jury was whether the defendant killed Levy in self-defense, it is manifest that the conclusion depended mainly upon the credibility of the witnesses. Hallowell and the defendant gave the testimony intended to establish the defense, and it is contended that the court erred in permitting the prosecution to cross-examine Hallowell as to his previous life and occupation, because it not only discredited him, but tended to show that the defendant was guilty of offenses against the law. On the direct examination Hallowell testified that neither he nor the defendant was drunk or intoxicated at the time, and on the cross-examination he was interrogated as to where and how he had spent the night and what he had drunk. He said he had been up all night in the defendant's saloon and had drunk probably three or four drinks of whisky. If this tended to prove that the defendant kept his saloon open all night, it had already been proven without objection. Anderson had testified that a man

came into the restaurant between 1 and 2 o'clock in the morning and wanted a bottle of beer and half a pint of whisky; that Anderson called up the defendant and asked him if the saloon was open, and that the man gave Anderson a dollar, and he went to the saloon and got two bottles of beer and a half pint of whisky. In any view, the cross-examination was clearly proper upon the subject about which the witness testified on the direct examination.

[3] It is also proper to cross-examine a witness as to his occupation and other matters which will enable the jury to determine what weight ought to be given to his testimony. This witness testified that he was a bartender, and that he had tended bar for the defendant for 18 months. The prosecution then showed, by further cross-examination, that he had put in more time in working for gambling houses in the last 15 years than in tending bar or running a saloon; that he had been employed in the gambling houses of the city, operating gambling tools and devices; that the greater part of his business had been running gambling devices in gambling houses or playing what is called "house money" in poker games, which meant that the saloon or gambling place furnished the money played for; that his business as a gambler frequently obliged him to be up all night as often as once or twice a week, and that frequently on Saturday and Sunday nights he would be up all night. The court did not permit any question as to what work the witness did in the defendant's saloon, or what took place there, and there was no attempt to make any such proof after the question was raised and the ruling made. It is argued that the cross-examination tended to show that the defendant ran a gambling house and was an offender against the law. But if there was any inference of that kind from what the witness said, it was a necessary and inevitable one in the exercise of the right that the prosecution had to bring before the jury the occupation and habits of life of the witness. The law does not permit proof of other offenses, not connected with the charge upon which the defendant is being tried (*Addison v. People*, 193 Ill. 405, 62 N. E. 235; *Brom v. People*, 216 Ill. 148, 74 N. E. 790); but the prosecution could not be hampered nor restrained in perfectly legitimate cross-examination, because an inference unfavorable to defendant might arise. Surely the prosecution was not required to permit this witness to appear before the jury as a man of high character and worthy of confidence, when he was disreputable and his chief occupation that of a lawbreaker. The defendant was cross-examined as to his whereabouts during the night, and testified that he was in the saloon until 11:30 at night, when he went to Carr & Midnight's clubroom, where he drank a couple of "snits" of beer and returned to the saloon about 3:30 in the morn-

ing, where he remained with Hallowell until he went over to the restaurant. There was no attempt by his cross-examination to show any crime or any violation of law.

On Tuesday the doctor in attendance on Levy at the hospital called up the assistant state's attorney and told him that Levy had become much worse, and he did not expect him to recover. The assistant state's attorney, with a stenographer and an attorney, went to the hospital, and the father of Levy was also there. The doctor was requested to inform Levy that he would not get well, but objected, because it would rob Levy of the only comfort that he had. The father then told Levy that he would die and there was no hope, and Levy said that he knew it and expected it, and that he was ready to make a statement, and did so. His declaration, witnessed by two nurses in the hospital, was offered in evidence. It stated that Levy believed that he was about immediately to die from the effects of his wound and had no hope whatever of recovery, and made the statement as his dying declaration. The declaration was to the effect that the night man called him and he came down and the defendant started to do him up, and Levy took a gun and told the defendant to get out, but Hallowell said to put the gun down and he would get him out; that he put the gun under the counter and defendant shot him; that he then picked up the gun and fired three shots; that the minute defendant shot he ducked, and was going out when Levy shot. The declaration was objected to, but was admitted on testimony heard in the absence of the jury, which was afterward read to the jury.

[4] The question whether alleged dying declarations are made under such circumstances as to render them admissible in evidence is to be determined by the court upon the preliminary proof, and if admitted their credibility is exclusively for the jury, whose province it is to consider the circumstances and give them such credit as they may think they deserve. *Starkey v. People*, 17 Ill. 17; *Hagenow v. People*, 188 Ill. 545, 59 N. E. 242, 21 Cyc. 986; 10 Am. & Eng. Ency. of Law (2d Ed.) 287. If the proof does not satisfy the court, beyond a reasonable doubt, that the declaration was made in extremity and was a dying declaration, it should not be permitted to go to the jury. *Digby v. People*, 113 Ill. 123, 55 Am. Rep. 402; *Westbrook v. People*, 126 Ill. 81, 18 N. E. 304.

[5] In our judgment the court was right. Levy was in actual danger of impending death, was suffering intense pain, had difficulty in speaking, was informed of the belief of the doctor that he could not recover, and, in fact, he died the next morning. The fact that he made some remark in answer to efforts of the nurses to cheer him up was not sufficient to show that he entertained a view different from that of the doctor or the statement in the declaration which he

signed. He did not call for any minister, but no inference is to be drawn from that fact, since he was a Jew and there was no rabbi in Ottawa.

[6] Objection was made to the testimony of the assistant state's attorney as to what Levy said and what occurred when the declaration was made, because the attorney was engaged in the prosecution, but that fact went to his credibility, and not his competency.

[7] The declaration was objected to because the names of two nurses were signed as witnesses to the signature of Levy. The objection is that the jury would infer that the nurses were witnesses to the facts stated in the paper. The nurses were not present in the restaurant, knew nothing about what happened there, and did not pretend to. The jury could not have supposed that the nurses did more than to witness the signature, which plainly appears on the face of the paper.

[8] On the final submission of the case, the court was asked to instruct the jury that nothing said or done by the court must be taken by the jury to indicate that the court entertained any opinion whatever on the question whether the statement was the dying declaration of Harry Levy, and the court refused to give the instruction. The jury were instructed, in accordance with the law, with reference to their right to weigh the evidence on the question whether the paper was the dying declaration of Levy, and it was not error to refuse to give them a false statement that the court had no opinion on the subject, when the court could not have submitted the declaration to them without finding, from the evidence, beyond a reasonable doubt, that it was a dying declaration.

[9] The eighth instruction, given at the request of the prosecution, told the jury that, if they believed the defendant not guilty of murder or entertained a reasonable doubt on that question, but believed that he unlawfully shot and killed Levy, and the other conditions named in the statute and instruction existed, they should find him guilty of manslaughter. It is objected to because it omitted the requirement that the evidence must establish the facts beyond a reasonable doubt. The defendant's counsel presented to the court more than 60 instructions, and the court gave 25 without change and four others as modified. It was necessary that the jury should fully understand that the defendant could not be convicted, unless they were convinced of his guilt by the evidence, beyond a reasonable doubt, but in more than half of the instructions given that doctrine was stated and repeated in every conceivable form. The jury were told that they could not find the defendant guilty if they had a single reasonable doubt of his guilt; that so long as any single reasonable doubt remained from the evidence they must

find him not guilty, which assumed that there might be a variety of single and separate doubts as to the one ultimate question whether the defendant was guilty; also that they must presume him to be not guilty at every stage of the proceedings, until they agreed upon a verdict; that then the presumption of innocence should still obtain, and that they should ask their inward conscience and get an answer whether they were morally certain of the defendant's guilt or had a doubt about it. The instruction objected to was not for the purpose of directing a verdict or stating the conditions which would authorize one, and would not be so understood, but was given to inform the jury that they might find the defendant guilty of manslaughter, although not guilty of murder. It is inconceivable that the jury could have supposed that the instruction had any other purpose.

[10] Instruction No. 17 required proof that the killing of the deceased was absolutely necessary or apparently necessary, and counsel insist that it was error to give it, because it was not in harmony with the doctrine of apparent danger. They say that the words "apparently necessary" apply to the killing of Levy, and not to the danger of the defendant, and that the appearances mentioned in the instruction were not limited to the defendant, and it was not stated to whom the killing must appear to be necessary. The instruction is not subject to the objection, and the argument belongs to a class of refinements that have no practical value.

[11] Instruction No. 20 is objected to because it directed the jury to give the defendant's testimony only such weight, if any, as they believed it entitled to in view of all the facts and circumstances proved at the trial. The objection is to the words "if any," which, it is said, would permit them to give the testimony no weight. But it is the law, and, if the jury were satisfied that the defendant was not telling the truth, they were not required to give any credence to his story.

[12] There are some instructions stating the law of self-defense under other conditions than those shown by the evidence in this case, but they are harmless and could not have misled the jury. The simple question involved was whether Levy or the defendant shot first, and the jury were very fully instructed; the instructions for the defendant generally going to the extreme limit of the law, and some of them beyond.

[13] Several of the numerous instructions on the subject of reasonable doubt invaded the realm of argument in favor of the defendant. Instruction No. 52, which the defendant procured to be given, is the same as the tenth instruction which was condemned in the case of *Johnson v. Farrell*, 213 Ill. 542, 74 N. E. 760, with its errors intensified by saying that the testimony of one credible witness is entitled to more weight

than the testimony of several others under the conditions named in the instruction, instead of saying that it may be entitled to more weight. The defendant had no cause to complain respecting the instructions.

It is argued that the judgment ought to be reversed because of improper remarks by the state's attorney and his assistant in arguing the case to the jury. The statements are almost wholly by the assistant, in the opening argument after conclusion of the evidence, to which counsel for the defendant had full opportunity to reply. The argument was confined to the evidence in the case, and in our opinion did not go beyond legitimate bounds.

[14] The evidence warranted the jury in finding the defendant guilty. The circumstances all tended to corroborate the witnesses for the prosecution. There was a bullet hole through a newspaper lying on the shelf under the counter and through the end of the counter, about 10 inches from the floor, which could not have been made by Levy with the revolver pointed at the defendant above the counter. That fact is strong evidence of the truth of the dying declaration that when Levy picked up the revolver from the shelf under the counter, as he said he did, in his excitement one shot was made through the paper and the counter. Witnesses who heard the shots testified that the first one was much louder than the three subsequent ones, and the defendant's revolver was .38 caliber while Levy's was .32, and the shot under the counter would not make as loud a noise as the one above. It was a controverted question whether the door was shut, and there was considerable evidence that there was a spring upon the door which would close it, unless it was fastened open, which was not done on this occasion. The front and the door were of glass, and if the door was closed Levy could not have fired the first shot, for the reason that the glass door and glass front did not have any bullet hole or bullet mark, and at least the last two shots were at a time when the door was open. If the spring was on the door, it would be conclusive evidence against the defendant, but if there was no spring it would not be conclusive that the door was open until the defendant was going out, when Levy was shooting. There is a controversy as to whether the defendant left his coat on the cigar case or hung it near the washroom door, but that question is not material. We approve of the verdict and judgment.

[15] There was a motion for a new trial based upon the affidavits of the drivers of a laundry and a bakery wagon that there was no spring on the door in working order, but the evidence was cumulative and not conclusive. If there was no spring on the door, that would not prove that it was open.

[16] There was an affidavit of the doctor, showing that on the morning when the declaration was made Levy was given a hypodermic injection of morphia. That would not overcome the testimony of a number of witnesses that the mind of Levy was perfectly clear when he made the declaration.

There is no prejudicial error in the record, and the judgment is affirmed.
Judgment affirmed.

(261 Ill. 185)

PEOPLE v. SMITH.

(Supreme Court of Illinois. June 20, 1911.

Rehearing Denied Oct. 11, 1911.)

1. CRIMINAL LAW (§ 37*)—ENCOURAGEMENT OF OWNER TO TAKE PROPERTY.

G. having been arrested with a large number of postage stamps on his person, and having said he got them of defendant, who was in charge of the mailing department of L., the detectives consulted with representatives of L., and, as then arranged, G. telephoned defendant that he had the money for the last stamps, asked if defendant could get more stamps, and arranged to meet him. L.'s representatives then marked some of its stamps. Defendant later met G., as he had telephoned that he would, bringing \$130 worth of stamps, including some of those marked. *Held*, that there was no encouragement, soliciting, urging, or advising of defendant by L. or its agents to commit the crime, preventing a conviction, but that the criminal design and intent originated with defendant.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 42; Dec. Dig. § 37.*]

2. CRIMINAL LAW (§ 1169*)—APPEAL—HARMLESS ERROR.

Any error in admitting defendant's confession was harmless, where independent of it the undisputed evidence was so complete as to leave no reasonable doubt as to his guilt.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3137-3143; Dec. Dig. § 1169.*]

Error to Criminal Court, Cook County; Marcus Kavanagh, Judge.

Jasper Mason Smith was convicted, and brings error. Affirmed.

S. E. Foos, for plaintiff in error. W. H. Stead, Atty. Gen., John E. W. Wayman, State's Atty., and W. Edgar Sampson (Robert E. Crowe, of counsel), for the People.

FARMER, J. The plaintiff in error was indicted in the criminal court of Cook county for the embezzlement and larceny of \$50 worth of United States postage stamps, the property of Libby, McNeill & Libby, a corporation. He pleaded not guilty to the indictment, was tried, convicted, and sentenced to confinement in the penitentiary, and brings the record here for review by writ of error.

Plaintiff in error had charge of the mailing department of Libby, McNeill & Libby. Elston and Driggs, two post office inspectors, learned in March, 1910, that one Robert Griffith had been disposing of considerable quan-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes
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titles of postage stamps to a man named Owens, who had an office in the New York Life building. On the 31st of March Elston and Driggs arrested Griffith, and found on his person United States postage stamps worth \$317. They took him to Inspector Steward, in the government building, and upon being questioned Griffith told the inspectors he obtained the stamps from the plaintiff in error, who was employed at the stockyards by Libby, McNeill & Libby. The inspectors then called up the president of that corporation by telephone, and on being informed of the situation he sent three representatives to the government building. On their arrival at the building it was arranged that Griffith should call plaintiff in error by telephone and inform him he had the money for the last stamps received, and also inform him that Owens wanted some more stamps. By means of extension phones the representatives of Libby, McNeill & Libby listened to the conversation between Griffith and the plaintiff in error, the substance of which was that Griffith told plaintiff in error he had the money, and asked when and where he could meet plaintiff in error, who replied he would meet Griffith the next evening at 5:30, at Halsted and Forty-First streets. Griffith inquired if plaintiff in error could get some more stamps, and he said he could get about \$200 worth. The representatives of Libby, McNeill & Libby then went to the offices of that corporation and marked a number of sheets of stamps so that they would be able to identify them. It was arranged between the post office inspectors and Griffith that the inspectors would be near the meeting place appointed by Griffith and plaintiff in error, so they could see them when they met. If plaintiff in error had any stamps, Griffith was to walk along the street with him; and if he did not have stamps, Griffith was to take off his hat. When Griffith and the plaintiff in error met, the inspectors placed the plaintiff in error under arrest and found upon his person United States postage stamps—ones, twos, fours, and fives—to the amount of \$130. These stamps were produced at the trial, and among them were sheets of different denominations containing marks which witnesses in the employ of Libby, McNeill & Libby testified they placed on the stamps the evening before. By means of these marks they positively identified them as the property of Libby, McNeill & Libby. The cashier of that corporation testified that upon the day plaintiff in error was arrested he issued to him 2,000 one-cent stamps, 5,500 two-cent stamps, and 200 four-cent stamps.

After placing plaintiff in error under arrest, the post office inspectors took him to the office of Libby, McNeill & Libby, and into the presence of H. W. Hardy, the assistant treasurer of Libby, McNeill & Libby, who was also present in the government building the evening before, when Griffith

talked with plaintiff in error over the telephone. Hardy testified plaintiff in error said he wished to see him personally; that he would like to get the matter out of the hands of the post office inspectors, and inquired if anything could be done to hush it up, and said he would give \$5,000 to do it. Hardy replied that he did not know what could be done, and asked plaintiff in error if \$5,000 would cover the amount of stamps he had taken. Plaintiff in error said he could not then tell how many he had taken. Hardy told him, if he had not taken that amount, he would not want to ask him to pay that much, but if that amount did not cover the stamps taken he would not consider a settlement on that basis. Hardy further told plaintiff in error he could not do anything without talking with Mr. Aaron, the attorney for Libby, McNeill & Libby; that he would talk to Mr. Aaron about the matter, and see plaintiff in error the next morning. The witness saw plaintiff in error the next morning at the police station, and plaintiff in error said he wished whatever was to be done would be done quickly. Witness told him he did not see what could be done unless he knew how many stamps had been taken. Plaintiff in error said he would like to see his wife about giving security; that he had been taking stamps for a period of about five years, and the amount taken was about \$9,000; that he had a small amount of farm property and an interest in the business of Lundstrom & Smith, but his home was in his wife's name, and he wanted to see her about giving security. He also said his income from the business of Lundstrom & Smith would soon wipe out the amount taken, if that would be accepted as security. Witness replied that he would see what could be done.

The errors assigned are that plaintiff in error was invited, encouraged, and solicited to commit the crime, that the court erred in admitting the confession of plaintiff in error to Hardy, that the evidence was insufficient to sustain the conviction, and that the court erred in giving and refusing instructions.

[1] There is no basis for the contention that plaintiff in error was encouraged or solicited to take the stamps by Libby, McNeill & Libby or any one in its employ. The criminal design and intent originated in the mind of plaintiff in error. Neither the owner of the stamps nor its agents urged or advised the commission of the crime, but, suspecting the plaintiff in error, it took precautions to ascertain whether he would commit the offense. The law does not prohibit this being done. If it did, it would destroy one of the most effective agencies for the detection of crime. *Love v. People*, 160 Ill. 501, 43 N. E. 710, 32 L. R. A. 139, only announced the rule that an owner cannot aid, encourage, or solicit the commission of crime against his own property.

[2] Only a general objection was interpos-

ed to the confession of plaintiff in error testified to by the witness Hardy, but whether said confession was made under circumstances which rendered it incompetent as testimony, and whether, if incompetent, the objection made preserved the question for review, is not necessary to a decision of this case; for, independent of the confession, the undisputed evidence against plaintiff in error was so complete as to leave no reasonable doubt whatever as to his guilt.

There was no error committed by the court in giving and refusing instructions. The judgment is affirmed.

Judgment affirmed.

(251 Ill. 34.)

FECHT v. FREEMAN et al.

(Supreme Court of Illinois. June 20, 1911.
Rehearing Denied Oct. 11, 1911.)

1. DEEDS (§ 211*)—EVIDENCE—MENTAL INCOMPETENCY.

In a suit by an incompetent's conservator to set aside a conveyance of realty, evidence held to warrant a finding that at the time of the conveyance the incompetent was wholly unable to care for himself or protect his property, especially as against the grantee and those acting with him in the endeavor to obtain the conveyance in question.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. § 633; Dec. Dig. § 211.*]

2. INSANE PERSONS (§ 36*)—APPOINTMENT OF CONSERVATOR—COLLATERAL ATTACK.

County courts having jurisdiction over the persons and estates of incompetents, with authority to appoint conservators, and not being courts of inferior, though of limited, jurisdiction, with power to determine in the first instance whether necessary jurisdictional facts appear, the judgment of a county court appointing a conservator for an incompetent was not subject to collateral attack in a suit by the conservator to set aside a conveyance by the incompetent, on the theory that, because of the incompetent's alleged lack of residence in the county, the county court was without jurisdiction.

[Ed. Note.—For other cases, see Insane Persons, Cent. Dig. § 55; Dec. Dig. § 36.*]

3. INSANE PERSONS (§ 32*)—RESIDENCE—APPOINTMENT OF CONSERVATOR—JURISDICTION.

Evidence held to show that an incompetent was a resident of C. county at the time a conservator was appointed for him by the county court of that county.

[Ed. Note.—For other cases, see Insane Persons, Cent. Dig. § 47; Dec. Dig. § 32.*]

4. INSANE PERSONS (§ 66*)—CONVEYANCE—VACATION—STATU QUO.

Where plaintiff, an incompetent and a spendthrift, being unable to get a loan on a farm in which he had an equity worth \$12,500, was induced to convey the farm to defendant in consideration of a house and lot valued at \$3,000 and mortgaged for \$3,500 to defendant's brother-in-law, which the incompetent assumed together with certain worthless mining stock and a check for \$1,250, which the incompetent immediately cashed and wasted, and any reasonable person conversing with the incompetent would have discovered his incapacity, he was not required to return the proceeds of the check

as a condition to the setting aside of the conveyance.

[Ed. Note.—For other cases, see Insane Persons, Cent. Dig. § 105; Dec. Dig. § 66.*]

Appeal from Circuit Court, Champaign County; Solon Philbrick, Judge.

Bill by John Fecht by William H. Wheat, his conservator, against Gus T. Freeman and others. From a decree dismissing the bill without prejudice, complainant appeals. Reversed and remanded, with directions.

H. I. Green and O. B. Dobbins, for appellant. Le Forgee, Vail & Miller, for appellees.

HAND, J. This was a bill in chancery filed in the circuit court of Champaign county by John Fecht, by his conservator, against Gus T. Freeman and Alice J. Freeman, his wife, to set aside a deed to the E. ¼ of the S. E. ¼ of section 25, in township 20 N., range 10 E. of the third principal meridian, in Champaign county, Ill., executed by John Fecht to Gus T. Freeman on May 4, 1908, and recorded in the recorder's office of the said county on May 5, 1908, and for other relief. An answer and replication were filed, and the case was referred to a special master to take the proofs and report his conclusions. The master took the proofs, and after overruling objections thereto filed a report, finding as follows:

(1) That the court had jurisdiction of the parties and subject-matter.

(2) That the equities of the cause are with the complainant.

(3) That John Fecht was on the 4th day of May, 1908, at the time of the transaction mentioned in said bill of complaint, and for several years previous thereto, and still is, a person of unsound mind and not capable of taking charge of his property and affairs; that from childhood up his mental ability has been so weak and undeveloped that he has been the creature of mere suggestion, and was so addicted to the use of intoxicating liquor that he would dispose of any of his effects and property without any consideration for their real value, in order to get a little money with which to purchase intoxicating liquor.

(4) That Henry Johnson was duly and regularly appointed conservator for the estate of the said John Fecht by a court of competent jurisdiction, and qualified as such prior to beginning this action.

(5) That on the 4th day of May, 1908, the said John Fecht was the owner of the following described real estate: The E. ¼ of the S. E. ¼ of section 25, township 20 N., range 10 E. of the third principal meridian, Champaign county, Ill., subject to a mortgage indebtedness of \$500 to the Trevett-Mattis Banking Company of Champaign, Ill., said mortgage for \$500 bearing date of March 2, 1906, and due in five years there-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes

after, with interest at 5 per cent. per annum, which said land he received as the heir and devisee of his father, Martin H. Fecht, who departed this life on or about the 19th day of January, 1906, leaving a last will and testament devising the above-described land to his son, John Fecht, which said will was duly probated in the county court of Champaign county, Ill., and that the land so owned by John Fecht was of the fair cash market value of \$13,000.

(7) That on the 4th day of May, 1908, the said John Fecht made a deed to said land conveying the same to the defendant Gus T. Freeman.

(8) That the defendants, Gus T. Freeman and Alice J. Freeman, are husband and wife.

(9) That the defendant Gus T. Freeman on the 4th day of May, 1908, was possessed of certificates of 58,466 shares of stock in the Lewis & Clark Gold Mining Company of Grant's Pass, Or., which certificates represented the shares of stock to be of the value of \$1 each.

(10) That said gold mine had been abandoned long previous to May 4, 1908, and the shares of stock were not of the value of \$1 each, nor of any market value whatever, and were not worth the paper they were written upon, and the defendant Gus T. Freeman had knowledge of the same.

(11) That Alice J. Freeman on the 4th day of May, 1908, was the owner of lot 7 of S. H. Busey's Third addition to the city of Urbana, Ill., Champaign county, upon which lot was located a house.

(12) That on the 4th day of May, 1908, the fair cash market value of said house and lot was \$8,000.

(13) That on the 4th day of May, 1908, the said Alice J. Freeman, with Gus T. Freeman, her husband, executed a mortgage upon said lot 7 of S. H. Busey's Third addition to the city of Urbana, Ill., for \$3,500 to George W. Busey, trustee for M. W. Busey, said mortgage purporting to secure one note of even date therewith for the principal sum of \$3,500, bearing interest at 6 per cent. per annum, payable semiannually, and due one year after date thereof, and the acknowledgment bearing date of May 1, 1908, being made and executed on the 4th day of May, 1908, and dated back by said defendants and filed for record on the 5th day of May, 1908, and the consideration for the same being paid on the 5th day of May, 1908, and the said mortgage was for \$500 more than the fair cash market value of said property.

(14) That the said John Fecht, under the direction of one J. F. Geddes, of the city of Danville, came to the office of said Gus T. Freeman, in the city of Urbana, in company with and was introduced by one Robert Swift to Gus T. Freeman on or about the 1st day of May, 1908, and at said time the defendant Gus T. Freeman, in accordance with a previous arrangement with the

said J. F. Geddes, of Danville, Ill., made a proposition to John Fecht to trade for his 80 acres of land described, giving said John Fecht for said land the house and lot above described of the defendant Alice J. Freeman, together with the certificates of shares of the gold mining stock in possession of defendant Gus T. Freeman and about \$1,000 in cash.

(15) That at that time the said John Fecht was of unsound mind and was not capable of taking charge of his property, and had not the mental ability to understand the nature and extent of such a transaction, and had not the mental ability to understand the value of the said 80 acres of land above described which he at that time owned, and that the enfeebled mental condition of the said John Fecht was of such an extent and character and so manifest that any person could observe the same in a few minutes' conversation with him, and that the mind of the said John Fecht was so manifestly weak that he would follow the suggestion of any person who would offer him or give him a small amount of money.

(16) That on the 4th day of May, 1908, again in company with one Robert Swift, the said John Fecht came from the office of J. F. Geddes, in the city of Danville, to the said city of Urbana, to the office of the defendant Gus T. Freeman, who thereupon took him to the office of one L. B. Saffer, in said city of Urbana, and consummated with said John Fecht a trade, the said John Fecht conveying by a warranty deed to Gus T. Freeman the 80 acres of land so owned by him, namely, the E. $\frac{1}{2}$ of the S. E. $\frac{1}{4}$ of section 25, in township 20 N., range 10 E. of the third principal meridian, in Champaign county, Ill., subject to a mortgage of \$500 thereon to the Trevett-Mattis Banking Company, and said Gus T. Freeman gave to the said John Fecht for said real estate a warranty deed made and executed by Alice J. Freeman and Gus T. Freeman, her husband, for lot 7 of S. H. Busey's Third addition to the city of Urbana, Illinois, subject to a mortgage (which mortgage, by the terms of the deed, the said John Fecht assumed and agreed to pay), certificates of 58,466 shares of stock in the Lewis & Clark Gold Mining Company of Grant's Pass, Or., and \$1,250 in cash.

(17) That at the time the said trade was made the said John Fecht was so weak mentally that he did not understand the nature and extent of the trade in which he was entering, and that said defendants, Gus T. Freeman and Alice J. Freeman, together with the agents that were working for the said defendants, knew, or by the exercise of reasonable care could have known, of his weak mental condition at said time.

(18) That the said will of Martin H. Fecht, by which the said John Fecht received title to the 80 acres of land in question, contained a clause as follows: "With

this provision, that he shall not sell or dispose of the said land until he shall have reached the age of forty-five years"—which provision the said Gus T. Freeman knew and concerning which he consulted with attorneys previous to the time of making any arrangements with the said John Fecht concerning the said trade, and the said Gus T. Freeman knew that the said John Fecht at the time was of about 25 years of age, which provision, together with the age of the said John Fecht, should have put the defendant Gus T. Freeman upon his inquiry as to the mental capacity of John Fecht.

(19) That the defendant Alice J. Freeman on the 4th day of May, 1908, knew that the fair cash market value of lot 7 in S. H. Bussey's Third addition to the city of Urbana did not exceed \$3,000, and that she, together with her husband, at the time of the trade in question, executed a mortgage upon said property for \$3,500, which the said Alice J. Freeman and her husband knew was far in excess of the fair cash market value of said property, and the defendants, Alice J. Freeman and Gus T. Freeman, knew that the price asked in said trade, with the incumbrance upon said property of \$3,500, was so grossly inadequate that they were constructively conspiring to defraud and take advantage of the enfeebled mental condition of John Fecht in said trade, by causing the said John Fecht, by the terms of said trade, to assume and agree to pay said mortgage of \$3,500.

(20) That the reasonable fair cash market value of the 80 acres of land so conveyed by John Fecht to Gus T. Freeman was \$12,000, and that the reasonable fair cash market value of the house and lot conveyed by Alice J. Freeman to John Fecht was \$3,000, subject to a mortgage of \$3,500, which John Fecht assumed and agreed to pay, that the fair cash market value of the gold mining stock was not anything, and that the only thing that John Fecht received for his 80 acres of land was a check for \$1,250.

(21) That the defendant Gus T. Freeman in his trade acted for himself and as agent for his wife, Alice J. Freeman, and that, acting for himself and as such agent, he did fraudulently, maliciously, and unlawfully take advantage of the enfeebled mental condition of said John Fecht, and did make said trade for the purpose of defrauding and cheating said John Fecht out of his land and property.

(22) That a decree should be entered in this court that the deed from the said John Fecht to Gus T. Freeman be canceled and declared null and void, and the defendants be required to cause to be conveyed to said John Fecht the said premises conveyed by the said John Fecht to said Gus T. Freeman, and that the said John Fecht be required to convey to the said Alice J. Freeman the title to the house and lot conveyed

by said Alice J. Freeman to the said John Fecht, and the said John Fecht be released from the agreement to pay the mortgage placed upon said house and lot by the said Alice J. Freeman, and John Fecht return, with proper assignment, the certificates of the gold mining stock secured from Gus T. Freeman.

(23) That the said John Fecht, by reason of his mental incapacity, has wasted and lost the \$1,250 paid to him in said trade by the defendant Gus T. Freeman, and that the defendants had knowledge of the mental incapacity of the said John Fecht, and by making use of said mental incapacity obtained the conveyance of land in question from said John Fecht for a consideration so inadequate as to be inequitable, and to evince that it was the intention of the defendants to take advantage of the infirmity of the said John Fecht and to defraud him, and that the said John Fecht should not be required to return to the defendants the \$1,250 which was paid to him in the consideration of said trade.

The objections filed with the master were renewed as exceptions in the circuit court, and were sustained as to findings Nos. 2, 3, 4, 15, 18, 19, 21, and 23, and the court prepared in lieu thereof findings as follows:

That John Fecht was devised by the will of his father Martin H. Fecht (which will was duly admitted to probate and recorded in the records of Champaign county), the E. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$ of section 25, township 20 N., range 10 E., of the third principal meridian, in Champaign county; that the provisions of said will restricting the alienation of this property by the said John Fecht until he should arrive at the age of 45 is void and of no effect. The court further finds that by the will of said Martin H. Fecht he made John Fecht coexecutor with his brother, and that from and after the death of the said Martin H. Fecht the said John Fecht managed and controlled his own property, and was permitted so to do and recognized as capable of so doing by his said father by said will, and that from that time until the time of the alleged appointment of a conservator the aforesaid John Fecht did transact all his business matters, dealt in business ways, and had the control of his property and the use and expenditures of the same with the general public as an ordinary person, and was so treated by persons who so dealt with him; that the said John Fecht was treated and dealt with by persons who had business relations with him during said time as ordinarily capable of doing such business as they were transacting with him. The court further finds that there was no conspiracy entered into by said Gus T. Freeman or Alice J. Freeman with any person whatever for the purpose of defrauding or cheating the said John Fecht out of his property. The court further finds that prior to the time of a trade entered into

by and between Gus T. Freeman and John Fecht the said John Fecht had been endeavoring through various parties to borrow money upon the land so owned by him, and that by reason of the clause of the will of the said Martin H. Fecht in attempting to prevent the alienation of the said premises parties from whom said loan was sought to be obtained declined to make the same. The court further finds that having failed to obtain said loan the said John Fecht then determined to dispose of, sell, and convey his said premises, regardless of their value, and entered into negotiations by which the said sale was consummated and the said property purchased by defendant Gus T. Freeman, that prior to the time of the said purchase the said Gus T. Freeman knew nothing of the mental condition or mental capacity or ability to transact business of the said John Fecht, and that there was nothing whatever at that time or in the transaction that gave him any reason to believe or suspect that the said John Fecht did not know or understand the value of the property he owned or the value of the property that he was receiving from Gus T. Freeman, except the fact that he made no investigation whatever of the value of the shares of gold stock which he was receiving as a part consideration for the said trade. The court further finds that at the time of the said trade the said John Fecht was not mentally capable of transacting, understanding, or protecting himself in the trade which he then consummated, and, that the said Gus T. Freeman having had no notice or knowledge of the condition of the said John Fecht, the trade so consummated and made was one which was not void but only voidable. The court further finds that at the time of the alleged appointment of Henry Johnson as conservator of the estate of John Fecht, and at the time of the institution of said proceedings, and for a considerable time prior thereto, the said John Fecht was not a resident of the county of Champaign, state of Illinois; that he at that time resided in the city of Danville, county of Vermillion, state of Illinois; that he was then engaged in business in said city in said Vermillion county, had voted at an election prior thereto, and had become a resident of that county. The court further finds that for the purpose of securing the appointment of a conservator by the county court of Champaign county the said John Fecht was illegally and fraudulently brought within the jurisdiction of Champaign county, where service was had upon him in said proceedings, and that the said John Fecht was not at that time a resident of the said Champaign county, and that the bringing of the said John Fecht within the jurisdiction of said county court of said Champaign county and of service of process upon him in that county did not give the county court of Champaign county jurisdiction or authorize it to appoint a conservator for said

John Fecht, and that by reason of the failure of the said county court of Champaign county to have jurisdiction to make the said appointment the alleged appointment of the conservator of John Fecht as herein set forth in the bill of complaint is not sustained, and that there was no legally appointed conservator of said John Fecht, and that the plaintiff herein is not authorized to and cannot maintain this action. It is therefore ordered that a decree be entered dismissing the bill, and it is ordered that the bill be and is hereby dismissed at the cost of the estate of John Fecht, without prejudice.

Thereupon the court entered a decree dismissing the bill at the cost of the estate of John Fecht, without prejudice, and John Fecht, by his conservator, has prosecuted an appeal to this court.

The findings of the master that John Fecht was incompetent to make the deed and that the same should be set aside for that reason were all approved, and the court, by its rulings upon the exceptions, disagreed with the master on the following propositions, only: First, that the conservator of John Fecht was duly appointed by the county court of Champaign county; and, second, that Gus T. Freeman did not act in good faith in dealing with said John Fecht and without notice that he was incompetent to make said deed, and that the same should be set aside without reimbursing Gus T. Freeman for the cash payment which he made John Fecht at the time said deed was made and delivered.

This record is voluminous, but there is but little conflict in the evidence as to the material facts. Martin H. Fecht, a widower, and his sons, John and Harm Fecht, resided upon a 160-acre farm in Champaign county, where Martin H. Fecht died in 1906, testate, leaving the said farm clear of incumbrance, which was of the value of about \$28,000, and possessed of about \$10,000 worth of personal property. By his will he gave to John the real estate in controversy and \$6,000 in money, and the balance of his estate to his son Harm Fecht, and appointed his sons as executors. The will was admitted to probate, and within one year thereafter John came into possession of the 80 acres of land devised to him and of \$6,000 in cash. The family physician, Dr. McKinney, who had treated the family for many years, testified that Mrs. Fecht was insane for many years prior to her death, and that Martin H. Fecht was demented and a dipsomaniac; that he only knew two things—one to acquire land and keep it, and the other to drink whisky—and that he died of delirium tremens and pneumonia while living alone with his sons and surrounded by the most filthy conditions he ever witnessed. Dr. Walker testified to the same conditions, and they both agreed the condition of his parents and the conditions under which he was

raised affected materially the physical and mental growth of John Fecht. Two score or more of the neighbors of the Fecht family testified that John Fecht from his infancy was mentally weak, bordering on imbecility; that he could not learn at school, and that as he has grown older his mental deficiencies and weaknesses increased and were more apparent; that for some years prior to the execution of the deed now sought to be set aside he was drunk substantially all the time if he could obtain liquor, and that within 18 months after he had received the \$6,000 in cash from his father's estate he had squandered every cent of that amount, together with the rents of the farm, and had incumbered the land for \$500, which had gone in the same way. Dr. McKinney testified that John Fecht was a masturbator, and that, when John was about 18 years old, he attempted self-castration, and that when the witness, in company with Dr. Walker, arrived at the Fecht home, he found John covered with blood, his testicles partially severed, and his private parts covered with wood ashes and wrapped in filthy rags, and his only excuse for the act given to the physicians was that his father had been castrating pigs in the forenoon, and, as he was no good, he concluded to treat himself in the same manner. On another occasion he called upon Dr. Harris in the evening and desired medical treatment. The doctor, on examination, found he had smallpox, and directed him to go immediately to his home, in company with another debauchee who was with him, and remain there until he (the doctor) should arrive. John inquired of the doctor if smallpox was a serious matter. The doctor explained to him the nature of the disease and he went away. On the arrival of the doctor at the farm he was unable to find him, but in a short time he arrived in company with his friend, and stated they had been to a neighbor's to get breakfast. After his father's death he made his home with his brother, who was married and who had more mentality than John. For a year or two after the death of his father John tried to farm, but with no success. He surrounded himself with drunken characters and neglected the farm. He then went into the implement business in a small village near his home, but that only lasted three months, when it was closed out. During the time he was conducting the implement business complaint was made to the town supervisor that he was constantly drunk, that he slept in barns, and was a general nuisance to the neighborhood, and a request was made that he be cared for. He then purchased a restaurant in Danville, which he carried on for a few days and then abandoned. He afterwards purchased a secondhand clothing business in Danville, which seems to have been soon converted into a drinking place and a

resort for lewd characters. The witnesses, with the exception of Freeman, a lawyer by the name of Saffer (who claimed his privilege on the ground he closed the deal for Freeman), a real estate agent from Danville by the name of Geddes, and one Swift, a hanger-on at the office of Geddes, who helped Freeman engineer the trade whereby Freeman got the deed to the land in controversy, all testified that no rational person could converse with John Fecht for but the briefest period and upon the simplest subjects without discovering that he was weak-minded and unable to do business. John Fecht was small in stature, and the witnesses generally spoke of him as a boy, although he was twenty-five years of age, and said he talked like a boy six or eight years old instead of like a man, that if he had money in his possession, regardless of the amount, he soon parted with it, and that he often begged for food from house to house, and asked people with whom he was acquainted for money with which to buy something to eat.

[1] The foregoing facts clearly, we think, establish that the master and chancellor were justified in finding that John Fecht was wholly unable to take care of himself or to protect his property, especially as against Freeman and the men who were acting with him in their endeavor to get the farm from John Fecht. The 80 acres owned by John Fecht were valued at about \$175 per acre, and were found by the master to be worth \$13,000. The 80 acres received by his brother were worth about \$15,000, and John was given \$2,000 more of the personal property than his brother to equalize the two 80's of land. John had mortgaged his 80 for \$500, so that his equity therein on May 4, 1908—the date of the deed—was worth \$12,500. For that 80 acres John Fecht received from Freeman a house and lot in the city of Urbana, which the master and chancellor found was worth \$3,000, and which for the purpose of the trade was incumbered by Freeman for \$3,500, which incumbrance John Fecht assumed and agreed to pay; 58,466 shares of mining stock, of the par value of \$1 per share, in a defunct mining company of which Freeman was president and which stock was absolutely worthless, and a check for \$1,250, which check was cashed by John Fecht and the proceeds given away, lost, or squandered within a few days. It is therefore clear from the foregoing figures, which are taken from the testimony of Freeman, that Fecht did not receive from Freeman to exceed \$1,250 for the equity in a farm that was worth \$12,500.

[2] The first question in law which arises on this record is, Could the appointment of a conservator of John Fecht by the county court of Champaign county be attacked collaterally in this proceeding? We are of the

opinion it could not. The county courts of this state are created by the Constitution; and, while they are courts of limited jurisdiction, they are not courts of inferior jurisdiction, and, when adjudicating upon the class of questions over which they have general jurisdiction, as liberal intendments will be indulged in their favor as will be extended to the proceedings of the circuit courts. The county courts of this state have jurisdiction to appoint conservators of insane and distracted persons, spendthrifts, etc., and jurisdiction over their persons and estates after a conservator has been appointed, and the question whether a particular county court has jurisdiction of a particular estate is a question of fact to be determined by that court, and when that question is once determined by the county court its judgment is conclusive and cannot be questioned by the circuit court in a collateral proceeding. *Bostwick v. Skinner*, 80 Ill. 147. In this case a petition was filed in the county court of Champaign county for the appointment of a conservator of John Fecht on the ground that he was insane and unable to care for his property. A summons was issued and served upon John Fecht in Champaign county by the sheriff of that county. A guardian ad litem was appointed by the court to represent the defendant, who appeared by attorney. A jury was selected, which after a trial found that John Fecht was a resident of Champaign county, was insane, and that a conservator should be appointed of his person and estate, and thereupon the court entered judgment upon the verdict and thereafter appointed Henry Johnson as conservator of John Fecht. He duly qualified and thereupon filed this bill. Henry Johnson, however, died during the pendency of this suit, and William H. Wheat was appointed by the county court of Champaign county in his stead as conservator of John Fecht and qualified, and was by order of the circuit court substituted as complainant, instead of Henry Johnson, and has prosecuted this appeal on behalf of his ward.

But two reasons are urged why the appointment of a conservator of John Fecht by the county court of Champaign county was not regular: First, that John Fecht was a resident of Vermillion county, and not of Champaign county, at the time the proceedings to appoint a conservator were commenced; and, second, that John Fecht was induced to come into Champaign county from Vermillion county, before the conservator had been appointed, in order that process might be served upon him. These were questions that the county court of Champaign county had the power to consider and determine—that is, that court might rightfully determine for itself whether it had jurisdiction of the person of John Fecht—and, the court having determined these questions and proceeded to hear the cause, its determination thereon was conclusive of

those questions and its judgment in that regard could not be reviewed by the circuit court in this proceeding, which is a proceeding collateral to the proceeding in the county court for the appointment of a conservator.

The authorities in this state are all one way upon the question that the county courts of this state, in the appointment of guardians, administrators, and conservators, are judges of their own jurisdiction. In *Dodge v. Cole*, 97 Ill. 338, 37 Am. Rep. 111, which was a proceeding in chancery by a conservator to set aside a fraudulent conveyance, where it was contended the county court which made the appointment did not have jurisdiction to make the appointment by reason of the fact that the insane person was not a resident of the county in which the appointment was made, the court, on page 351 of the opinion, said: "It is claimed, in the first place, that the proceedings in the De Witt circuit court in which Maria Sharp was adjudged an insane person and John H. Lisk was appointed her conservator are null and void for the reason it does not appear that there was personal service on her, and that therefore Lisk had no right or authority, as conservator, to make application for a sale of the land or to sell the same under the directions of the court, that, his appointment being void, his action in the premises must be regarded as that of a mere stranger, and in support of this position *Eddy v. People*, 15 Ill. 386, is cited and relied on. It is sufficient to say with respect to this question that we are of opinion that the validity of Lisk's appointment as conservator cannot be inquired into in a collateral proceeding like the present. It is the settled doctrine of this court that the regularity or validity of an administrator's appointment cannot be questioned collaterally (*Wight v. Wallbaum*, 39 Ill. 554; *Duffin v. Abbott*, 48 Ill. 18), and on principle we can see no difference in the case of a conservator and an administrator."

In the late case of *Balsewicz v. Chicago, Burlington & Quincy Railroad Co.*, 240 Ill. 238, 88 N. E. 734, an administrator was appointed in Bureau county, and a suit for damages was commenced by the administrator so appointed in that county. The defendant offered in evidence a release made by a prior administrator who had been appointed by the county court of Cook county, and it was sought to prove in that case that the appointment in Cook county was void for want of jurisdiction. This court held otherwise, and on page 246 of 240 Ill., page 737 of 88 N. E., said: "The probate court of Cook county has general jurisdiction of the settlement of the estates of deceased persons, and, when adjudicating upon questions arising in such matters, as liberal intendments are to be made in favor of its findings as of those of courts of general jurisdiction. *Bostwick v. Skinner*, 80 Ill. 147; *Blair v. Sennott*, 134 Ill. 78 [24 N. E. 969]. Residence of the deceased at the time of his death within the territorial

jurisdiction of the court is essential to give the probate court jurisdiction to grant administration of his estate. But the probate court having general jurisdiction of the subject-matter of the settlement of estates, if such court has assumed jurisdiction of a particular estate and granted administration thereof, then, in accordance with the rule in regard to the acts of courts of general jurisdiction that all intendments of law are in favor of such acts and that they are presumed to have jurisdiction to give the judgments they render until the contrary appears, such grant of administration is conclusive and not subject to attack in a collateral proceeding. *Wight v. Wallbaum*, 39 Ill. 554; *Schnell v. City of Chicago*, 38 Ill. 382 [87 Am. Dec. 304]; *Hobson v. Ewan*, 62 Ill. 146; *Bostwick v. Skinner*; *supra*. In these cases the question did not arise precisely as it does here. The case of *Bolton v. Schriever*, 135 N. Y. 65 [31 N. E. 1001, 18 L. R. A. 242], however, presents the question as it arises here, and it was there held that the fact that the decedent was not at the time of his death a resident of the county in which administration of his estate was had does not authorize a collateral attack upon the acts of the administrator. While there are decisions to the contrary, the decided weight of authority is in favor of the proposition that the appointment of an administrator by a court of general probate jurisdiction is valid against collateral attack on the ground that the decedent was not a resident of the county. *Kling v. Connell*, 105 Ala. 590 [17 South. 121, 53 Am. St. Rep. 144]; *Irwin v. Scriber*, 18 Cal. 499; *Eller v. Richardson*, 89 Tenn. 575 [15 S. W. 650]; *Railway Co. v. Mahoney*, 89 Tenn. 311 [15 S. W. 652]; *Jordan v. Chicago & Northwestern Railway Co.*, 125 Wis. 581 [104 N. W. 803, 1 L. R. A. (N. S.) 885, 110 Am. St. Rep. 865]; *Comstock v. Crawford*, 3 Wall. 396 [18 L. Ed. 34]; *Grignon's Lessee v. Astor*, 2 How. 319 [11 L. Ed. 283]."

Numerous other cases might be cited covering the foregoing proposition, but the law is so well settled upon the subject in this state that we deem it unnecessary to quote further from the cases. The following cases substantiate the doctrine that a bill in a case like this is collateral to the appointment of a conservator by the county court, and that the circuit court, in a proceeding like this, is powerless to inquire into the validity of the appointment of such conservator or to review the judgment of the county court upon that subject: *Propst v. Meadows*, 13 Ill. 157; *Matthews v. Hoff*, 113 Ill. 90; *Blair v. Sennott*, 134 Ill. 78, 24 N. E. 969; *Bradley v. Drone*, 187 Ill. 175, 58 N. E. 304, 79 Am. St. Rep. 214.

[3] If, however, the circuit court did have jurisdiction to review the action of the county court of Champaign county in a proceeding like this, to appoint a conservator of John Fecht, the evidence found in this record shows that John Fecht was a resident

of Champaign county. His home was with his brother on the home farm, and the fact that he was temporarily in Danville, or that he voted at an election held in that city six months after the conservator had been appointed in Champaign county, did not establish, or tend to establish, that he was a resident of Vermillion county at the time he was adjudged to be insane in Champaign county, and the fact that after it was discovered that John Fecht had traded his farm to Freeman for a house and lot in Urbana (which was incumbered for more than it was worth), for worthless mining stock and a small amount of money, two of the citizens of Champaign county went to Vermillion county, where they found him penniless and induced him to return to Champaign county, and after he returned to his home set in motion proceedings for the appointment of a conservator and for the recovery of his farm, did not deprive the county court of Champaign county of jurisdiction to determine the question of his insanity, upon a proper petition being filed in that court and service of summons had upon John Fecht in said county. Regardless of the motives of the persons who were instrumental in inducing him to return to Champaign county, the persons who induced him to return to Champaign county did not control the litigation in the county court, and are not connected in any way with this litigation. No fraud or duress was practiced upon John Fecht or used against him to induce him to return to his home. After his return, and after the facts had been made known to him that the house and lot for which he held a deed was incumbered for more than it was worth, and that the mining stock was worthless, he expressed a desire to get his farm back before the proceedings for the appointment of a conservator were commenced, and, if he desired to leave Champaign county, he had an opportunity to do so before summons was served upon him. But, as we have heretofore seen, the facts herein last above referred to are immaterial in this case, and presumably were before the county court at the time the proceedings for the appointment of a conservator were heard in that court and were determined by that court adversely to the contention of the appellees in this court. The judgment of the county court was not susceptible to collateral attack in this proceeding in the circuit court, and the facts have only been referred to by reason of the importance given them by the decree entered in the circuit court and the briefs filed by appellees in this court.

[4] The other question presented for our consideration is, Should the decree which will be directed to be entered in this case on its remandment require that Gus T. Freeman be reimbursed the \$1,250 which it is said he paid to John Fecht at the time he procured a deed from Fecht for his farm,

as a condition precedent to the entering of a decree setting aside said deed?

The law is well settled that if Freeman traded for the farm of John Fecht in good faith, and had no knowledge of the fact that John Fecht was insane or incompetent to do business, the deed ought not to be set aside without placing Freeman in statu quo by returning to him the entire consideration which he paid to John Fecht. On the contrary, if Freeman did not deal with John Fecht in good faith, but intended to cheat him out of his farm, and knew, or should have known, that John Fecht was mentally incapable of making the trade whereby Freeman acquired the farm, then the deed should be set aside without Freeman being placed in statu quo by having returned to him the \$1,250 which he says was paid in cash to John Fecht at the time the trade was made. Three weeks after the deed was made and the \$1,250 paid to Fecht, according to the testimony of Freeman, the conservator, Henry Johnson, went to Danville and found John Fecht scrubbing out a saloon, being entirely destitute of funds and without means of support. The \$1,250, if paid to Fecht, soon disappeared, as no trace of it has ever been found. The facts surrounding the deal between John Fecht and Gus T. Freeman are that John Fecht was in Danville engaged in running "a secondhand clothing store," for which he had agreed to pay the witness Swift \$650, and which store Swift testified was paying from \$8 to \$10 per day, and that one day the profits were \$52.80; that John Fecht had no money and wanted to borrow money on his farm, which was then incumbered for \$500; that he went to Geddes to make a loan; that Geddes promised to go to Urbana and borrow the money; that he went to Urbana, saw Freeman, and left the abstract of title with him, but did not negotiate a loan; that Freeman soon telephoned Geddes he could not make the loan as the title was not good, although he had obtained the opinion, in writing, of a reputable lawyer in said city that it was good, and it is now conceded it was good; that Geddes stated over the 'phone that his client must have money and would trade the farm; that Freeman then proposed to Geddes to trade the Urbana property and the mining stock for the farm and pay a small amount of money, and then stated to Geddes, although he knew Geddes was representing John Fecht, that, if he could get the deal through, he would pay him well for so doing, and after the deal was closed he did pay Geddes \$200; that Geddes then sent John Fecht to Urbana, with Swift, to see Freeman, and although at that time John Fecht was running a secondhand store (according to the testimony of Swift) which was paying from \$8 to \$10 per day, and one day had paid \$52.80, neither John Fecht nor Swift had any money with which to pay street car fare to Urbana and Geddes advanced it; that on their arrival in Urbana John Fecht was

shown the house and lot in Urbana and told it was worth \$4,500, and was taken to the secretary of the mining company and was told by Freeman that the mining stock might be worth \$1,000,000; that after some delay the trade was made by John Fecht conveying his farm to Gus T. Freeman, which was worth \$12,500 over and above the mortgage, and Freeman caused his wife, in whom the title rested to the Urbana property, to mortgage the same for \$3,500 to her brother-in-law, date the mortgage back and have it acknowledged before Saffer, a notary public, as of May 1st when it was made on May 4th, and then conveyed the property to John Fecht subject to the mortgage, which John Fecht assumed and agreed to pay, and assigned and delivered to John Fecht 58,466 shares of the Lewis & Clark Gold Mining Company of Grant's Pass, Or., which he knew to be worthless, and drew his check for \$1,250. The deed for the farm was delivered to Gus T. Freeman and recorded the next morning, but the deed to the house and lot, the shares of stock and the check were put up with the brother-in-law, to hold for John Fecht until a quitclaim deed could be procured from Harm Fecht, as the attorney who had given Freeman an opinion, in writing, upon the title to the farm, before he had any interest in the farm, and before he talked of the trade with John Fecht, stated that, while the title was good, he would suggest a quitclaim deed be obtained from Harm Fecht. Harm Fecht would not sign a quitclaim deed, and the point was then waived, and the deed, stock, and check were on the 6th day of May delivered to John Fecht, and within a few days Gus T. Freeman and wife conveyed the farm to S. D. Taylor without consideration, and, as Freeman admitted before the master under the advice of his lawyer, for the purpose of preventing John Fecht from recovering back the farm. Taylor was made a party to this suit, but he refused to hold the title and conveyed it back to Freeman, and the suit was then dismissed as to Taylor.

The inadequacy of consideration for the transfer of said farm from John Fecht to Gus T. Freeman is so great as to shock the conscience of a court of equity and stamp the whole transaction with fraud from its inception to its close, and the evidence is convincing and well nigh conclusive that John Fecht was the victim of Geddes and Freeman. The cash payment of \$1,250 paid to John Fecht was immediately squandered by him, lost, or given away, and within three weeks after he had been introduced to Freeman by Geddes and had conveyed his farm to Freeman he was scrubbing out saloons in Danville with a view to getting a drink and a morsel of food, and was sleeping in the office of Geddes in the city of Danville, which he swore was his place of residence at the time he voted in Danville, in November, 1908. The evidence is convincing that John Fecht

was a wreck, mentally and physically, and that no sane man—especially one like Freeman—could meet him and talk with him without discovering at once he was lacking in mental capacity to transact ordinary business; and the fact that he was willing to exchange a valuable farm for a piece of property incumbered for far more than it was worth and for mining stock which was entirely worthless, in order that he might be able to get a few dollars into his possession with which to buy drinks, should have at once aroused the suspicion of Freeman. Freeman also knew, according to his own testimony, that Geddes had been employed, as he said, by John Fecht to get a loan on his farm for \$1,500, and he immediately proposed to pay Geddes well, and did subsequently pay him \$200, to assist him in engineering the mining stock deal, whereby he acquired title, substantially without other consideration, to a valuable farm.

In the case of Hardy v. Dyas, 203 Ill. 211, on page 221, 67 N. E. 852, on page 855, it was said: "The law is well settled that where a grantee has notice of the grantor's incapacity to manage his property and delivers to the latter money or property in exchange for lands, and the money or property is lost or squandered, or if it appears the grantee intended to defraud such grantor out of his property, a court of chancery may set aside the sale without requiring the consideration to be restored." Clearly this case falls within the rule there announced. In Ronan v. Bluhm, 173 Ill. 277, on page 287, 50 N. E. 694, on page 698, it was said: "The rule which seems to commend itself to our sense of justice, and which is supported by what we conceive to be the weight of authority, is that a completed contract of sale of lands by a grantor who is insane but has not been judicially declared insane, for a fair consideration in money or property, to a grantee who entered into the contract without fraudulent intent and without knowledge or notice of the disability of the grantor, will not be set aside in favor of the grantor or his representatives unless the purchase price be returned or the property parted with by the grantee be restored. Scanlan v. Cobb, 85 Ill. 296; Boswell on Insanity, §§ 413, 414. If the grantee, with notice of the incapacity of the insane grantor to manage his estate, invests such grantor with the possession of money or property in exchange for lands, and the said money or property, by reason of the mental incapacity of the grantor, is wasted and lost, or if the grantee, with such knowledge, obtains a conveyance of the lands from such a grantor for a consideration so inadequate as to be inequitable and to evince that it was his intention to take advantage of the infirmity of the grantor and to defraud him, such a grantee would have no standing

to invoke the equitable rule that 'he who asks equity must do equity,' and demand that under the operation of that maxim a court of equity should refuse to set aside the conveyance except upon the imposition of such terms as would amply protect him from any loss. Such a rule would be but to guarantee that, although the attempt to fraudulently procure the property of an insane man might fail, yet the perpetrator of the attempt would be protected by law from any loss in the transaction."

The decree of the circuit court will be reversed and the cause will be remanded to that court, with directions to enter a decree setting aside the deed from John Fecht to Gus T. Freeman, bearing date of May 4, 1908, for the E. ½ of the S. E. ¼ of section 25, township 20 N., range 10 E., of the third principal meridian, Champaign county, Ill.; also the deed from Alice J. Freeman and Gus T. Freeman to John Fecht for the house and lot conveyed by them to him, situated in the city of Urbana, and releasing John Fecht from his agreement to pay the said \$3,500 mortgage, and that the conservator of John Fecht, if he has the mining stock in his possession which was delivered to John Fecht by Gus T. Freeman, return said mining stock to Gus T. Freeman. If, however, said mining stock was lost or destroyed by John Fecht and never came into the possession of the said conservator, the same need not be returned or the value thereof accounted for, and that the relief ordered to be granted to John Fecht be granted without the repayment to Gus T. Freeman of the \$1,250 paid by him to John Fecht at the time the trade was consummated.

Reversed and remanded, with directions.

(251 Ill. 153)

PATTERSON et al. v. PATTERSON et al.
(Supreme Court of Illinois. June 20, 1911.
Rehearing Denied Oct. 13, 1911.)

1. WITNESSES (§ 144*)—COMPETENCY—TRANSACTIONS WITH DECEASED PERSONS.

In an action by heirs and legatees to invalidate a transaction between decedent and a son, who is defending the transaction, the son is not a competent witness as to the transaction between himself and decedent.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 625-643; Dec. Dig. § 144.*]

2. EVIDENCE (§ 271*)—HEARSAY EVIDENCE.

In a suit to set aside transactions between parents, since deceased, and a son seeking to sustain the transactions, unsworn statements of the deceased parents as to the transactions, including their self-serving statements, made in the absence of the son, are inadmissible as hearsay.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1094, 1095; Dec. Dig. § 271.*]

3. APPEAL AND ERROR (§ 931*)—REVIEW—PRESUMPTIONS.

The court on appeal will presume that the chancellor, though receiving incompetent testi-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

mony subject to objections interposed, disregarded it in determining the issues.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3766; Dec. Dig. § 931.*]

4. TRIAL (§ 62*)—ORDER OF PROOF—REBUTTAL TESTIMONY.

Where testimony offered in rebuttal did not rebut anything adduced by defendant, the testimony should be disregarded in determining the issues.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 148-150; Dec. Dig. § 62.*]

5. DEEDS (§ 211*)—INVALIDITY—EVIDENCE.

A deed by parents to a son will not be set aside after the death of the parents at the suit of heirs and legatees on mere proof that the father had previously conveyed land to other sons, so that he could obtain loans without being required to execute notes and mortgages therefor, that on one occasion he had neglected to record a deed reconveying the land to him, that the parents received the rents from the land conveyed to the son during their lifetime, and that the son had never asserted any claim of ownership during the life of the parents, since such proof is not necessarily inconsistent with the theory that the son purchased the land, and that the deed which he received is what it purports to be.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 637-647; Dec. Dig. § 211.*]

6. PROPERTY (§ 9*)—TITLE—EVIDENCE:

Parol evidence to justify a transfer of title to real estate must establish the facts so convincingly as to leave no reasonable doubt in the mind of the court.

[Ed. Note.—For other cases, see Property, Dec. Dig. § 9.*]

7. LANDLORD AND TENANT (§ 18*)—EXISTENCE OF RELATION—EVIDENCE—SUFFICIENCY.

In a suit by heirs and legatees to set aside a deed by decedent to a son, evidence held not to justify a finding that the son ever occupied the premises as a tenant of either his father or mother, so that the son could rely on the deed as against the rule that a tenant is estopped from denying his landlord's title.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 45-48; Dec. Dig. § 18.*]

8. CANCELLATION OF INSTRUMENTS (§ 59*)—ISSUES—DECREE—RELIEF TO DEFENDANT.

Where the issue in a suit in equity by heirs and legatees of a decedent against a grantee of decedent was whether a conveyance by decedent to the grantee was intended to convey the title to the grantee, the court, finding that the deed conveyed the property, could confirm the title in the grantee.

[Ed. Note.—For other cases, see Cancellation of Instruments, Cent. Dig. §§ 119-125; Dec. Dig. § 59.*]

9. INJUNCTION (§ 26*)—RESTRAINING ACTION AT LAW—CONDITIONS PRECEDENT.

To obtain an injunction restraining an action at law, complainant must show that he has a defense cognizable in equity only.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 36; Dec. Dig. § 26.*]

10. INJUNCTION (§ 26*)—RESTRAINING ACTION AT LAW—CONDITIONS PRECEDENT.

Where the evidence showed that a contract and notes forming the basis of a son's claim against his mother's estate were just and equitable, and that the notes were given on a fair settlement of accounts between the son and the mother, equity would not restrain enforcement of his claim on the ground of a defense based on the existence of a confidential relation be-

tween the son and his mother, and that he abused such confidence, available only in equity.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 36; Dec. Dig. § 26.*]

11. INJUNCTION (§ 26*)—RESTRAINING ACTION AT LAW—CONDITIONS PRECEDENT.

Where the evidence showed that a contract and notes forming the basis of a son's claim against his mother's estate were just and equitable, and that her mental faculties, though impaired, enabled her to understand the effect of the transactions evidenced by the contract and notes, equity would not restrain proceedings at law to enforce the claim on the ground of the mental incapacity of the mother, available in equity as a defense.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 36; Dec. Dig. § 26.*]

12. EQUITY (§ 22*)—ADMINISTRATION OF ESTATES—JURISDICTION.

A court of equity will not administer a decedent's estate except where special reason requires the withdrawal of the administration from the probate court, and, where one can obtain all the relief in the probate court to which he is entitled, he cannot require equity to exercise jurisdiction.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 51-62; Dec. Dig. § 22.*]

13. EXECUTORS AND ADMINISTRATORS (§ 131*)—RENTS OF REAL ESTATE—ACCOUNTING.

Where one appointed executor of his mother's estate had accounted to her for the rents of her premises up to a designated date, and settlements were then had between the parties and a contract gave him the right to retain possession of the premises until a designated future date at an annual rental, which he had credited on a claim against her estate, he was not liable to account to other heirs and legatees for rents prior to such future date.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 541-544; Dec. Dig. § 131.*]

14. INJUNCTION (§ 189*)—ENJOINING PROCEEDINGS AT LAW—DENIAL OF RELIEF—EFFECT.

Where a court of equity found that equitable defenses to claims against a decedent's estate were not sustained and refused to enjoin proceedings at law to enforce the claims, it properly refused to pass on the legal defenses to the claims, and remitted the parties to their remedy at law.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 409; Dec. Dig. § 189.*]

15. EQUITY (§ 41*)—JURISDICTION—RETENTION OF JURISDICTION—DISPOSITION OF LEGAL RELIEF.

Where a bill seeks equitable relief and the evidence establishes a right to that relief, equity will retain jurisdiction for all purposes connected with the subject-matter of the suit and establish purely legal rights, but, where the bill is dismissed as to the part founded on equitable relief and only legal rights remain, the jurisdiction of equity must fail, unless an equitable ground appears for retaining jurisdiction.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 116-118; Dec. Dig. § 41.*]

16. TRIAL (§ 11*)—TRANSFER FROM LEGAL TO EQUITY DOCKET—RETENTION OF JURISDICTION—DISPOSITION OF LEGAL RELIEF.

A court of equity, finding that equitable defenses to claims against a decedent's estate were not established, should not, even by agreement of parties, dispose of the claims on their merits without a transfer of the claims from the law side to the chancery side of the court; since otherwise the jurisdiction of equity would be limited to the issuance of an injunction restraining the prosecution of the claims in a

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

court of law, being without jurisdiction of the subject-matter.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 28-30; Dec. Dig. § 11.*]

17. INJUNCTION (§ 189*)—RETENTION OF JURISDICTION—DISPOSITION OF LEGAL RELIEF.

A decree of a court of equity, denying an injunction to restrain the prosecution at law of claims against a decedent's estate, should not contain a recital that the court desires the benefit of the advisory aid of a verdict of a jury on the claims, where the court by the decree did not retain any jurisdiction of the case for the purpose of entering any subsequent decree after the verdict of a jury.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 409; Dec. Dig. § 189.*]

18. INJUNCTION (§ 189*)—RETENTION OF JURISDICTION—DISPOSITION OF LEGAL RELIEF.

Where, in a suit to enjoin the prosecution at law of a claim against a decedent's estate, the court found that the equitable defenses to the claim were not established, the court should not attempt to dispose of the claim by finding the existence of a legal defense thereto, because the claim was not within the jurisdiction of the court either to render or deny judgment thereon.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 409; Dec. Dig. § 189.*]

Appeal from Circuit Court, Moultrie County; W. G. Cochran, Judge.

Suit by W. J. Patterson and others against B. W. Patterson, individually and as executor of Margaret Patterson, deceased, and Margaret Underwood. From the decree, complainants appeal, and defendant Underwood assigns cross-errors. Modified and affirmed.

E. J. Miller and F. M. Harbaugh, for appellants. E. E. Wright, John E. Jennings, and W. K. Whitfield, for appellees.

COOKE, J. This is an appeal from a decree of the circuit court of Moultrie county, entered on October 26, 1910, in a suit brought by W. J. Patterson and others, appellants, against B. W. Patterson (individually and as executor of the last will and testament of Margaret Patterson, deceased) and Margaret Underwood, appellees.

The undisputed facts upon which the suit is predicated are as follows: On March 11, 1876, William M. Patterson, now deceased, was the owner of several tracts of land in Moultrie county, including the following: The W. ½ of the S. W. ¼ of section 7, containing about 90 acres, and lot 2 in the N. W. ¼ of section 18, containing about 90 acres, both in township 13 N., range 6 E.; also the E. ½ of the E. ½ of the N. E. ¼ of section 13, and 33 acres in the N. W. ¼ of the N. W. ¼ of section 36, in township 13 N., range 5 E. On that date he, together with Margaret Patterson, his wife, conveyed all of the tracts owned by him to his son, Daniel M. Patterson, for a nominal consideration, the purpose of this conveyance being to obtain a loan on the land, and then, by mesne conveyances place the title in the name of Margaret Patterson. On the day this conveyance was made Daniel M. Pat-

terson mortgaged all of the tracts above described, except the N. ½ of the W. ½ of the S. W. ¼ of said section 7, to the Aetna Life Insurance Company to secure a note for \$2,750, due in five years; the money borrowed being for the use of William M. Patterson. On the 21st day of the same month Daniel M. Patterson, at the direction of his father, conveyed all the land which had been conveyed to him by William M. Patterson to Levi Seass. William M. Patterson had agreed to give his son B. W. Patterson, one of the appellees, the east 80 acres of lot 2 in the N. W. ¼ of section 18, above described, and to his son George W. Patterson the E. ½ of the E. ½ of the N. E. ¼ of section 13, above described, and 40 acres adjoining the last-mentioned tract, provided each of them would assume the payment of \$1,000 of the said mortgage indebtedness of \$2,750. In pursuance of this agreement, Levi Seass on April 16, 1877, conveyed to B. W. Patterson, subject to \$1,000 of said incumbrance, the land given him by his father, and on the same day conveyed to Margaret Patterson, the wife of William M. Patterson, the remainder of the land which had been conveyed to him by Daniel M. Patterson. Before George W. Patterson had obtained a deed to the land which his father had given him, he sold that land to B. F. Blackwell, and September 4, 1886, Margaret Patterson conveyed this land to Blackwell, subject to \$1,000 of the said mortgage incumbrance, which Blackwell assumed and agreed to pay. Thereafter, in November 1889, Margaret Patterson and William M. Patterson, her husband, conveyed to B. W. Patterson, for the expressed consideration of \$2,600, the land included in said mortgage to which Margaret Patterson then held the title, being the S. W. ¼ of the S. W. ¼ of said section 7, and 33 acres in the N. W. ¼ of the N. W. ¼ of said section 36, and B. W. Patterson and B. F. Blackwell then executed and delivered to the Aetna Life Insurance Company a new mortgage upon the same land to secure a new note for \$2,750, due in five years, given to take the place of the old note and mortgage. The mortgage given in November, 1889, was released by the insurance company in January, 1895.

When B. W. Patterson received this last deed, he was living with his parents at their home farm adjoining the city of Sullivan, in Moultrie county, his wife having died in 1886, and he having soon thereafter removed, with his two small children, to the home of his parents. His father was then quite aged and feeble, and he, after removing to the home of his parents, took charge of and farmed the land belonging to his parents, and was in possession of and farming this land when his father died, in January, 1897. After William M. Patterson placed the title to his land in the name of his wife, as above de-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

talled, he continued to transact all business in connection therewith until his death. After his death Margaret Patterson, who could neither read nor write, appointed her sons Daniel M. Patterson and W. J. Patterson as agents to attend to her business. They rented the land owned by their mother to B. W. Patterson, and he continued in possession, upon terms agreed upon with them, until Margaret Patterson, in December, 1899, revoked the appointment of W. J. Patterson as her agent on account of the hostility which had arisen between him and B. W. Patterson. Daniel M. Patterson was then dead, having died about one year after his appointment as such agent. Thereafter B. W. Patterson continued in possession of the land owned by his mother until her death in March, 1909, under arrangements made with her.

Soon after her husband's death Margaret Patterson suffered a stroke of paralysis, from which she rallied within a short time, and was able to walk with the aid of a cane. In 1900 she sustained a second stroke, and shortly thereafter a third stroke. From the time of the second stroke until her death she was a helpless invalid, confined to her bed, and requiring the constant attendance of a nurse. Her family then consisted of herself and B. W. Patterson and his two children, and after her second stroke of paralysis, until her death, B. W. Patterson employed and paid a nurse at a weekly salary ranging from \$7 to \$9, and a servant girl at a weekly salary of from \$2 to \$3. On February 27, 1907, Margaret Patterson and B. W. Patterson entered into and executed a written contract, whereby the former leased to the latter the various tracts of land owned by her and standing in her name, and consisting of about 131 acres, for a term of 10 years from March 1, 1907, at an annual cash rental of \$350. The lease contained a provision that, in case of the death of either party, the lease should terminate on the 1st of March following the time of such death. By the same instrument Margaret Patterson agreed that B. W. Patterson should deduct the taxes and cost of material for repairs from the rent, and should be reimbursed at the rate of \$25 per week for the necessary supplies, nurse hire, medical attendance and help furnished by him. On the day following the execution of this contract Margaret Patterson and B. W. Patterson had a settlement of their accounts to that date, and as a result of such settlement Margaret Patterson executed and delivered to B. W. Patterson her promissory note for \$6,550. On March 4th of the same year she executed and delivered to B. W. Patterson a note for \$650, payable to her daughter, Margaret Underwood, and directed him to hold it until after her death and then to deliver it to Margaret Underwood. This note was given to compensate Margaret Underwood for serv-

ices rendered in taking care of her mother during the latter's illness. On March 3, 1908, Margaret Patterson executed and delivered to B. W. Patterson her promissory note for \$1,173.49, and on March 2, 1909, another note for \$1,190.49, being the amounts found due B. W. Patterson on those dates upon settlements between him and his mother in accordance with the terms of the contract of February 27, 1907. All of these notes were by their terms due one day after date, and bore interest at the rate of 7 per cent. per annum.

Margaret Patterson died on March 29, 1909, leaving a will, dated April 5, 1898, which was duly probated in the county court of Moultrie county. She nominated B. W. Patterson executor of her will, and directed him, as such executor, to convert all her property into cash, under the order of the county court, as soon after her death as practicable, and to distribute the proceeds among her legal heirs in the proportions therein specified. B. W. Patterson was at the time of filing the bill herein, and had been ever since the death of his mother, in possession of the real estate and had taken no steps to obtain an order to sell the same. After the bill was filed herein, and on September 5, 1910, he filed his petition in the county court and obtained an order to sell all the real estate standing in the name of Margaret Patterson at the time of her death. On March 18, 1910, Margaret Underwood filed a claim against the estate of Margaret Patterson, deceased, for \$788.27, being the amount of principal and interest due on the \$650 note above mentioned. The executor having indorsed on the claim that he had no objection to its allowance and having entered his appearance, the county court on March 24, 1910, allowed the full amount of the claim and entered judgment accordingly. Some of the heirs at law and legatees of Margaret Patterson prosecuted an appeal from the judgment of the county court to the circuit court of Moultrie county, and that appeal was pending and undisposed of at the time the bill was filed herein. On April 9, 1910, B. W. Patterson filed four claims against the estate of Margaret Patterson. Three of these claims were for the principal and interest due on the respective promissory notes above mentioned which had been delivered to him by his mother, and the fourth was for taxes paid by him and the amount due under the contract of February 27, 1907, for care, nursing, etc., during the last four weeks of her life. The court appointed an administrator pro tem. to defend against the claims filed by the executor. Some of the heirs and legatees of Margaret Patterson appeared and objected to the allowance of these claims. This was the situation with reference to the claims filed by B. W. Patterson at the time the bill was filed herein. Thereafter, on August 9, 1910, by agreement, the

venue was changed to the circuit court of Moultrie county and the claims were transferred to that court.

On June 8, 1910, W. J. Patterson and other heirs and legatees of Margaret Patterson, deceased, filed their bill in the circuit court of Moultrie county against B. W. Patterson and Margaret Underwood, the remaining heirs and legatees, and B. W. Patterson, as executor of the last will and testament of Margaret Patterson, deceased. The bill charged that the deed executed in November, 1889, by which Margaret Patterson and her husband conveyed to B. W. Patterson the 45 acres in said section 7 and the 33 acres in said section 36, was executed by them "in connection with and as a part of a mortgage and for no other purpose, and was never intended to convey the title to said land"; that B. W. Patterson never took possession of said land under said deed during the lifetime of Margaret Patterson and never claimed any rights in, through, or under said deed until after the death of his mother, and that Margaret Patterson was at the time of her death the owner of said real estate; that said deed is not now held as security for any debt; that the indebtedness was paid and satisfied by William Patterson in his lifetime and the mortgage of which the debt formed a part has been released, and that the deed is now a cloud on the title of the complainants and others interested in the estate of Margaret Patterson, deceased. The bill further alleged that the notes executed and delivered by Margaret Patterson to B. W. Patterson, including the note payable to Margaret Underwood, were without consideration, and were obtained by B. W. Patterson by means of persuasion and undue influence while said B. W. Patterson was acting as the sole confidential agent, adviser, business representative, and manager for his mother and stood in a confidential relation to her and while Margaret Patterson was unable to transact ordinary business, and that B. W. Patterson held the note which was payable to Margaret Underwood until after the death of his mother and then caused Margaret Underwood to file the same as a claim against the estate, and, with full knowledge of the unlawful procedure by which it was obtained, indorsed thereon his allowance thereof and permitted judgment to be rendered thereon by the county court. The bill further alleged that the value of the 209 acres of land which appellants claim Margaret Patterson owned at the time of her death, and which include the 78 acres conveyed to B. W. Patterson in November, 1889, is \$30,000, and that the annual rental thereof, for the past 12 years has been \$1,200, and that there is now due the estate from B. W. Patterson, on account of rents and profits from the land during that period, the sum of \$15,000, for which he refuses to account; that B. W. Patterson has wholly fail-

ed to take any steps to carry out the provisions of the will of Margaret Patterson with reference to the sale of the real estate left by her, but has retained possession of all real and personal property of the estate for his own gain and profit and has failed to report his acts and doings to the county court; that he has failed to inventory a large part of the personal property belonging to the estate and has not accounted for the same but has converted it to his own use. The bill prayed, in effect, that the court find and decree that B. W. Patterson has failed to inventory a large part of the real and personal property belonging to Margaret Patterson, deceased, and has set up an adverse claim of his own; that said claims presented by B. W. Patterson and Margaret Underwood be canceled and decreed to be fraudulent and without consideration and null and void and their prosecution enjoined; that an accounting be had against B. W. Patterson, whereby he may be compelled to account for the rents and profits of the 209 acres of land alleged to have been left by Margaret Patterson from the year 1899 to the present time; that B. W. Patterson be removed as executor of the estate of Margaret Patterson, deceased, and that the circuit court in chancery take over the administration of said estate and appoint some disinterested and proper person to administer upon the estate and sell all of said land in pursuance of the terms of said will and distribute the proceeds as therein directed; and that complainants have such further relief in the premises as equity may require.

Issues were made up by the filing of answers and replications, and the cause was submitted to the chancellor upon the evidence taken before him in open court. A decree followed, in which it was recited that the cause came on for hearing upon the bill, answers and replications; that the court heard the testimony and documentary proofs introduced by the respective parties, and "at the same time, by agreement of the parties, heard the proof applicable to the four claims of B. W. Patterson and the one claim of Margaret Underwood against the estate of Margaret Patterson, deceased, which said claims are each pending on the common-law docket of this court, but not consolidated herewith." The decree found the issues for the defendant B. W. Patterson as to the 78 acres of land involved in the suit, and found that the deed through which he claimed title to the said 78 acres was not executed by Margaret Patterson and her husband in connection with and as a part of a mortgage; that said tract was not the property of Margaret Patterson at the time of her death, and is not a part of her estate, but that the defendant B. W. Patterson is the owner of the same. With reference to the four claims filed by B. W. Patterson against the estate of Margaret Patterson, and which

the decree refers to as "now pending and undetermined upon the law side of the court," the decree contains the following provision: "And the court, having heard the evidence with reference to the said four claims filed by the said B. W. Patterson against the estate of Margaret Patterson, deceased, makes no findings with reference to the merits of said claims, but the court doth find that the complainant B. W. Patterson is entitled to a trial by jury as to said claims; and the court further finds that as to said claims of the said B. W. Patterson so pending on the law side of the docket of this honorable court that this court desired the benefit of the advisory aid of a verdict by a jury in reference thereto." The decree further found that the alleged defenses to the said claims of B. W. Patterson are of a character that the complainants have a full, adequate, and complete remedy at law. With reference to the claim of Margaret Underwood, the decree found that the note which is the basis of said claim was never delivered in the lifetime of Margaret Patterson to Margaret Underwood, and that Margaret Underwood is not entitled to recover upon her said claim against the estate of Margaret Patterson, and that the objections of the complainants to said claim should be and are sustained. After making the above findings, it is ordered, adjudged, and decreed that the equities in the cause are with the defendants, B. W. Patterson, individually and as executor, and Margaret Underwood, and that as to said defendants the bill of complaint should be and is dismissed for want of equity, at the cost of the complainants. The decree then proceeds as follows: "It is further ordered, adjudged, and decreed by the court that the objections of the complainants herein to the claim of Margaret Underwood against the estate of Margaret Patterson, deceased, be and the same are hereby sustained, and judgment upon said claim is hereby denied." The costs made by the complainants in relation to the claim of Margaret Underwood are then adjudged against her, and the complainants are awarded execution therefor. The complainants have prosecuted an appeal to this court, and have assigned numerous errors. Margaret Underwood has assigned cross-errors questioning that portion of the decree which purports to finally dispose of her claim against the estate of Margaret Patterson.

It will be observed from the foregoing that the bill filed herein embraced several distinct matters, and that the record has been further complicated by the action of the court in adjudicating matters not presented by the issues in the case. While the bill does not clearly show, in apt language, the precise relief sought by the complainants, the apparent objects of the bill are, as hereinbefore indicated, first, to obtain an adjudication that

Margaret Patterson was at the time of her death the owner of the 78 acres of land which had been conveyed by her to B. W. Patterson in November, 1889; second, to obtain an injunction restraining the prosecution at law of the claims filed by B. W. Patterson and Margaret Underwood against the estate of Margaret Patterson; third, to compel an accounting by B. W. Patterson of the rents and profits received by him from the land owned by Margaret Patterson, from 1899 to the present time; and, fourth, to have the administration of the estate transferred from the probate court to the court of chancery, B. W. Patterson removed as executor, and some disinterested person appointed to administer upon the estate, and carry out the provisions of the will of Margaret Patterson. The decree denied all the relief sought and dismissed the bill for want of equity, but went further, and decided a matter entirely outside the issues, viz., that Margaret Underwood was not entitled to recover on her claim against the estate of Margaret Patterson because the note which formed the basis for the claim was not delivered to Margaret Underwood during the lifetime of her mother.

The record is voluminous, the evidence covering 1,100 typewritten pages. Practically all of this evidence was presented upon the question of the ownership of the 78 acres of land in controversy and the matter of the claims presented by B. W. Patterson and Margaret Underwood against the estate of Margaret Patterson. Before entering upon a discussion of any of the questions presented upon this appeal, the character of a considerable portion of the evidence upon which appellants rely should be noticed.

[1] The transactions out of which the controversy between the parties arose were transactions between William M. Patterson and Margaret Patterson, both now deceased, and B. W. Patterson, now defending against a suit brought by the heirs and legatees of Margaret Patterson. B. W. Patterson was not a competent witness as to any of these transactions between him and his father or mother, and his testimony was confined to matters relating to the Margaret Underwood claim and to a denial of statements attributed to him by certain of the witnesses for the complainants.

[2] Appellants, while strenuously insisting upon the incompetency of B. W. Patterson as a witness at the hearing in the circuit court, introduced a large amount of testimony showing the unsworn statements of William M. Patterson and Margaret Patterson concerning these transactions, and the record abounds with self-serving statements of William M. Patterson and Margaret Patterson which witnesses called by the complainants testified had been made to them by these deceased persons during their lifetime, out of the presence of B. W. Patterson, and which

we are now asked by appellants to consider in determining whether the chancellor correctly decided the issues in the case.

[3] This testimony was clearly hearsay, and was therefore incompetent, and it is to be presumed that the chancellor, who heard a large portion of it subject to objections interposed by the defendants, disregarded it in determining the issues presented to him for decision.

The first complaint which we shall notice is that the court erred in denying the relief sought with reference to the 78 acres of land in controversy and in making findings which, in effect, confirmed the title to that land in B. W. Patterson. The deed by which Margaret Patterson and husband conveyed that land to B. W. Patterson was a statutory warranty deed, without any reservations or exceptions, and purported to convey the premises to the grantee in consideration of the sum of \$2,600. This deed was acknowledged by the grantors before T. H. Scott, a notary public, who testified on behalf of the defendants that at the time the deed was executed B. W. Patterson signed a promissory note for \$2,600, payable either to Margaret Patterson or William M. Patterson, which had been prepared by the witness, and gave that note in payment for the land. B. F. Blackwell, another witness, who had purchased a portion of the land covered by the mortgage to the Aetna Life Insurance Company and who was one of the mortgagors in the last mortgage to that company, testified that, when the new mortgage was given, William M. Patterson told him that B. W. Patterson had bought the 78 acres, and had given his note for \$2,600, and later, in 1894, told him that B. W. Patterson had paid for the land. The deed was filed for record and duly recorded in the recorder's office of Moultrie county within a few days after its delivery. Appellants contend that the presumption arising from the recitals in and character of the deed and the force of the testimony of Scott and Blackwell are overcome by the evidence adduced by the complainants. This evidence tended to show that it was the custom of William M. Patterson to convey tracts of land to his sons W. J. Patterson and Daniel M. Patterson in order that they might execute mortgages to secure the repayment of money borrowed for William M. Patterson, and that, upon the payment of the indebtedness by the latter, the tracts were reconveyed to him; that in one instance he neglected to record a deed by which W. J. Patterson reconveyed to him a tract of land, and this deed was after his death found among his papers and filed for record by B. W. Patterson; that, after making the deed in November, 1889, he delivered a car load of cattle to B. W. Patterson in payment of that portion of the mortgage indebtedness of \$2,750 which had been apportioned to the 78 acres in controversy; that William M. Patterson

during his lifetime, and Margaret Patterson after his death, rented this land and collected and received the rents therefrom; and that B. W. Patterson never made any claim of ownership to the land until after the death of his mother, but, on the contrary, made statements inconsistent with any such claim of ownership. From this evidence appellants deduce the theory that William M. Patterson had an aversion to signing notes and executing mortgages, and that when it became necessary to execute a new note and mortgage to take the place of the note and mortgage which had been given to the insurance company by Daniel M. Patterson on March 11, 1876, he caused his wife to convey this 78 acres, which stood in her name and was covered by the old mortgage, to B. W. Patterson, in order to avoid the necessity of himself and wife signing the new note and mortgage; that this was the sole and only purpose of the conveyance of the 78 acres to B. W. Patterson; that William M. Patterson afterwards paid that portion of the mortgage indebtedness which had been apportioned to this 78 acres by the delivery of the car load of cattle to B. W. Patterson, and that the latter either reconveyed the 78 acres to his father or mother by a deed which was never recorded and cannot now be found, or it thereupon became his duty to convey the same, and he thereafter only held the legal title as trustee for his mother, and is now holding it as trustee, to be disposed of according to the provisions of her will.

The evidence relied upon by appellants as proving the allegation of the bill that the deed from Margaret Patterson and husband to B. W. Patterson was executed "in connection with and as a part of a mortgage, and for no other purpose," and as proving their theory that this deed was given in order that a new mortgage might be given upon the same land without requiring the signatures of William M. Patterson and Margaret Patterson thereto, is that tending to show that, after the execution and delivery of the deed and the giving of the new mortgage, William M. Patterson paid that portion of the mortgage indebtedness which had been originally apportioned to the 78 acres in controversy by delivering a car load of cattle to B. W. Patterson, upon the understanding and agreement that the latter should apply the proceeds therefrom, when sold, to the payment of the mortgage indebtedness against this land. The evidence relied upon by appellants as proof of this fact is, however, incompetent, most of it consisting of alleged statements which witnesses for the complainants testified had been made to them by William M. Patterson during his lifetime, out of the presence of B. W. Patterson, and the remainder consisting of testimony given by Charley Patterson, a nephew of William M. Patterson, on rebuttal. This last witness, while called by the complain-

ants in presenting their case in chief, did not then testify to any conversation with B. W. Patterson concerning the car load of cattle, but when called in rebuttal testified, over the objections of the defendants, that he saw the cattle in question in the possession of B. W. Patterson, and that the latter told him, in 1892 or 1893, that he got them from his father; that he was to "feed them out" and apply the proceeds on the mortgage; and that the cattle just about "paid his father out of debt."

[4] The court heard this testimony subject to the objections of the defendants, and, as it did not tend to rebut anything adduced by the defendants, it should have been, and undoubtedly was, disregarded by the court in determining the ownership of this land. Another witness, George W. Patterson, one of the complainants, testified to a conversation with B. W. Patterson concerning the delivery of a car load of cattle to him by William M. Patterson. He testified that he saw the cattle on B. W. Patterson's farm, and that the latter told him that his father had turned them over to him in consideration of his agreement to pay the mortgage upon the 78 acres belonging to his father. This witness testified that he had this conversation with B. W. Patterson while the witness was living on the land given him by his father, and that it occurred before he deeded that land to Blackwell. The land was deeded to Blackwell in 1886—three years before B. W. Patterson obtained title to the 78 acres and remortgaged it to secure the same debt of \$2,750 which had been a lien upon that land since 1876. B. W. Patterson denied making the statements attributed to him by this witness. But, even if the testimony of the witness be taken as true, it does not tend to support the allegation of the bill or appellants' theory of the transaction. Nor would the fact that William M. Patterson had during the year 1886, or before that time, delivered to B. W. Patterson a car load of cattle in payment of that portion of the mortgage indebtedness against his land tend to show that a deed made at least three years later, and purporting to convey the same land to B. W. Patterson in consideration of \$2,600, had any connection with the former transaction or was anything other than an absolute conveyance of land.

The testimony tending to show that B. W. Patterson had made statements inconsistent with his claim of ownership to the land was successfully controverted, and the other matters above mentioned which are relied upon by appellants as tending to support their claim that Margaret Patterson was at the time of her death the owner of this land, are wholly insufficient to sustain their claim.

[5] Neither the fact that William M. Patterson had theretofore conveyed tracts of land to his sons W. J. Patterson and Daniel M. Patterson in order to obtain loans with-

out being required to execute notes and mortgages therefor, nor the fact that he had on one occasion neglected to record a deed reconveying land to him, nor the fact (if such be a fact) that William M. Patterson and Margaret Patterson were permitted to receive and enjoy the rents from the land during their lifetime, nor the fact that the witnesses called by the complainants had never heard of B. W. Patterson asserting any claim of ownership to the land during the lifetime of his mother, is necessarily inconsistent with the theory that he purchased this land, and that the deed which he received is what it purports to be.

[8] As we said in *Reeve v. Strawn*, 14 Ill. 94, and again in *Ryder v. Ryder*, 244 Ill. 297, 91 N. E. 451: "Before we transfer the title to real estate upon the strength of parol testimony alone, the facts upon which such change is asked should be so convincing as to leave no reasonable doubt in the mind of the court."

Appellants contend that the evidence shows that B. W. Patterson was during the lifetime of his father and mother in possession of this land as their tenant, and argue that, because of the well-known rule that a tenant is estopped from denying his landlord's title, B. W. Patterson is now estopped from denying that Margaret Patterson was the owner of the land at the time of her death, and that they are entitled to a decree divesting B. W. Patterson of his title to the land and placing it in the heirs of Margaret Patterson in order that it may be sold and the proceeds distributed according to the provisions of her will, and that they are also entitled to an accounting of the rents and profits of that land from the time William J. Patterson was removed as agent for his mother. There is no evidence whatever in the record showing that B. W. Patterson was ever in possession of the 33-acre tract in section 33 as the tenant of his father or mother, or that he ever paid any rent therefor. The only evidence concerning the renting of this tract is to the effect that in 1890 William M. Patterson rented it to a man named Righter, who occupied it as the tenant of William M. Patterson for six years, and that the tract was thereafter rented by William M. Patterson to a man named Simmons, who was in possession of it as tenant at the time of the death of William M. Patterson, and who for two or three years after his death paid the rent therefor to W. J. Patterson, as agent for his mother. There is also evidence tending to show that Margaret Patterson was permitted to enjoy the rents from this tract during the remainder of her life, but the evidence fails to show who was in the actual possession of the tract during that time.

The remainder of the land in controversy is the south half of a 90-acre tract, and is referred to by a number of the witnesses as the "East Nelson farm," it being in East

Nelson township. The land which it is conceded Margaret Patterson owned at the time of her death consists of about 131 acres, composed of the north half of the 90-acre tract in East Nelson township, 8 acres adjoining that tract in Sullivan township, and several small disconnected tracts, the exact location of which cannot be determined from this record. The evidence shows that B. W. Patterson farmed all of this land, as well as the land owned by him, during at least the last six years of his father's life, and was farming it at the time of his father's death, but there is no competent evidence whatever which can be considered as proof of the fact that B. W. Patterson ever paid any rent to his father, or to his mother during the lifetime of his father, for the 45 acres in controversy in East Nelson township. The only period during which any payment of rent by B. W. Patterson for this 45 acres is shown by any competent evidence is the period during which W. J. Patterson acted as agent for his mother. W. J. Patterson testified that, when he and his brother Daniel M. Patterson became agents for their mother in February, 1897, they rented the 90-acre tract in East Nelson township, together with all the other land owned by their mother except the 33 acres in section 33, to B. W. Patterson, and the latter paid annual rent therefor at the rate of \$4 per acre, except for 60 acres of pasture land, for which he paid \$150; that Daniel M. Patterson prepared a memorandum of the rental agreement and gave it to the witness to copy; that he copied this memorandum and had B. W. Patterson sign it, but does not know what has become of the one which was signed. The witness produced a paper which he testified was the memorandum prepared by Daniel M. Patterson, that it correctly set forth the agreement which was made with B. W. Patterson for the leasing of the land to him, and that it had been in the possession of the witness ever since. This memorandum, which was not signed by any one, purported to be a recital by B. W. Patterson that he had rented from D. M. Patterson and W. J. Patterson, agents of Margaret Patterson, for one year, with the privilege of three years, her farm situated in East Nelson township, 90½ acres, and 18¼ acres in Sullivan township; also her pasture, 60 acres, in Sullivan township, for which he agreed to pay one-half of all corn raised on the place and one-third of all small grain and \$150 for the 60 acres of pasture, and also to furnish all necessary things for the family to live on and to pay a girl for her work. W. J. Patterson testified that shortly after this agreement was made the grain rent was changed to cash rent at the rate of \$4 per acre. The evidence, however, clearly shows that B. W. Patterson never paid any rent to W. J. Patterson, but settled directly with his mother during these years and paid her the balance

found due upon an accounting between them, which did not during any of these years exceed \$150.

During the fall of 1899 Margaret Patterson called upon W. J. Patterson for a settlement of his accounts as agent from the time of his appointment, in 1897, this settlement apparently being of moneys collected from notes and accounts due William M. Patterson at the time of his death, after deducting the amount paid out for debts and funeral expenses. During the month of December, 1899, W. J. Patterson and B. W. Patterson met with their mother at her home for the purpose of making the settlement. At the request of the former, his cousin, Charley Patterson, and Charles Tabor, a neighbor, were present at the settlement. W. J. Patterson testified that he requested these parties to be present in order that he might have witnesses to the settlement with his mother and witnesses to the receipt which he expected to have his mother sign. As a result of this settlement Margaret Patterson signed, by mark, a document which was witnessed by Charley Patterson and Charles Tabor, in which it was stated that it had been determined, upon a settlement then made of the accounts of W. J. Patterson as agent, that W. J. Patterson was indebted to his mother in the sum of \$76.02. Neither Charley Patterson nor Charles Tabor had any recollection whatever concerning this receipt nor of signing it as witnesses, but both testified that at the time of this settlement the fact that B. W. Patterson was paying rent at the rate of \$4 per acre on the 90 acres in East Nelson township was mentioned. The memory of these witnesses about what took place and what was said at the time of that settlement is so indistinct and so unreliable that a court would not be justified in finding therefrom that B. W. Patterson, who held the record title to the south 45 acres of the 90-acre tract which the witnesses say was mentioned at the time of that settlement, was renting that 45 acres from his mother and paying rent therefor as her tenant. At times these witnesses referred to the 90-acre tract as the 90 acres in East Nelson township, and at other times as the East Nelson farm. It is very probable that if at the settlement the fact was mentioned that B. W. Patterson was paying rent at the rate of \$4 per acre for the East Nelson farm or the land in East Nelson township the witnesses would conclude therefrom that he was paying rent for the entire 90 acres in East Nelson township at that rate, when, as a matter of fact, the conversation may have related only to that portion of the land in East Nelson township owned by Margaret Patterson and the number of acres for which he was paying rent may not have been mentioned.

Shortly after this settlement with his mother and the revocation of his authority to act as her agent, W. J. Patterson sent to

some of the children and grandchildren of Margaret Patterson letters which purport to contain a statement of the income and expenses of the land owned by his mother for the years 1897 and 1898. He gave the income from all the land (exclusive of the 33 acres in section 36) for those two years as being \$858.25, or an average of \$429.12 for each year, and the expenses for the same period as \$802.27. This statement, made by W. J. Patterson in December, 1899, completely refutes his testimony, given 10 years later, that B. W. Patterson rented the 45 acres in controversy from him and his brother Daniel M. Patterson, that the purported memorandum correctly sets forth the terms of the rental agreement, and that B. W. Patterson paid rent upon that 45 acres during the time that W. J. Patterson acted as agent for his mother. According to the testimony of W. J. Patterson, the ultimate agreement was that B. W. Patterson should pay \$150 per year for the pasture and \$4 per acre for the balance of the land, consisting of 108 acres. Upon such terms the annual income from the land mentioned in the memorandum would have been \$532, instead of \$429.12, as shown by the statement. The amount shown by the statement to be the yearly income from the farm is approximately the amount which would have been received from the 131 acres of land owned by Margaret Patterson upon the terms testified to by W. J. Patterson; the difference being less than \$5. The only other evidence concerning the renting of this tract by B. W. Patterson introduced by the complainants is the testimony of Perry Patterson, a nephew of William M. Patterson, who testified that he thinks B. W. Patterson told him upon several occasions that he had rented the 90 acres in East Nelson township and the pasture land, and that he paid grain rent for a short time and afterwards \$4 per acre. This witness could not fix the time when he had these alleged conversations with B. W. Patterson, and it is apparent from reading his testimony that his memory about the conversations was equally as unreliable as that of the witnesses Charley Patterson and Charles Tabor concerning the conversation which occurred at the time of the settlement between W. J. Patterson and his mother. B. W. Patterson denied making any such statements as were attributed to him by the witness Perry Patterson. The only documentary proof relating to the renting of land by B. W. Patterson is the lease or contract which was executed by him and his mother on February 27, 1907, and this instrument did not mention either the 33-acre tract or the 45 acres in East Nelson township.

[7] It is our conclusion from a careful consideration of all the evidence bearing upon the question that it is not shown by any reliable evidence or with a sufficient degree of certainty that B. W. Patterson ever occupied the 45 acres in question as the tenant

of either his father or mother. It is therefore unnecessary to consider whether the doctrine that a tenant is estopped from denying his landlord's title can be invoked in a proceeding brought against the tenant for the purpose of divesting him of his title and vesting it in the heirs or devisees of the landlord.

[8] The finding contained in the decree that B. W. Patterson is the owner of the 78 acres of land in controversy is supported by the proof, and is not contrary to the weight of the evidence, and, as this was one of the issues in the case, there was no impropriety in making the findings upon this issue which are contained in the decree, even though the effect of such findings may be, as appellants contend, to confirm the title in B. W. Patterson. It necessarily follows that the complainants were not entitled to an accounting from B. W. Patterson for the rents and profits from the 78 acres in question.

Appellants complain of the action of the court in refusing to make any finding with reference to the merits of the claims filed by B. W. Patterson against the estate of Margaret Patterson, and, in effect, remitting the parties to their remedy at law, and Margaret Underwood, under her assignment of cross-errors, complains of the disposition of her claim made by the decree. As we have hereinbefore stated, the apparent relief sought by the bill with reference to these claims was to obtain an injunction restraining their prosecution at law and, a decree ordering the contract and notes to be delivered up and canceled.

[9] In order to obtain this relief, under the issues of this case, it was incumbent upon the complainants to show that they had a defense which was only cognizable in a court of equity. *Catholic Bishop of Chicago v. Chiniquy*, 74 Ill. 317; *County of Cook v. City of Chicago*, 153 Ill. 524, 42 N. E. 67.

[10] This they claim to have done, with reference to the claims of B. W. Patterson, by proving that a confidential relation existed between B. W. Patterson and his mother, and that after the second stroke of paralysis, in 1900, Margaret Patterson became mentally and physically incapable of transacting business, and argue that from these facts a court of equity will presume that the contract and notes which form the basis for the claims filed by B. W. Patterson were procured by undue influence exercised by him and are therefore fraudulent and void. In other words, their contention is that having shown that a confidential relation existed between B. W. Patterson and his mother, and that the latter, on account of her weakened condition, was susceptible to the influence of the former, the law imposed on B. W. Patterson the burden of showing, by clear and convincing proof, that the contract was equitable, fair, and just, and that the notes were based upon an adequate

and sufficient consideration, which appellants contend he failed to do. The evidence fails to show that B. W. Patterson abused this confidence or obtained any advantage in any of the transactions with his mother, but, on the contrary, shows, as clearly as can reasonably be expected, that the contract of February 27, 1907, was just and equitable, and that the notes were given upon a fair settlement of accounts and represented the amounts equitably and legally due B. W. Patterson from his mother at the times they were given.

By the contract in question Margaret Patterson leased her land to B. W. Patterson at an annual rental of \$350, and in the settlements which resulted in the giving of notes on March 3, 1908, and March 2, 1909, he was charged with that amount for rent due his mother, and appellants contend that this was a grossly inadequate rental. It is true that one witness called by appellants testified that the reasonable rental value of the 209 acres of land which appellants claim Margaret Patterson owned at the time of her death had been during the past 10 years \$1,100 per annum, but the witness did not designate what portion of that amount was the rental value of the 78 acres which B. W. Patterson owned nor what portion was the rental value of the remaining 131 acres which Margaret Patterson owned. Another witness testified that the rental value of the 90-acre tract in East Nelson township, which includes the 45 acres owned by B. W. Patterson, was \$4 or \$5 per acre from 1899 to 1905 and \$7 per acre from 1905 to the present time. The witness did not, however, testify that such was the rental value of the north 45 acres which belonged to Margaret Patterson, nor can the rental value of the remaining land owned by Margaret Patterson be determined from his testimony. Still another witness testified that the annual rental value of the 90-acre tract, which includes the 45 acres owned by B. W. Patterson, had been \$6 per acre for the past seven years; and that for the three years preceding that period was \$5 per acre. The same objection appears to the testimony of this witness as to the testimony of the former witness. It is apparent that the testimony given by these witnesses was of no benefit whatever in determining the rental value of the 131 acres owned by Margaret Patterson during the last 10 years of her life or at any time during that period. On the other hand, while there is no direct evidence of the rental value of this land, it does appear from letters written by William J. Patterson to some of the children and descendants of Margaret Patterson in December, 1899, that the reason his mother revoked his agency was because she desired to accept the offer of \$325 per year as rent for her land made by B. W. Patterson, while he (W. J. Patterson) was insisting on renting it to a stranger who had offered to pay more rent for it. It therefore appears

that before Margaret Patterson had sustained the stroke of paralysis which left her a helpless invalid, and at a time when her mental faculties were unimpaired by the disease from which she afterwards suffered, and when she had the independent advice of another son who was then acting as her agent, she insisted upon renting her land to B. W. Patterson for \$325 per year, being apparently a little less than the amount received as rent during the preceding two or three years, notwithstanding the fact that a stranger was willing to pay more rent. Nor was this action on her part unreasonable or against her interests. She was an old woman and was personally unable to manage her farm. As long as she rented it to B. W. Patterson, however, she could live in her own home and receive the care and attention which at her age she required from one of her own children, instead of intrusting herself to the care of strangers, as she might have been compelled to do had the land been rented to another. While the annual rent with which B. W. Patterson was charged in the settlement with his mother which resulted in the giving of the \$6,550 note on February 27, 1907, is not shown, yet it is fair to assume that the amount ranged from \$325 to \$350 per year. In the absence of any testimony showing that this was an inadequate rental for the land, and in view of the attitude taken by Margaret Patterson before any confidential relation existed between her and B. W. Patterson and at a time when she had independent advice, and in view of the benefit which would naturally accrue to her from being able to live in her own home with her own son, there can be no presumption in this case that B. W. Patterson exercised undue influence in renting the land from her at an annual rental of from \$325 to \$350.

The defendant B. W. Patterson introduced considerable evidence showing various amounts paid out by him from 1899 to the time of his mother's death for the services of nurses, physicians, and servant girls, for medicines, groceries, meat, taxes, repairs, and various other expenses incurred in caring for his mother, in maintaining the household, and in making repairs on the farm. It is unnecessary to attempt to give these various items in detail or to determine the total amount shown to have been paid out, which is stated in appellees' argument to have been between \$10,000 and \$11,000, but it is apparent from the fact that the amount paid for nurses and servant girls alone during the latter years amounted to \$12 per week that an agreement to pay \$25 per week in consideration that B. W. Patterson should pay all expenses incurred in taking care of his mother and in conducting the household was not unreasonable. The children of Margaret Patterson, some of whom resided in foreign states, and members of their families, as well as other relatives and friends, frequently visited her during the

years of her illness, sometimes staying for periods of several weeks. It is not shown that any of them, except Margaret Underwood, assisted materially in caring for Mrs. Patterson, but their visits necessarily increased the household expenses, which were borne by B. W. Patterson. The evidence does not show the various items entering into the settlement which resulted in the giving of the \$6,550 note, but it does appear that the settlement was made from an account book kept by B. W. Patterson showing the various items paid out by him during several years preceding that settlement. It therefore does not appear that B. W. Patterson obtained any advantage over his mother in this settlement, but, on the contrary, using the settlements made in 1908 and 1909 under the contract as a criterion, it would appear that B. W. Patterson received something less per year on account of expenses paid by him during the period from December, 1899, to February, 1907, than he received during the subsequent years under the contract. This is perhaps, in part, accounted for by the fact that during a portion of this period the nurses were paid but \$7 per week and servant girls but \$2 per week.

That Margaret Patterson received the best of care and attention during all the years of her sickness is a fact which appellants do not deny, and in our judgment the record shows, with as great a degree of certainty as can reasonably be expected, that she received full value for the notes given to B. W. Patterson, and that he derived no advantage in the transactions, and did not abuse the confidence reposed in him by his mother.

[11] Considerable evidence was introduced concerning the mental condition of Margaret Patterson from the time she received the second stroke of paralysis until her death. While this evidence shows that her mental faculties were somewhat impaired, yet, on the whole, what we consider the most credible evidence shows that she was able to understand and comprehend the ordinary business affairs of life, and in particular that she understood the nature and effect of the transactions when she executed the contract and notes in question.

The proof fails to establish any equitable defense to the claims of B. W. Patterson.

Appellants contend that the court erred in refusing to take over the administration of the estate of Margaret Patterson, to remove B. W. Patterson as executor, and to appoint some disinterested person to administer upon the estate and carry out the provisions of the will.

[12] A court of equity will not exercise this jurisdiction and take upon itself the administration of an estate except in extraordinary cases, where some special reasons are shown to exist why the administration should be withdrawn from the probate court. *Freeland v. Dazey*, 25 Ill. 294; *Shepard v. Speer*, 140 Ill. 238, 29 N. E. 718; *Ames v.*

Ames, 148 Ill. 321, 36 N. E. 110; *Goodman v. Kopperl*, 169 Ill. 136, 48 N. E. 172; *Elting v. First Nat. Bank*, 173 Ill. 368, 50 N. E. 1095. Appellants have not made out such a case. They can obtain all the relief to which they may be entitled with reference to all of the matters alleged as grounds for interference by a court of equity, in the probate court.

[13] It is also urged that the court erred in refusing to order an accounting by B. W. Patterson of the rents and profits received by him from the land owned by his mother at the time of her death. B. W. Patterson had accounted to his mother for the rents up to March 1, 1909, and settlements had been had between them, as hereinbefore shown, by which all rents due from him were paid. Under the contract with his mother he was entitled to retain possession and use of the lands until the 1st day of March, 1910, at a rental of \$350, which he has credited upon one of the notes filed by him against his mother's estate. The record therefore fails to show that B. W. Patterson is liable for any rents and profits for which he is under any obligation to account to the complainants.

Appellants contend that the court should have passed upon the merits of the B. W. Patterson claims, and should have disallowed them because of the legal defenses which they claim to have established thereto, even though they failed to establish the equitable defense set up in their bill, and they seek to have the decree reversed with directions to the circuit court to disallow those claims. The appellee B. W. Patterson, in reply to this contention, urges, first, that the provision in the decree relating to these claims is authorized by section 40 of the chancery act (*Hurd's Rev. St. 1909, c. 22*), which provides that the court may, in its discretion, direct an issue or issues to be tried by a jury whenever it shall be judged necessary in any cause in equity pending therein, and that the action of the court in exercising its discretion under the authority conferred by this section is not subject to review; and, second, that, the court having found that all of the alleged defenses to these claims could be interposed in a court of law, its action in remitting the parties to the court of law was proper, and the decree therefore not erroneous in that regard. Margaret Underwood, under her assignment of cross-errors, complains of the action of the court in sustaining the objections of the complainants to her claim, in denying judgment thereon and in awarding costs against her, and insists that this disposition of her claim was contrary to the law and the evidence and that the court should have allowed her claim against the estate; while appellants contend that, as Margaret Underwood was the daughter of Margaret Patterson, the services rendered by her for her mother are presumed to have been gratu-

itous, in the absence of proof of any contract between the parties showing that Margaret Patterson agreed to pay for such services, and that the note was therefore only an attempted gift, which cannot be enforced against the estate of Margaret Patterson, that it also appeared that the note was never delivered to Margaret Underwood during the lifetime of her mother, and that for these reasons the court properly disallowed the claim.

[14] These alleged defenses to the claims of B. W. Patterson and Margaret Underwood can be interposed in a court of law, and the court, having correctly decided that the equitable defenses relied upon by appellants had not been established, did not err in refusing to pass upon the legal defenses to the claims of B. W. Patterson or in remitting the parties to their remedy at law.

[15] Where the bill seeks equitable relief and the evidence establishes the right to that relief, the court will retain jurisdiction for all purposes connected with the subject-matter of the suit and establish purely legal rights and grant legal remedies which would otherwise be beyond the scope of its authority (*Stickney v. Goudy*, 132 Ill. 213, 23 N. E. 1034); but, where the bill is dismissed as to the portion founded on the right to equitable relief and only legal rights remain to be ascertained and passed upon, the jurisdiction of the court must fall unless some equitable ground appears for retaining jurisdiction. *Daniel v. Green*, 42 Ill. 472; *Toledo, St. Louis & New Orleans Railroad Co. v. Railroad Co.*, 208 Ill. 623, 70 N. E. 715.

As heretofore pointed out in this opinion, the decree dismissed the bill for want of equity, thus disposing of all the issues arising upon the pleadings in the case, including the alleged equitable defenses to these claims, adversely to the complainants. The decree contained a recital, however, to the effect that the parties had agreed that the court might hear the proof applicable to the merits of these claims, but it was also expressly stated in the decree that the claims are pending on the common-law docket of the court, and are not consolidated with the chancery suit. No agreement or stipulation of any kind between the parties appears in the record, except as shown by the recital just mentioned in the decree.

[16] If it was the intention of the parties to submit these claims to the court of equity for decision upon the evidence heard in the chancery suit, the suits thereon should have been transferred from the law side to the chancery side of the court and consolidated with the chancery suit, otherwise the jurisdiction of the court of equity to grant relief was necessarily limited to the issuance of an injunction restraining the prosecution of these claims in the court of law, and the court was without jurisdiction of the subject-matter to allow these claims against

the estate of Margaret Patterson or to require their allowance by the court of law. The only conclusion which can be drawn from the provisions of the decree with reference to the claims of B. W. Patterson is that the court has refused to interfere with the proceedings at law upon those claims, and that the suits thereon are now pending for trial upon the common-law docket of the court in the same manner as though this chancery suit had never been brought, and that the court has therefore remitted the parties to their remedy at law.

[17] While the decree recites that the court desires the benefit of the advisory aid of the verdict of a jury upon these claims, it does not direct any issue or issues to be tried by a jury, nor does the court by the decree retain any jurisdiction of the cause for the purpose of entering any subsequent decree therein after the verdict of a jury has been rendered. This provision with reference to the desire of the court to have the benefit of the advisory aid of the verdict of a jury should not have been inserted in the decree, as it can serve no purpose but to confuse the parties and the court in the proceedings at law upon those claims.

[18] With reference to the claim of Margaret Underwood, the court, instead of remitting the parties to their remedy at law, as in the case of the claims of B. W. Patterson, has attempted to finally dispose of her claim, not by enjoining the prosecution of the suit at law, but by finding that the complainants have a legal defense to the claim by denying judgment thereon and by awarding costs against Margaret Underwood. The claim was not before the court of equity in such form as to give it jurisdiction either to render judgment or to deny judgment thereon, but the only relief which it had any jurisdiction to grant was an injunction restraining the prosecution of the suit at law. This relief was, however, denied by the action of the court in dismissing the bill for want of equity. Although the parties have not raised the question of jurisdiction in this court but have discussed the law and the evidence applicable to this claim, the lack of jurisdiction in the circuit court to enter a decree allowing the claim against the estate of Margaret Patterson in case we should conclude, from the evidence in this record, that the complainants have no legal defense to the claim and should remand the cause to the circuit court with directions, requires us to refrain from considering any of the questions discussed by the parties with reference to the alleged legal defenses to the claim and to modify the decree so as to permit the prosecution of the claim at law, where Margaret Underwood can obtain a judgment against the estate of Margaret Patterson if the law and evidence shall warrant such judgment.

Nothing said in this opinion is intended to, or should, prejudice the rights, if any, of

the parties upon trials of these claims at law.

The decree will be modified by striking out all findings with reference to the claims of B. W. Patterson, and Margaret Underwood, except the finding that the complainants have a full, adequate, and complete remedy at law, and also by striking out the following portion of the decree: "It is further ordered, adjudged, and decreed by the court that the objections of the complainants herein to the claim of Margaret Underwood against the estate of Margaret Patterson, deceased, be and the same are hereby sustained, and judgment upon said claim is hereby denied. And it is further ordered, adjudged, and decreed by the court that the complainants herein have and recover of and from the defendant Margaret Underwood all their costs by them in this behalf made in relation to the claim of the said Margaret Underwood against the estate of Margaret Patterson, deceased, and that they have execution therefor." As so modified, the decree will be affirmed.

Decree affirmed as modified.

(251 Ill. 123)

**LONDON GUARANTEE & ACCIDENT CO.
v. AMERICAN CEREAL CO.**

(Supreme Court of Illinois. June 20, 1911.
Rehearing Denied Oct. 11, 1911.)

1. EVIDENCE (§§ 579, 580*)—TRANSCRIPT OF EVIDENCE ON FORMER TRIAL—DEATH OF WITNESS.

To render the testimony of a witness in a former action admissible in a subsequent one because the witness has since died, it must appear that both actions involved the same issue between the same parties or their privies, it being insufficient to show that the party against whom the testimony was offered in the subsequent action was a party to the former action, and had full opportunity to cross-examine the witness.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2412, 2413; Dec. Dig. §§ 579, 580.*]

2. EVIDENCE (§ 579*)—TRANSCRIPT OF EVIDENCE ON FORMER TRIAL—DEATH OF WITNESS.

Defendant, having arranged with C. & Co. to construct a building, purchased from plaintiff a policy indemnifying defendant against loss arising solely from its contingent liability as general constructor or owner on account of injuries to persons during the construction of the building. Suit having been brought against defendant for injuries, plaintiff assumed the defense under the terms of the policy, refusing to permit defendant to participate therein. On testimony that C. & Co. were agents of defendant, and not independent contractors, judgment was rendered in favor of C. & Co. and against defendant, whereupon plaintiff's attorneys withdrew from the case, when defendant employed new attorneys, and procured a reversal, after which plaintiff sued defendant to recover the cost and disbursements on the theory that it was not liable under the policy. *Held*, that since there was no issue between insurer and insured in such former action involving the question whether C. & Co. were inde-

pendent contractors, and there was no such issue between insured and any one with whom plaintiff was in privity in that action, the transcript of the evidence of deceased witnesses testifying therein was inadmissible in such subsequent action to show that C. & Co. were agents of defendant, and not independent contractors.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2412; Dec. Dig. § 579.*]

3. EVIDENCE (§ 578*)—DECEASED WITNESSES—TRANSCRIPT OF TESTIMONY ON FORMER TRIAL.

Insured not having been permitted by insurer to participate or take any part in the conduct of the trial of such former action, insurer having insisted the same be conducted by its attorneys, such transcripts were inadmissible because insured had never had an opportunity to cross-examine the witnesses.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2411; Dec. Dig. § 578.*]

Appeal from Appellate Court, First District, on Appeal from Superior Court, Cook County; Marcus Kavanagh, Judge.

Action by the London Guarantee & Accident Company against the American Cereal Company. Judgment for plaintiff affirmed by the Appellate Court, and defendant appeals. Reversed and remanded.

Jones, Addington, Ames & Seibold, for appellant. F. J. Canty and Robert J. Folonie, for appellee.

COOKE, J. This is an appeal, granted under a certificate of importance, from a judgment of the Appellate Court for the First district affirming a judgment for \$956.73 and costs of suit, rendered by the superior court of Cook county in an action of assumpsit brought by the London Guarantee and Accident Company, appellee, against the American Cereal Company, appellant, to recover the amount expended by appellee in the defense of a suit brought in the district court of Linn county, Iowa, by Henry Overhauser, as administrator of the estate of William L. Overhauser, deceased, against the American Cereal Company and others.

The facts upon which the action of assumpsit is based are as follows: Some time prior to October 26, 1899, appellant, by an oral contract, arranged with Connor & Co., a firm engaged in the general contracting business at Cedar Rapids, Iowa, to construct a building for it in Cedar Rapids. After making this contract, appellant purchased from appellee a policy of insurance, by which, in consideration of the payment of \$50 premium, appellee, subject to the agreements contained in the policy, agreed to indemnify appellant for the period of one year, beginning on October 26, 1899, and ending on October 26, 1900, "against loss arising solely from his (its) contingent liability as general contractor or owner, from common law or any statute, for damages on account of bodily injuries, fatal or nonfatal, accidentally suffered by any person or persons during the construction of the building described in the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep't Indexes

schedule hereinafter given [being the building above mentioned], and resulting from the negligence of any contractor or subcontractor engaged in the construction of said building." The agreements contained in the policy included a provision that the assured, upon the occurrence of an accident, should give immediate written notice thereof to the company and should give like notice of any claim that should be made on account of such accident, and also included the following provisions: "If thereafter any suit is brought against the assured to enforce a claim for damages on account of any accident covered by this policy, the assured shall immediately forward to the head office of the company for the United States of America every summons or other process as soon as the same shall have been served on him (it), and the company will at its own cost defend against such proceedings in the name and on behalf of the assured, or settle the same, unless it shall elect to pay to the assured the indemnity provided for in clause A of special agreements as limited therein. The assured shall not settle any claim except at his (its) own cost, nor incur any expenses, nor interfere in any negotiation for settlement or in any legal proceeding, without the consent of the company previously given in writing. * * * The company's liability for an accident resulting in injury to or in the death of one person is limited to five thousand dollars (\$5,000). * * * If the assured is the owner of the building mentioned in the schedule, it is agreed that all the work of constructing the same is to be done by contract at the risk of the contractor or contractors, and that the assured has not and will not, by contract or otherwise, voluntarily assume any liability for loss on account of bodily injuries suffered by any person or persons by reason of the negligence of any contractor or subcontractor."

On November 20, 1899, William L. Overhauser, while riding a bicycle upon one of the streets of Cedar Rapids, struck a rock which had been dropped from a wagon which was being used in hauling dirt and rock by men engaged in the construction of the building described in the policy of insurance, and was thereby thrown from the bicycle and sustained injuries from which he died. During the early part of January, 1900, the administrator of his estate brought suit in the district court of Linn county, Iowa, against the city of Cedar Rapids to recover damages occasioned by his death. The city notified appellant and Connor & Co. to appear and defend the action, as the liability of the city, if any, was due to their negligence. On January 12, 1900, appellant sent a copy of this notice to appellee, accompanied by a letter from appellant, in which the following statement was made: "The claim in question, if there is any liability, comes under policy No. 242,362, issued by your general agent, Frederick S. Gray." In reply there-

to, appellee's general manager, on January 18th sent a letter to appellant acknowledging receipt of the notice and containing the following statements: "While the possibility of your liability is very remote, we will, of course, protect your interests under policy 242,362. I have referred the matter to our attorneys, Messrs. Powell & Harman, Cedar Rapids, who will make investigations, and if there are any reasons why the case is not covered by the policy we will let you know later on." Afterwards appellant and Connor & Co. were made defendants to the suit, and the summons served upon appellant was sent by it to appellee. Thereafter, by correspondence and in personal interviews, in answer to appellant's offers to employ attorneys to represent it in the defense of the suit, appellee assured appellant that it was looking after the case, that its attorneys would protect appellant's interests, and that there was no necessity of appellant incurring any expense whatever, as the defense would be as vigorous with Powell & Harman alone as it would be with any help that could be given them.

The defense on behalf of appellant was conducted by appellee, through Powell & Harman, its attorneys, until the end of the second trial. During the progress of the first trial the plaintiff dismissed the suit as to the city of Cedar Rapids, and at the conclusion of the plaintiff's case the court directed a verdict in favor of the remaining defendants. The plaintiff in that suit prosecuted an appeal to the Supreme Court of Iowa, and the judgment of the district court was reversed and the cause remanded. A second trial was then had in the district court, at the conclusion of which the court directed a verdict in favor of Connor & Co., and the jury returned a verdict finding the American Cereal Company guilty and assessing the plaintiff's damages at \$7,000. Upon the return of this verdict, appellee caused its attorneys to withdraw from the case, and notified appellant that as it had been determined by the verdict of the jury rendered upon the second trial that Connor & Co. were not independent contractors, but were acting as agents for appellant in the construction of the building, the policy did not cover appellant's liability, for the death of Overhauser, and that appellee would have nothing further to do with the case. Appellant retained other attorneys and prosecuted an appeal to the Supreme Court of Iowa, and the judgment against it was reversed and the cause remanded for a new trial because of the refusal of the court to give certain instructions requested by appellant defining the conditions under which the jury would be warranted in reaching the conclusion that the relationship of Connor & Co. was, in fact, that of independent contractor. So far as the record shows, there has been no further trial of that cause.

After refusing to further conduct the de-

fense of the case against appellant, appellee rendered a statement of the amounts paid out by it in conducting such defense up to the time the verdict was rendered upon the second trial and demanded the repayment of those amounts by appellant, claiming that it had undertaken the defense of the suit under the belief, induced by appellant, that Connor & Co. were independent contractors and under the belief that appellant's liability was therefore covered by the policy, but had been informed by its attorneys that appellant's superintendent, and Connor, of the firm of Connor & Co., had both testified to a state of facts on the second trial which proved that Connor & Co. were not independent contractors but were acting merely as agents for appellant in the construction of the building. Appellant's failure to pay the sum demanded resulted in this suit, brought to enforce payment thereof. The cause was tried before the court without a jury.

In addition to the above facts, which are undisputed, appellee introduced evidence which tended to show that appellant referred appellee's attorneys, Powell & Harman, to George Stuart, the superintendent of appellant's plant at Cedar Rapids, as one from whom they could obtain information with reference to the terms of the oral contract under which Connor & Co. were constructing the building, and that the terms of the contract, as stated by George Stuart to the attorneys, were such as to constitute Connor & Co. independent contractors in the construction of the building; that after the first trial, and shortly before the second trial, George Stuart's attitude in the case changed, and he stated to appellee's attorneys that, as appellant was protected by its policy, it did not want to cast the responsibility on Connor & Co., and that during the second trial he assisted Connor & Co. in making their defense, which consisted chiefly in showing that they were not independent contractors, but were acting merely as agents for appellant in constructing the building, and that appellant, and not Connor & Co., was liable for the damages occasioned by the death of Overhauser. In order to prove that Connor & Co. were not independent contractors, appellee offered, and the court admitted in evidence over appellant's objection, a transcript of the testimony given upon the second trial of the Overhauser case by A. H. Connor, George Stuart, and J. E. Fitzsimmons, all of whom had since died. The testimony of each of these witnesses tended to show that Connor & Co. were not independent contractors in the construction of the building for appellant at Cedar Rapids.

At the close of all the evidence in the case appellant submitted to the court seven propositions to be held as law in the decision of the case, upon each of which the court wrote "refused." The only questions that can be considered upon this appeal are ques-

tions of law, arising upon the action of the court in refusing the propositions submitted by appellant to be held as law in the decision of the case, and in admitting the transcript of the testimony given by witnesses, now deceased, upon the second trial of the Overhauser suit. The propositions which appellant submitted to the court were properly refused. Some of them were mere findings of fact which the court was requested to make, while the others either assumed as true facts which were in controversy or contained matters extraneous to the issues in the case.

The policy of insurance issued to appellant by appellee indemnified appellant only against loss arising from its contingent liability, as owner, for damages on account of bodily injuries, fatal or nonfatal, accidentally suffered by persons during the construction of the building, and resulting from the negligence of any contractor or subcontractor engaged in the construction thereof. By a provision in the policy appellant represented and agreed that all work of constructing the building mentioned in the policy should be done by contract at the risk of the contractor or contractors, and that it had not, and would not, by contract or otherwise, voluntarily assume any liability for loss on account of bodily injuries suffered by any person by reason of the negligence of any contractor or subcontractor. By another provision of the policy appellee agreed that, if any suit should be brought against appellant to enforce a claim for damages on account of any accident covered by the policy, appellee would, at its own cost, defend against such proceeding in the name and on behalf of appellant. These provisions of the policy show conclusively that the policy only covered the appellant's contingent liability, as owner, for personal injuries resulting from the negligence of one whom the law considers an independent contractor in the construction of the building, and that appellee was not required to defend, at its own cost, any proceeding brought against appellant to recover damages on account of bodily injuries, fatal or nonfatal, unless such injuries resulted from the negligence of an independent contractor engaged in the construction of the building. In order to recover from appellant the amount expended in the defense of the Overhauser suit, it was incumbent upon appellee to prove, among other things, that Connor & Co. were not independent contractors. The only evidence tending to prove that issue is the transcript of the testimony of the deceased witnesses, Connor, Stuart, and Fitzsimmons, which was given on the second trial of the Overhauser suit, and, if the court erred in admitting this transcript in evidence over appellant's objection, it necessarily follows that the judgments of the Appellate and superior courts must be reversed because of that error.

In *McInturff v. Insurance Co. of North America*, 248 Ill. 92, 93 N. E. 369, we said: "There is a general agreement of authorities that evidence given on a former trial of the same action, or a former action involving the same issues between the same parties, is admissible if it be established that the witness is dead." We also quoted a paragraph from the sixteenth edition of *Greenleaf on Evidence*, as enlarged and annotated by Prof. Wigmore in 1899, which contains the following statement: "As to the parties, all that is essential is that the present opponent should have had a fair opportunity of cross-examination." And with reference to that statement we said: "If this paragraph is read as laying down the rule broadly that a fair opportunity for cross-examination by the party against whom the evidence is offered is all that is necessary to render it admissible, then the overwhelming weight of authority is against the accuracy of the rule as stated; but if it is read, as no doubt its author intended it should be, as stating the rule that a mere nominal change of parties is of no consequence provided the parties in the second action are so privy in interest with those on the former trial that the same motive and need for cross-examination existed, then the rule stated is in accord with the great weight of authority." The holding in the *McInturff Case* was to the effect that the evidence given by a witness, since deceased, in a criminal prosecution against the owner of a building for setting fire to and burning property covered by insurance was inadmissible in a subsequent action by the owner of the building against the insurance company to recover upon the policy, such testimony being offered by the insurance company, notwithstanding the fact that the owner of the building had full opportunity to cross-examine the witness in the criminal proceeding against him.

[1] It may therefore be regarded as the settled law of this state that, in order to render the testimony of a witness in a former action admissible in a subsequent action on the ground that the witness has died since giving his testimony, it must appear that both actions involved the same issue between the same parties or their privies, and the fact that the party against whom the testimony is offered in the subsequent action was a party to the former action and had full opportunity to cross-examine the witness does not necessarily render the testimony admissible.

[2] The issue in the *Overhauser suit*, whether *Connor & Co.* were independent contractors, was one, first, between the plaintiff in that suit on the one side and appellant on the other; second, between the plaintiff in that suit on the one side and *Connor & Co.* on the other; and, third, between *Connor & Co.* on the one side and appellant on the other; but there was no

issue between appellant and appellee in the former action involving the question whether *Connor & Co.* were independent contractors, nor was there any such issue between appellant and any one with whom appellee was in privity. It therefore did not appear that both actions involved the same issue between the same parties or their privies, and for that reason the court should have sustained appellant's objection and excluded the testimony of the deceased witnesses given on the trial of the *Overhauser suit*.

The appellee contends, and the superior and Appellate Courts held, that as appellee was in privity with appellant in the former action to which appellant was a party, and as appellant had the right to cross-examine the witnesses in the former action, the testimony given in the former action upon the same issue involved in this action was admissible. If this were an action between plaintiff in the *Overhauser suit* on the one side and appellee on the other, or between *Connor & Co.* on the one side and appellee on the other, and involved the issue whether *Connor & Co.* were independent contractors in the construction of the building for the appellant, then the testimony of the deceased witnesses given on the trial of the *Overhauser suit* upon this issue would be admissible in this case, for the reason that appellee, while not a party to the former action, was in privity with appellant, who was a party to that action, was present and participated in that trial, and had full opportunity to cross-examine the witnesses. The inclusion of privies of parties in the rule with reference to the admissibility of testimony given by deceased witnesses in former actions cannot, however, extend the rule so as to render admissible in a subsequent action between one of the parties in a former action and one in privity with that party in the former action the testimony of deceased witnesses given in the former action because there was no issue between the party and his privy in the former action, and the mere fact that the party to the former action had full opportunity to cross-examine the witnesses does not alone, as held in the *McInturff Case*, render the evidence given in the former action admissible in the subsequent action.

[3] There is, moreover, another objection to the admissibility of the testimony in this case. It appears that as between appellant and appellee the former had no opportunity to cross-examine any witnesses, but appellant's defense in the trial in which the testimony was given was conducted by appellee under a contract which appellee then believed covered appellant's liability, if any, for damages sought to be recovered in that action. Appellee had agreed to defend, at its own cost, any action brought against appellant to enforce a claim for damages on account of an accident covered by the policy, and appellant had agreed not to inter-

here in any legal proceeding without the consent of the insurance company previously given in writing. Appellant attempted to obtain this consent by offering to employ its own attorneys to represent it and to assist the attorneys employed by appellee, but appellee, instead of giving its consent, dissuaded appellant from participating in the trial through its own attorneys by representing that appellee's attorneys were looking after the defense of the suit and needed no assistance from attorneys employed by appellant. While the law gave appellant the right to participate in the defense of the Overhauser suit and to examine and cross-examine witnesses therein, yet such conduct on its part without appellee's written consent would have been a breach of its contract with appellee, and, so far as appellee is concerned, it is therefore, by its contract and by its conduct when appellant offered to employ attorneys to represent it in that action, estopped to rely upon the legal right of appellant to cross-examine witnesses in the former action in order to render the evidence given in the former action admissible as against appellant in this action.

For the reasons above given, and for the additional reason that it was manifestly to the interest of appellee to make it appear in the former action that Connor & Co. were not independent contractors, and thus relieve it of any liability under the policy, including the liability to defend the suit at its own expense, the testimony of the deceased witnesses given on the second trial of the Overhauser suit should have been excluded.

The cases cited by appellee to the effect that a former adjudication of a fact or matter in controversy is conclusive when a controversy arises over the same fact or matter between a party to the judgment and one who was in privity with him in the proceeding in which the judgment was rendered have no application to the question presented for our determination. Had there been a final judgment in the Overhauser suit against appellant, and had that judgment, together with the testimony of the deceased witnesses showing that the judgment necessarily involved a determination of the fact that Connor & Co. were not independent contractors, been introduced in evidence in this case by appellee to establish the fact that Connor & Co. were not independent contractors, then the authorities cited by appellee would support the action of the court in admitting such evidence. The testimony of the deceased witnesses, however, in such case, could only be received in evidence for the purpose of showing the issue involved in the action in which the judgment was rendered, and not as proof of the matters testified to by the deceased witnesses. *Washington Gas Light Co. v. District of Columbia*, 161 U. S. 316, 16 Sup. Ct. 564, 40 L. Ed. 712.

For the error of the court in admitting in evidence the transcript of the testimony given on the second trial of the Overhauser suit by witnesses since deceased, the judgments of the Appellate and superior courts will be reversed, and the cause will be remanded to the superior court.

Reversed and remanded.

(251 Ill. 135.)

KELLY et al. v. JOHNSON et al.

(Supreme Court of Illinois. June 20, 1911.

Rehearing Denied Oct. 11, 1911.)

1. MECHANICS' LIENS (§ 103*)—LIEN OF SUBCONTRACTOR—EXISTENCE.

The lien of a subcontractor can only exist by virtue of the original contract, and, if it provides that there shall be no lien on the improved property for material and labor furnished by the original contractor, such contract is binding on the subcontractor, who, under such circumstances, cannot obtain a lien for material or labor.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. § 135; Dec. Dig. § 103.*]

2. MECHANICS' LIENS (§ 103*)—RIGHT TO A LIEN—WAIVER—MODIFICATION OF CONTRACT.

Since an original contractor may waive his right to a lien in the original contract, he may also do so thereafter by a modification of the original contract based on a valuable consideration, and, where this is done, no subcontractors, laborers, or materialmen rendering services or furnishing material thereafter are entitled to a lien.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. § 135; Dec. Dig. § 103.*]

3. CONSTITUTIONAL LAW (§ 89*)—MECHANICS' LIENS (§ 3*)—RIGHTS OF SUBCONTRACTORS—STATUTES—CONSTITUTIONALITY.

Mechanic's Lien Law 1903 (Starr. & C. Ann. St. Supp. 1903, c. 82) § 21, provides that every mechanic or other person who shall furnish any labor or materials for any contractor shall be known as a subcontractor, and shall have a lien for the value thereof on the same property as provided for the contractor, whether or not the original contractor could have obtained a lien or was by contract or conduct divested of the right to a lien. *Held*, that such section in so far as it attempts to vest a subcontractor or materialman with the right to a lien in a case where the original contractor has waived his right to a lien before the materials are furnished or the labor performed for which the subcontractor or materialman claims a lien is unconstitutional as depriving the owner of the right to contract in a matter not within the police power of the state.

[Ed. Note.—For other cases, see *Constitutional Law*, Cent. Dig. § 157; Dec. Dig. § 89.* *Mechanics' Liens*, Dec. Dig. § 3.*]

Appeal from Superior Court, Cook County; M. M. Gridley, Judge.

Bill by A. W. Kelly and others against J. W. Johnson and others to foreclose a mechanic's lien, in which other mechanic's lien claimants intervene. From a decree establishing such liens, L. G. Hallberg and others appeal. Affirmed in part, and reversed in part and remanded.

Fyffe & Adcock (Edmund D. Adcock and Ira Ryner, of counsel), for appellants. Adams, Bobb & Adams (James B. Wescott, of

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

counsel), for appellees A. W. Kelly and others. Felsenthal & Beckwith, for appellee Labahn Brick Co.

HAND, J. This was a bill in chancery filed on the 8th day of September, 1906, in the superior court of Cook county, by A. W. Kelly, doing business as A. W. Kelly & Co., a subcontractor, against J. W. Johnson, doing business as J. W. Johnson & Co., the original contractor, and L. G. Hallberg and Stewart Hodges, the owners, and Francis E. Broomell, trustee of certain premises located in the city of Chicago, to establish a mechanic's lien under the statute for certain materials furnished in the construction of the masonry work in a brick building in course of construction on the said premises, which masonry work was being constructed by J. W. Johnson for the owners in pursuance of a contract between J. W. Johnson and the owners bearing date March 5, 1906, to which bill other materialmen who had furnished material to J. W. Johnson for use in said building were made parties defendant. Answers and replications were filed, and the case was referred to a master. The master took the proofs, and reported that A. W. Kelly & Co., in pursuance of a contract with J. W. Johnson made April 15, 1906, was entitled to a subcontractor's lien for \$793.50; that the Waukesha Lime & Stone Company, in pursuance of a contract with J. W. Johnson made April 30, 1906, was entitled to a subcontractor's lien for \$331; that the M. A. Staley Company, in pursuance of a contract with J. W. Johnson made August 2, 1906, was entitled to a subcontractor's lien for \$69.88; that the Juhl Automatic Hoisting Machine Company, in pursuance of a contract with J. W. Johnson made June 4, 1906, was entitled to a subcontractor's lien for \$295; and that the Labahn Brick Company, in pursuance of a contract with J. W. Johnson made April 27, 1906, was entitled to a subcontractor's lien for \$455. The court entered a decree establishing such liens, from which decree L. G. Hallberg, Stewart Hodges, and Francis E. Broomell, trustee, have prosecuted an appeal to this court on the ground that section 21 of the mechanic's lien statute of 1903 (Starr. & C. Ann. St. Supp. 1903, c. 82) is unconstitutional and void.

Section 21 of the statute, in part, reads as follows: "Every mechanic, workman or other person who shall furnish any materials, apparatus, machinery or fixtures, or furnish or perform services or labor for the contractor shall be known under this act as a subcontractor, and shall have a lien for the value thereof, with interest on such amount from the date the same is due, from the same time, on the same property as provided for the contractor, and, also, as against the creditors and assignees, and personal and legal representatives of the contractor, on the material, fixtures, apparatus or machinery furnished, and on the moneys or other considera-

tions due or to become due from the owner under the original contract, whether or not the original contractor could have obtained a lien or was by contract or conduct divested or deprived of a right to obtain a lien."

It appears from the evidence that the original contract of March 5, 1906, between J. W. Johnson and the owners of the said premises, provided that Johnson should receive \$13,801 for the material and labor to be furnished and performed by him in doing the masonry work upon the said building, to which was added \$975 for extras, which amounts aggregated the sum of \$14,776 as the contract price of the masonry work on said building. It also appears that J. W. Johnson commenced work on said premises and received from the owners in payment for material and work \$10,300; that, when the masonry work was about four-fifths done, J. W. Johnson failed, and the owners were obliged to take over the contract and complete the building at an actual cost to them of \$15,353.33; that at the time the original contract was made there was no waiver of lien in the contract; that the first payment in the contract was the sum of \$5,000, which was made on the 15th day of May, 1906, at which time the original contract was modified by the parties by J. W. Johnson executing and delivering to the owners a waiver of lien in the original contract for all materials theretofore furnished or to be furnished thereafter on account of said building, which waiver was in the following form: "To All Whom It May Concern: Whereas, I, the undersigned, have been employed by Stewart Hodges and L. G. Hallberg to furnish masonry work, including labor and material, for the building known as [describing property]. Now, therefore, know ye that I, the undersigned, for and in consideration of \$5,000 and other good and valuable considerations, the receipt whereof is hereby acknowledged, do hereby waive and release any and all lien or claim, or right of lien, on said above described building and premises under 'An act to revise the law in relation to mechanics' liens,' approved May 18, 1903, and in force July 1, 1903, on account of labor or materials, or both, furnished, or which may be furnished, by the undersigned to or on account of the said for said building or premises. Given under my hand and seal this 15th day of May, 1906. J. W. Johnson & Co. [Seal.] by J. W. Johnson. [Seal.]" The contracts with all the subcontractors who were allowed liens, with the exception of A. W. Kelly & Co. for \$793.50, whose contract for materials bore date of April 15, 1906, the Waukesha Lime & Stone Company for \$331, whose contract bore date of April 30, 1906, and that of the Labahn Brick Company for \$455, whose contract for material bore date of April 27, 1906, were made subsequent to the date of said waiver of lien by J. W. Johnson.

[1] The lien of a subcontractor can only

exist by virtue of the original contract; and, in case the original contract provides there shall be no lien on the improved property for material and labor furnished by the original contractor, such contract is binding upon a subcontractor, and a subcontractor, when a lien has been waived in the original contract, has no lien for material or labor. *Williams v. Rittenhouse & Embree Co.*, 198 Ill. 602, 64 N. E. 995; *Von Platen v. Winterbotham*, 203 Ill. 198, 67 N. E. 843.

[2] We think as to all contracts for material or labor made subsequent to May 15, 1906—the date of the waiver of all liens for material and labor, executed by J. W. Johnson to Hodges and Hallberg—no subcontractors' liens can exist. Clearly, if a lien can be waived in the original contract, it can be subsequently waived, for a valuable consideration, as between the original parties. The right to modify a contract as between the original parties, so long as there are no intervening rights, involves the exercise of the same power as does the execution of the original contract.

[3] The section of the statute heretofore referred to, we think, in so far as it attempts to give a subcontractor a lien when the original contract waives all liens or all liens have been thereafter released by the contractor, is clearly unconstitutional, as its enforcement against an owner, where the original contractor has waived all liens, or all liens have been released subsequent to the date of the contract, would be to deprive the owner of his property without due process of law, as it would prevent the owner from making such contract with reference to his property as he might see fit.

The right to contract is clearly a property right; and, if the Legislature should pass a statute which would provide that the owner of land should be powerless to make a contract for the erection of a building thereon which should be relieved from all liens for the material and labor which the original contractor should put into the building in its erection, the effect of such act would be to deprive the owner of the right to contract with reference to the erection of such building upon such terms as he might deem to be for his best interests—that is, of the right to make a contract for the erection of a building whereby a contractor would agree to look solely to the individual responsibility of the owner for his pay, which would be, in part, to deprive the owner of full dominion over his property. *Ritchie v. People*, 155 Ill. 98, 40 N. E. 454, 29 L. R. A. 79, 46 Am. St. Rep. 315; *Gillespie v. People*, 188 Ill. 176, 58 N. E. 1007, 52 L. R. A. 283, 80 Am. St. Rep. 176; *Balliey v. People*, 190 Ill. 28, 60 N. E. 98, 54 L. R. A. 838, 83 Am. St. Rep. 116; *Mathews v. People*, 202 Ill. 389, 67 N. E. 28, 63 L. R. A. 73, 95 Am. St. Rep. 241. It is true in some instances the right to contract may be restrained; but that is in cases where the morals, comfort, health, or

welfare of the public is involved, and such cases fall within the police power of the state, which power is not here involved. Permitting the owner of real estate to retain the right to contract with reference to his property when making improvements thereon does no injustice to the subcontractor, as such contractor can fully protect himself from loss by informing himself of the terms of the contract which exists between the original contractor and the owner of the property to be improved before he contracts with the original contractor, and, if the terms of the contract are not satisfactory to the subcontractor, he may refuse to contract with the original contractor to furnish material or to perform labor in the improvement of the property.

The authorities are not in entire harmony as to the constitutionality of statutes of this character, but we think on principle the adjudicated cases which uphold the right of the owner of real estate to freely contract for its improvement are sound, and that this court is committed to that view of the law. While in *Von Platen v. Winterbotham*, supra, the precise question here involved was not considered by the court, this court clearly expressed its doubt as to the constitutionality of a statute similar to section 21 if it were construed as that section of the statute was construed by the trial court, which would incumber real estate with the liens of subcontractors when the original contract provided no lien should exist. On page 204 of 203 Ill., on page 845 of 67 N. E., it was said: "It is not to be presumed that the Legislature intended to restrict or abridge the right of contract which the owner has, and to give a lien to a subcontractor where the terms of the only contract to which the owner is a party are such that no lien can arise or in spite of an agreement that there shall be no lien. Under such construction, a contractor whose contract with the owner does not create or authorize a lien could establish against the property liens to the whole amount of the contract by simply subletting all the work. If a statute would be constitutional which would give a lien to a subcontractor where the owner has not assented to any contract which would create a lien, the act should not be construed in that way if it can be avoided."

In *Spry Lumber Co. v. Trust Co.*, 77 Mich. 199, 43 N. W. 778, 6 L. R. A. 204, 18 Am. St. Rep. 396, the Supreme Court of Michigan, in considering a statute similar to section 21 of the mechanic's lien statute of 1903, used the following language: "This statute is made for the express, and, so far as differing from former laws, for the only purpose of enabling strangers to the title to subject it to sale for obligations to which the owner never became bound and in which he has no part whatever. It strikes at the foundations of all property in land. There is no constitutional way for divesting a man's title

except by his own act or default. Here his own act is not required and his freedom from default is no defense. He may pay in full, in advance, or otherwise, for all he has contracted for. He may contract for a house built in a certain way and of certain materials, and may have to pay for what he never bargained for and what his building contractor had no right to put off upon him. The original contract plays no part in the matter, except as a fact which binds no one and has no significance. Such a gross perversion of all the essential rights of property is so plain that no explanation can make it plainer, and as this purpose forms the only apparent reason for repealing the old law and passing the new one, the present statute, and all its parts, must fall together, leaving the law of the state where it was before the law of 1887 was passed."

In *Taylor v. Murphy*, 148 Pa. 337, 23 Atl. 1134, 33 Am. St. Rep. 825, the Supreme Court of Pennsylvania, in considering a similar statute, on page 340 of 148 Pa., on page 1135 of 23 Atl., 33 Am. St. Rep. 825, used the following language: "The contract between the owner and the contractor is the source from which the right of the subcontractor is derived under the provisions of the law, and it is self-evident that a stream cannot rise higher than its source. The agreement of the builder to provide all the labor and materials for the erection of the building and look for his security solely to the personal responsibility of the owner, leaving the building unincumbered by liens is a valid and binding one. It violates no rule of public policy. A statute that should disregard its obligations and authorize the entry of a lien for work or materials in violation of its terms would seem to be within the prohibition of the Constitution."

In the case of *Palmer v. Tingle*, 55 Ohio St. 422, 443, 45 N. E. 313, 315, it was held that the statute there in question, in so far as it undertook to give a lien on the owner's property for labor, machinery, materials, or tile not supplied under any agreement with him or with his agent and not at the instance of either, is unconstitutional. In a lengthy opinion the court says, in part: "To enable the contractor by force of this statute to enlarge the price to be paid by allowing liens to be taken on the property for labor and materials would be as unjust as to authorize the owner, by statute, to enlarge the building without a corresponding increase in payment." See, also, *Seemann v. Blemann*, 108 Wis. 365, 84 N. W. 490, and *Epenet v. Montgomery*, 98 Iowa, 159, 67 N. W. 93.

We are of the opinion that A. W. Kelly & Co. the Waukesha Lime & Stone Company and the Labahn Brick Company, which firms had contracted to furnish material prior to May 15, 1906 (the date of the waiver), were entitled to liens, as their contracts were

made with the original contractor prior to the date of waiver, and by no act of the owner or the original contractor could the liens of those claimants which had attached prior to the execution of the waiver be affected. As to the claims of those firms which contracted to furnish material subsequent to May 15, 1906, viz., the M. A. Staley Company, and the Juhl Automatic Hoisting Machine Company, we are of the opinion they were not entitled to establish liens against the property of the appellants.

The decree will therefore be affirmed as to A. W. Kelly & Co., the Waukesha Lime & Stone Company, and the Labahn Brick Company and reversed as to the M. A. Staley Company, and the Juhl Automatic Machine Company. The appellants will pay all costs as to A. W. Kelly & Co., the Waukesha Lime & Stone Company, and the Labahn Brick Company and the M. A. Staley Company and the Juhl Automatic Hoisting Machine Company will each pay its own costs.

Affirmed in part and reversed in part and remanded.

(351 Ill. 321.)

DRUM v. DRUM et al.

(Supreme Court of Illinois. June 20, 1911.
Rehearing Denied Oct. 12, 1911.)

1. APPEAL AND ERROR (§ 931*)—REVIEW—FINDINGS—PRESUMPTIONS.

Where a decree specifically bases the court's findings upon competent evidence, it will be presumed that incompetent testimony admitted was not considered.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3766; Dec. Dig. § 931.*]

2. REFORMATION OF INSTRUMENTS (§ 45*)—MISTAKE—EVIDENCE—SUFFICIENCY.

In a suit to reform a deed, evidence held to sustain a finding of an agreement between the parties that the grantee was to take a fee-simple estate, and not a mere life estate, as granted.

[Ed. Note.—For other cases, see Reformation of Instruments, Dec. Dig. § 45.*]

3. REFORMATION OF INSTRUMENTS (§ 17*)—DEEDS—MISTAKE AS TO ESTATE GRANTED.

A deed was properly reformed so as to grant a fee-simple estate, instead of a life estate, where there was clear and convincing evidence of a mistake of fact.

[Ed. Note.—For other cases, see Reformation of Instruments, Cent. Dig. §§ 69-71; Dec. Dig. § 17.*]

4. REFORMATION OF INSTRUMENTS (§ 47*)—RELIEF AWARDED.

Having taken jurisdiction of a bill to reform a deed given under a contract, equity will retain jurisdiction to enter a decree for the payment of rent money due under the contract.

[Ed. Note.—For other cases, see Reformation of Instruments, Cent. Dig. §§ 195-198; Dec. Dig. § 47.*]

5. LANDLORD AND TENANT (§ 232*)—RENT—INTEREST.

In a suit against a son on a contract, whereby his debt to his father for rent was assigned to his mother, the plaintiff, interest was improperly included in a decree in plaintiff's favor where it did not appear whether the lease under which the rent accrued was in writing,

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

or that the amount was agreed upon, or that any demand had ever been made upon the son for payment.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. §§ 935-939; Dec. Dig. § 232.*]

Appeal from Circuit Court, La Salle County; Edgar Eldredge, Judge.

Bill by Julia A. Drum against Stephen H. Drum and another. Decree for complainant, and defendant Edward Drum appeals. Modified and affirmed.

McDougall & Chapman, for appellant. C. G. Faxon and Browne & Wiley, for appellee.

COOKE, J. Edward W. Drum died intestate in La Salle county, Ill., on September 12, 1900. He left surviving appellee, Julia A. Drum, his widow, and Edward Drum (appellant) and Stephen H. Drum, his only children and only heirs at law. He died seised of 113 acres of land in Northville township and 100 acres of land in Adams township, in La Salle county, and at the time of his death owned a note for \$2,000, secured by a mortgage on the farm of his son Stephen H. Drum, situated in the state of Iowa, \$1,000 in cash, an account for \$400 rent due from appellant, and about \$200 in chattel property. There is some testimony that he also owned a mortgage for \$3,000. Appellant is the only witness who testified to that fact, and from his testimony it appears this mortgage, if it existed, was, in fact, the property of appellee. He owed no debts. Within a day or two after his burial his widow and two sons held a conference, and it was agreed that there should be no administration upon the estate. During the lifetime of his father Stephen H. Drum had received advancements from him, amounting, with interest, to the sum of \$8,000. He proposed that, if the note and mortgage for \$2,000 which the estate held against him should be canceled and delivered to him, he would be satisfied with that and the advancements he had already received as his full share from his father's estate, and that the real estate and remainder of the personal property might be divided between his mother and his brother, Edward Drum, appellant. This proposition was accepted, and it was further agreed that appellee should be given all the personal property of the estate, including the accounts due and owing to Edward W. Drum at the time of his death. As to these facts there is no controversy. In this conference the disposition of the land was determined upon. The two brothers went to the village of Somonauk, where Stephen, the elder, procured the services of L. B. Olmstead, an attorney at law, to draft the deeds which should put the title to the real estate in appellant and appellee. He drew three deeds

—one to be executed by Stephen and his wife to appellant quitclaiming all interest in the whole of the real estate; one from appellee to appellant quitclaiming all interest in the 113 acres of land in Northville township; and one from appellant to appellee conveying to her a life estate in the 100 acres in Adams township and the use of three rooms in the dwelling house on the farm in Northville township. The note for \$2,000 was canceled and the mortgage securing the same was released, and they were delivered to Stephen H. Drum. The remainder of the personal property was delivered to appellee, and she went into possession of the 100-acre farm in Adams township. Appellant took possession of the Northville township farm. A short time before the bill was filed herein appellee endeavored to sell a portion of the Adams township farm, when, as she claimed, she discovered for the first time that she owned only a life estate, instead of an estate in fee simple. She thereupon filed this bill, in which, after reciting the death of her husband and that part of the agreement entered into between her sons and herself, as hereinabove set forth, she alleged that by the agreement then entered into it was agreed between her said sons and herself that she should receive all the personal property and a fee-simple estate in the farm in Adams township, but that by a mutual mistake of the parties the deed was so drafted as to give her a life estate in that farm instead of an estate in fee simple, as was agreed and intended, and prayed that the deed be reformed so as to express the true agreement and intention of the parties thereto. Stephen H. Drum and appellant were both made defendants. Appellant answered the bill. Stephen H. Drum was defaulted. The cause was referred to the master in chancery of La Salle county to take and report the proofs. Upon the report of the proof by the master a hearing was had, and the court entered a decree reforming the deed, vesting title to the Adams township land in appellee in fee simple, and entered judgment against appellant and in favor of appellee for \$595, being the rent, and interest thereon, which the bill alleged to be due, and costs of suit. From this decree appellant has perfected this appeal.

[1] The grounds upon which appellant relies for reversal are that the court considered incompetent testimony offered on the part of appellee, and that the decree is contrary to the evidence and to the law. An inspection of this record discloses that some testimony was taken by the master which is incompetent. To this testimony appellant interposed objections and motions to strike, which were not passed upon. By its decree the court specifically based its findings upon the competent evidence in the cause.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

and upon review it will be presumed that the court considered only the competent evidence if there be any competent evidence in the case.

[2] From a careful examination of the record we are convinced that the decree of the court is amply sustained by the competent evidence in the case.

Appellee and Stephen H. Drum testified on behalf of appellee as to the agreement entered into between appellee and her two sons shortly after the death of her husband, relative to the division and disposition of the estate, both real and personal. They both testified that it was mutually agreed among them that the \$2,000 mortgage was to be canceled and released, and that, together with the advancements already received by him, should constitute all that Stephen H. Drum should receive from the estate; that the mother should receive all the personal property and an absolute title to the Adams township farm and the use of three rooms in the dwelling house on the Northville township farm; and that appellant should be given the Northville township farm. They both testified that, during this conference, while appellant was present, he took no part in the conversation. Appellant, however, upon his part testified that he took what they had a mind to give him, and that, if they saw fit to give him the title to the Northville township farm and his mother the title outright to the Adams township farm, it was satisfactory to him. He made no objection whatever to the proposals made by his mother and brother, and, in effect, admits that he agreed to and acquiesced in whatever arrangement was made on that occasion. Stephen testifies that he called upon L. B. Olmstead at Somonauk, consulted him about the possibility of being able to settle the estate without administration, told him of the division which had been agreed upon, and employed him to draw the necessary release and conveyances. Shortly thereafter Olmstead called at the home of appellant and appellee, who were living together, procured from appellee an affidavit as to the heirship of the father, and a few days thereafter returned with the release and deeds for execution. Both Olmstead and appellant testified that Stephen was present on this occasion. On the other hand, Stephen and appellee both testified that he was not there, but had returned to his home in Iowa before this visit of Olmstead. Mrs. Drum testifies that, while Olmstead read the deed from Edward to her on this occasion, that portion of the deed which limited her estate to one for her life was not read, while, on the other hand, Olmstead testified that he read the whole of the deed and explained to her specifically the extent of the interest in the Adams township farm conveyed to her by this deed. Olmstead was called as a witness on behalf of appellant, and testified that the deed from

Edward to his mother was drawn according to the terms given to him, and that it was read and fully explained to the parties at the time of its execution. Edward Drum did not testify as to what the agreement was which was entered into between his mother, his brother and himself, but he did testify that at the time he executed the deed to his mother Olmstead read the deed to her and explained to her that she was receiving a life estate, only, in the lands conveyed to her, and that "everything seemed to be satisfactory." A short time after the father's death Miss Cole, a sister of Mrs. Drum, came to live with her at the dwelling house on the Northville township farm. She testified that a short time after she arrived there appellant asked her if she knew whether his mother had made a will during a recent visit she had made to the state of New York, and that she told him she had not and asked him why he desired to know, to which she testifies he replied that, when his mother went away, she was angry; that they had had a little trouble, and he was afraid she had made a will; and that his mother had promised him, if he would be a good boy, she would give him the Adams township farm. Edward testified that he did not remember having such a conversation, and did not think his aunt had said anything to him about that.

Appellee testifies that, when she discovered the mistake in the deed, she informed appellant of the fact, and that he told her he was not surprised at all; that he thought Olmstead did not know what he was doing when he drew the deeds. On his cross-examination appellant did not deny that he had made that statement, but says that he does not think, when the matter was first mentioned to him, that he said he was not surprised. Miss Cole testified that, when the mistake in the deed was discovered, she called at the office of Olmstead and informed him of the fact, and that he told her he would swear that the deed conveyed to Mrs. Drum an absolute fee-simple title. This testimony was produced in rebuttal of the cross-examination of Olmstead wherein he denied that conversation. Olmstead admitted that it was Miss Cole who called his attention to the mistake, and that she informed him that Mrs. Drum had been given a life estate only in the farm instead of a fee-simple estate, as was intended. He admitted that he thereupon secured copies of the deeds which he had drawn on that occasion from the recorder of La Salle county, for the purpose, as he says, of determining whether he had made a mistake in the description, although he does not contend that Miss Cole had complained of any other mistake than that Mrs. Drum had been given a life estate only in the Adams township farm. Upon his cross-examination Olmstead was asked if some time after he had drawn these deeds he did not prepare a will for Mrs. Drum. He testified that he had no rec-

ollection of that fact. The will was then produced, and the witness admitted that it was in his handwriting, and that he had signed it as one of the attesting witnesses, but still denied having any recollection of the circumstance of drawing and witnessing the will, and he stated that the will itself did not serve to refresh his recollection. By this will the sister, Miss Cole, was given a life estate in 80 acres of the Adams township farm and the remaining 20 acres in fee simple, the remainder in the 80 acres, after the death of Miss Cole, being devised to a son of Stephen H. Drum. Olmstead denied that in a conversation with appellee, in the presence of Miss Cole, in his office, three or four years after the execution of this deed, when appellee was attempting to secure his services in having her name entered on the tax books of La Salle county as the owner of the Adams township farm, he told her that that land was hers individually, and that she could do with it as she pleased. Appellee and Miss Cole both testify that Olmstead made this statement on that occasion.

From the testimony of appellee and Stephen H. Drum as to what agreement was entered into at the conference shortly after the death of the father, and from the testimony of appellant himself that he accepted the proposition just as it was made to him by his mother and his brother, it is clear that the agreement as entered into did not contemplate that appellee should receive a life estate only in the Adams township farm, but that she was to receive a conveyance of that farm in fee simple.

The situation and condition of this estate, while, of course, not conclusive as to the agreement or contract entered into among the parties, tends strongly to sustain the contention of appellee. It is clear that appellee and her sons were endeavoring to make a fair and equitable division of the estate of the husband and father, and they were attempting to accomplish this division without the necessity of incurring costs of administration. The testimony discloses that at the time of the death of Edward W. Drum the Northville township farm, consisting of 113 acres, was worth about \$100 per acre. The Adams township farm, consisting of 100 acres, was worth about \$70 per acre. The personal estate consisted of the \$2,000 note and mortgage due from Stephen, \$1,000 in cash, \$400 due from Edward for rent, and about \$200 in chattel property. Adding to this the advancements of \$6,000 which had theretofore been made to Stephen, we find the total value of the estate at the time of the death of Edward W. Drum to be \$27,900. By conveying to Edward the Northville township farm he received in value \$11,300 as his portion of the estate, less whatever the use of the three rooms in the dwelling house by his mother during her lifetime might be worth. Appellee was 63 years of age at the time her husband died. By estimating the value of her homestead

and dower and her award and adding to that one-third of the personal property remaining, and subtracting that sum from the total value of the estate, including the \$6,000 theretofore advanced to Stephen, it will be seen that one-half of the remainder (which would be the value of the share of each of the sons) would be approximately the value of the Northville farm. It will thus be seen that by giving appellee the absolute title to the Adams township farm by this agreement, it was Stephen, and not appellant, who was making concessions to his mother. There is not a suggestion in this record that it was intended that Edward should be given any advantage in this settlement or should receive any more than his legal share and interest in the estate of his father.

[3] The decree of the court in reforming this deed by striking out the words limiting the estate of appellee in the Adams township farm to a life estate is neither contrary to the evidence nor the law. The proof discloses that a mistake of fact was made, and this mistake, which was mutual and common to both parties to the instrument, was proven by clear and convincing evidence.

[4] The decree found further that by the terms of this agreement between the parties appellant agreed and promised to pay to appellee \$400 rent due his deceased father at the time of his death, with interest on the same from the date of the death of his father, and decreed that he should pay her, within 60 days from the date of the decree, the sum of \$595, being the rent due from him, with interest thereon at the rate of five per cent per annum. Complaint is made that the court erred in so decreeing, and that there is nothing in the record on which to base this finding and decree of the court. The bill alleged that at the time of his death Edward W. Drum was the owner of the sum of \$400 rent money due him from appellant for the Northville township farm for the year previous to his death; that appellant, although often requested, had neglected and refused to pay appellee said sum, and prayed that appellant be decreed to pay appellee said sum of \$400, with interest since the death of Edward W. Drum. By his answer appellant admitted that at the time of his father's death he was the owner of the sum of \$400 rent due from appellant, and that by the terms of the agreement entered into among his mother, his brother, and himself it was agreed that his mother should have, among other things, all accounts due his father at the time of his death. On the hearing appellee testified that appellant had never paid this rent money. Appellant did not testify upon this subject at all. The assignment of this account was a part of the same agreement whereby the lands in question were contracted to be conveyed to appellee. While a bill in equity could not be maintained if brought merely for the purpose of recovering this rent money, it does not follow that a

court of equity, under the circumstances of this case, cannot enter a money decree for the payment of the amount of rent money due. The controversy here contains an equitable feature which authorizes a court of equity to take cognizance, and that court should retain jurisdiction for all purposes, and may establish purely legal rights and grant legal remedies growing out of the contract which might otherwise be beyond the scope of its authority. *Stickney v. Goudy*, 132 Ill. 213, 23 N. E. 1034.

[5] The proof here is sufficient to authorize the entry of a money decree for the payment of the \$400 due, but we do not deem it sufficient to authorize a decree for interest. While appellant admits, by his answer, that at the time of his father's death he owed him \$400 for rent, and also that all accounts due his father were by the agreement entered into assigned to his mother, it does not appear whether the lease under which this rent accrued was a written or a verbal one, or whether it was agreed among the parties, at the time they entered into the agreement in question, that \$400 was the amount due and that appellant then promised to pay the sum of \$400 as the amount of rent due. Neither does it appear, as is alleged in the bill of complaint, that any demand or request had ever been made upon appellant to pay this rent or that he had ever refused to pay it. Under these facts, had appellee brought her suit at law against appellant to recover this amount due her she would not have been entitled to recover any interest, and we know of no reason why a court of equity, under these circumstances, should enforce the payment of interest.

The decree of the circuit court will be modified by striking out of the findings therein contained the following: "The said defendant Edward Drum agreed and promised to pay to the said complainant the sum of four hundred (\$400) dollars, the rent that was due the said Edward W. Drum, deceased, for the year prior to the decease of the said Edward W. Drum, with interest on said sum of four hundred (\$400) dollars from September 12, 1900, the date of the death of the said Edward W. Drum. The court further finds that there is now due from the said defendant Edward Drum to the said complainant, Julia A. Drum, with interest thereon as aforesaid, the sum of five hundred ninety-five (\$595) dollars," and inserting in lieu thereof the following: "It was agreed that all accounts due the deceased should be paid to and become the property of said complainant, that at the time of the death of his father there was then due from Edward Drum to his father the sum of \$400 for rent, and that by the terms of said agreement said sum of \$400 for rent due deceased became due and payable to complainant, Julia A. Drum," and by striking out of the ordering part of

said decree the words and figures, "five hundred ninety-five (\$595) dollars" and inserting in lieu thereof the following: "\$400." In all other respects the decree is affirmed.

Decree affirmed as modified.

(251 Ill. 143)

LONG et al. v. MORRISON et al.

(Supreme Court of Illinois. June 20, 1911.
Rehearing Denied Oct. 11, 1911.)

1. TENANCY IN COMMON (§ 15*)—ADVERSE POSSESSION—HOSTILE CHARACTER OF POSSESSION.

Before a tenant in common in possession can acquire his cotenant's title by limitation, he must show an ouster of his cotenant, and, to constitute a disseisin of the cotenant, there must be such an open and hostile possession by the occupying tenant as against cotenants out of possession as to show an intention to exclude them.

[Ed. Note.—For other cases, see *Tenancy in Common*, Cent. Dig. §§ 42-52; Dec. Dig. § 15.*]

2. TENANCY IN COMMON (§ 15*)—ADVERSE POSSESSION—PAYMENT OF TAXES—MAKING OF IMPROVEMENTS.

Possession by one tenant in common, who receives all the rents and profits and pays the taxes, however long continued, will not constitute a bar under the statute of limitations.

[Ed. Note.—For other cases, see *Tenancy in Common*, Cent. Dig. §§ 42-52; Dec. Dig. § 15.*]

3. TENANCY IN COMMON (§ 15*)—CHARACTER AND EFFECT OF POSSESSION OF COTENANT.

Possession of one tenant in common is the possession of the other cotenants, especially where all of the parties derive title from the same deed or from the same ancestor.

[Ed. Note.—For other cases, see *Tenancy in Common*, Cent. Dig. §§ 42-52; Dec. Dig. § 15.*]

4. TENANCY IN COMMON (§ 15*)—ADVERSE POSSESSION—CONVEYANCE BY COTENANT.

The doctrine that, where a tenant conveys the entire premises, a purchaser, who buys in good faith and takes possession, may acquire title by limitation as against the cotenant of his grantor cannot be invoked against such cotenant, where the purchaser had been a cotenant with all the parties, and knew that his grantor did not own the entire premises, and where such purchaser was living upon the premises with the grantor at the time the deed was made, and continued to live there afterwards, so that there was no visible change of possession.

[Ed. Note.—For other cases, see *Tenancy in Common*, Cent. Dig. §§ 42-52; Dec. Dig. § 15.*]

5. TENANCY IN COMMON (§ 15*)—ADVERSE POSSESSION—EVIDENCE.

Evidence, in a suit between cotenants, for partition, held insufficient to show adverse possession by complainants.

[Ed. Note.—For other cases, see *Tenancy in Common*, Cent. Dig. §§ 42-52; Dec. Dig. § 15.*]

Farmer and Vickers, JJ., dissenting.

Appeal from Circuit Court, Christian County; J. C. McBride, Judge.

Suit for partition by James E. Long and others against Virginia L. Morrison and an-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

other. Decree for complainants, and defendants appeal. Reversed and remanded.

James M. Taylor and Leslie J. Taylor, for appellants. Hogan & Wallace, for appellees.

HAND, J. This was a bill in chancery, filed by James E. Long, Florence Dorrah, and Elizabeth A. Manners in the circuit court of Christian county, against Virginia L. Morrison and Eliza A. Long, for the partition of lots 8 and 9, in block 10, in the original town of Taylorville, in said Christian county. The bill was amended, and an answer and replication were filed; a trial was had without a reference, and a decree was entered, finding that James E. Long and Florence Dorrah were each the owner in fee of the undivided one-fourth, and Elizabeth A. Manners was the owner in fee of the undivided one-half of said premises, and a decree for partition was entered accordingly. Virginia L. Morrison and Eliza A. Long have prosecuted an appeal to this court.

It appears from the record that on the 10th day of August, 1855, one Thomas Long purchased lots 8 and 9, in block 10, in the original town of Taylorville; that on the 28th day of February, 1861, said Thomas Long and Annis Long, his wife, conveyed said lots in fee to their sons, B. F. Long and F. M. Long; that shortly thereafter F. M. Long departed this life intestate leaving his father and mother and six brothers and sisters him surviving as his only heirs at law; that subsequent to the death of said F. M. Long numerous conveyances were made by and between his heirs to portions of said premises, so that in 1893 the title in fee to the undivided seven-sixteenths of said premises stood of record in Annis Long, mother of F. M. Long, and the title in fee to the undivided nine-sixteenths of said premises stood of record in the heirs of B. F. Long, his brother; that for many years prior to the year 1893 Thomas Long and several members of his family had been engaged in the hotel business in Taylorville, the hotel carried on by them being known as the Long House; that said lots 8 and 9 were located near said hotel, and were used in connection with the hotel as a barn and horse lot; that in the year 1892 (Thomas Long and B. F. Long both being dead) Annis Long sold the hotel, and used the proceeds of the sale, in part, in erecting a dwelling house, which cost about \$2,500, upon said lots 8 and 9, in which for a time Annis Long (the widow of Thomas Long), Eliza A. Long (the widow of B. F. Long), and Thomas W. Long and Elizabeth A. Manners, a brother and sister of B. F. Long, resided as their home; that in 1893 Annis Long executed a deed to the east half of lot 8 and all of lot 9 to Thomas W. Long and Elizabeth A. Manners, and a deed to the west half of lot 8 to George W. Long, another son, who subsequently conveyed said west half of lot 8 to Thomas W. Long and Elizabeth A. Manners. Thomas W. Long, a

widower, resided upon the premises until his death, and Elizabeth A. Manners, a widow, resided on the premises until about the time the original bill was filed in this case, when the possession of the premises was turned over to James E. Long by her. The complainants James E. Long and Florence Dorrah are the children of Thomas W. Long, deceased, and Elizabeth A. Manners is a daughter of Annis Long, deceased, and the defendant Eliza A. Long is the widow, and the defendant Virginia L. Morrison the daughter and sole heir at law, of B. F. Long, deceased. The original bill charged that the complainants James E. Long and Florence Dorrah were each the owner in fee of the undivided $\frac{1}{4}$ part of said premises, that Elizabeth A. Manners was the owner of the undivided $\frac{1}{4}$ part of said premises, and that Virginia L. Morrison was the owner of the undivided $\frac{3}{4}$ part of said premises, subject to the dower of her mother, Eliza A. Long, therein, and that the dwelling house thereon had been constructed by Annis Long, deceased. The amended bill denied that Virginia L. Morrison or Eliza A. Long had any interest in said premises, and charged that one-fourth thereof belonged to James E. Long, one-fourth to Florence Dorrah, and one-half to Elizabeth A. Manners, and on the final hearing the court so held; it being the view of the court, as expressed in the decree, that the interest of Virginia L. Morrison and Eliza A. Long in said premises had been barred by the statute of limitations.

It is admitted that the title to the said premises, in the year 1893, stood of record jointly in Annis Long and the heirs of B. F. Long; Annis Long being the owner of seven-sixteenths and the heirs of B. F. Long the owners of nine-sixteenths thereof. The sole question, therefore, to be determined in this case is, Had the complainants, at the time they filed their amended bill in this case, acquired, by limitation, title to the portion of said premises theretofore held by Virginia L. Morrison as sole heir at law of B. F. Long, deceased?

[1] In 1893 Annis Long and B. F. Long were tenants in common of said premises, and the law is well settled that before a tenant in common can acquire his cotenant's title under the limitation laws of this state, although he is in possession of the premises, he must show an ouster of his cotenant; and to constitute a disseisin of a cotenant there must be an open, hostile, and adverse possession of the premises by the occupying cotenant as against the cotenant out of possession—such a possession as shows an intention to hold possession of the premises to the exclusion of the joint owner, who is out of possession. In *Busch v. Huston*, 75 Ill. 343, on page 347, it was said: "It is not sufficient that he [a cotenant] continues to occupy the premises and appropriates to himself the exclusive rents and profits, makes slight repairs and improvements on the lands,

and pays the taxes, for all this may be consistent with the continued recognition of the rights of his cotenants. To constitute disseisin, 'there must be outward acts of exclusive ownership of an unequivocal character, overt and notorious, and of such a nature as by their own import to impart information and give notice to the cotenants that an adverse possession and an actual disseisin are intended to be asserted against them.' It is obvious, we think, that the evidence found in this record falls far short of showing an ouster or disseisin as against Virginia L. Morrison, the heir of B. F. Long, deceased.

Elizabeth A. Manners, a complainant, in answer to the question, "Mrs. Manners, did you ever tell Mrs. Long or Mrs. Morrison here that you claimed that property—you and Mr. Long—and that they had no interest in it?" testified as follows: "No, sir; I never did. I never made any claim to them that Mr. Long and I owned that property exclusively. The matter of ownership of that property was never discussed between us, to our knowledge."

Eliza A. Long, in answer to the question, "Now, I will ask you, Mrs. Long, if any claim was ever made, of any kind, by either Mrs. Long in her life or by Mr. T. W. Long or Mrs. Manners, that they were the exclusive owners of that property?" testified as follows: "Nothing was ever said to me in any way that myself or husband or daughter did not have an interest in the property. It was never mentioned. The question of ownership was never discussed by Mrs. Long or Mrs. Manners or myself, nor by Thomas W. Long and Mrs. Manners and myself."

Virginia L. Morrison testified: "I am well acquainted with Mrs. Manners and Thomas W. Long. They are aunt and uncle, respectively. I remember when the house was built on that property. I knew at that time that my father had an interest in the property. My grandmother built that house. I have never had a word of conversation with Thomas W. Long or Mrs. Manners with regard to the ownership of that house. Neither of them at any time ever claimed to me that they were the owners of the property. I never discussed the matter with them in any way. My relation with them during all these years has always been friendly. There has never been any dispute between us, prior to the bringing of this suit, as to the ownership of these two lots. We never discussed it. There never has been any discussion between us, and they never made any claim that I had no interest in the property." And again: "Now you may state, if you knew that you owned an interest in the property, why you never made any claim before the bringing of this suit." She answered: "Because of the request my father had made of my mother. And Grandma had built the house, saying she wanted it to be a home for Uncle Tom, Aunt Lizzie, and my mother. I

wouldn't disturb Uncle Tom and Aunt Lizzie as long as they cared to live in it. I expected after Uncle Tom died, when it came to Aunt Lizzie's death, to claim my share, for I thought the other children could afford to let me have it. That is the exact reason we have never claimed anything."

[2. 3] The testimony of these witnesses is all the direct evidence there is in this record upon the question of the exclusion of the defendants from said premises, or which tends to establish adverse possession of said premises in the complainants, other than the admitted facts that in 1893 Annis Long built a house on said premises with money derived from the sale of the hotel property (nineteenths of which belonged to Virginia L. Morrison, subject to her mother's dower therein), for the joint use of herself and Thomas W. Long, Elizabeth A. Manners, and the widow of B. F. Long, the mother of Virginia L. Morrison, and a statement taken from the tax record in the county clerk's office, which showed that some one, other than Virginia L. Morrison (who it was being left in doubt by the statement), had paid the taxes on said premises from the year 1892 to the time of the commencement of this suit. In *McMahill v. Torrence*, 163 Ill. 277, on page 281, 45 N. E. 269, on page 270, it was said: "Possession by him [a cotenant] and payment of taxes, however long continued, would not constitute a bar under the statute, as one tenant in common cannot set up the statutory bar against his cotenant. *Stevens v. Wait*, 112 Ill. 544; *Comer v. Comer*, 119 Ill. 170 [8 N. E. 796]. The reason of this rule is that the possession of one tenant, in contemplation of law, is the possession of the others; and this is especially so where all the parties derive title from the same deed or from the same ancestor. *Dugan v. Follett*, 100 Ill. 581; *Angell on Limitations*, §§ 422, 423. The possession of one cotenant will not be adverse to the other, where there is a mere possession of the premises and an appropriation of the rents. Something more is required. *Todd v. Todd*, 117 Ill. 92 [7 N. E. 583]. 'It is not sufficient that he continues to occupy the premises and appropriates to himself the exclusive rents and profits, makes slight repairs and improvements on the lands, and pays the taxes, for all this may be consistent with the continued recognition of the rights of his cotenants. To constitute a disseisin, there must be outward acts of exclusive ownership of an unequivocal character, overt and notorious, and of such a nature as by their own import to impart information and give notice to the cotenants that an adverse possession and an actual disseisin are intended to be asserted against them.' *Busch v. Huston*, 75 Ill. 343; *Ball v. Palmer*, 81 Ill. 370." And in *Carpenter v. Fletcher*, 239 Ill. 440, on page 444, 88 N. E. 162, on page 164, it was said: "The rule is well settled that the mere possession by one tenant in common, who receives all the rents and prof-

its and pays the taxes assessed against the property, no matter for how long a period, cannot be set up as a bar against the cotenants. In such case the possession of one tenant in common is, in contemplation of law, the possession of all the tenants in common. *McMahill v. Torrence*, 163 Ill. 277 [45 N. E. 269], and cases there cited. Such possession, however, may become adverse, if the tenant in common by his acts and conduct disses his cotenants by repudiating their title and claiming adversely to them."

[4] It is contended that the execution and delivery of the deed by Annis Long, in 1893, of the entire premises amounted to an ouster of Virginia L. Morrison. We recognize the law to be that, where a cotenant conveys the entire premises to a purchaser, who buys in good faith, and the grantee takes possession under such conveyance and pays the taxes and remains in the adverse possession of the premises for the statutory period, he may thereby build up a good title by limitation, as against the cotenant of his grantor. *Goewey v. Urig*, 18 Ill. 238; *Hinkley v. Greene*, 52 Ill. 223; *Steele v. Steele*, 220 Ill. 318, 77 N. E. 232; *Waterman Hall v. Waterman*, 220 Ill. 569, 77 N. E. 142. We are of the opinion, however, that doctrine cannot be invoked in this case to defeat the title of Virginia L. Morrison, for the following reasons: First, the grantees of Annis Long had been the cotenants of Virginia L. Morrison and knew that Annis Long did not own the entire premises; second, the grantees in the deed were living upon the premises with the grantor at the time the deed was made, and continued to so live until her death, and at the time the deed was executed and delivered there was no change in the possession—in other words, they did not take possession under the deed; and, third, at no time was the possession of the grantees adverse to Virginia L. Morrison, as the possession of the appellees was at all times for the benefit of themselves and Virginia L. Morrison, and they could not acquire a limitation title by reason of such possession as against her. *Carpenter v. Fletcher*, 239 Ill. 440, 88 N. E. 162.

[5] We think the appellees have wholly failed to show title in themselves, other than as to the $\frac{28}{64}$ part of said premises, and that the evidence clearly shows that the house which was erected on said premises by Annis Long, the grandmother of Virginia L. Morrison, was built from the proceeds of the sale of the hotel property, nine-sixteenths of which belonged to Virginia L. Morrison, as heir at law of B. F. Long, deceased. It would appear, therefore, equitable, and to accord with justice, we think, to hold that Virginia L. Morrison should be decreed a $\frac{38}{64}$ part of said premises, subject only to her mother's right of dower therein.

The decree of the circuit court will be reversed, and the cause will be remanded to that court, with directions to enter a decree

finding James E. Long and Florence Dorrah each to be the owner of a $\frac{7}{64}$ part of said premises, Elizabeth A. Manners to be the owner of a $\frac{14}{64}$ part thereof, and Virginia L. Morrison to be the owner of a $\frac{38}{64}$ part thereof, the portion decreed to Virginia L. Morrison to be subject to the dower right of Eliza A. Long, as the widow of B. F. Long, deceased.

Reversed and remanded, with directions.

FARMER and VICKERS, JJ. (dissenting). The deed from Annis Long, in 1893, to Thomas W. Long and Mrs. Manners, for the whole of lot 9 and the east half of lot 10, and the deed to George W. Long for the west half of lot 10, were warranty deeds, and purported to convey title to the whole of the premises to the grantees. The same year George W. Long made a deed to Thomas W. Long and Mrs. Manners, purporting to convey to them the title to the whole of the west half of lot 10. Thomas W. Long and Mrs. Manners have been in the sole possession and use of the whole of the premises since those conveyances were made, in 1893, and the answer of appellants admits they paid the taxes thereon. As early as *Goewey v. Urig*, 18 Ill. 238, this court held that a sale by one tenant in common of the whole premises, followed by adverse possession, "amounts to an ouster or dissesin of the cotenants, and the statute of limitations will bar their action or entry." This has been approved in *Hinkley v. Greene*, 52 Ill. 223; *Lavelle v. Strobel*, 89 Ill. 370, and later cases. In *Steele v. Steele*, 220 Ill. 318, 77 N. E. 232, where the statute of limitations was set up against parties claiming an interest in premises which had been conveyed by a cotenant, it was insisted the statute of limitations did not apply, for the reason "that complainants and defendants are tenants in common, the complainants owning an undivided one-fourth and the defendants an undivided three-fourths of the property, and that the possession of one tenant in common cannot be adverse to his cotenant." The court said: "It is the general rule that statutes of limitation do not run as between tenants in common, for the reason that the possession of one tenant is, in contemplation of law, the possession of all; but if, as a matter of fact, the possession of one is adverse to the other, a right of action may be barred, or title may be acquired under a statute of limitations. If one tenant in common holds exclusive possession claiming the land as his, and his conduct and possession are of such a character as to give notice to his cotenant that his possession is adverse, the statute of limitations will run." Under these decisions, we think the statute of limitations was bound to run against appellants, unless the proof showed the title of the grantees of Annis Long was not obtained in good faith, or that their possession was not adverse; and the burden was upon appellants

to prove one or the other of these facts to take the case out of the operation of the statute of limitations. *Burgett v. Tallaferrero*, 118 Ill. 503, 9 N. E. 334. In our opinion, the decree of the circuit court was in harmony with the previous decisions of this court, and should be affirmed.

(251 Ill. 116)

JORDAN v. KIRKPATRICK.

(Supreme Court of Illinois. June 20, 1911.
Rehearing Denied Oct. 11, 1911.)

1. INSANE PERSONS (§ 61*)—DEEDS—VALIDITY.

A deed by a lunatic before inquest found is not void, but voidable.

[Ed. Note.—For other cases, see *Insane Persons*, Cent. Dig. §§ 93-99; Dec. Dig. § 61.*]

2. INSANE PERSONS (§ 66*)—CONDITIONS—RESTORING CONSIDERATION.

Where a lunatic, before inquest found, executed a note and mortgage for money loaned, but did not receive any part of the loan, but her husband, who acted as her agent in procuring the loan, obtained the proceeds and abandoned her, a suit to set aside the note and mortgage was maintainable, without offering to restore to the lender the consideration.

[Ed. Note.—For other cases, see *Insane Persons*, Cent. Dig. §§ 100-105; Dec. Dig. § 66.*]

Appeal from Appellate Court, Third District, on Appeal from Circuit Court, McLean County.

Consolidated suits by George F. Jordan against W. A. Kirkpatrick to set aside a note and mortgage and by defendant to foreclose the mortgage. From a judgment of the Appellate Court, affirming a decree for plaintiff, canceling the instruments, and granting a certificate of importance, defendant appeals. Affirmed.

F. Y. Hamilton and John E. Pollock, for appellant. Livingston & Bach, for appellee.

FARMER, J. George F. Jordan, conservator of Minnie E. Arnold, filed his bill in the circuit court of McLean county to cancel a note for \$1,000, signed by Minnie E. Arnold and her husband, dated October 1, 1906, payable to W. A. Kirkpatrick, one year after date, and also to cancel a real estate mortgage signed by said Minnie E. Arnold and her husband to secure the payment of said note. The bill alleged that Minnie E. Arnold was a distracted person and incapable of executing the note and mortgage. It was also alleged that the said Minnie E. Arnold received no consideration for the execution of the note and mortgage, and that none of the money represented by said note and mortgage was ever paid to her, or to any person for or in her behalf, and that immediately after the execution of said note and mortgage the husband appropriated the money, and deserted her, and left her destitute. The bill alleged that Kirkpatrick knew, or could have known by the use of reasonable

care and caution, that Minnie E. Arnold was not of sound mind and memory and was incapable of understandingly making the note and mortgage. Kirkpatrick answered, denying that Minnie E. Arnold was a distracted person, or that she received none of the money represented by the note and mortgage, and averred that he gave a check for the money, payable to the order of Minnie E. Arnold, and that said check was indorsed by her, and the money used for board and other expenses. The answer avers that Albert N. Arnold, the husband of Minnie E. Arnold, acted as her agent in procuring the loan, and that Minnie E. Arnold knew and understood what she was doing when she executed the note and mortgage. Subsequently Kirkpatrick filed a bill to foreclose the mortgage. After answer filed by the conservator of Minnie E. Arnold, in which her insanity and incapacity were alleged, the two cases were consolidated, and were referred to the master in chancery to take the testimony and report his conclusions of law and fact.

The master found from the proof that at the time Minnie E. Arnold executed the note and mortgage she was insane, and that she had been in that condition for four months prior to that time. He further found that Kirkpatrick had no knowledge of her mental condition, and that nothing occurred to cause suspicion in the mind of the notary public who took the acknowledgment to the mortgage, or the agent through whom Kirkpatrick made the loan to Minnie E. Arnold, as to her mental condition, and that the business was conducted without legal negligence or fraud on the part of Kirkpatrick. The master further reported that the evidence showed Minnie E. Arnold received no benefit from the transaction and that the proceeds of the note and mortgage were received and appropriated by her husband, who abandoned her immediately after receiving it. Under this state of proof the master reported his view of the law to be that the note and the mortgage should be canceled and set aside, without the payment to Kirkpatrick of anything, and that the bill to foreclose the mortgage should be dismissed for want of equity. Objections to the report filed with the master by Kirkpatrick were overruled, and were renewed as exceptions before the chancellor, who overruled them, and entered a decree approving the master's report and in accordance with its findings and recommendation. From that decree Kirkpatrick prosecuted an appeal to the Appellate Court for the Third District. That court affirmed the decree, granted a certificate of importance, and Kirkpatrick has prosecuted a further appeal to this court.

There is no substantial controversy as to the facts. It is conceded by appellant that Minnie E. Arnold was insane at the time the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

note and mortgage were signed by her, on October 1, 1906. Appellee was appointed conservator of Minnie E. Arnold on the 12th day of November, 1906. Previous to that time there had been no inquisition and finding that she was a lunatic or insane. The note and mortgage were given for money loaned by the appellant through an agent by the name of O'Connor. Neither appellant nor O'Connor had any knowledge at the time of the transaction that Minnie E. Arnold was a distracted person. The question of law involved is whether, under those circumstances, the note and mortgage should be set aside without placing the parties in statu quo.

[1] A deed or contract made by an idiot or lunatic before inquest found is not void, but voidable. There is apparently confusion in the authorities as to the terms and conditions upon which a court of equity will, at the suit of a lunatic, set aside a conveyance obtained in good faith before an inquisition and finding of lunacy. In most of the cases we have examined where this question has been before the courts, the grantor has received the benefit and advantage of the consideration paid for the conveyance. Under such circumstances a majority of the cases require that the consideration paid for the conveyance must be returned to the grantee as a condition upon which it will be set aside. *Eldredge v. Palmer*, 185 Ill. 618, 57 N. E. 770, 76 Am. St. Rep. 59; *Scanlan v. Cobb*, 85 Ill. 296. We have been referred to no case requiring the parties to be restored to their status quo where the grantor had not received the money for the conveyance or any benefit or advantage therefrom. It must be admitted this case is one of peculiar hardship. Neither appellant nor Mrs. Arnold has been guilty of any actual wrong or fraud, and yet one of them must be made to suffer a substantial loss. While there are intimations in some cases, including *Scanlan v. Cobb*, supra, that the rule requiring parties to be placed in statu quo should be confined to cases where the lunatic grantor received the benefit of the consideration paid, yet we have been unable to find any case where it has been so expressly decided. In *Gribben v. Maxwell*, 34 Kan. 8, 7 Pac. 584, 55 Am. Rep. 233, it was said: "We think, however, the weight of authority favors the rule that, where the purchase of real estate from an insane person is made and the deed of conveyance is obtained in perfect good faith before an inquisition and finding of lunacy, for a sufficient consideration, without knowledge of the lunacy, and no advantage is taken by the purchaser, the consideration re-

ceived by the lunatic must be returned, or offered to be returned, before the conveyance can be set aside at the suit of the alleged lunatic or one who represents him."

[2] Neither the appellant nor O'Connor saw or talked with Mrs. Arnold about making the loan or giving the note and mortgage. They dealt entirely with her husband, and the check for \$1,000, less \$35 commissions and expenses of abstracts, was made payable to Minnie E. Arnold, but was delivered to her husband. While this is not unusual, and is perhaps a general practice in transactions of that kind, it was within appellant's power to have seen Mrs. Arnold and ascertained her mental condition before making the loan. Mrs. Arnold knew nothing whatever of what was going on, and was powerless to do anything to prevent it, or to give any warning to appellant. A lady notary, who took Mrs. Arnold's acknowledgment to the mortgage, testified she told her what the instrument was, but did not read it to her; that Mrs. Arnold signed the note and mortgage, and the witness did not observe anything wrong with her mental condition. The proof shows she was just out of the hospital, and both her mental and physical condition were very bad. She was unable to wash, dress, or feed herself.

The reason given in the cases for requiring the consideration to be returned where the lunatic has received the benefit of it is that to refuse to do so would be allowing the lunacy to be the means of perpetrating a fraud. Where the benefit of the consideration is not received by the lunatic, the reason upon which the rule is based does not exist, and in view of the difference in circumstances and opportunities of the parties it would seem in harmony with sound principles of justice that the lunatic, having no responsibility for the transaction and receiving no benefit therefrom, should receive the protection of the court of equity, and the loss should be made to fall on the party dealing with the lunatic. We agree with the Supreme Court of Indiana that "the protection of persons who are so unfortunate as to be bereft of reason and incapable of managing their own estates is of higher obligation and an object more to be cherished by the courts than is the protection of holders of commercial paper, however innocent they may be." *Dickerson v. Davis*, 111 Ind. 433, 12 N. E. 145.

In our opinion, under the evidence in this case, the law justified the decree, and the judgment of the Appellate Court is affirmed. Judgment affirmed.

(251 Ill. 251.)

PEORIA, B. & C. TRACTION CO. v. VANCE et al.

(Supreme Court of Illinois. Oct. 13, 1911.)

EMINENT DOMAIN (§ 265*)—CONDEMNATION PROCEEDINGS—COSTS ON APPEAL—RIGHT OF CONDEMNOR.

The owners of land sought to be condemned are entitled to compensation without deducting any part of the costs incurred in ascertaining the damages, so that fees incurred by plaintiff on two appeals taken by it in proceedings to condemn land to review the allowance of compensation cannot be taxed against the landowners, though the judgments were reversed on each appeal; to comply with the statute allowing costs on appeal to the Supreme Court being to deprive the owner of his constitutional right to full compensation.

[Ed. Note.—For other cases, see Eminent Domain, Dec. Dig. § 265.*]

Condemnation proceedings by the Peoria, Bloomington & Champaign Traction Company against Frank A. Vance and others. On defendants' motion to quash fee bills issued against them for costs incurred by plaintiff on two appeals. Motion allowed.

DUNN, J. The Peoria, Bloomington & Champaign Traction Company instituted in the county court of McLean county proceedings for the condemnation of land belonging to Frank A. Vance and others for its right of way. A trial was had. The traction company, not being satisfied with the assessment, appealed to this court, and at the February term, 1907, the judgment of the county court was reversed and the cause was remanded. It was tried again in the county court. The traction company again appealed from the judgment rendered, and at the April term, 1908, the second judgment was reversed, and the cause was again remanded. In June, 1911, fee bills were issued against the landowners, appellees, for the collection of the costs of these two appeals. The landowners having replevied the fee bills, they were returned, together with the bonds, by the sheriff, and the appellees have now made a motion to quash the fee bills.

[1] In proceedings for the appropriation of land to the public use the owners of the land are entitled to full compensation, without deduction for any part of the costs incurred in the ascertainment of the amount. These must be borne by the party seeking to take the property, in whatever court it institutes proceedings for that purpose. If, dissatisfied with the assessment, it seeks to reduce the amount by an appeal to another tribunal, such appeal is but a continuation of its effort to have the compensation to be paid the owner for his property ascertained, and its costs on such appeal are in the same category as costs in the trial court. The provisions of the statute in regard to costs on appeals to the Supreme Court cannot be applied to cases of this kind, because to do so would deprive the owner of his constitu-

tional right to full compensation for his land. The same view was held by the Court of Appeals of the state of New York in a like case. In *Matter of New York, West Shore & Buffalo Railway Co.*, 94 N. Y. 287, 294, it is said: "The appeal was taken by the company because it was dissatisfied with the amount awarded, and was a continuation of the proceeding instituted by it to ascertain the compensation payable to the landowners and to acquire their land against their will. In such a case, to compel the landowners to pay any part of the expenses incurred by the company for the purpose of ascertaining the compensation, which proceedings were an indispensable condition of its right to take the land, would conflict with the constitutional right of the landowners to just compensation. They are entitled to the full amount of their damages when finally ascertained, and this amount cannot be diminished by allowing to the company its own expenses incurred in ascertaining it or in endeavoring to reduce it." It may be that a different rule would apply if the appeals had been taken by the landowners, but in cases like these, in which the appeals were taken by the party seeking to condemn, no judgment for costs can be rendered against the landowners.

The motion to quash will be allowed, and the fee bills quashed.

Motion to quash allowed.

(251 Ill. 108.)

SULLIVAN et al. v. ATCHISON, T. & S. F. RY. CO. et al.

(Supreme Court of Illinois. June 20, 1911.)

Rehearing Denied Oct. 11, 1911.)

1. MUNICIPAL CORPORATIONS (§ 663*) — STREETS—VACATION—REVERSION.

On the vacation of a street existing under a common-law dedication, the title to the center of the street reverts to the adjacent lot owners freed from the incumbrance of the easement.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1439; Dec. Dig. § 663.*]

2. BOUNDARIES (§ 20*) — LAND ADJOINING STREET—OWNERSHIP OF STREET.

A conveyance of a lot adjoining a street or highway established by common-law dedication conveys the title to the middle of the street or highway subject only to the public easement.

[Ed. Note.—For other cases, see Boundaries, Cent. Dig. §§ 123-130; Dec. Dig. § 20.*]

3. MUNICIPAL CORPORATIONS (§ 669*) — STREETS—RIGHTS OF ABUTTING OWNERS.

Where a street is created by a common-law dedication, the abutting owner may make any use of the land to the center of the street that he desires, so long as it does not interfere with the use of the easement by the public.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1445; Dec. Dig. § 669.*]

4. CONSTITUTIONAL LAW (§ 277*)—STREETS—ABUTTING OWNERS—TITLE TO STREET.

The title of the owner of land adjoining a street created by common-law dedication to

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

one-half of the street, subject to the public easement, is a vested interest, of which he cannot be deprived without due process of law.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 762; Dec. Dig. § 277.*]

6. EMINENT DOMAIN (§ 85*)—STREETS—VACATION—OCCUPATION BY RAILROAD COMPANY.

Plaintiffs owned certain lots adjoining a street created by common-law dedication. In 1906 the city council passed an ordinance requiring defendant railroad companies to elevate their tracks, by which ordinance that portion of the street opposite plaintiffs' property was unconditionally vacated. This was made necessary in order that the railroad companies might cross the street with their tracks and other structures connected therewith, and in pursuance of such elevation the railroads erected a solid concrete wall across the street from one side to the other, entirely obstructing it from travel. *Held*, that such ordinance constituted a vacation of the portion of the street in question resulting in a reversion of the title to the street to plaintiffs; and hence the railroad companies were not entitled to occupy the land and construct a wall thereon without condemnation proceedings.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. § 222; Dec. Dig. § 85.*]

6. EMINENT DOMAIN (§ 85*) — RIGHTS — STREETS AFTER VACATION — MUNICIPAL GRANTS.

That a municipal corporation may grant to street and steam railroads the right to lay tracks and operate railroads in the streets does not authorize a city to grant a railroad company the right to use land formerly used as a street existing under a common-law dedication, after it had been vacated, without rendering compensation to abutting owners.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. § 222; Dec. Dig. § 85.*]

Appeal from Circuit Court, Will County; *Dorrance Debell*, Judge.

Action by Margaret L. Sullivan and others against the Atchison, Topeka & Santa Fé Railway Company and another. Judgment for plaintiffs, and defendants appeal. Affirmed.

J. L. O'Donnell, T. F. Donovan, and J. A. Bray (Robert Dunlap and Winston, Payne, Strawn & Shaw, of counsel), for appellants.

VICKERS, J. This is an appeal from a decree in the circuit court of Will county awarding a mandatory injunction against the Atchison, Topeka & Santa Fé Railway Company and the Chicago & Alton Railroad Company commanding said companies within 90 days to remove a concrete wall erected in that portion of Van Buren street which lies south of the west 79 feet of lot 5, in block 14, in the city of Joliet. The bill was filed by the owners of the west 79 feet of said lot 5. The cause was heard upon the amended bill, answer of the defendants, and evidence, both documentary and oral, submitted in open court, and a decree was rendered in accordance with the prayer of the bill, requiring the railroad companies to remove said concrete wall within 90 days, with a proviso in the decree that, if said railroad companies shall commence proceedings to con-

demn the premises occupied by said wall within the 90 days, the time during which such condemnation proceedings are pending shall be excluded from the 90 days allowed for the removal of said wall. The railroad companies have perfected this appeal.

The evidence necessary to an understanding of the questions involved is as follows: Appellees are the owners in fee of the west 79 feet of lot 5, in block 14, in the city of Joliet. Van Buren street runs east and west. The south line of appellees' lot is the north line of Van Buren street. Van Buren street was opened as a highway pursuant to a common-law dedication made by a plat which was not executed in accordance with the statute then in force in the year 1835. In January, 1906, the city council passed an ordinance, known as Ordinance No. 2219, requiring the railroads to elevate their tracks. By said track elevation ordinance that portion of Van Buren street occupied by the concrete wall in question was vacated and closed to public travel. Appellants claim that the erection of the wall in question was a necessary part of the work required by the track elevation scheme provided for by the ordinance. Appellees contend that upon the vacation of Van Buren street the title to that portion of the street adjoining their lot to the center of said street reverted to them by virtue of their ownership of said lot, and that the erection of said concrete wall by appellants was an unlawful invasion of appellees' property rights.

[1] The principles of law that govern this case are well settled by the previous decisions of this court. Upon the vacation of a street existing by virtue of a common-law dedication, the title to the center of the street reverts to the adjacent lot owners freed from the incumbrance of the easement. *Gebhardt v. Reeves*, 75 Ill. 301; *Hamilton v. Chicago, Burlington & Quincy Railroad Co.*, 124 Ill. 235, 15 N. E. 854; *Thomsen v. McCormick*, 136 Ill. 135, 26 N. E. 373.

[2] A conveyance of a lot adjoining a street or highway established by a common-law dedication conveys the title to the middle of such highway, subject only to the public easement. When the easement is abandoned or otherwise terminated, the title, with all the incidents of ownership, becomes perfect in the adjacent lot owner.

[3] Even while the easement is in existence the abutting owner may make any use he sees fit of the premises to the center of the street that does not interfere with the use of the easement by the public. *Sears v. City of Chicago*, 247 Ill. 204, 93 N. E. 158.

[4] The title of the adjacent lot owner is a vested interest, of which he cannot be deprived without due process of law, and any statute or ordinance that deprives one of his property rights thus vested would be uncon-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

stitutional and void. *McGee on Due Process of Law*, p. 153; *Sears v. City of Chicago*, *supra*.

[5] The track elevation ordinance vacated Van Buren street in front of appellees' lot, and in effect authorized its total and permanent abandonment as a street. If this is true, there is no escape from the conclusion that the title of the adjacent lot owners was united with the seisin in law, thus giving them the right to enter and enjoy the same according to the nature of the estate they owned in the abutting lot. If the street was legally vacated, in the usual and ordinary sense of those terms, appellants had no more right to erect a wall or other obstruction on the north half of said street in front of appellees' lot than they would have had to build a like wall on any other portion of appellees' premises.

Appellants deny that the track elevation ordinance had the effect of vacating any portion of Van Buren street so as to destroy the public easement and cause a reversion to the adjacent lot owners, and in support of this contention they rely on *Summerfield v. City of Chicago*, 197 Ill. 270, 64 N. E. 490, *Weage v. Chicago & Western Indiana Railroad Co.*, 227 Ill. 421, 81 N. E. 424, 11 L. R. A. (N. S.) 539, and *People v. Pittsburg, Ft. Wayne & Chicago Railway Co.*, 244 Ill. 166, 91 N. E. 48. Those cases are distinguishable from the case at bar. The *Summerfield Case* was a condemnation proceeding by which the city of Chicago sought to condemn private property for the purpose of widening Stewart avenue so as to accommodate the public in reaching a subway constructed in Stewart avenue under a track elevation ordinance. It was contended that the city had no power to turn over the original street to a railroad company for the purpose of enabling it to elevate its tracks, and then condemn other property for the use of the public. It was held that the track elevation ordinance was a proper exercise of the powers vested in the city, and that the use of the street for such purpose was not an unlawful diversion of the street to the use of the railroad company, and that such use of the streets was not a new servitude, but only another mode of using the street so as to conserve the best interest of the public. There was no question in that case relating to a complete abandonment of the street or to the rights of abutting lot owners that would arise out of a situation of that character. As widened by the condemnation proceeding, the street was left open for the use of the public for ordinary travel, and at the same time sufficient space was furnished for the structures made necessary by the track elevation ordinance.

The case of *Weage v. Chicago & Western Indiana Railroad Co.* was a bill filed by a number of lot owners whose lots were located on Wallace street, between Forty-Ninth and Seventy-Second streets, to enjoin the railroad

company from elevating its tracks in said street, or, in the alternative, that damages be assessed to the several lot owners, on the theory that the track elevation ordinance vacated Wallace street and that the fee to the center of the street reverted to the owners of the adjoining lots. A demurrer was sustained to the bill and the bill dismissed for want of equity. That decree was affirmed by this court, the court holding that the track elevation ordinance, which allowed the use, for its full width, of a street by a railroad company which had a perpetual easement for its tracks therein, did not effect a vacation of the street, so as to cause a reversion of the fee to the abutting property owner. This court, in discussing the question presented (227 Ill. 427, 81 N. E. 426), said: "The exclusion of the public from the use of the street and the continuation of its use by defendant in error did not have the effect of causing a reversion to the dedicators, as would have been the case had the street been vacated for the purpose of abandoning its use entirely as a street." The decision in that case is based on the proposition that the use of a street longitudinally for elevated railroad tracks is simply a change in the method of using the street and not an abandonment of it as a public highway. While it was not decided what the rule would be where a railroad crossed a street and by its structures therein rendered any use of said street by the public impossible, it was pointed out in that case that under the ordinance the railroad company was required at all street crossings to maintain subways for the use of the public.

The case of *People v. Pittsburg, Ft. Wayne & Chicago Railway Co.* presented substantially the same questions that were before the court in the *Weage Case*, and the decision in the former case controlled the latter.

In our opinion these cases are all clearly distinguishable from the case at bar. Here there is an unconditional vacation of the street within certain described limits. The vacation is made necessary in order to enable appellants to cross the street with the elevated tracks and other structures connected therewith. The erection of a solid concrete wall across a street, from one side to the other, cannot be other than a complete obstruction of the use of said street for the ordinary and usual purposes for which streets are used.

[6] This court has uniformly held that cities may properly grant to street railways, and even to steam railways, the right to lay tracks and operate railroads in their streets. Such use of the streets has never been regarded as anything more than a change in the mode of travel, and the principle of these cases has been applied to elevated railroads. The principle upon which these decisions rest is undoubtedly sound, but it does not apply to the situation presented by the facts in the case at bar. There was here a total aban-

donment of that portion of Van Buren street in front of appellees' lot. It was not within the contemplation of the track elevation ordinance that a change was being effected in the mode of using Van Buren street, but the intention was to completely close it at this point, in order to carry out the track elevation scheme of railroads crossing Van Buren street at right angles.

The decree of the court below was in accordance with the views herein expressed. It should be, and is accordingly, affirmed.

Decree affirmed.

(251 Ill. 228)

BOENDER v. CITY OF HARVEY.

(Supreme Court of Illinois. June 20, 1911.

Rehearing Denied Oct. 11, 1911.)

1. MUNICIPAL CORPORATIONS (§ 763*)—DEFECTIVE STREETS—CARE REQUIRED.

A municipal corporation is not an insurer against accidents to persons using its streets, but is only bound to use reasonable care to keep the streets in reasonably safe condition for ordinary travel thereon by persons using due care and caution for their safety.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1612-1615; Dec. Dig. § 763.*]

2. MUNICIPAL CORPORATIONS (§ 764*)—STREETS—EXTENT OF USE.

All portions of a public street from side to side and end to end are for public use in an appropriate and proper method; but the only duty cast on a city is to maintain the respective portions of the street in a reasonably safe condition for the purposes for which such portions are intended.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1616-1620; Dec. Dig. § 764.*]

3. MUNICIPAL CORPORATIONS (§ 788*)—STREETS—INJURIES TO PEDESTRIANS—NOTICE TO CITY.

A city is not liable for injuries to a pedestrian by a defect in a street, unless it had notice of the defect, or of such facts and circumstances as would, by the exercise of reasonable diligence, lead a prudent person to such knowledge, whether the defect was caused by the act of a third person or by the failure of the city to make repairs.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1641-1643; Dec. Dig. § 788.*]

4. MUNICIPAL CORPORATIONS (§ 819*)—INJURIES TO TRAVELERS—DEFECTIVE STREETS—NOTICE—EVIDENCE.

In an action for injuries to a pedestrian by a defect in a city street, evidence held insufficient to show that the city had notice of the defect, either actual or constructive, as a matter of law.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1741; Dec. Dig. § 819.*]

Appeal from Appellate Court, First District, on Appeal from Circuit Court, Cook County; John Gibbons, Judge.

Action by Howard Boender against the City of Harvey. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

Frederic R. De Young, for appellant. McCaskill & McCaskill, for appellee.

CARTER, C. J. This is an action of trespass instituted by the appellee against the appellant in the circuit court of Cook county for injuries alleged to have been received by him between 4 and 5 o'clock in the afternoon of July 16, 1904, in the city of Harvey, by tripping and falling against a pile of timbers in the parkway of Center avenue. The trial resulted in a verdict of \$750 in favor of appellee, which was affirmed on appeal to the Appellate Court for the First District. A certificate of importance being granted, this appeal followed.

Center avenue runs north and south and is 80 feet wide. At the time of the accident there was on each side of the street a cement sidewalk 5 feet 4 inches wide, about 8 feet from the lot line. Between the sidewalk and the street proper there were strips on each side of the street about 8 feet wide, called by the witnesses "parkways." Between the parkways there was an unpaved roadway about 37 feet in width. On each side of this roadway, next to the parkways, were shallow ditches or gutters scraped out and formed from the natural earth, the slope next to the roadway being less sharp or abrupt than that next to the parkway. On the parkway on the east side of the street, in front of some vacant lots, there were piles, in from two to four tiers, six or more house-moving timbers, each about 30 feet long and about a foot square. Some weeds and grass were growing up about them, but they were in plain sight and had been lying there for several months. While there is a controversy on the point, the evidence most favorable to appellee is to the effect that there were weeds and grass not more than a foot high in the gutter by these timbers. Appellee swore that at the time of the accident he was a milkman, 17 years of age, and was delivering milk from his wagon to customers on each side of Center avenue; that just before the accident he had crossed from a house near by to his wagon, and after filling a small milk can stepped out with it in his hand while the horse was walking and started rapidly southeast from the center of the traveled road, intending to cross the parkway just south of the timbers; That as he was crossing the gutter he tripped and fell against the south end of the timbers, injuring his kidneys quite seriously; that when he got up he saw for the first time a stone in the gutter, about a foot and a half or two feet south of the south end of the timbers and west of their west edges, and that he had fallen by reason of tripping on this stone. One of his witnesses (Hill) testified that, having heard of the accident, he went that evening, after dark, to that

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

location, and on lighting a match saw a stone lying about 4 feet west of the timbers and a little south; that it was in the west slope of the ditch, but not in the traveled portion of the road; that he could not tell just its location, because it was dark; that the weeds about it were 6 or 8 inches high; that from the appearance of the weeds, by the light of the match, he did not think the stone had been there a great while, but might have been several days. He further testified that it weighed about 20 pounds, and that he removed it; but what he did with it is not stated. No other persons testified that they had ever seen the rock there. Neither the policeman who traveled his beat along there six or seven times on the day of the accident, nor any of the nearby residents, had noticed it.

[1] No arbitrary rule can be laid down as to defects in highways or streets for which municipalities will be liable, or as to the degree of care required of the person injured. Municipal corporations are not insurers against accidents. The object to be secured is reasonable safety for travel, considering the amount and kind of travel which may fairly be expected upon the particular road or street. A highway in the country need not be of the same character as a street in a large city. *Molway v. City of Chicago*, 239 Ill. 486, 88 N. E. 485, 23 L. R. A. (N. S.) 543. [2] All portions of a public street from side to side and end to end, are for public use in the appropriate and proper method; but the only duty cast upon the city is that it shall maintain the respective portions of the street in reasonably safe condition for the purposes to which such portions of the street are devoted. *Kohlhof v. City of Chicago*, 192 Ill. 249, 61 N. E. 446, 85 Am. St. Rep. 335; 2 *Dillon on Mun. Corp.* (2d Ed.) § 1019. The city is not bound, under the law, to keep its streets absolutely safe. It is only bound to use reasonable care to keep its streets reasonably safe for ordinary travel thereon by persons using due care and caution for their safety. *City of Salem v. Webster*, 192 Ill. 369, 61 N. E. 323; *Village of Lockport v. Licht*, 221 Ill. 35, 77 N. E. 581. "The obstructions or defects in the streets or sidewalks of a city, to make the corporation liable, must be of such a nature that they are in themselves dangerous, or such that a person exercising ordinary prudence cannot avoid danger or injury in passing them—in general, such defects as cannot be readily detected." *City of Aurora v. Pulfer*, 56 Ill. 270.

[3] Municipal corporations cannot be held liable for every accident that occurs within their limits, but the defect must be such as could have been foreseen and avoided by ordinary care and prudence of the city authorities. The theory upon which the appellee has

presented his case is that the proximate cause of the accident was the stone in the gutter. Whether a defect in the street is caused by the act of a third person or the failure of the city to repair in general, the city is not liable, unless it had notice of the defect, or of such facts and circumstances as would by the exercise of reasonable diligence lead a prudent person to such knowledge. *City of Chicago v. Stearns*, 105 Ill. 554; *Elliott on Roads and Streets* (2d Ed.) 626. It is not claimed that the city had any actual notice of the stone.

[4] The evidence fails to show constructive notice. Generally, it is a question for the jury whether a city has had notice of a defect in a street. Where the facts are undisputed, and but one reasonable inference can be drawn from them, it then becomes a question for the court. *Bell v. City of Henderson (Ky.)* 74 S. W. 206; *City of Chicago v. Murphy*, 84 Ill. 224; *Elam v. Mt. Sterling*, 132 Ky. 657, 117 S. W. 250, 20 L. R. A. (N. S.) 512, note on page 731.

On account of lack of notice there could be no recovery in this case.

The judgments of the circuit and Appellate Courts are reversed, and the cause is remanded to the circuit court.

Reversed and remanded.

(251 Ill. 190)

WETZEL et al. v. FIREBAUGH et al.

(Supreme Court of Illinois. June 20, 1911.)

Rehearing Denied Oct. 12, 1911.)

1. EVIDENCE (§ 474*)—TESTAMENTARY CAPACITY—OPINION—QUALIFICATIONS.

Witnesses were not disqualified to give opinions as to the mental capacity of testatrix, because she had not discussed business affairs or her relatives with them, so that they might thereby become qualified to state whether she knew the extent and nature of her property, and who were the natural objects of her bounty.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2198; Dec. Dig. § 474.*]

2. EVIDENCE (§ 474*)—TESTAMENTARY CAPACITY—OPINIONS—QUALIFICATIONS.

Witnesses were not disqualified to give opinions as to testatrix's mental capacity because they had not first read the will probated, and did not know its contents.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2198; Dec. Dig. § 474.*]

3. EVIDENCE (§ 471*)—CONCLUSIONS OF WITNESSES.

Questions asked of witnesses in a will contest whether testatrix was able to understand the business in which she was engaged when she made the will, or able understandingly to execute it, merely called for conclusions as to her testamentary capacity, and were inadmissible.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2168; Dec. Dig. § 471.*]

4. APPEAL AND ERROR (§ 882*)—RIGHT TO ALLEGE ERROR.

Where both parties follow an improper practice in the examination of witnesses in a

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

will contest, neither can complain on appeal of the method used by his adversary.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3597; Dec. Dig. § 882.*]

5. WITNESSES (§ 195*)—SURVIVING HUSBAND*—COMPETENCY.

On an issue of testamentary capacity in a will contest, testatrix's surviving husband was incompetent to testify to any fact or transaction, the knowledge of which was obtained by means of the marriage relation.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 743; Dec. Dig. § 195.*]

6. WITNESSES (§ 98*)—INTEREST—CREDIBILITY.

Where a witness in a will contest testified that testaments had promised to pay him an amount equal to his legacy or more in case the will was set aside, the witness' interest in the contest was neither legal, direct, certain, nor immediate, and hence it affected his credibility, and not his competency.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 295-370; Dec. Dig. § 98.*]

7. WILLS (§ 400*)—COMPETENCY OF WITNESS—PREJUDICE.

Where a witness offered by proponents in a will contest was erroneously held to be incompetent, but there was nothing to indicate that he could have testified to any fact of importance, his exclusion was not ground for reversal.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 873; Dec. Dig. § 400.*]

8. WITNESSES (§§ 100, 369*)—COMPETENCY—ATTORNEY.

That a witness offered in a will contest by proponents had been their chief solicitor and still acted in an advisory capacity did not disqualify him to testify, though it was not proper for him to do so, and little weight should have been given to his testimony.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 378-394, 1187, 1188; Dec. Dig. §§ 100, 369.*]

9. WILLS (§ 53*)—CONTEST—TESTAMENTARY CAPACITY—EVIDENCE.

In a will contest for testamentary incapacity, evidence that a conservator had been appointed for testatrix two years or more after the will was made was inadmissible.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 121; Dec. Dig. § 53.*]

10. WILLS (§ 400*)—ADMISSION OF EVIDENCE—PREJUDICE.

Where complainant sued to set aside the probate of a will for testatrix's alleged incapacity and for alleged undue influence on the part of F., it was not reversible error for the court to admit on the part of proponents a contract between testatrix and F., by which the latter was to have testatrix's property at her death in consideration of taking care of her, etc., though such evidence was admissible only on the issue of undue influence, and there was no other evidence to prove such charge.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 873; Dec. Dig. § 400.*]

11. WILLS (§ 330*)—CONTEST—INSTRUCTION.

Instructions that, if testatrix was possessed of testamentary capacity and was free from undue influence, she could dispose of her property as she saw fit, that the jury should not be influenced by any belief or feeling that the will was not such as they thought she ought to have made, but the jury could consider any intrinsic evidence afforded by the will of want of mental capacity to make it, and in determining the question they should consider the amount and nature of her property, her various

relatives and friends, and all the facts, were proper, and not misleading.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 779-781; Dec. Dig. § 330.*]

Appeal from Circuit Court, McDonough County; Harry M. Waggoner, Judge.

Bill by Christopher Wetzel and others against Nellie E. L. Firebaugh and others, to set aside the probate of the will of Ellen Wetzel, deceased. Decree for defendants, and plaintiffs appeal. Affirmed.

A. P. Landers and Elting & Hainline, for appellants. Flack & Lawyer, for appellees.

CARTWRIGHT, J. The circuit court of McDonough county entered a decree upon the verdict of a jury dismissing for want of equity the bill of complaint filed in that court to set aside the probate of the last will and testament of Ellen Wetzel, deceased, and to declare said will null and void, and from that decree this appeal was prosecuted.

The bill was filed by the surviving husband and a brother of the testatrix and a number of her nephews and nieces, and the defendants were a niece (who was executrix and a devisee), a nephew, and a legatee. The grounds upon which the validity of the will was challenged were that the testatrix at the time of executing the will was not of sound mind and memory, and that she was under improper restraint and undue influence exercised by her niece, the defendant Nellie E. L. Firebaugh.

The following facts were proved at the trial: The testatrix was married in 1858 to William Culp, and lived with him on his farm near Bushnell, in McDonough county, until his death, which is variously stated by witnesses to have occurred at dates between 1880 and 1891. There were no children of the marriage, and she inherited as heir an undivided half of the quarter section, which constituted the farm, and also had dower and homestead in the premises. She purchased the remaining interest in the quarter section, and afterward acquired two dwelling houses in the city of Bushnell, and occupied or rented her real estate until her death. On November 4, 1896, she was married to Christopher Wetzel, one of the complainants, and they lived in Bushnell most of the time after the marriage. The testatrix sold the west half of the farm, leaving 81 acres, which she owned when the will was made, together with the two dwelling houses in Bushnell, and she also had money in a bank. In May, 1905, she went with her husband and her niece, Nellie E. L. Firebaugh, to visit her brother, Rankin McClaren, in Indiana, and remained there until the latter part of July. The will was made on July 26, 1905, and in the morning of that day she went to the house of her niece, Nellie E. L. Firebaugh, and wanted the niece to go with her to the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

office of a lawyer to have her will drawn. The niece could not go at that time, but agreed to go at 1 o'clock if the testatrix would wait. The testatrix finally concluded to wait, and remained there to dinner, and at about 1 o'clock they went to the lawyer's office. The testatrix gave directions for the making of a will, and the attorney who drew it testified that nothing was either said or done by the niece in reference to it. There was no contradictory evidence and nothing tending to prove undue influence. By the will the testatrix provided first for the payment of her debts and funeral expenses, and then gave to her brother, Rankin McClaren, whom she had recently visited, \$1,500 if he should be living 15 months after her death, which the attorney told her would be the time that the estate would be closed. He died before the testatrix, so that the bequest lapsed. She next gave to the defendant Manning Culp (who was not a relative, a boy raised by her and her first husband) one of the pieces of property in Bushnell, but this property was sold in her lifetime under some arrangement between the devisee and her. She then gave to said Manning Culp \$500, to be paid to him in installments of \$100 each year, and she devised the other piece of property in Bushnell and all the residue of her estate to the niece, Nellie E. L. Firebaugh. She separated from her husband in 1907, and went to live with Mrs. Firebaugh, and died on May 28, 1910. She was 70 years old when she made the will and 75 years old at the time of her death, and never had any child. The proponents of the will offered it in evidence, together with the certificates of the oaths of the subscribing witnesses, and also examined a large number of witnesses, including the nearest neighbors of the testatrix, her banker and his cashier, an insurance agent who insured her property, an assessor who took her assessment, the ministers of her church, and some relatives who visited her frequently. They all testified to her soundness of mind, and their testimony, if true, established beyond question her ability to make a will.

The contestants produced quite a number of witnesses, by whom the following facts were proved and which were not disputed: In 1904 the testatrix, while attending the World's Fair at St. Louis, became overheated, and during the last ten days of July and the first three weeks in August she was treated by a physician at her home in Bushnell for cystitis, which is inflammation of the bladder. The physician visited her two or three times later and his treatment covered a period of about five weeks. He testified that, when he questioned her in regard to her symptoms and the conditions attending the physical trouble, there was an absence of decision in making up her mental processes; that her answers were hesitating and undecided; that she was not actively delirious, but was confused a considerable portion of the time.

After the overheating, she frequently complained of a pain in her head, and during part of the time wore a wet cloth around it. Afterward, and covering the period when the will was made, she was forgetful, and would ask the same question in a short time after it had been answered. A fair illustration is an occasion when she made a call of 20 minutes upon a neighbor and asked how old the little boy was, and after being told asked the same question again before she left and said he was a bright little fellow. Sometimes she did not recognize acquaintances, and did not recognize a nephew who was passing along the street, and, upon inquiring and being told, asked if it was possible she did not know him. Sometimes she recognized the tenant on the farm when he called and sometimes she did not, but there was no evidence that she did not understand everything that was said to her or that there was any want of understanding of her business affairs. She consulted with her husband about her business, but acted for herself. This was the entire scope of the evidence which is claimed to show a want of mental capacity to make a will, and it is scarcely enough to raise an inference against the will in the absence of contradictory testimony. Unless the record contains material and prejudicial error, the decree must necessarily be affirmed.

[1] It is argued that many of the witnesses testifying to the mental capacity of the testatrix were not qualified to give opinions for the reason that they did not hear her say anything about her property or relatives, and therefore could not say that she knew the extent or nature of her property or who were the natural objects of her bounty, and objections of that kind were made upon the trial. If it is true of the witnesses in support of the will, it is equally true of those who testified for the contestants. The witnesses on both sides talked with the testatrix, when they met, upon the common subjects of conversation between neighbors and friends. It is not to be expected that the testatrix, when calling upon other women or being visited by them, would talk about other subjects than the weather, their health, their housekeeping experiences, flowers, gardens, and other matters that interested them. The witnesses were not disqualified to give opinions as to the sanity and mental capacity of the testatrix because she did not discuss with them business affairs or her relatives.

[2] The contestants also objected to the giving of opinions by witnesses for the proponents as to the competency of the testatrix unless they had first read the will and knew its contents, and in examining witnesses on their own behalf asked them if they had read the will and knew its provisions, and whether in their opinion the testatrix had sufficient mind and memory to understand the business of making this particular will. The court did not agree with the

solicitors for contestants, and ruled that the opinions of the witnesses should relate to ability to make a will, and not this particular will. The issue submitted to the jury was whether the writing produced was the last will and testament of the testatrix, and the question to be decided by the jury was whether she was competent to execute that will. The business in which she was engaged at the time of making the will was the disposition of her property by that instrument, and it was necessary that she should be capable of knowing what her property was and who were the natural objects of her bounty and be able to understand the natural consequences and effect of the act of executing the will. *Dowle v. Sutton*, 227 Ill. 183, 81 N. E. 395, 118 Am. St. Rep. 286. In solving those questions, the jury could take into consideration the nature of the will, the extent of the estate, whether there were many facts and details in the disposition to be made of the estate, or whether there were but few simple details. *Campbell v. Campbell*, 130 Ill. 466, 22 N. E. 620, 6 L. R. A. 167; *Taylor v. Pegram*, 151 Ill. 106, 37 N. E. 837; *Dillman v. McDanel*, 222 Ill. 276, 78 N. E. 591, 113 Am. St. Rep. 400; *Healea v. Keenan*, 244 Ill. 484, 91 N. E. 646. But it was not proper for witnesses to put themselves in the place of the jury.

[3] Questions put to witnesses whether the testatrix was able to understand the business in which she was engaged when she made this will or able understandingly to execute it simply called for conclusions of the witnesses as to testamentary capacity, and amounted to an attempt to put the witnesses in the place of the jury and allow them to determine the very question which the jury had been sworn to try. *Schneider v. Manning*, 121 Ill. 376, 12 N. E. 267; *Pyle v. Pyle*, 153 Ill. 289, 41 N. E. 999; *Baker v. Baker*, 202 Ill. 595, 67 N. E. 410. It was proper for the parties to furnish the jury with all the facts relating to the extent of the estate and the number and situation of the relatives as well as with the opinions of witnesses touching the sanity and mental capacity of the testatrix, but the court was right in sustaining the objections to questions calling for opinions on the issue submitted to the jury. Both parties interrogated their witnesses on the question whether the testatrix had sufficient mental capacity to understand the business she was engaged in, of making a will, and this was improper. The law fixes the degree of capacity required to make a valid will, and it is the proper function of the court to advise the jury as to the rules of law, and it is not proper for witnesses, whether experts or not, to give opinions whether a person was capable of executing a valid will. *Garrus v. Davis*, 234 Ill. 326, 84 N. E. 924.

[4] As both parties followed the improper

practice, neither is entitled to complain of that method of examination.

[5] The contestants offered as a witness for all purposes—and especially as a witness to conversations with the testatrix, in his presence, during the marriage, testified to by other witnesses—the surviving husband, Christopher Wetzel, and the court held that he was incompetent. He was incompetent to testify to any fact or transaction the knowledge of which was obtained by means of the marriage relation. *Schrefler v. Chase*, 245 Ill. 395, 92 N. E. 272, 137 Am. St. Rep. 330.

[6] The contestants also offered as a witness Manning Culp, the legatee under the will. The proponents, by leave of court, examined the witness to show that he had an agreement with the contestants that, if the will was set aside, he would be paid an amount equal to his legacy, or more. The witness said that the contestants had told him he should be an heir if the will was set aside, and the court held him incompetent because he was interested in the result of the suit. The test of interest which determined the competency of this witness was whether he would gain or lose as the direct result of the suit. The interest must be a legal interest in the event of the suit which is certain, direct, and immediate, as otherwise it goes merely to the credibility of the witness and not to his competency. *Illinois Mutual Fire Ins. Co. v. Marseilles Manf. Co.*, 1 Gilman, 236; *Campbell v. Campbell*, supra; *Pyle v. Pyle*, supra. The fact that Culp had a prospect of gaining something from the contestants if they were successful affected his credibility and not his competency.

[7] The ruling was wrong, but there is nothing in the record to indicate that he could have testified to any fact of importance, and his exclusion as a witness is not ground for reversing the decree. His wife, May Culp, was also offered as a witness and excluded, and in this the court did not err, for the reason that she was not competent to testify either for or against her husband.

[8] Solon Banfill was presented as a witness by the proponents, and the contestants interposed an objection to his competency on the ground that he was a solicitor in the suit. The court overruled the objection, and he testified generally, not only to the execution of the will, which he drew and of which he was a witness, and what occurred in his office at the time, but also to the competency of the testatrix. His name was not entered of record as a solicitor in the case, but he was one in fact. He had been the chief solicitor in consulting with the witnesses and securing testimony and sat at the trial table with the other solicitors, consulting with them and taking an active part in the trial. An attorney

voluntarily assumes that relation in each case, and, if he is to be a witness, he places himself in the position of an interested party unnecessarily. It is not proper for him to do that, and but little weight should be given to the testimony of a witness who is not only acting as an attorney, but also furnishing evidence to enable him to succeed in his professional capacity. *Wilkinson v. People*, 226 Ill. 135, 80 N. E. 699; *Bishop v. Hilliard*, 227 Ill. 382, 81 N. E. 403; *Grindle v. Grindle*, 240 Ill. 143, 88 N. E. 473. The question, however, does not relate to competency but only to credibility, and the ruling of the court was not wrong.

[9] The contestants attempted to prove that a conservator was appointed for the testatrix two years or more after the will was made, and the court excluded the evidence, which was in accordance with the decision in *Entwistle v. Meikle*, 180 Ill. 9, 54 N. E. 217.

[10] The court admitted in evidence, on the part of the proponents of the will, a contract between the testatrix and Mrs. Firebaugh, made in January, 1898, by which Mrs. Firebaugh was to care for the testatrix if she became ill or widowed, and to attend to her business. The testatrix was to reside in the home of Mrs. Firebaugh as one of the family, and Mrs. Firebaugh was to settle all bills, bury the testatrix beside her former husband, and have all her property at her death. This contract would only have been competent on the question of undue influence at the time the will was executed, and had no tendency to prove capacity to make the will. There was nothing in evidence tending to prove undue influence, but it was one of the charges of the bill and may have been the subject of argument to the jury. The fact that the contract was admitted in evidence would be no ground for reversing the decree.

[11] Objection is made to instructions numbered 3 and 9, which advised the jury that if the testatrix was possessed of testamentary capacity and free from undue influence she could dispose of her property as she saw fit, and that the jury should not be influenced by any belief or feeling that the will was not such as they thought she ought to have made. The jury had a right to take into consideration any intrinsic evidence afforded by the will of a want of mental capacity to make it, and the court told the jury that in determining the question they should take into consideration the amount and nature of her property, her various relatives and friends, and all the facts. The instructions objected to stated a correct rule of law, and, when the instructions are taken together, they could not have misled the jury.

We have noticed every objection presented in the brief and argument which is worthy

of attention, and find nothing which would justify reversing the decree. Accordingly it is affirmed.

Decree affirmed.

(251 Ill. 243)

PLAFF v. PACIFIC EXPRESS CO.

(Supreme Court of Illinois. June 20, 1911.)

1. JUDGMENT (§ 129*)—DEFAULT JUDGMENT—WANT OF PLEA.

A default judgment for want of an appearance rendered after the filing of an appearance is irregular; the proper judgment being a judgment for want of a plea.

[Ed. Note.—For other cases, see *Judgment*, Cent. Dig. § 240; Dec. Dig. § 129.*]

2. APPEAL AND ERROR (§ 1073*)—HARMLESS ERROR—ERRONEOUS ENTRY OF JUDGMENT.

The entering of a default judgment for want of an appearance, instead of for want of a plea after an appearance is on file, is a mere irregularity, and does not justify a reversal.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4240-4247; Dec. Dig. § 1073.*]

3. JUDGMENT (§ 138*)—DEFAULT JUDGMENT—RIGHT TO OPEN.

A default judgment will not be set aside where the defaulted party, though having a meritorious defense, or his attorney, has been guilty of negligence.

[Ed. Note.—For other cases, see *Judgment*, Cent. Dig. §§ 249-254; Dec. Dig. § 138.*]

4. COSTS (§ 137*)—SECURITY FOR PAYMENT—EFFECT OF FAILURE TO GIVE.

A judgment for a nonresident plaintiff is not void because the record fails to show that he gave a cost bond.

[Ed. Note.—For other cases, see *Costs*, Cent. Dig. §§ 537-548; Dec. Dig. § 137.*]

5. COSTS (§ 119*)—SECURITY FOR PAYMENT—NECESSITY.

Where a nonresident brings suit without filing a cost bond, and afterwards files one without first obtaining leave of court, a refusal to dismiss for want of a cost bond amounts to leave to file a bond, and there is a substantial compliance with the statute.

[Ed. Note.—For other cases, see *Costs*, Cent. Dig. §§ 479-481; Dec. Dig. § 119.*]

6. JUDGMENT (§ 126*)—DEFAULT JUDGMENT—DAMAGES.

A carrier who defaults in an action against it for the value of a shipment of merchandise lost during transit is entitled to be heard on the question of damages and to appear and cross-examine plaintiff's witnesses, and introduce evidence on the question of damages, and to ask for instructions on that question and preserve its rights for review on the issue of damages by a bill of exceptions.

[Ed. Note.—For other cases, see *Judgment*, Cent. Dig. §§ 228-230; Dec. Dig. § 126.*]

7. CARRIERS (§ 135*)—LOSS OF GOODS—MEASURE OF DAMAGES.

The measure of damages for the loss of merchandise during transit is fixed by the market value of the merchandise at the place of delivery, and not the cost price at the point where the carrier received the goods for transportation.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 557-559, 599-604½; Dec. Dig. § 135.*]

8. APPEAL AND ERROR (§ 204*)—QUESTIONS REVIEWABLE—RULINGS ON EVIDENCE—EXCEPTIONS.

Rulings on evidence are not reviewable on appeal, where no objection or exception was made or preserved to the rulings.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1258-1280; Dec. Dig. § 204.*]

9. DAMAGES (§ 203*)—DEFAULT JUDGMENT—CONCLUSIVENESS.

A default judgment in an action against a carrier for loss of goods during transportation rendered for want of a plea is an adjudication of the truth of the declaration averring that the goods were lost through the carrier's negligence, and it may not litigate that issue on the hearing as to damages.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 524-527; Dec. Dig. § 203.*]

10. CARRIERS (§ 155*)—LIMITATION—LIABILITY—CONTRACTS.

Where a carrier delivers to the shipper a receipt for goods which limits its common-law liability, it must, to bind the shipper, show that he was aware of the restriction in the receipt, and, where the carrier seeks to bind the consignee by the act of the consignor, it must show that the consignor had authority to bind the consignee by such restriction.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 677-696; Dec. Dig. § 155.*]

Cartwright, J., dissenting.

Appeal from Branch Appellate Court, First District, on Appeal from Superior Court, Cook County; Ben. M. Smith, Judge.

Action by Henry Plaff against the Pacific Express Company. From a judgment of the Appellate Court affirming a judgment for plaintiff, and granting a certificate of importance, defendant appeals. Affirmed.

John Gibson Hale, for appellant. Clinton O. Collins and E. S. Metcalf, for appellee.

HAND, J. This was an action of assumption commenced by the appellee against the appellant in the superior court of Cook county to recover the value of a shipment of merchandise delivered by Spaulding & Co., as consignors, in the city of Chicago, Ill., of whom the appellee had purchased said merchandise, to the appellant, as a common carrier, for shipment to the appellee, as consignee, at El Paso, Tex., the place of residence of the appellee. The declaration contained two counts, which, in substance, are as follows:

The first count charges that the defendant at the time of the making of the promise hereinafter referred to was a common carrier of goods and chattels for hire from the city of Chicago, Cook county, Ill., to El Paso, Tex.; that, the defendant being such common carrier, the plaintiff on or about the 21st day of December, 1906, at Chicago, Ill., at the request of the defendant, caused to be delivered to defendant certain goods and chattels of the plaintiff, to wit, one hair brush, one comb, two colognes, two puff boxes, one ring, two pencils, one cigar cutter, one cigar case,

one bridge set, one purse, one brooch, one match-box and one card case, of the value of \$538, to be taken care of and safely carried by defendant, as such carrier, from the city of Chicago, Ill., to El Paso, Tex., and there safely delivered by the defendant for the plaintiff; that, in consideration thereof and of certain reward to defendant in that behalf, the defendant, at Chicago, Ill., promised the plaintiff to take care of the said goods and chattels and safely carry the same from Chicago, Ill., to El Paso, Tex., and there deliver the same for the plaintiff; that although the defendant, as such carrier, then and there received the said goods and chattels for the purpose aforesaid, yet, not regarding its said promises, it has not taken care of the said goods and chattels or safely carried and delivered the same for the plaintiff, but, on the contrary thereof, so carelessly behaved itself in that respect that the said goods and chattels by and through the mere negligence and improper conduct of defendant and its servants, afterwards, to wit, on the day aforesaid, became and were lost to plaintiff.

The second count charges that on the day aforesaid, at Chicago, Ill., the defendant became and was indebted to the plaintiff in the sum of \$538 for the loss of the said goods and chattels (describing them as goods, wares, and merchandise), then and there delivered to the defendant, to be carried by the defendant from Chicago, Ill., to El Paso, Tex., and being so indebted, the defendant, in consideration thereof, then and there promised the plaintiff to pay to him the said sum of money on request, and that, though thereafter requested so to do, the defendant has not paid such sum or any part thereof.

A summons was duly issued returnable to the September term, 1907, which was served on July 8, 1907. On September 3d the appellant filed its appearance in writing, and on the 7th day of the same month a default was entered against the appellant, the order being in the following terms: "On this day comes the plaintiff, and it appearing to the court that due personal service of the summons has been had on defendant for at least ten days before the first day of this term, and the defendant being now thrice called in open court comes not, nor does any person for it, but herein makes default, which is, on motion of the plaintiff, ordered to be taken and the same is hereby entered of record, wherefore the plaintiff ought to have and recover of and from the defendant his damages sustained herein by reason of the premises." On the 14th day of May, 1908, the appellant entered its motion to set aside said default and for leave to plead, on two grounds: First, that the court had no right to enter a default against it, as it had a written appearance on file; and, secondly,

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

that the default was wrongfully entered, as the appellee was a nonresident, and at the time of the entering of the default no cost bond was on file. The appellant filed affidavits with its motion to set aside the default, setting up its grounds of defense to the action upon the merits. The court overruled the motion to set aside the default, whereupon the appellant moved the court to dismiss the suit for want of a cost bond, and thereupon the appellee filed a cost bond and the motion to dismiss the suit was overruled. A jury was then waived, and the court assessed the damages of the appellee at \$538 and rendered judgment against appellant for that amount and costs, from which judgment appellant prosecuted an appeal to the Appellate Court for the First District, where the judgment of the superior court was affirmed, and, the Appellate Court having granted a certificate of importance, a further appeal has been prosecuted to this court.

The first contention of the appellant is that the court erred in entering a default judgment against it, as it is said at the time of the entering of said judgment it had a written appearance on file.

[1] We think it manifest that a judgment by default, after an appearance has been filed, for want of an appearance is irregular, and that the proper order in such case is judgment *nil dicat* or for want of a plea.

[2] The entering of a default judgment for want of an appearance instead of for want of a plea, after an appearance is on file, is, however, a mere irregularity and should not work a reversal of a judgment.

[3] Although a defaulted party has a meritorious defense, a default will not be set aside if he or his attorney has been guilty of negligence. *Mendell v. Kimball*, 85 Ill. 582; *Walsh v. Walsh*, 114 Ill. 655, 3 N. E. 437; *Hitchcock v. Herzer*, 90 Ill. 543.

[4] It is next contended that the court erred in declining to dismiss the suit for want of a cost bond. A judgment in favor of a nonresident plaintiff is not void because the record fails to show that the plaintiff gave a cost bond. *Palmer v. Riddle*, 180 Ill. 461, 54 N. E. 227.

[5] If a nonresident brings suit without filing a cost bond and afterwards files one without first obtaining leave of court so to do, this will be a substantial compliance with the statute, and the denial of a motion to dismiss the suit amounts to leave to file a bond. *Baker v. Palmer*, 83 Ill. 568. The court did not err in declining to dismiss the suit for want of a cost bond. The defendant's rights were not, however, wholly foreclosed by the default.

[6] While the default admitted every material allegation of the declaration, it did not admit the amount of damages. The defendant on the execution of the writ of inquiry before the court could not introduce evidence tending to dispute the allegations

of the declaration or to show the plaintiff had no cause of action, as the default admitted the cause of action stated in the declaration, still it had the right to appear and cross-examine plaintiff's witnesses and introduce witnesses on its part on the question of damages, ask for instructions on that question, and preserve its rights for review on that branch of the case by a bill of exceptions. *Cook v. Skelton*, 20 Ill. 107, 71 Am. Dec. 250; *Chicago & Rock Island Railroad Co. v. Ward*, 16 Ill. 522; *Calro & St. Louis Railroad Co. v. Holbrook*, 72 Ill. 419.

[7, 8] It is further contended the trial court erred in admitting proof of the cost price in Chicago of the lost merchandise, as it is said the measure of damages should have been fixed by the market value of the merchandise at the place where it was to be delivered. We think the court did fall into error in the particular pointed out (*Northern Transportation Co. v. McClary*, 66 Ill. 233; *Chicago & Northwestern Railway Co. v. Dickinson*, 74 Ill. 249); but no objection or exception was made or preserved to the ruling of the court upon that question and it is not open for review in this court.

It is finally contended that by the receipt which was issued to Spaulding & Co. on behalf of the appellee at the time the merchandise was delivered to appellant for shipment the right of recovery in case of the loss of the merchandise, other than by the negligence of the appellant, was limited to \$50.

[9] The declaration averred the goods were lost through the negligence of the appellant, and that averment was admitted by the default of the appellant.

[10] If, however, that question were open upon the assessment of damages, the law is, we think, settled in this state that, where a common carrier delivers to the shipper a receipt for goods received for shipment which limits its common-law liability, in order to bind the shipper, it must be made to appear by the carrier that the shipper was aware of the restriction contained in the receipt. *Field v. Chicago & Rock Island Railroad Co.*, 71 Ill. 458; *Boscowitz v. Adams Express Co.*, 93 Ill. 523, 34 Am. Rep. 191; *Chicago & Northwestern Railway Co. v. Simon*, 160 Ill. 648, 43 N. E. 596; *Illinois Central Railroad Co. v. Carter*, 185 Ill. 570, 48 N. E. 374, 38 L. R. A. 527; *Chicago & Northwestern Railway Co. v. Calumet Stock Farm*, 194 Ill. 9, 61 N. E. 1095, 88 Am. St. Rep. 68; *Wabash Railroad Co. v. Thomas*, 222 Ill. 337, 78 N. E. 777, 7 L. R. A. (N. S.) 1041; *Cleveland, Cincinnati, Chicago & St. Louis Railway Co. v. Patton*, 203 Ill. 376, 67 N. E. 804. And where, as here, it is sought to bind the consignee by the act of the consignor, it must be made to appear that the consignor had authority to bind the consignee. The case of *Merchants' Despatch Transportation Co. v. Joesting*, 89 Ill. 152, 155, is directly in point. In that case it was said: "In this case appellees did not see the shipping receipt, and were not aware

that it contained the exception until after the goods passed to appellants. But it is said the merchants of whom the goods were purchased knew of the exceptions when they shipped them. Concede this to be true, and there is no evidence that appellees ever authorized them to make a contract limiting the carrier's liability. In the absence of evidence the presumption would be that they had only authority to ship them with all the liabilities of the common carrier attaching, without exceptions of any description. So it is seen that appellant has failed to show that appellees ever expressly or by implication assented to the exemption from liability by loss from fire." It is urged by the appellant that the Joesting Case is out of line with the cases, generally, upon this question in other states. While there is some conflict in the authorities upon the question, that case was well considered, and is, we think, in harmony with the cases upon the subject of the liability of common carriers to shippers in this state, and we are not disposed at this late day to modify the opinion or recede from the position therein announced.

Other questions are raised upon this record, but they go to the right of recovery, and not to the question of damages, and appellant upon those questions is foreclosed by the default, and they need not be considered in this opinion.

Finding no reversible error in this record the judgment of the Appellate Court will be affirmed.

Judgment affirmed.

CARTWRIGHT, J., dissenting.

(251 Ill. 260)

MILLER, WATT & CO. v. O'CONNELL,
County Treasurer.

(Supreme Court of Illinois. Oct. 4, 1911.)

TAXATION (§ 317*)—CORPORATE SHARES.

Revenue Law (Laws 1871-72, p. 2) § 3, requiring the capital stock of companies to be assessed by the State Board of Equalization, was amended by Laws 1879, p. 251, and Laws 1893, p. 172, so as to require companies organized for purely manufacturing purposes, for printing or publishing newspapers, for improving or breeding stock, and for the mining and sale of coal to be assessed by the local assessors, and requiring the capital stock of other companies to be assessed by the State Board of Equalization. Revenue Law §§ 1, 3, 32, was amended by Laws 1905, pp. 353-355, so as to exempt the capital stock of mercantile corporations from assessment, but such exemptions were held unconstitutional. The same act amended Revenue Law, § 108, by forbidding the State Board of Equalization to assess the capital stock of mercantile corporations. *Held* that, since the amendment of 1905, the capital stock and franchises of companies organized purely for mercantile purposes are assessable by the local assessors, and not by the State Board of Equalization.

[Ed. Note.—For other cases, see Taxation, Dec. Dig. § 317.*]

Appeal from Superior Court, Cook County; Farlin O. Ball, Judge.

Suit by Miller, Watt & Co. against William L. O'Connell, county treasurer. From a decree for complainant, defendant appeals. Affirmed.

Gustavus J. Tatge, County Atty., and William F. Struckmann, for appellant. Vroman, Munro & Vroman, for appellee.

CARTER, C. J. Appellee, Miller, Watt & Co., a corporation, was organized under the laws of the state of Illinois for mercantile purposes. The State Board of Equalization made for the year 1910 an assessment of the capital stock and franchise of said company in excess of the value of its tangible property, and said assessment was returned to the county clerk of Cook county, who extended the taxes against the same, amounting to \$464, and the collector's warrant for the collection of that amount was delivered to appellant. On March 18, 1911, appellee filed its bill of complaint in the superior court of Cook county, alleging that the State Board of Equalization was without jurisdiction to assess said capital stock and franchise, and asking that the collection of the tax be permanently enjoined. A general demurrer filed to this bill was overruled, and the defendant elected to stand by his demurrer. A decree was entered permanently enjoining the collection of the tax as prayed in the bill. From that decree this appeal has been prayed.

The question at issue in this case is whether the local board of assessors or the State Board of Equalization should assess the capital stock and franchises of mercantile corporations. By section 3 of the revenue law approved March 30, 1872, the capital stock of all companies and associations created under the laws of the state were to be assessed by the State Board of Equalization. Laws 1871-72, p. 2. This section was amended in 1879 so as to require companies and associations organized for purely manufacturing purposes, or for printing, or for publishing of newspapers, or for the improving and breeding of stock, to be assessed by the local assessors and the capital stock of all other companies and associations by the State Board of Equalization. Laws 1879, p. 251. The revenue law was amended in 1893 by adding to the corporations to be assessed by the local assessors, companies, and associations organized for the mining and sale of coal. Laws 1893, p. 173. In *The Hub v. Hanberg*, 211 Ill. 43, 71 N. E. 826, construing the statute as then amended, this court held that it was no violation of the rule of uniformity in taxation that by these provisions of the revenue law the capital stock and franchises of some corporations were to be assessed by the State Board of Equaliza-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

tion while that of other corporations was to be assessed by local assessors.

At the next session of the Legislature the attempt was made to exempt the capital stock of those corporations which had been theretofore assessed by local assessors, and also to exempt the capital stock of mercantile corporations, by amending sections 1, 3, 32, and 108 of the revenue law. Laws 1905, p. 353. This court held in *Consolidated Coal Co. v. Miller*, 236 Ill. 149, 86 N. E. 205, that the provisions of this amendment which attempted to exempt from taxation the capital stock of such corporations were unconstitutional and void. In *People v. National Box Co.*, 248 Ill. 141, 93 N. E. 778, and *People v. Lewy Bros.*, 250 Ill. 613, 95 N. E. 984, it was held that the capital stock of manufacturing and mercantile corporations should be assessed by the local assessors. As construed by those decisions, the revenue law as changed since the said amendment of 1905 requires the local assessors to assess the capital stock and franchises of companies and associations organized for purely manufacturing and mercantile purposes, or for either of such purposes, or for the mining and sale of coal, or for printing, or for the publishing of newspapers, or for the improving and breeding of stock, while the capital stock and franchises of all other companies or associations must be assessed by the State Board of Equalization. In other words, the local assessors assess the capital stock and franchises of all corporations and associations that were assessed by them previous to the amendment of 1905 and since that amendment are also required to assess the capital stock and franchises of corporations and associations organized for mercantile purposes.

The decree of the superior court must be affirmed.

Decree affirmed.

(251 Ill. 200).

WINTER v. DIBBLE et al.

(Supreme Court of Illinois. June 20, 1911.

Rehearing Denied Oct. 14, 1911.)

1. MARRIAGE (§ 40*)—EXISTENCE—PRESUMPTION.

On an issue as to the validity of a marriage, proof of the celebration of the marriage raised a presumption of the existence of everything essential to its validity, including the capacity of the parties, so that, if a prior marriage of one of them was shown, the death or divorce of the former spouse would be presumed, and the burden was on the party asserting the invalidity of the subsequent marriage because of the former to prove that the former spouse was living, and had not been divorced, even though imposing the burden of proving a negative.

[Ed. Note.—For other cases, see *Marriage*, Cent. Dig. §§ 58-69; Dec. Dig. § 40.*]

2. MARRIAGE (§ 50*)—INVALIDITY—PROOF.

On an issue as to the validity of complainant's marriage to deceased, proof that com-

plainant had instituted divorce proceedings against each of her former husbands, and that she demurred to a cross-bill for discovery to show when and where any divorce suits to which she was a party had ever been pending, on the ground that it was obvious that the purpose of the cross-complainants was to obtain proof that her marriage to decedent was bigamous, which, if established, might subject her to indictment and punishment, was insufficient to impeach the validity of her subsequent marriage to decedent.

[Ed. Note.—For other cases, see *Marriage*, Cent. Dig. §§ 79-89; Dec. Dig. § 50.*]

3. EVIDENCE (§ 186*)—SECONDARY EVIDENCE—LOST INSTRUMENT—SUFFICIENCY.

Testimony of an alleged subscribing witness to a lost instrument affecting real estate, given 29 years after a casual reading of the instrument, which contained more than a thousand words, the witness not being able to remember the substance of the instrument, but only the meaning of part of it as he understood it, that he believed a document read to him was a copy of the original instrument, was insufficient to prove the same.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. § 669; Dec. Dig. § 186.*]

4. ACKNOWLEDGMENT (§ 5*)—UNACKNOWLEDGED INSTRUMENT—CERTIFIED COPY.

Since all instruments of writing relating to real estate may be recorded, whether acknowledged or proved according to law or not, and from the time of filing the record constitutes notice to subsequent purchasers and creditors, but, when not acknowledged, are not available for any other purpose, a certified copy of the record of an alleged conveyance of real estate in the form of a lease which was unacknowledged was inadmissible to prove the instrument on the issue of title.

[Ed. Note.—For other cases, see *Acknowledgment*, Cent. Dig. §§ 22-45; Dec. Dig. § 5.*]

5. EVIDENCE (§ 174*)—SECONDARY EVIDENCE—RECORD—INSTRUMENTS AFFECTING REAL ESTATE.

Under Rev. St. 1874, c. 30, § 35, providing that the acknowledgment of deeds and other instruments relating to real estate by the parties or proof of their execution in the manner provided may be certified by certain officers, and when so acknowledged or proved, whether recorded or not, may be read in evidence without further proof of execution, if recorded, the record is not primary proof, but may be resorted to only as secondary evidence on proof to the satisfaction of the court that the original instrument is lost, and not within the power of the party wishing to use it to produce.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. § 564; Dec. Dig. § 174.*]

6. ACKNOWLEDGMENT (§ 5*)—INSTRUMENTS AFFECTING REAL ESTATE—WANT OF ACKNOWLEDGMENT—CERTIFIED COPY OF RECORD.

Rev. St. 1874, c. 30, § 35, provided that the acknowledgment of deeds and other instruments affecting real estate might be certified by certain officers, and that, when so acknowledged or proved, they might be read in evidence, without further proof of execution. Section 36 provided that whenever it was proved that the original of a deed, conveyance, or other writing of or concerning lands, acknowledged or proved "according to any of the laws of this state," is lost, and not within the power of the party wishing to use it to produce, the record of such deed, conveyance, or other writing or a transcript, certified, etc., may be read in evidence with like effect as though the original was produced. *Held*, that neither of such sections au-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

thorized the reading in evidence of a copy of the record of a deed not acknowledged or proved in the manner provided by chapter 30, proof of which was attempted at the trial by the alleged subscribing witness.

[Ed. Note.—For other cases, see Acknowledgment, Cent. Dig. §§ 22-45; Dec. Dig. § 5.*]

7. EVIDENCE (§ 373*)—AUTHENTICATION OF COPY—BLUE PRINT.

Evidence held insufficient to establish the authenticity of a blue print alleged to be a copy of a conveyance in the form of a lease.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 1593; Dec. Dig. § 373.*]

8. EXECUTORS AND ADMINISTRATORS (§ 72*)—INVENTORY—REFERENCE TO INSTRUMENT—EFFECT—ESTOPPEL.

That an executrix in her inventory in setting out the title to certain real property mentioned a paper purporting to be a life lease of the property, bearing a specified date, and signed by testator to "W. and others," etc., was not a recognition of the validity of the instrument, but only an acknowledgment of the existence of a record purporting to convey the title.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 321; Dec. Dig. § 72.*]

9. EQUITY (§ 153*)—BILL—CONSTRUCTION—ADMISSIONS.

A bill for partition alleged that complainant had been informed that a certain instrument had been discovered among the papers of W., under whom she claimed, after his death, and had been filed for record and recorded, and the copy of the instrument as recorded was attached to the bill as an exhibit, but, on information and belief, complainant alleged that the instrument never was delivered. The answer averred that complainant's deceased husband, under whom she claimed, entered and collected and appropriated rents, and therefore he and complainant, claiming under him, were estopped to deny the validity of the instrument. A cross-bill was also filed alleging the execution and delivery of this instrument, which complainant answered, denying the same on information and belief as in the bill. *Held*, that the allegations in the bill did not amount to an admission that the instrument attached to the bill was a copy of the original instrument, and that complainant had no defense thereto, except want of delivery.

[Ed. Note.—For other cases, see Equity, Dec. Dig. § 153.*]

10. WILLS (§§ 506, 524*)—CONSTRUCTION—VESTING HIS ESTATE—DEATH OF CHILDREN—TIME—"HEIRS"—"BUT."

Testator devised all his real estate to his widow so long as she should remain such, and then provided that certain of his real estate should not be sold or incumbered, and, on the death of the widow, should be owned and used by his children as equal co-owners, "but in case of the death of any one leaving heirs, then the share of such deceased child," in equal portions, should descend to his or her heirs, and, on the death of the children or any of them, the property should descend to their respective heirs in fee simple absolute. *Held*, that the word "heirs" in the clause, "in case of the death of any one leaving heirs," meant children or heirs of the body, and that since the word "but," following the creation of the life estate in testator's children, marked the beginning of an exception, and was used in the sense of "except," "unless," "save," "yet," "still," "however," "nevertheless," the clause relating to the death of any of the children referred to their death during the lifetime of the widow, and that, as to children surviving her, no contingency long-

er existed, the words "heirs" in the last clause not being limited to heirs of the body, but referring to testator's heirs generally.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1090-1099, 1116-1127; Dec. Dig. §§ 506, 524.*]

For other definitions, see Words and Phrases, vol. 1, pp. 926, 927; vol. 4, pp. 3241-3265; vol. 8, pp. 7677, 7678.]

11. WILLS (§ 608*)—CONSTRUCTION—DEVISE—RULE IN SHELLEY'S CASE.

Testator, after devising real estate to his wife so long as she remained his widow, provided that certain of his real estate should not be incumbered by her, but, on her marriage or death, should be "held, owned, and used" by testator's children as co-owners for and during the full period of their several natural lives, but, in case of the death of any one leaving heirs, then the share of such deceased child, in equal portions, should descend to his or her heirs, and on the death of the children or any of them the property should descend to their respective heirs in fee simple absolute. *Held*, that the word "heirs" was used as a word of limitation, and not of purchase, and that testator's children thereby acquired a fee, under the rule in Shelley's Case.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1372-1378; Dec. Dig. § 608.*]

12. APPEAL AND ERROR (§ 187*)—OBJECTIONS NOT RAISED BELOW—DEFECT OF PARTIES.

Where parties to a partition suit up to the time of decision had been invoking the court's jurisdiction to grant the relief they were respectively seeking, and to make partition of the premises without reference to the rights of persons not joined, but subsequently claimed to be interested, defendants were not entitled to assert on appeal that the court erroneously entered a decree without the presence of such parties, and until another pending suit had been determined.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1184-1189; Dec. Dig. § 187.*]

13. APPEAL AND ERROR (§ 107*)—ORDERS APPEALABLE—REFERENCE.

An order referring a partition suit to a master for an accounting to enable the court to arrive at a decision for the apportionment of costs, including a reasonable solicitor's fee, and to report what would be a reasonable sum for the necessary services of complainant's solicitor, was not reviewable on appeal prior to an allowance of such fee.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 735-739; Dec. Dig. § 107.*]

Appeal from Superior Court, Cook County; William Fennimore Cooper, Judge.

Bill by Antoinette Thayer Winter against Sarah P. Dibble and another. Judgment for complainant, and defendants appeal. Affirmed.

Albert M. Kales, for appellants. Morris St. P. Thomas, for appellee.

DUNN, J. The defendants have appealed from a decree of partition involving several parcels of real estate claimed by different titles and presenting distinct questions. Appellee claims as the widow and sole devisee of Samuel Blair Winter, who died in December, 1908, leaving no descendant, but leaving the appellants, his sisters, heirs surviv-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.

ing him. For more than a year preceding his death he was domiciled in Holland, Mich., where he died, and shortly before his death he there executed a will devising all his property to the appellee. The will was admitted to probate in Michigan, and an authenticated copy was filed in the probate court of Cook county in accordance with the provisions of the statute which relate to foreign wills. The appellee thereupon filed the bill now under review for the partition of the premises. The appellants soon after filed their bill against the appellee to have the copy of the will set aside, canceled, and declared void on account of the want of testamentary capacity of the testator and undue influence exercised upon him. The court dismissed the latter bill upon demurrer, but this decree was reversed (*Dibble v. Winter*, 247 Ill. 243, 93 N. E. 145), the cause was remanded, and it was pending when the decree was entered in the partition suit at the December term, 1910.

It is the claim of the appellee, in accordance with which the decree was rendered, that Samuel Blair Winter and his two sisters, the appellants, were in his lifetime tenants in common, in equal shares, of all the real estate mentioned in the bill, and that the appellee succeeded, under his will, to his title. The appellants, on the other hand, contend that Samuel Blair Winter had only a life estate in the whole of one parcel and in the undivided third of another, and had, therefore, no interest in these two parcels which he could devise. They also contend that the appellee was not lawfully married to Samuel Blair Winter; that there is a defect of parties defendant; that the entry of the decree should have been postponed until the determination of the suit to set aside the copy of the will and until claims against the estate of Samuel Blair Winter have been barred; and that the court erred in referring the cause to the master to ascertain a reasonable solicitor's fee for the complainant.

[1] Samuel Blair Winter and the appellee were married in June, 1907, by a minister of a Congregational church, at the home of the appellant, Mrs. Dibble, in Chicago. Evidence was introduced tending to prove that she had previously been married three times, and that her former husbands were living at the time of the last marriage. It is insisted that the last marriage was not shown to be lawful because the evidence does not show that the appellee was divorced from any of her husbands. The rule is well settled that, where the celebration of a marriage is shown, everything essential to the validity of the marriage, including the capacity of the parties, will be presumed. If a prior marriage is shown, the death or divorce of the former spouse will be presumed, and the burden is on the party asserting the invalidity of the subsequent marriage because of the former to show that the former spouse is living and has not been divorced,

even though such burden imposes the proving of a negative. *Potter v. Clapp*, 203 Ill. 592, 68 N. E. 81, 96 Am. St. Rep. 322; *Cartwright v. McGown*, 121 Ill. 388, 12 N. E. 737, 2 Am. St. Rep. 105; *Schmisser v. Beattie*, 147 Ill. 210, 35 N. E. 525; *Cole v. Cole*, 153 Ill. 585, 38 N. E. 703.

[2] To sustain the burden thus imposed upon them, the appellants introduced evidence tending to show that the appellee instituted divorce proceedings against each of her husbands in Cleveland, Ohio. This, of course, has no tendency to prove that she was not divorced from them. The appellants filed a cross-bill, one of the purposes of which was to obtain a discovery from the appellee as to when and where any divorce suits to which she was a party had ever been pending. She demurred to this portion of the cross-bill because the allegations were not sufficiently definite, and because it was obvious that the purpose of the appellants in seeking the discovery was to obtain evidence that the appellee's marriage to Samuel Blair Winter was bigamous, and, if that fact were established, the appellee might be subject to indictment and punishment. The court sustained the demurrer, and the counsel for the appellants seems to think that from this action in regard to the pleadings some inference should be drawn against the appellee in the hearing upon the evidence. We do not see any basis for this claim. There was no evidence tending to impeach the validity of the appellee's marriage.

The two parcels of property the title to which is drawn in question on this appeal were known as 417 and 421 Warren avenue, which will be referred to as the Warren avenue property, and 905 and 907 West Madison street, which will be referred to as the Madison street property. Peter Winter, the father of Samuel Blair Winter, owned the Madison street property in his lifetime, and it is the claim of the appellants that he conveyed it to Samuel Blair Winter for life after the death of Peter Winter, and then to the appellants, with certain gifts over. The appellee's claim is that Peter Winter did not convey this property but owned it at his death, and that it passed under his will to Samuel Blair Winter and the appellants, in equal shares. The questions in regard to the conveyance concern its execution, its contents and its construction, all of which are in issue.

The instrument which is claimed to have the effect of a conveyance was not produced at the hearing, but was sought to be established by secondary evidence, and a document certified by the recorder of Cook county to be a copy of an instrument recorded in his office was introduced in evidence. It bore the date of November 20, 1880, purported to be signed by Peter Winter and Samuel Blair Winter and to be witnessed by Isaac Winter, though it was not acknowledged, and was filed for record on September 29, 1883, 20

days after the death of Peter Winter. It occupies four pages of the printed abstract, and is in the form of a lease by Peter Winter, of the first part, to Samuel Blair Winter, of the second part, of the Madison street property from the day of the death of the party of the first part, in the year 1870, to the day of the death of the party of the second part, in 1870. It provides that the "party of the second part is to pay all taxes and assessments and keep the property in good repair, and the rents of the above 905 and 907 West Madison street to be used for the support and maintenance of Samuel Blair Winter so long as he may live. After his death the rest of the property 905-907 West Madison street shall be equally divided between my daughters, Mrs. Sarah P. Dibble and Estella Winter, or if they should die, or either of them, then each one's share to go to their children, if any, or either die without heirs, the surviving heirs to have the income by complying with the requirements of this lease." Then follow about three pages of covenants and agreements entirely inappropriate to a deed conveying a life estate or fee, and meaningless in that connection, but of such a character as are frequently found in leases.

That an instrument relating to this Madison street property was executed by Peter Winter and Samuel Blair Winter about the time of the date of this instrument and delivered to Samuel Blair Winter is proved by the testimony of Isaac Winter. An instrument relating to this Madison street property purporting to be executed by Peter Winter and Samuel Blair Winter was filed for record in the recorder's office of Cook county on September 29, 1883, and there recorded. But the evidence fails to show that these two are the same instrument. The deposition of Isaac Winter, the attesting witness, was taken in the spring of 1910—29 years after the instrument was executed, when he was 89 years old. He testified that he remembered being a witness to an instrument in November, 1880, between Samuel Blair Winter and Peter Winter—a lease of the Madison street property. The lease was to go to Blair Winter and the rent of these shops after his father's death, then the rents were to go to Sarah P. Dibble and Estella Winter; that it was a long instrument, written on one sheet with a pen, but not in the handwriting of either Peter Winter or Samuel Blair Winter. When the recorder's copy was read over to him, he said he believed it was a copy of the lease referred to, but on cross-examination said that he could not tell about that; that all he remembered about the lease was the part that was to go to Blair and the girls, the way he understood it; that all he remembered was that Blair was to draw after Peter's death; that it should go to Estella Winter and Sarah Dibble, the rents of the shops were to go to them; that, when they died, he did not re-

member exactly what was to become of it, or whether the lease said anything about that or not. He said that he remembered the meaning of the lease and that was about all, he could not remember the language; that he had read the lease, but was uncertain whether he had read all of it; that he had not seen or thought of it since 1881, when Samuel Blair Winter had it; that it was delivered to Samuel Blair Winter when Peter Winter signed it. No other witness who had ever read the instrument testified about it.

[3] The testimony of a witness 29 years after the casual reading of an instrument containing a thousand words or more, who cannot remember the substance of the instrument, but only the meaning of part of it as he understood it, and that he believes a document read to him is a copy of the original instrument, is not of that certain and satisfactory character required to divest titles to real estate. "To prove the contents of a written instrument, the vague recollections of witnesses are not sufficient to supply its place. The substance of the contract ought to be proved satisfactorily; and, if that cannot be done, the party is in the condition of every other suitor in court who has no witness to support his claim. When the parties reduce their contract to writing, the obligation and duties of each are described and limited by the instrument itself. The safety which is expected from them would be much impaired if they could be established upon uncertain and vague impressions of witnesses." *Rankin v. Crow*, 19 Ill. 628.

The appellant, Mrs. Dibble, testified that immediately after the death of Peter Winter Samuel Blair Winter had the lease in his possession; that he then delivered it to Mr. Dibble, her husband, to be recorded; that Mr. Dibble had it recorded and kept it until his death, when Mrs. Dibble found it in his papers and delivered it to her brother. Mrs. Dibble never saw the instrument in her father's lifetime, and does not say that she ever read it. She is therefore unable to identify the instrument given by her brother to her husband as the instrument executed by her father and witnessed by Isaac Winter.

[4] The certified copy of the instrument recorded in the recorder's office was not evidence of the contents of the instrument executed by Peter Winter. All instruments of writing relating to real estate may be recorded, and from the time of filing for that purpose they constitute notice to subsequent purchasers and creditors, whether acknowledged or proved according to law or not. The record of unacknowledged and unproved instruments is not, however, available as evidence for any other purpose than to show notice. The object of the recording laws in permitting such unproved instruments to be filed is not to preserve the evidence of title

but to give notice of claim. The record does not prove anything. It only gives warning which persons dealing with the land must heed.

[5] The statute provides that the acknowledgment of deeds and other instruments relating to real estate by the parties, or the proof of their execution in the manner mentioned in the statute, may be certified by certain officers authorized for that purpose, and that when so acknowledged or proved, whether recorded or not, they may be read in evidence without further proof of execution. If recorded, the record does not become primary proof, but may be resorted to only as secondary evidence upon its appearing, to the satisfaction of the court, that the original deed so acknowledged or proved and recorded is lost or not in the power of the party wishing to use it, in which case the record, or a transcript thereof, certified by the recorder, may be read in evidence. This is the provision of section 35 of chapter 30 of the Revised Statutes of 1874, and it cannot be plausibly insisted that the certified copy is admissible under this section, for it expressly applies only to deeds "acknowledged or proved according to the provisions of this act," and the only method of proof, according to those provisions, is by a witness whose testimony is certified to by the officer taking the proof.

[6] It is, however, argued that the certified copy is admissible under section 36 of chapter 30, because that section refers to instruments "acknowledged or proved according to any of the laws of this state," instead of "according to the provisions of this act," and it is said this instrument has been proved by the attesting witness, which is "according to the laws of this state." Disregarding the assumption thus made of the whole matter at issue (for if the instrument has been proved by the attesting witness there is no occasion for further discussion on this point), the assumption that the difference in the language of these two sections in the particular mentioned creates any different rule as to the application of the two sections is unwarranted. Section 35 of chapter 30 has been the law of this state since 1827, when it was enacted, substantially as it now reads, as section 17 of "an act concerning conveyances of real property." Under this section, this court held that, in order to admit certified copies of the instrument mentioned in evidence, it was necessary to make strict proof of the existence of the original, its loss, diligent search, and of all the requirements of the common law for the admission of secondary evidence. *Dickinson v. Breeden*, 25 Ill. 186. In order to obviate this construction, relax the rule laid down by the court, and modify the strictness of the common-law rule, the Legislature in 1861 passed an act which, with a slight change, became sections 36 and 37 of chapter 30 of the Revised Statutes of

1874. *Deininger v. McConnel*, 41 Ill. 227; *Fisk v. Kissane*, 42 Ill. 89; *Nixon v. Cobleigh*, 52 Ill. 387. This act was dealing with precisely the same subject as section 35, and the object of both was to obviate the difficulties attending the introduction of secondary evidence of instruments which had been acknowledged or proved and certified in such a way that the originals would be admissible without any preliminary proof. The act had nothing to do with the subject-matter of section 31, and was not intended to include in its provisions the miscellaneous, unacknowledged, and unproved documents and papers which might, under the provisions of that section, be recorded and constitute notice, but for the reading in evidence of which documents and papers, or the record thereof, neither that section nor any other made any provision. Section 35, when passed in 1827, was a part of the act which provided for the acknowledgment and proving of deeds, and therefore mentioned the instruments to which it referred as those "acknowledged or proved according to the provisions of this act." Section 36 did not purport to be a part of any other act, and this accounts for the different language, "acknowledged or proved according to any of the laws of this state," in which it refers to instruments of the same character as those mentioned in section 35. This difference in language does not require or justify any difference in the construction of the two sections. The statute does not authorize the reading in evidence of the record of a deed not acknowledged or proved as provided in chapter 30 of the Revised Statutes; and this conclusion is supported, inferentially, by the statement of the court in a case where a certified copy of the record of a deed was admitted, that "this evidence fulfilled the conditions of this statute, the lease having been properly acknowledged and recorded in the proper office." *Prettyman v. Walston*, 34 Ill. 175. The certified copy read in evidence by the appellants was not evidence of the contents of the instrument executed by Peter Winter.

[7] The evidence connecting the instrument executed with the instrument recorded is not satisfactory, nor is the evidence that Samuel Blair Winter caused this instrument to be recorded. The evidence of the contents of the instrument executed by Peter Winter other than the record is altogether unsatisfactory. So the claim that the appellee is estopped to deny this instrument because Samuel Blair Winter went into possession under it, collected the rents, and received the benefit of it during his lifetime is unfounded. While he collected the rents and claimed an interest in the property during his lifetime, the evidence fails to show that he did so under this instrument.

[8] Appellants introduced in evidence a blue print which Mrs. Dibble testified was a fac simile of the instrument. Its appearance

in the case is not very satisfactorily explained. Mrs. Dibble testified before the master on April 21, 1910. She could not remember ever having seen the lease in her father's lifetime, but saw it in her brother's possession immediately after the former's death. After her husband's death she found it in his safety deposit box and gave it to her brother. She had seen the original very many times and had it in her possession. It was written on several sheets of paper—probably as many as six—and was all written out in longhand. On May 26th Mrs. Dibble was again a witness before the master. A paper was put in her hands, and she testified that it was a fac simile of the original lease of the Madison street property; that she was perfectly familiar with the original lease; that it was in her hands, and she certainly was familiar with it; that the lease proper was printed and then her father filled it in; that it was all filled in with his writing, with which she was perfectly familiar. The blue print shows a printed form of lease, with blanks containing writing. It shows the signature of Peter Winter, but not either that of Isaac Winter or Samuel Blair Winter, as does the certified copy of the recorder. Mrs. Dibble gives no explanation of the discovery of the blue print, whence, when, where or how it came into her possession, whether she had it or had seen it when she testified five weeks before, who made it, under what circumstances, or what it was made from. Neither does she attempt any explanation of the versatility of her memory, which seems to respond readily to the exigency of the occasion. She seems to be as certain in May that the lease was written on the single sheet of a printed blank form as she was in April that it was all written in longhand, covering half a dozen sheets, but no more so. Without questioning her good faith, it seems impossible to repose implicit confidence in her accuracy and the fidelity of her memory under the circumstances. Isaac Winter also testified that the lease was written with a pen, but not in the handwriting of Peter or Samuel Blair Winter, and that both he and Samuel Blair Winter signed it as well as Peter Winter, yet the blue print shows no signature but that of Peter Winter. It may be said of the testimony of Mrs. Dibble that substantially all of it was incompetent because the appellee was suing as the devisee of a deceased person. Most of it was received, however, without objection, but her testimony in regard to the blue print was objected to on account of her incompetence and should not have been considered. Without it there was no foundation for the introduction of the blue print. On the whole, the blue print is not sufficiently authenticated to carry any weight.

[9] It is also insisted that Joanna O. Winter, the widow of Peter Winter and executrix of his will, to whom he devised all his property for life, in the inventory of his es-

tate (which she filed in the probate court) recognized the recorded instrument as valid and the instrument executed by Peter Winter. The item referred to, in setting out the title to the Madison street property, which is inventoried as a part of the estate, mentions "a paper purporting to be a life lease of said property, bearing date November 20, 1880, and signed by Peter Winter, to S. B. Winter and others, recorded September 29, 1883, in the recorder's office of Cook county, Illinois, in book 1376 of records, page 238." This was no recognition of the validity of the instrument, but rather a mere acknowledgment of the existence of a record purporting to affect the title.

[10] The appellants insist that they were not called upon, under the pleadings, to prove the contents of the instrument because the bill has attached to it as an exhibit an exact copy of the recorded instrument, and, as appellants claim, admits that it is a copy of the original instrument and makes no objection to it, except it is charged that there was no delivery of it in the lifetime of Peter Winter. The averments of the bill in regard to this instrument are that the appellee had been informed a certain instrument had been discovered among Peter Winter's papers after his death and had been filed for record and recorded, and a copy of the instrument as so recorded, was attached to the bill as an exhibit, and upon information and belief that the instrument never was delivered and for that reason never became operative. The answer averred that the instrument was delivered and became effective; that under it Samuel Blair Winter entered into possession of the premises and collected and appropriated the rents to his own use; and that thereby he and those claiming under him were estopped to deny the validity of the instrument. The issues on which the cause was submitted were not confined to the bill and answer, for a cross-bill was filed by the appellant Estella W. Gair, in which the execution and delivery of the instrument of November 20, 1880, were averred. The appellee answered the cross-bill, setting up, as in her original bill, the information which she had received in regard to this supposed instrument, but expressly stating that she had no personal knowledge as to the truth of such information and did not make any representation or admission in respect thereto, but left the cross-complainant to make such proof as she might be advised in respect of the execution and delivery of the said supposed instrument. Under these pleadings, there was no admission in regard to the instrument in controversy, but all questions in regard to its existence, identity, execution, and contents were left for determination by evidence.

We are satisfied with the conclusion of the chancellor that the instrument of November 20, 1880, was not established by the evidence.

[11] By his will Peter Winter devised all his real estate, so long as she should remain his widow, to his wife, whom he nominated executrix, with power to sell a part of such real estate. She died not having remarried. The remainder in the Warren avenue property passed by the following clause in the will: "My real estate in Chicago is not to be sold nor encumbered by my executrix, but in case of her marriage, then, subject to her marital rights as my widow or at her decease, * * * my real estate which I now own in Chicago is to be held, owned and used by my said children, as equal co-owners, for and during the full period of their several natural lives, but in case of the death of any one leaving heirs, then the share of such deceased child, in equal portions, shall descend to his or her heirs, and upon the death of my said children, or any of them, the property shall descend to their respective heirs in fee simple absolute." This language manifested the testator's intention to give to each of his three children, subject to the life estate of his widow, an estate for life, and for life only, in one-third of the real estate he owned in Chicago at the date of the will. The two clauses which follow this gift, "but in case of the death of any one leaving heirs, then the share of such deceased child, in equal portions, shall descend to his or her heirs," and "upon the death of my said children, or any of them, the property shall descend to their respective heirs in fee simple absolute," do not in any way qualify or affect the life estate so given. They refer to two distinct contingencies which may arise, unless, as suggested by counsel for appellants, the second clause be regarded as mere repetition, by way of special emphasis of what was said in the first. It cannot, however, be so regarded, for it is a rule frequently referred to in the interpretation of written instruments that the intention must be ascertained from a consideration of the whole instrument; that every word in the instrument is presumed to have been placed there for some purpose and must be given effect in arriving at the intention; and that none can be arbitrarily rejected as meaningless or surplusage. A construction which requires the rejection of an entire clause in an instrument is not to be admitted except from absolute necessity. *City of Alton v. Illinois Transportation Co.*, 12 Ill. 38, 52 Am. Dec. 479; *Mittel v. Karl*, 133 Ill. 65, 24 N. E. 553, 8 L. R. A. 655.

The sole object of construction of a will is to ascertain the intention of the testator. That intention will be enforced unless it violates some rule of law. In seeking it every word will be scrutinized and given force, if possible. The language will be interpreted in view of the circumstances attendant upon each case, and the variety of language and of circumstances is so great that precedents are usually of little value.

Rules of interpretation have been announced and are observed, but all yield to the prime rule that the intention of the testator must control. The general scheme of Peter Winter's will is not complex. Disregarding details not material here, it was to provide for his wife by giving to her the use, rents, and profits of all his estate during her life; then for his children by giving them, among other things, after his wife's death, his Chicago real estate for life, only; then to give the fee ultimately to the heirs of his children. The first question arises out of the clause, "in case of the death of any one leaving heirs." The parties do not disagree that the word "heirs" here means children or heirs of the body, and such must be its meaning. *Bradsby v. Wallace*, 202 Ill. 239, 66 N. E. 1088. They do differ, however, as to the time to which the words referring to the death of any of the children relate. The appellants insist that they refer to death at any time, and that the children of the appellants now living have a contingent interest in the property in which the parents have a life estate only, while the appellee insists that the words refer to death in the lifetime of the widow, and that, the children having survived her, the contingency no longer exists.

The appellants rely upon the rule laid down in *Fifer v. Allen*, 228 Ill. 507, 81 N. E. 1105, and other cases, that, when a devise is made to one in fee and in case of his death to another in fee, the devise over will be interpreted as referring to death in the testator's lifetime only, but when the death of the first taker is coupled with a condition which may or may not occur, as death during minority or leaving no children, the devise over, unless controlled by the context, will be interpreted as referring to death at any time. Those were all cases of conditional fees, where, by an executory devise, the estate in fee of the first taker was terminated and another fee limited in place of it, and do not, in terms, apply to the case in hand. Whether the rule applies, in principle, to this case or not, it is only a presumption, which yields to a contrary intention shown by the will. The testator here has sufficiently indicated the period for the final ascertainment of the interests vesting under his will at the death of his wife. Then it is that his children come into possession of their life estates. The parenthetic clause does not affect the estates, but provides for the contingency of a child's death occurring before the widow's by substituting an estate in fee to such child's children for the life estate given the child which cannot come into possession. The clause is introduced by the word "but," which indicates an exception to what has gone before, and not by the word "and," which would indicate a continuation of the same subject. "But," whether used as a conjunction or a preposition, indicates exception. As a conjunction,

it is used as a connective of sentences more or less exceptive or adversative. It marks opposition in passing from one thought to another. It is defined, "except," "unless," "save," "yet," "still," "however," "nevertheless." Webster's New Int. Dict.; Century Dict. In the present instance it excepts the case mentioned in the clause it introduces from the operation of the preceding clause. The preceding clause provides that at his wife's decease the real estate shall be held, owned, and used by testator's children as tenants in common during their natural lives. The time to which it refers is "at her decease." The exception refers to the same period. It does not refer to a death occurring after her decease. In such case there would be no exception from the preceding clause, for the life estate would have been enjoyed to the same extent as if the exception had not been introduced. The meaning is that at the wife's decease each child shall have a life estate, except in case of the death of one leaving children, in which case his or her children shall take in fee the share the parent would have taken for life. This construction, that the intention of the testator was not to create a contingent remainder, but to provide that the issue of any of his children dying before his wife should be alternative beneficiaries of the shares of their parents, is further supported by the fact that what is devised over is the "share of such deceased child," the natural meaning of which is an undivided portion of the estate while it existed as his estate, and not many years after distribution, as might probably be the case. *Lumpkin v. Lumpkin*, 108 Md. 470, 70 Atl. 238, 25 L. R. A. (N. S.) 1063; *Galloway v. Carter*, 100 N. C. 128, 5 S. E. 4; *Fairfax v. Brown*, 60 Md. 50. In the subsequent clause, where the reference is to the remainder after the distribution of the life estate, the testator uses the word "property," and not "share." In fact, all the children survived the widow, so that the clause referring to "death leaving heirs," as we have construed it, has no effect upon the estates created by the will, but the will is to be construed as though it devised to the three children life estates as tenants in common, "and upon the death of my said children, or any of them, the property shall descend to their respective heirs in fee simple absolute." The question is presented whether the rule in *Shelley's Case* is applicable to this language. Under the operation of that rule, if a life estate is granted and by the same instrument the remainder is limited to the heirs of the life tenant, the law declares the remainder to be to the life tenant and both estates vest in him. *Balls v. Davis*, 241 Ill. 536, 89 N. E. 706, 29 L. R. A. (N. S.) 937.

It is argued, first, that the word "heirs" means "heirs of the body," and it is so argued because the same word in the preceding clause admittedly means "heirs of the

body." Ordinarily it will be presumed that a word used more than once in an instrument has the same meaning each time. This is, however, only a presumption. Technical words are presumed to be used according to their technical meaning, and will be given that meaning unless it clearly appears that they were not used in that sense. The word "heirs" in the prior clause is construed "children" or "heirs of the body" because the context makes it certain that no other meaning could have been intended. The two clauses do not concern the same thing, the first referring to the case where no life estate has come into possession, the second to the disposition of property after the termination of the life estate. The word is used in such different connection in the two cases that its use as "heirs of the body" in the one case does not require it to be given other than its technical meaning in the other.

It is also insisted that in the second clause the word "heirs" means collateral heirs, being contrasted with "heirs" in the first clause meaning "heirs of the body." Under our construction these clauses are not related, but the "heirs" referred to in the second clause are the general heirs.

[12] It is next insisted that the words "in fee simple absolute" show that the word "heirs" was used as a word of purchase and not of limitation, and that therefore the rule in *Shelley's Case* does not apply. The effect of the rule where it applies is that the law declares the remainder expressed to be to the heirs, a remainder to the ancestor. One taking in the character of heir must take in the quality of heir, and all heirs taking as heirs must take by descent and must take the estate of the ancestor. The limitation to heirs by that name as a class, to take in succession from generation to generation, requires the estate of inheritance imported by that limitation to vest in the ancestor. It is the nature of the estate intended to be given to the heirs, whether by inheritance or otherwise, which determines the application of the rule. *Baker v. Scott*, 62 Ill. 86; *Vangleston v. Henderson*, 150 Ill. 119, 36 N. E. 974; *Ward v. Butler*, 239 Ill. 462, 88 N. E. 180, 29 L. R. A. (N. S.) 942; *Balls v. Davis*, supra. The ordinary form of a conveyance of a fee at common law was to the grantee and his heirs. A conveyance to the grantee alone gave a life estate only. The added words, "and his heirs," indicated a fee simple. The word "heirs" was not used to describe the persons who were to take the estate after the grantee's death, but the quality of the estate granted, which was a fee. The estate granted was not different if given to the grantee for life with remainder to his heirs. The addition to the ordinary formula for granting a fee of the words "for life" was regarded merely as an effort to restrict the grantee's enjoyment of the fee granted to him by restraining his power of alienation, and the law would not permit

this to be done. The word "heirs" had therefore, long before Shelley's case arose, been regarded as a word descriptive of the estate and not of the person, and the rule called by Shelley's name was merely the announcement of a legal principle which had then been applied by the courts for more than 200 years. The rule as stated by Coke (volume 1, 104a) is that "when the ancestor by any gift or conveyance takes an estate of freehold, and in the same gift or conveyance an estate is limited, either mediately or immediately, to his heirs in fee or in tail, that always in such cases 'the heirs' are words of limitation of the estate and not words of purchase." This is a rule of law and not of construction, and the use of the word "heirs," unless it clearly appears from the instrument to have been used in a sense different from its strict legal meaning, is conclusive of the intention. No declaration, however positive, that the ancestor shall be tenant for life and no longer, and shall have no power to sell or dispose of the premises or any part of them, or to defeat the intention of the testator, will prevent the application of the rule. Lord v. Comstock, 240 Ill. 492, 88 N. E. 1012; Deemer v. Kessinger, 208 Ill. 57, 69 N. E. 28; Hageman v. Hageman, 129 Ill. 164, 21 N. E. 814; Carpenter v. Van Olinder, 127 Ill. 42, 19 N. E. 868, 2 L. R. A. 455, 11 Am. St. Rep. 92. If a testator has used technical language which brings the case within the rule, a declaration, however positive, that the rule shall not apply, or that the estate of the ancestor shall not continue beyond the primary express limitation, or that his heirs shall take by purchase and not by descent, will be unavailing to exclude the rule and cannot affect the result. Daniel v. Whartenby, 17 Wall. 639, 21 L. Ed. 661; Hargrave's Law Tracts, 562; 2 Jarman on Wills, 311. A grantor or testator may use the word "heirs" in the sense of "children," and, if it clearly appears to have been so used, the rule will not apply, because it then appears that the word was not used to describe the estate granted, but the persons who should take the estate. Whenever it is made to appear by the language of the instrument that the words of inheritance were not used according to their legal import to include the whole line of inheritable blood of the ancestor and to make him the stock of descent, but have been used in a restrictive and untechnical sense, to designate individuals to whom a distinct estate is given and from whom, as its origin, the descent is thereafter to be derived, the rule will be excluded. The words relied upon here, "in fee simple absolute," in no manner affect the meaning of "their respective heirs." Without those words "the heirs" would imply a fee simple. With those words they mean nothing else. There is no doubt of the intention of the testator to give to his children a life estate only, and not an estate in fee. It is equally manifest that he intended

their heirs to take precisely the estate which they would have inherited from their parents. There is nothing in the language to indicate that he intended the heirs to take it in any other way than as heirs. This is the exact situation which calls the rule into operation. The devise is to each child for life, remainder to his heirs. The words "in fee simple absolute" add nothing to the meaning. They do not indicate that the heirs shall take their fee-simple estate otherwise than as heirs.

Our attention has been called to various cases where words of limitation or of explanation added to the words "heirs" or "heirs of the body" have been held to qualify those words so as to show that they were not used in their technical sense but as meaning "children" or "issue" or the persons who might be heirs at a particular time, or as describing in some other way the particular persons to whom the estate should go. In such cases the rule does not apply.

In *Butler v. Huestis*, 68 Ill. 594, 18 Am. Rep. 589, the appointment was to Altieri A. Huestis during her natural life, "the reversion and fee thereof to the heirs of her body at and after her decease." The court stated that the rule in Shelley's Case can operate in this state only in the one case where a devise gives the ancestor a freehold for life and limits the inheritance in fee to the heirs without naming any particular class, and that, therefore, the court was under no imperative necessity to regard the words used in the will, "heirs of the body," as words of limitation rather than words of purchase. It was held that the words "heirs of the body," as employed in the will, might be regarded simply as words of description, designating the children of Mrs. Huestis as the persons who should take the fee of the estate, and the only words upon which this proposition was based were "at and after her decease"; the court saying: "The very fact the enjoyment of the estate is postponed until 'at and after the decease' of Mrs. Huestis, and then becomes absolute, shows beyond doubt the testatrix did not use the words 'heirs of her body' in the common-law sense of the words of limitation, to indicate a class of persons to take from generation to generation." The decision reached in that case was inevitable, for the only question in the case was whether the appointment to Mrs. Huestis disposed of the fee; and whether the words were to be regarded as words of limitation, which would create an estate in tail at common law, which the statute would turn into an estate for life in Mrs. Huestis with a remainder in fee simple absolute to the heirs of her body, or mere words of purchase, which conveyed the remainder, after her life estate, to her children in fee simple, the result was the same so far as the fact of the disposition of the fee was concerned. Whether the fact that the enjoyment of an estate in remainder ex-

pectant upon the termination of the natural life of a preceding tenant was postponed until "at and after the decease" of such life tenant could throw any light upon the intention that the remaindermen should take by inheritance or purchase or not, this case is no authority, direct or indirect, for the proposition that the addition of the words "in fee simple absolute" to a remainder devised to "heirs" qualified the latter word so as to require it to be regarded as a word of purchase and not of limitation. Words added cannot be said to qualify an expression if the expression means the same thing with the words added as without.

In *Fowler v. Black*, 136 Ill. 363, 26 N. E. 596, 11 L. R. A. 670, it is expressly stated that the declaration in a deed that it was the true intent and meaning of the instrument that the grantee should hold only during his natural life and upon his death the premises should be held in fee simple by his heirs was wholly ineffectual to make the word "heirs" a word of purchase.

The case of *Westcott v. Meeker*, 144 Iowa, 311, 122 N. W. 964, 29 L. R. A. (N. S.) 947, is also cited by counsel for appellants. The Supreme Court of Iowa had held in *Doyle v. Andis*, 127 Iowa, 36, 102 N. W. 177, 69 L. R. A. 953 (a case involving the construction of a deed) that the rule in *Shelley's Case* was a part of the common law of that jurisdiction. In *Westcott v. Meeker*, supra, which involved the construction of a will, it was held that the rule should not be so applied to a will as to defeat the manifest intention of the testator in respect to the estates devised. The will in question devised the estate to children during their natural lives, with "no power to convey or dispose of the same, their respective portions, for a longer time than during their natural lives, respectively. At the death of my children aforesaid, their respective portions * * * descend to their heirs, respectively, said heirs to have absolute title unto their respective portions." Of course, the intention of the testator that his children should have no more than a life estate and that the title should descend to their heirs was manifest, and it was held that the will should be construed according to the intention, without regard to the rule in *Shelley's Case*. The effect of these two decisions was that until the recent abolition of the rule in Iowa by statute the rule in *Shelley's Case* was in force in that state as to deeds, but not as to wills. No such distinction prevails elsewhere, to our knowledge, and certainly not in this state. *Lord v. Comstock*, supra; *Hageman v. Hageman*, supra; *Carpenter v. Van Olinder*, supra. In the latter case the language of the opinion in *Belslay v. Engel*, 107 Ill. 182, is expressly disapproved in so far as it seems to place the decision upon the intention of the testator as determined from a consideration of all the language of the will, and not upon his evident intention

to use the words "legal representatives" or "legal heirs" as synonymous with "children," and therefore as words of purchase, and not of limitation.

[13] It is insisted that the decree must be reversed for want of necessary parties, viz., the children and grandchildren of the appellants, who would have an interest in the property under the instrument of November 20, 1880. It is also insisted that no decree should have been rendered until the determination of the proceeding to set aside the copy of the will of Samuel Blair Winter and until the debts of his estate have been barred in this state. The appellants filed a cross-bill, in which they claimed to be the owners of the property involved in this proceeding, subject to the contingent interest, in a part thereof, of their children and grandchildren, who were made parties to the cross-bill, but not served with process. By this cross-bill the appellants sought to have a partition of the premises. On motion of the complainant the original bill, being at issue, was referred to a master in January, 1910, but the cross-bill, for want of service on some of the defendants, was not then at issue. No summons, either before or after that time, was issued on the cross-bill, but in April following it was dismissed by the complainants therein as to their children and grandchildren, and on their motion the order of reference theretofore made was extended to the cross-bill. Thereafter the bill and cross-bill were prosecuted by the respective complainants in the usual way and were brought to a hearing together. No objection was made by any party to proceeding for want of parties. The administration of Samuel Blair Winter's estate was had presumptively in the state of Michigan, and there is no intimation that there were any debts which were likely to become chargeable upon his real estate in Illinois. The pendency of the suit to set aside the copy of Samuel Blair Winter's will was never brought to the attention of the court in any way until the hearing on exceptions to the master's report, when counsel for the appellants, in argument, questioned the right and propriety of entering a final decree until the other suit was disposed of; and stated that the latter matter would have to be determined before a decree could be entered in the pending cause. After the hearing had been concluded and the court, having held the cause under advisement for two weeks, had announced its decision, and when, two weeks later, a draft of the decree had been presented to the court for approval, counsel for the appellants entered a motion to withhold the entry of the decree until after the determination of the other case. Up to this time both the appellants and the appellee had been prosecuting the cause, calling upon the court to exercise its jurisdiction, to grant the relief they were respectively seeking, and to make partition of the premises.

If the court ought not to have heard and adjudicated the cause, it was induced to do so by the joint efforts of all the parties, and none of them can now complain that the court did what it was asked to do. If there are interests which were not represented, they are not bound by the decree. The execution of the decree will not affect such interests. If, in a contested cause, parties knowingly choose to submit their rights in the absence of others who ought to be parties to a complete adjudication, but are not necessary parties to the immediate controversy and whose rights will not be affected, a party who has deliberately and intentionally procured the adjudication to be made in the absence of such parties cannot have it reversed because they were not before the court.

[14] By the decree the cause was referred again to the master in chancery for an accounting, and among other things it was ordered that the master, to enable the court to arrive at a basis for apportioning the costs, including a reasonable solicitor's fee, should ascertain and report, in accordance with the practice in such cases, what is a reasonable sum for the necessary services of the complainant's solicitor in the cause. It is contended that the appellee is not entitled to any allowance against the estate for solicitor's fees. No allowance has been made to the appellee nor has it been adjudicated that she is entitled to any. It may never be so adjudicated. The reference for an accounting and the ascertainment of a solicitor's fee is merely interlocutory. *Jones v. Young*, 228 Ill. 374, 81 N. E. 1042; *Glos v. Clark*, 199 Ill. 147, 65 N. E. 135. Upon the coming in of the master's report the court may either allow or refuse to allow a solicitor's fee. Until such action of the court its order is not the subject of appeal.

Decree affirmed.

(176 Ind. 353)

BEARD, County Auditor, v. STATE ex rel. GOTTA. (No. 21,928.)

(Supreme Court of Indiana. Oct. 13, 1911.)

1. STATUTES (§ 159*)—PLEADING—IMPLIED REPEAL.

Under the rule that implied repeals are not favored, a later act will not repeal a former by implication, unless it is so repugnant as to render the conflict irreconcilable.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 229; Dec. Dig. § 159.*]

2. INTOXICATING LIQUORS (§ 45*)—LICENSES—APPROVING BOND—"FEES."

Fee and Salary Law 1895 (Acts 1895, c. 145; Burns' Ann. St. 1908, § 7325) § 115, providing that for each retail liquor license \$4 shall be paid by the licensee, and for taking, approving, indexing, and recording the bond, \$1 was not impliedly repealed by Act March 4, 1911 (Acts 1911, c. 119), providing that the license fee prescribed by that act shall be the only fee required for the issuing of licenses, the term

"fees" as used in the latter act not being intended to mean compensation for services of officers as in the fee and salary act, but an amount paid for the privilege of carrying on the business of a retail liquor dealer.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 47; Dec. Dig. § 45.*]

For other definitions, see Words and Phrases, vol. 3, pp. 2712-2716.]

Appeal from Circuit Court, Vanderburgh County; C. A. De Brulen, Judge.

Mandamus by the State, on the relation of William Gotta, against Charles P. Beard, Auditor of Vanderburgh County. Judgment for relator, and respondent appeals. Reversed.

George A. Cunningham and Daniel H. Ortmeier, for appellant. Edgar Durre and C. T. Curry, for appellee.

MONKS, J. The relator brought this action under the statute to compel appellant to perform an alleged legal duty.

The only question presented is whether or not a person who is granted a renewal of his license "to sell intoxicating liquors at retail" under the provisions of "An act concerning intoxicating liquors," approved March 4, 1911 (Acts 1911, pp. 244-267), commonly known as the "Proctor Law," is required to pay to the county auditor the fees provided in that part of section 115 of the fee and salary law of 1895 (Acts 1895, p. 348), being section 7325, Burns' 1908, which reads as follows: "For each retail liquor license to be paid by the licensee, four dollars. * * * For taking, approving and indexing and recording bond, one dollar." The relator claims that he is not required to pay said fees as provided in said section 115 of said act of 1895, above set out, for the reason that said provisions were repealed by implication by that part of section 5 of the Proctor law, which reads as follows: "The license fee provided in this act shall be the only fees required for the issuing of license to sell intoxicating liquors at retail." Acts 1911, § 5, p. 250. The court below sustained this contention, and rendered final judgment against appellant. If this contention of relator is correct, the judgment must be affirmed, but, if not, it must be reversed.

[1] It is well settled that repeals by implication are not favored, and therefore two or more acts must be so construed, if possible, that all may stand. It has been repeatedly held by this court that implied repeals are only recognized and upheld when the later act is so repugnant to the earlier as to render the repugnance or conflict between them irreconcilable. A court will always, if possible, adopt that construction which will permit both laws to stand and be operative. *Board, etc., v. Garty*, 161 Ind. 464, 469, 68 N. E. 1012, and cases cited; *Shea v. City of Muncie*, 148 Ind. 14, 21, 46 N. E. 138, and cases cited; *State v. City of Noblesville*, 157 Ind. 31, 34,

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

35, 60 N. E. 704; *Pomeroy v. Beach*, 149 Ind. 511, 516, 49 N. E. 370, and cases cited; *Robinson v. Rippey*, 111 Ind. 112, 12 N. E. 141.

[2] Applying this rule, it is evident that the provisions of the Proctor law did not repeal that part of section 115 of the fee and salary law of 1895, above set out. The \$4 "for retail liquor license" and the \$1 for "taking, approving, and indexing and recording bond" are fees for the services of the auditor in performing the duties imposed upon him in regard to said liquor license and said bond. Such fees were under some earlier laws the property of the auditor, but under the act of 1895 they are the property of the county, and must be collected and paid into the county treasury to reimburse the county in part at least for the salary of the auditor. *Ryan v. State*, 95 N. E. 561. The fees, however, provided by and mentioned in the Proctor law are not for the services of any officer or person, but are paid for the privilege of carrying on the business of a retail liquor dealer under the laws of the state, which forbid such business except by those who obtain such license. 23 Cyc. 71, 105, 106. It was in this sense that the word "fees" is used in the last clause of section 5 of the Proctor law, which provides that the license fees required by this act shall be paid into the tuition fund of the county. They do not belong to the county fund, but are a part of the school fund, and can only be used for such purposes as the law concerning the "tuition fund" provides. For the privilege of engaging in the business of a retail liquor dealer, it is evident that only the fees for such privilege provided by the Proctor law can be required under said last clause of section 5 of said law. In other words, if there were other laws fixing the fees to be paid for such privilege when the Proctor law went into effect, only the fees for such privilege provided in the Proctor law can be required. It is clear that the word "fees" used in the last clause of section 5 of the Proctor law has no reference to the "fees" provided in section 115 of the fee and salary law of 1895 for the services of the county auditor in the issuance of the license and approving, indexing, and recording the bond. The certificate of renewal which the Proctor law requires the county auditor to issue to the person obtaining an order therefor is a "retail liquor license" within the meaning of section 115 of the fee and salary law of 1895 (Acts 1895, p. 348; section 7325, *Burns* 1908). We hold, therefore, that, when a renewal of a license is obtained under the provisions of the Proctor law, the person obtaining such renewal must pay said fee of \$4 and said fee of \$1 as provided in section 115 (section 7325), *supra*.

It follows that the court erred in overruling appellant's demurrer to each paragraph of the complaint. Judgment reversed, with in-

structions to sustain the demurrer, and for further proceedings in accordance with this opinion.

(176 Ind. 323)

FEDERAL UNION SURETY CO. v. INDIANA LUMBER & MFG. CO.

(No. 21,967.)

(Supreme Court of Indiana. Oct. 10, 1911.)

1. EVIDENCE (§ 355*)—DOCUMENTARY EVIDENCE—MEMORANDA—"ORIGINAL RECORD."

It was complainant's custom in operating a lumber yard, on receiving an order, to write the substance on a small order blank, which was given to a loader, who put the material on a wagon, and returned the slip to the yard clerk, who then made three "original slips" on an automatic register, showing the date, names, quantity, price, etc. In filling out the blanks the machine made three exact copies of the slips by one impression, and automatically numbered them. One of the slips was given to the driver, who delivered the lumber, and the other two and the original written memorandum retained by plaintiff. *Held*, that the original written memorandum was a mere shop book entry, and not ordinarily admissible, but that one of such "original slips" retained by plaintiff in its office was admissible as the original record.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 1444, 1484-1491; Dec. Dig. § 355.*]

2. WITNESSES (§ 255*)—REFRESHING RECOLLECTION—MEMORANDA.

In an action for the price of lumber sold, a hauler for plaintiff testified that he delivered a number of loads to the contractor, that in some instances he examined the original slips to see if the load contained the lumber described in the slip, but usually the contractor or his foreman checked the slip as the lumber was unloaded. He was then handed a slip of a certain number, and asked if he remembered delivering a load of lumber represented by the slip, and answered in the affirmative. *Held*, that the court properly permitted him to refer to the slip to refresh his recollection, and then to state the number of pieces and dimensions and kinds of lumber he unloaded from the wagon on that date, over an objection that the witness did not make the slip or verify the same, and was not present when it was made.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. §§ 874-890; Dec. Dig. § 255.*]

3. EVIDENCE (§ 250*)—ADMISSION OF LIABILITY—PRINCIPAL AND SURETY.

In an action against a contractor's surety, evidence that the principal, on being presented with a bill by plaintiff, stated that the job was about complete, and that he would mail a check as soon as it was completed, was *prima facie* admissible as an admission of some liability by the principal, though he was not a party to the suit.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 976-982; Dec. Dig. § 250.*]

4. EVIDENCE (§ 543*)—EXPERTS—COMPETENCY.

Where, in an action for the value of lumber delivered, a witness testified that he had been engaged in the lumber business all his life, was familiar with the lumber business in retail, contract, and construction work, had seen the lumber in controversy after it had been placed in the sewer construction for which it was purchased, he was sufficiently qualified to testify as to its value.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. § 2358; Dec. Dig. § 543.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

5. EVIDENCE (§ 525*)—EXPERTS—SUBJECT OF OPINION EVIDENCE—VALUE.

The value of lumber sued for used in sewer construction work was a proper subject for opinion evidence.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2333; Dec. Dig. § 525.*]

Appeal from Circuit Court, La Porte County; John C. Richter, Judge.

Action by the Indiana Lumber & Manufacturing Company against the Federal Union Surety Company. Judgment for plaintiff, and defendant appeals. Transferred from Appellate Court under Acts 1901, c. 259 (Burns' Ann. St. 1903, § 1405). Affirmed.

Samuel Dowden, F. H. Wurzer, and Osborn, McVey & Osborn, for appellant. F. J. Lewis Meyer, for appellee.

MORRIS, J. Appellee filed its complaint in the St. Joseph circuit court against one Peter Suizo and appellant on a city sewer bond executed by appellant as surety for Suizo, contractor. The venue was changed to the La Porte circuit court. Service of summons was never obtained on Suizo. Appellant filed answer, and the cause was tried on the issues formed by appellant's answers to the complaint. There was a special finding of facts made by the court, and conclusions of law stated thereon. Appellant excepted to each conclusion of law. Judgment was rendered against appellant for \$842. Appellant filed a motion for a new trial, alleging therein that the decision of the court is contrary to law, and is not supported by sufficient evidence, and that the court erred in certain instances in the admission and exclusion of evidence. This motion was overruled. The errors assigned and discussed in appellant's brief relate only to the action of the court in the admission of evidence, and to the sufficiency of the evidence to support the judgment.

In November, 1903, a contract was executed by Peter Suizo, contractor, and the board of public works of the city of South Bend, by the terms of which Suizo agreed to construct a certain sewer in that city and to pay for all "material used in said work." It was also provided in the contract that the city might reserve out of any allowance made on any estimate in favor of the contractor so much as might be necessary to pay materialmen for amounts due them on the work. Accompanying the contract, and attached thereto, was a bond executed by Suizo as principal and appellant as surety in the penalty of \$17,500 for the faithful performance of the contract by the principal. The complaint was for the value of lumber furnished by appellee to Suizo, and by him used in the construction of the sewer. Appellee was engaged in the lumber business in South Bend. After the letting of the contract, Suizo informed appellee that he would

need lumber to use in the construction of the sewer. Appellee quoted prices, with the result that it was agreed that appellee should furnish the lumber. This was furnished as needed in the work. The orders for the lumber were given by Suizo at various times, usually over the telephone. The method used by appellee in transacting the business was as follows: When one of appellee's agents received an order from the contractor, he wrote on a small order blank the substance of the order. This slip was given to the yard clerk, who, in turn, gave it to a loader. The loader put the material on the wagon, and returned the slip to the yard clerk. Before the load was delivered, the clerk made, on a machine called an autographic register, three "original slips." These slips were on printed blanks, with appropriate headings, and, when filled out, showed the name of the employé who received the order, the name of the person who ordered the lumber, the name of the employé who checked the load, and of the driver who was to deliver it, and the particular point of delivery. Under a heading, "Quantity," the number of pieces of lumber was stated. Under the heading "Description," the kind and dimension of pieces were written. Under a heading of "Feet," the number of feet was stated. Under the heading, "Price," the prices per thousand feet, of each kind of lumber ordered, were written. Under the heading, "Amount," the charge for the lumber was stated, and, where more than one kind was ordered, these charges were added together, and the total amount stated. In filling out these blanks the machine made three exact copies by one impression, and automatically numbered them. One of these "original slips" was given the driver who delivered the same to the contractor, when he delivered the lumber. The contractor examined the slip as the lumber was unloaded. There were 43 deliveries of lumber. Appellant retained two of the three "original slips," and also the original written memorandum made by the employé receiving the order, and placed the same on its files.

[1] Over appellant's objection, the court admitted in evidence one of each of the two "original slips" retained in its office by appellee. Appellant contends that this was error, because the original written memorandum retained by appellee was the best evidence; that the register slip was but a copy of the original memorandum. This position is not tenable. The original written memorandum stood on the same footing as a shop book entry, and would not ordinarily have been admissible over proper objection. The register slip was admissible, however, because it—or a triplicate original thereof—was delivered to the contractor with the lumber and as a part of the same transaction.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

and was admissible to prove the kind and quantity of lumber delivered at the sewer. It was not necessary, in this case, to account for the slip delivered to the contractor before offering the copy thereof retained by appellee. Each of the three slips was printed by a single mechanical impression. There is a distinction between letter press copies of writing and triplicate writings produced as was the slip in controversy. The law does not require the doing of unnecessary things. The slip delivered to the contractor was of necessity exactly like the slip admitted, and may be regarded as a triplicate original, and no useful purpose would be subserved by requiring a notice for the production of the slip delivered to the contractor. *International Harvester Co. v. Elfstrom* (1907) 101 Minn. 263, 112 N. W. 252, 12 L. R. A. (N. S.) 343, 118 Am. St. Rep. 626; *Wright v. Chicago, etc., R. Co.*, 118 Mo. App. 392, 94 S. W. 555; *Cole v. Elwood Power Co.*, 216 Pa. 283, 65 Atl. 678; *Virginia-Carolina Chemical Co. v. Knight*, 106 Va. 674, 58 S. E. 725; *Waterman v. Davis*, 66 Vt. 83, 28 Atl. 664; *Gardener v. Eberhardt*, 82 Ill. 316; *Rex v. Watson*, 2 Starkie, 116. Appellant maintains that these original slips were, in effect, the same as shop book entries, and therefore were not admissible. This assumption is not well founded. One of each of these original slips was delivered to the principal at the time the lumber was delivered, and was therefore admissible as a part of the *res gestæ*. *Heady v. Brown* (1898) 151 Ind. 77, 49 N. E. 805, 51 N. E. 85; *Fleming v. Yost* (1894) 137 Ind. 95, 36 N. E. 705; *Ohio, etc., R. Co. v. Stein* (1892) 133 Ind. 243, 31 N. E. 180, 32 N. E. 831, 19 L. R. A. 733.

[2] One of the witnesses, Josiah Cline, was a lumber hauler for appellee. He testified that he delivered a number of loads of lumber to the contractor. He testified that in some instances he examined the original slip itself to see if the load contained the lumber described in the slip, but usually the contractor or his foreman checked the slip as the lumber was unloaded. He was handed a slip of a certain number, and asked if he remembered delivering a load of lumber represented by the slip. He said he did. The court permitted him to refer to the slip to refresh his recollection, and then state the number of pieces and dimensions and kinds of lumber he unloaded from the wagon at the sewer on a certain date. Appellant asserts this was error because it was shown that the witness did not make the slip, or verify the same, and was not present when it was made out. The court did not err in permitting the witness to refresh his recollection from the slip.

[3] Forest Hillier, treasurer of appellee company, testified that as often as once a month he presented Suizo a monthly bill.

He testified that the last time he presented the monthly bill "was about the time of the completion of the sewer." He was then permitted to testify that at that time "Mr. Suizo told me that, as the job was about completed, he would mail me a check as soon as the job was completed." This was admitted over the objection of appellant that "Suizo is not a party to this suit, and any conversation had between the witness and Suizo would not be competent evidence against the defendant." There was no error. This was an admission of some liability, made by the principal, against his interest, in the course of the business provided for in the bond, and was *prima facie* admissible against the surety in an action to which the principal was not a party. *Parker v. State* (1846) 8 Blackf. 292; *Nichols v. State ex rel., etc.* (1879) 65 Ind. 512; *Boone County Bank v. Wallace* (1862) 18 Ind. 82; *Foster v. Gaston* (1890) 123 Ind. 96, 23 N. E. 1092; *Brandt, Suretyship and Guaranty*, § 521; *Lancashire Ins. Co. v. Callahan*, 68 Minn. 277, 71 N. W. 261, 64 Am. St. Rep. 475; *Phillips v. Eggert* (1907) 133 Wis. 318, 113 N. W. 686, 126 Am. St. Rep. 963; 16 Cyc. 1034.

[4] Appellant claims that there was error in admitting in evidence the opinion of one Hillier as to the value of the lumber delivered by appellee and used in the sewer work. The ground of contention is that the witness was not properly qualified to give opinion evidence. The record shows that the witness had been engaged in the lumber business all his life, and was familiar with the lumber business in retail, contract, and construction work, and had seen this lumber in controversy after it was placed in the sewer construction work. We think his qualification as expert could not be questioned.

[5] Appellant raises the further objection to the evidence of Hillier that the value of the lumber used was not a proper subject for opinion evidence. There is no merit in this.

The evidence supported the decision of the court. The judgment should be, and is, affirmed.

(176 Ind. 699)

KINSEY v. TOWN OF NORTH MANCHESTER. (No. 21,995.)¹

(Supreme Court of Indiana. Oct. 11, 1911.)

1. MUNICIPAL CORPORATIONS (§ 514*)—STREET IMPROVEMENTS—ASSESSMENTS—STATUTES—REPEAL—EFFECT ON PENDING CASES.

Acts 1909, c. 172, § 4, effective March 8, 1909, by repealing, without a saving clause, Acts 1905, c. 129, § 111 (Burns' Ann. St. 1908, § 8716), under which appraisers were appointed to reassess benefits upon street improvements, before such appraisers had made their report, deprived them of the power of making their report, reassessing benefits, or of proceeding further under such provision.

[Ed. Note.—For other cases, see *Municipal Corporations*, Dec. Dig. § 514.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes
¹ Rehearing denied.

2. MUNICIPAL CORPORATIONS (§ 514*)—IMPROVEMENTS.

The overruling of an objection to the appointment of appraisers to assess benefits in street improvement proceedings was harmless to the landowner, even if erroneous, where they never made any reassessment of benefits.

[Ed. Note.—For other cases, see *Municipal Corporations*, Dec. Dig. § 514.*]

Appeal from Circuit Court, Wabash County; A. H. Plummer, Judge.

Proceedings by Horry Kinsey against the Town of North Manchester. From a judgment confirming the report of appraisers appointed to assess benefits and overruling an objection to their appointment, plaintiff appeals. Affirmed.

Transferred from Appellate Court under Burns' Ann. St. 1908, § 1405 (Acts 1901, c. 259).

Lesh & Lesh, for appellant. Sayre & Hunter, for appellee.

MONKS, J. On January 13, 1909, the court below upon appellant's petition appointed three appraisers under section 111 of the act of 1905, concerning municipal corporations (Acts 1905, pp. 292-294; section 8716, Burns' 1908), to reassess benefits to his real estate on account of certain street improvement. On January 21, 1910, appellant objected and excepted to the appointment of said appraisers on the ground that they were not "disinterested freeholders as required by said section 111," and asked the appointment of appraisers "who are wholly disinterested." The court overruled said objection for the reason that the same "was made too late."

[1] It is not necessary to determine as to the correctness of this ruling of the court for the reason that, before the appraisers made their report, the part of said section 111 of the act of 1905 (section 8716, Burns' 1908) under which they were appointed was repealed without a saving clause by the act of 1909, which amended said section 111 of said act of 1905 (Acts 1909, pp. 423, 426). After March 8, 1909, when said act of 1909 took effect, said appraisers had no power to reassess the benefits to said real estate, or to proceed further under the provisions so repealed. *Taylor v. Strayer*, 167 Ind. 23, 28, 78 N. E. 236, 119 Am. St. Rep. 469, and cases cited; *Zintsmaster v. Aiken*, 173 Ind. 269, 88 N. E. 509, 90 N. E. 82, and cases cited; *Kohr v. Town of North Manchester*, 95 N. E. 1003, No. 21,997 this term.

[2] The action of the court in overruling the objection to said appraisers, even if erroneous, was harmless, because they never made any reassessment of said benefits.

The other questions in this case are the same as those in *Kohr v. Town of North Manchester*, this term, and *Spitzer v. Town of North Manchester*, 95 N. E. 1004, this term, and upon the authority of those cases we

hold that the court did not err in its ruling against appellant on such questions.

The judgment is therefore affirmed.

(176 Ind. 334)

WATTS et ux. v. WATTS. (No. 21,898.)

(Supreme Court of Indiana. Oct. 13, 1911.)

1. HABEAS CORPUS (§ 61*)—ACTION FOR CUSTODY OF CHILDREN—WAIVER OF ISSUANCE OF WRIT.

A defendant who appeared in response to the summons in an action in the nature of habeas corpus for the custody of a child and demurred to the complaint thereby waived the issuance of the writ of habeas corpus.

[Ed. Note.—For other cases, see *Habeas Corpus*, Dec. Dig. § 61.*]

2. HABEAS CORPUS (§ 57*)—COMPLAINT—WAIVER OF ABSENCE OF VERIFICATION.

A defendant who appeared in an action in the nature of habeas corpus for the custody of a child and did not object to the complaint because not verified, thereby waived the omission of a verification.

[Ed. Note.—For other cases, see *Habeas Corpus*, Cent. Dig. §§ 53, 54; Dec. Dig. § 57.*]

3. HABEAS CORPUS (§ 57*)—COMPLAINT—OMISSION OF VERIFICATION—MANNER OF RAISING OBJECTION.

A defendant in an action in the nature of habeas corpus for the custody of a child, who desires to raise the objection that the complaint is not verified, must move to strike the complaint from the files.

[Ed. Note.—For other cases, see *Habeas Corpus*, Cent. Dig. §§ 53, 54; Dec. Dig. § 57.*]

4. HABEAS CORPUS (§ 38*)—ACTION FOR CUSTODY OF CHILD—PARTIES ENTITLED TO SUE.

Under Burns' Ann. St. 1908, § 1164, providing that writs of habeas corpus shall be allowed in favor of parents, etc., a parent may sue in his own name for the custody of his child, and the action need not be brought by the state on the relation of an interested person.

[Ed. Note.—For other cases, see *Habeas Corpus*, Cent. Dig. § 8; Dec. Dig. § 38.*]

5. HABEAS CORPUS (§ 99*)—CUSTODY OF CHILDREN—DISCRETION OF COURT.

The complaint in an action in the nature of habeas corpus for the custody of a child, which alleges facts showing that the immorality of defendants having the custody of the child renders them unfit to be intrusted with its custody, is addressed to the sound discretion of the trial court, and where the facts are admitted as by a demurrer, the court may in its discretion deprive defendants of custody of the child.

[Ed. Note.—For other cases, see *Habeas Corpus*, Cent. Dig. § 84; Dec. Dig. § 99; Parent and Child, Cent. Dig. § 27.]

6. HABEAS CORPUS (§ 48*)—CUSTODY OF CHILD—JURISDICTION.

Where, in an action in the nature of habeas corpus for the custody of a child, the defendants appeared in court and contested the action, and the child was brought before the court pursuant to an order made by it, the court had jurisdiction of defendants and of the child to render judgment depriving defendants of custody.

[Ed. Note.—For other cases, see *Habeas Corpus*, Dec. Dig. § 48.*]

7. APPEAL AND ERROR (§ 1040*)—HARMLESS ERROR—ERRONEOUS RULINGS ON PLEADINGS.

The error in sustaining a demurrer to paragraphs of the answer is harmless, where the facts therein alleged are admissible under the general denial also pleaded.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4093, 4094; Dec. Dig. § 1040.*]

8. COURTS (§ 66*)—JUDGMENT (§ 11*)—TERMS OF COURT—CONTINUANCE.

Under Burns' Ann. St. 1908, § 1653, authorizing the court to continue its sitting beyond the expiration of the term where the trial of a case is in progress, the court hearing a cause on the last day of the term may continue the hearing over until the following day and then dispose of the matter, and a judgment then rendered is not void as rendered in vacation.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 240; Dec. Dig. § 66; * Judgment, Dec. Dig. § 11.*]

9. APPEAL AND ERROR (§ 1028*)—HARMLESS ERROR—IRREGULARITIES NOT AFFECTING RESULT.

Where the correct judgment was reached, irregularities in the proceedings will be disregarded.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4034; Dec. Dig. § 1028.*]

Appeal from Circuit Court, Wabash County; A. H. Plummer, Judge.

Action by Caroline E. Watts against Josiah F. Watts and wife. From a judgment for plaintiff, defendants appeal. Affirmed.

Will H. Anderson and Elmer E. Slick, for appellants. Joseph W. Murphy, for appellee.

JORDAN, C. J. This was an action in the nature of habeas corpus proceedings instituted by appellee, Caroline E. Watts (formerly Caroline E. McGath), against Josiah F. and Nellie R. Watts, husband and wife, to obtain the custody of her daughter by a former marriage, a girl five years old. By her complaint she charged that the defendants had obtained the custody of her said child by false and fraudulent representations, thereby inducing her to consent to its adoption by them; that they represented themselves to be moral and Christian people, and would give the child a good moral home, etc.; that under these circumstances they adopted her said daughter. The complaint then sets out facts showing the immorality of the defendants, and their unfitness to have the care, custody, and education of said infant.

[1] Appellants, in response to a summons, appeared in the lower court, and demurred to the complaint, thereby waiving the issuing of the writ of habeas corpus. The demurrer was based, first, on the insufficiency of facts alleged in the complaint; second, a lack of capacity to sue; and, third, defect of parties plaintiff. This demurrer was overruled, and appellants, who appear to have adopted the child jointly, answered the complaint in four paragraphs. Appellee demurred to these paragraphs of answer for

want of facts. Her demurrer was sustained as to the second and fourth, and overruled to the third. The reply was a general denial. Upon the issues joined the cause was tried by the court, and a finding made that "the defendants Nellie R. Watts and Josiah F. Watts are unfit persons to be intrusted with the care and custody of the infant child, Mildred Watts, named in plaintiff's complaint, because of the immorality of the defendant Nellie R. Watts, and that the defendants Nellie R. Watts and Josiah F. Watts be deprived of the custody of said child, Mildred Watts, and, further, that the said child, Mildred Watts, be given to the plaintiff herein, Caroline E. Watts, until the further order of the court." Over the joint motion of appellants for a new trial assigning insufficiency of the evidence and other grounds, the court rendered judgment upon its finding, depriving the defendants of the custody of the child, and awarding the same to its natural mother, appellee herein, Caroline E. Watts (formerly Caroline E. McGath).

[2, 3] Counsel for appellants in their points and argument assail the method by which this action was instituted; or, in other words, they contend that it should have been a suit in habeas corpus to obtain the possession of the child here involved, but, as previously herein stated, the action was in the nature of a habeas corpus, and to all intents and purposes it was a proceeding of that character. It is true, as counsel for appellants contend, that the complaint was not verified, but they appeared in the lower court, and acquiesced in this omission. At least, they made no objections upon this ground. They could have presented that question to the lower court, if they desired, by a motion to strike the complaint from the files, which would have been a proper procedure. Under the circumstances, the verification of the complaint must be considered as having been waived by appellants in the lower court.

[4] It is further insisted that appellee, the natural mother of the child, did not have the right to institute and maintain this action; that the suit should have been brought by the state of Indiana on the relation of some interested person. This contention cannot be sustained. The right of appellee to maintain this suit in her own name is authorized by section 1164, Burns' 1908. See, also, *Willis v. Willis*, 165 Ind. 325, 75 N. E. 653.

[5] The complaint alleges facts showing the immorality of appellants to be such as to render them unfit to be intrusted with the care and custody of this infant child. The pleading in question was addressed to the sound legal discretion of the lower court, and under the facts therein alleged, which were admitted to be true by the demurrer, it disclosed the immoral lives which appellants were leading and the evil surroundings to

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

which they subjected the child, and certainly was sufficient to justify the court in the exercise of its discretion to deprive them of its custody.

[6] The contention of appellants that the trial court did not have jurisdiction either over their persons or that of the child is not supported by the record. As previously shown, they entered a full appearance in court, and contested the action until it was finally determined against them. After suit was commenced, they appear to have removed the child beyond the jurisdiction of the lower court, but by order of the latter they were compelled to return it and produce it in court, subject to the order of that tribunal. In order to give the court jurisdiction over the person of the infant, it was not material, for that purpose, whether it was brought before the court in response to an order made or writ issued by it, or whether it was produced before the court voluntarily by appellants.

[7] The error, if any, committed by the court in sustaining demurrers to the second and fourth paragraphs of appellants' answer was harmless for the reason that, if the facts therein alleged were admissible, they could be admitted under the general denial, which was the first paragraph of the answer.

[8] It is further insisted by appellants' counsel that the judgment rendered in this cause was void because it was rendered in vacation after the close of the term. The record, however, discloses that the hearing of this cause was in progress on Saturday, the last day of the September term, 1907, of the Wabash circuit court. Thereupon the court continued its sitting until the following Monday, at which time the cause was determined and the judgment in question rendered. The continuance of the sitting of the court on the last day of the term over until the following Monday operated in respect to and so far as this case was concerned as an extension of the term, and such term was not ended until the case had been fully disposed of by the court. By section 1658, Burns' 1908, it is provided: "That if at the expiration of the time fixed by law for the continuance of the term of any court the trial of a case shall be progressing, such court may continue its sitting beyond such time. * * * And in such case the term of said court shall not be deemed to be ended until the cause shall have been fully disposed of by the court." See *Wayne Pike Co. v. Hammons*, 129 Ind. 368, 27 N. E. 487; *Sutherland v. State*, 150 Ind. 154, 49 N. E. 947.

[9] While, perhaps, there may have been some irregularities in the proceedings leading up to the final judgment, nevertheless, under the evidence in the case, it may be said that the court by its judgment reached the correct result, and therefore, under the circumstances, such irregularities, if any,

may be disregarded. It would be of no profit in this case to advert to all of the evidence given in the lower court. It is sufficient to say that it shows that both of appellants are immoral persons, and that the surroundings of the child were such that, if it were permitted to remain with them, it might be led into the paths of evil.

Finding no available error in the record, the judgment below is in all things affirmed.

(177 Ind. 447)

PITTSBURGH, C., C. & ST. L. RY. CO. v. TERRELL (No. 21,948.)

(Supreme Court of Indiana. Oct. 5, 1911.)

1. RAILROADS (§ 344*)—CROSSING ACCIDENT—COMPLAINT.

Plaintiff alleged that with her husband she was a traveler at dark of a winter evening on a much traveled street of a city, riding in a horse-drawn vehicle, and approaching a point where the street was intersected by defendant's railroad tracks, and that when they entered on the tracks at the street crossing defendant ran one of its locomotive engines with a train of cars backwards from the crossing at a speed of 30 miles an hour without a light, and without sounding a whistle or ringing a bell, or giving other signal to warn that the train was approaching the crossing, and that just as the plaintiff and her husband were crossing the track they were run against and over by such train of cars, causing plaintiff's injuries. Held, that the complaint sufficiently charged a violation of duty to plaintiff as a traveler to signal the train's approach of the crossing, both under Burns' Ann. St. 1908, §§ 5431, 5432, requiring signals, and at common law.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 1107-1112; Dec. Dig. § 344.*]

2. RAILROADS (§ 313*)—CROSSING SIGNALS—STATUTES—APPLICATION.

Burns' Ann. St. 1908, §§ 5431, 5432, requiring railroad crossing signals, applies to the crossings of streets in cities and towns, unless the statutory signals are prohibited by ordinance.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 1002-1005; Dec. Dig. § 313.*]

3. RAILROADS (§ 313*)—CROSSING ACCIDENT—NEGLIGENCE—FAILURE TO RING BELL OR BLOW WHISTLE.

Where a railroad train was backed over a street crossing from a point less than 80 rods therefrom without ringing the bell or blowing the whistle, and ran into and injured plaintiff, defendant was negligent in failing to continuously ring the bell, as required by Burns' Ann. St. 1908, §§ 5431, 5432, without reference to whether the statute required the blowing of the whistle under such circumstances.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 1002-1005; Dec. Dig. § 313.*]

4. RAILROADS (§ 312*)—CROSSING ACCIDENT—WARNING.

A railroad company backing a train over a street crossing at night owes a common-law duty to travelers who may be on the crossing to give reasonable and timely warning of the train's approach.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 988-1003; Dec. Dig. § 312.*]

5. RAILROADS (§ 344*)—CROSSING ACCIDENT—NEGLIGENCE—PROXIMATE CAUSE.

Where plaintiff alleged that she was injured at defendant's railroad crossing by be-

ing struck by a train backing over the crossing without signal or light displayed on the first car of the backing train, it was not necessary to allege in addition that she would have heard a signal, if given, or seen a light, if displayed, to show that the negligence alleged was the proximate cause of her injury.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 1107-1112; Dec. Dig. § 344.*]

6. RAILROADS (§ 348*)—CROSSING ACCIDENT—NEGLIGENCE.

Evidence held to warrant a finding that plaintiff was injured at a railroad crossing by defendant's negligence in running a train over the crossing backwards at night without giving any signal, and without any light on the nearest part of the train.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 1138-1150; Dec. Dig. § 348.*]

7. RAILROADS (§ 350*)—CROSSING ACCIDENT—CONTRIBUTORY NEGLIGENCE—DUTY OF TRAVELER.

Where a traveler along a city street, with which she was familiar, at night, approached a railroad crossing and did not see or hear a train by which she was subsequently struck, and no signal was given, she was not negligent, as a matter of law, in failing to require her vehicle to be stopped before entering on the crossing, and in failing to alight therefrom and go on the tracks in quest of an approaching train before attempting to cross.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 1152-1192; Dec. Dig. § 350.*]

8. RAILROADS (§ 327*)—CROSSING ACCIDENT—DUTY OF TRAVELER—INSTRUCTIONS.

A requested charge that a traveler approaching a railroad crossing had no right to proceed to cross the tracks until she knew it was safe to do so, and that she could not recover for an injury sustained because of her failure to ascertain and know that no train was coming close to the crossing, was properly refused, as requiring too high a degree of care.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 1043-1056; Dec. Dig. § 327.*]

Appeal from Circuit Court, Wabash County; A. H. Plummer, Judge.

Action by Lydia O. Terrell against the Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company. Judgment for plaintiff, and defendant appeals. Case transferred from Appellate Court under Burns' Ann. St. 1908, § 1405 (Acts 1901, p. 580). Affirmed.

Geo. E. Ross, for appellant. Manley & Stricler and Elliott & Elliott, for appellee.

COX, J. Appellee recovered a judgment in the lower court against appellant for personal injuries alleged to have been inflicted upon her by the negligence of appellant's employees in the movement of one of its switching trains across a public street in the city of Marion, whereby the train was backed into a wagon in which appellee was riding with her husband, who was driving.

From this judgment of \$2,250, appellant prosecutes this appeal, and charges error on the part of the trial court in overruling its demurrer to the complaint of appellee, its motion for a new trial, and its motion in arrest of judgment. By the first and last speci-

fications of error, the sufficiency of the complaint is brought in question by appellant.

[1] The complaint is substantially as follows:

"The plaintiff complains of the defendant, and says that said defendant is now, and has been for more than 10 years last past, a corporation duly organized and incorporated, and has during the last past 10 years or more owned and operated and controlled a line of railroad from the city of Pittsburgh, in the state of Pennsylvania, in and through the said county of Grant, in the state of Indiana, to the city of Chicago in the state of Illinois, running into and through a large number of intervening cities, towns, and stations; that in operating and managing its said road said defendant has, during said time, and did on the 17th day of December, 1906, own and use, and still owns and uses, a large number of locomotive engines and trains of cars, both freight and passenger; that said defendant runs over its said road daily a large number of freight and passenger trains, hauled and drawn by its said locomotive engines; that it has and maintains, and did have and maintain, at the city of Marion, in Grant county, in the state of Indiana, on or about the 17th day of December, 1906, side tracks, switches, and spurs, and all the usual and necessary convenience for managing and operating its said road; that on the 17th day of December, 1906, one of the defendant's said side tracks, switches, or spurs extended across a public street and highway in the western part of the city of Marion, known and called second street, or Delphi avenue; that the defendant's said tracks and railroad in crossing said Second street, or Delphi avenue, run nearly due north and south, or at about right angles with said street, and that said Second street, or Delphi avenue, runs east and west in said city of Marion; that said Second street, or Delphi avenue, is about 40 feet wide, and is paved with brick up to the east line of defendant's said track; that where said railroad crosses said Second street, or Delphi avenue, in the city of Marion, people are constantly passing and repassing and crossing said tracks of said railroad company.

"Plaintiff further avers that on the 17th day of December, 1906, just at dark, in the evening, she, in company with her husband, was driving in a one-seated, one-horse wagon, along and upon said Second street, or Delphi avenue, as travelers thereon; that when about 100 feet from said crossing, and approaching the same from the east, her said husband driving, he (her said husband) checked the horse and drove in a slow walk, and she and her said husband looked and listened to see and hear if a train of cars or an engine were approaching said crossing; that she and her said husband looked both to north and south, up and down said railroad

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.

track and continued to so look and listen for any signal or any sound of an approaching train or engine; that they neither of them saw or heard any train or engine approaching, and not seeing or hearing any locomotive engine or train, and not hearing or seeing any signals given, they started to drive across said track, approaching the same from the east; that as the horse the plaintiff and her husband were driving approached defendant's said tracks, and just as plaintiff and her said husband entered upon said track at said crossing, the defendant carelessly and negligently ran and operated a certain locomotive engine and cars along, over, and upon its said track and road at said crossing, in a south or nearly south direction, and so operated and ran said locomotive and cars backward, over, and across said crossing, at a dangerous and reckless rate of speed, to wit, about 30 miles per hour, and without having any light on the rear end of said train of cars, as a signal of its approach to travelers; that the defendant, its agents, and servants, in the operation and management of said train of cars and engine, carelessly and negligently failed to sound the whistle, or ring the bell, or to have any light on the front end of said train of cars (the end that was in front in the moving of said train of cars), and carelessly and negligently failed to give any signal whatever of the approaching of said cars or train; that on the east side of said railroad track, and on the north side of said Second street, at said point where said accident occurred at said crossing, there are buildings projecting out to the east side of said railroad track, and to the north of said Second street, which obstruct the view of said railroad tracks and its trains to the north of said railroad track, as approached from the east; that by reason of the said obstruction, and by reason of the rapid speed at which said train was run, and by reason of the defendant, its agents, and servants failing to sound the whistle, or ring the bell, and by reason of said defendant, its agents, or servants failing to have a light on the rear of said train when it was pushing the same across a public street when it was dark, and by reason of the defendant, its agents, or servants failing to give any signals whatever of the approach of its said train at said time and place, and for the further reason that said train approached said crossing so quietly and so silently that its approach could not be heard or seen by this plaintiff or by her companion, although they and each of them have good eyesight and good hearing, that as said engine and train of cars approached said crossing in said careless and negligent manner as aforesaid, just as this said plaintiff and her companion were crossing said railroad track, they were run against and over by said train of cars at and on said crossing; that plaintiff was thrown from the wagon in which they were riding with

great force and violence, and was hurled a great distance by reason of being struck by said train of cars at said crossing, and badly injured thereby by having her spinal column injured and sprained, her ribs broken, her ankle fractured, sprained, and broken, and the ligaments thereof torn loose, her shoulder and back mashed, bruised, and injured, by reason of which she (the plaintiff) has received lasting, permanent injuries; that she is now crippled, and will, as she believes and is informed by her doctors, remain a cripple during the remainder of her natural life; that she is unable, and has been ever since the injury aforesaid, to do her work as housekeeper and to attend to her home duties; that she has been under the doctor's care ever since said injury, and is still the object of his care and treatment, and will so continue to remain.

"Wherefore, by reason of the facts heretofore stated, she has been damaged in the sum of \$5,000; that said injuries were received without any fault whatever of the plaintiff or her companion, who was with her at the time, but wholly on account of the careless and negligent manner in which defendant was running and operating its said locomotive engine and cars, by running upon said crossing of said street, as aforesaid, without giving any signal, sounding any whistle, without having any light or lights thereon, so that they could have been seen by persons crossing said tracks, and without having any person or persons on the rear end of the car being pushed across said crossing, or in any manner or way making any provisions for the safety of the traveling public at said crossing. Wherefore she prays for judgment," etc.

It is the contention of counsel for appellant that the complaint does not allege facts showing a duty owing to appellant in the operation of its train and the violation of it. While it may be at once conceded that the complaint is not a model of clear, concise, and orderly allegation of actionable facts, it is quite clear that it does directly allege facts sufficient to show a violation of both a statutory and a common-law duty to give warning of the approach of the train to a highway crossing. It is alleged that appellee, together with her husband, was a traveler at dark of a winter evening on a public highway, a much traveled street of the city of Marion, riding in a horse-drawn vehicle thereon, and approaching the point where the street was intersected by appellant's railroad tracks, and that when they had entered upon the tracks at the street crossing in pursuing their journey as travelers along the street appellant drove one of its locomotive engines with a train of cars backwards over and across the crossing at a speed of 30 miles an hour, without a light, without sounding a whistle or ringing a bell, or giving other signal to warn that the train was approaching the cross-

ing, and that just as the plaintiff and her husband were crossing said railroad track they were run against and over by said train of cars at and on said crossing, causing plaintiff's injuries.

It has long been settled by many decisions of this court that the failure of a railroad company in the operation of its road to give the signals enjoined by statute of the approach of its trains to public highways crossed by its tracks, in a violation of its duty owing to travelers on such highway, constitutes negligence giving rise to a cause of action in favor of such a traveler, who has been injured thereby without negligence on his part which contributed to his injury. Indeed, the statute itself expressly makes the railroad company in such case liable. *Burns* 1908, §§ 5431, 5432; *Chicago, etc., R. Co. v. Boggs* (1885) 101 Ind. 522, 51 Am. Rep. 761; *Cincinnati, etc., R. Co. v. Butler* (1885) 103 Ind. 31, 2 N. E. 138; *Baltimore, etc., R. Co. v. Walborn* (1891) 127 Ind. 142, 26 N. E. 207; *Greenawaldt v. Lake Shore R. Co.* (1905) 165 Ind. 219, 74 N. E. 1081; *Cincinnati, etc., R. Co. v. Grames* (1898) 8 Ind. App. 112, 84 N. E. 613, 37 N. E. 421; *New York, etc., R. Co. v. Robbins* (1906) 38 Ind. App. 172, 76 N. E. 804; *Chicago, etc., R. Co. v. Coon* (App. 1911) 93 N. E. 561.

[2] That the statutory duty of giving warning of the approach of trains to highway crossings applies to the crossings of streets in cities and towns, unless the statutory signals are prohibited by ordinance passed pursuant to the power granted to cities and towns to regulate the running of trains therein, has been recognized and impliedly decided by many of our cases. *Cincinnati, etc., R. Co. v. Butler*, 103 Ind. 31, 2 N. E. 138; *Baltimore, etc., R. Co. v. Walborn, Adm'r*, 127 Ind. 142, 26 N. E. 207; *Pittsburgh, etc., R. Co. v. Burton, Adm'r*, 139 Ind. 357, 37 N. E. 150, 38 N. E. 594; *Chicago, etc., R. Co. v. Fenn*, 3 Ind. App. 250, 29 N. E. 790; *Cincinnati, etc., R. Co. v. Grames*, 8 Ind. App. 112, 84 N. E. 613, 37 N. E. 421; *Chicago, etc., R. Co. v. Butler*, 10 Ind. App. 244, 38 N. E. 1; *Pittsburg, etc., R. Co. v. Shaw et al.*, 15 Ind. App. 173, 43 N. E. 957; *Lake Shore, etc., R. Co. v. Boyts* (1896) 16 Ind. App. 640, 45 N. E. 812; *Aurelius v. Lake Erie, etc., R. Co.* (1897) 19 Ind. App. 585, 49 N. E. 857; *Cleveland, etc., R. Co. v. Carey* (1904) 33 Ind. App. 275, 71 N. E. 244; *Pennsylvania Co. v. Fertig*, 34 Ind. App. 459, 70 N. E. 834; *Chicago, etc., R. Co. v. Coon* (App. 1911) 93 N. E. 563. And it has been expressly so decided in the case of *Cleveland, etc., R. Co. v. Carey* (1904) 33 Ind. App. 275, 282, 71 N. E. 244, wherein it was held that the statute was in force in a city, notwithstanding the fact that there was then in force in such city an ordinance prohibiting the sounding of railroad whistles, except to give "such danger signals as are necessary for the protection of life and property."

But it is argued by counsel for appellant

that, because it is not specifically alleged that the train in question was one running between given points on the main track, or that it came from beyond a point 80 rods from the crossing, it fails to allege facts showing a violation of the statutory duty imposed on appellant. In other words, as we understand appellant's contention, it is that the statute requiring signals to be given does not apply to a train of cars on a switch pushed by a locomotive attached to it, especially when started at a point less than the required statutory distance for giving signals, and that, as it appears from the complaint that the train which it is alleged struck plaintiff was backed over the crossing on a switch, it was at least necessary to allege facts showing that the train came from a distance more than 80 rods away to show a violation of the statutory duty. The reason for the application for the statute to a train running over a switch track which crosses a highway is as obvious as that for applying it to a train running on a main track. A railroad company at common law is under a duty, in the operation of its trains over highway crossings, of using reasonable and ordinary care to avoid injury to travelers at and on highways which are intersected by its tracks. The statute requiring the giving of signals of the approach of trains to crossings is said to be the expression of the minimum care required. That the approach of a backing train, with the locomotive at the end farthest from the point of crossing, would ordinarily be less readily observed by a traveler on a highway is clear to the mind, and that the statute should apply to such a train is at once evident. The statute requires that the engineer or other person in charge of or operating a locomotive shall, when such engine approaches a highway crossing, and not less than 80 and not more than 100 rods therefrom, sound the whistle three times, and ring the bell continuously thereafter until the crossing is passed. We know of no case in this state which has considered and determined whether, when a train begins to move towards a highway crossing from a stop less than 80 rods from the crossing, the statutory duty of blowing the whistle arises. In some other jurisdictions under like statutes, it has been held that in such case the statute requires the sounding of the whistle. See *L. S. & M. S. Ry. Co. v. Johnsen*, 135 Ill. 641-653, 26 N. E. 510; *Spiller v. St. Louis, etc., Ry. Co.*, 112 Mo. App. 491, 87 S. W. 43; 33 Cyc. 966.

[3] But, conceding that the statutory duty to sound the whistle in each case does not arise, there still remains the duty to ring the bell continuously until the crossing is passed; and it would be wholly contrary to the plain purpose of the statute to say that, in so far as the duty to ring the bell is concerned, the statute does not apply to a train that is being backed over a highway crossing

from a point less than 80 rods therefrom. That the duty to ring the bell in warning does flow from such a statute has been frequently held by the courts of other states. *Gulf, etc., R. Co. v. Hall*, 34 Tex. Civ. App. 535, 80 S. W. 133; *Ft. Worth, etc., R. Co. v. Greer*, 32 Tex. Civ. App. 606, 75 S. W. 552; *Mitchell v. Union Ter. R. Co.*, 122 Iowa, 237, 97 N. W. 1112; *Spiller v. St. L. Ry. Co.*, supra; *Herring v. Wabash Ry. Co.*, 80 Mo. App. 562; *Canada, etc., R. Co. v. Henderson*, 29 Can. S. C. 632. As the complaint in this case directly alleges that no whistle was sounded or bell rung, or any other signal given by appellant's employes in charge of the engine in question, it at least charged the violation of a statutory duty in failing to ring the bell.

[4] But, independently of the statute, it is the duty of those in charge of a railroad train to give reasonable and timely warning of its approach to a street or highway crossing. *Indianapolis, etc., R. Co. v. Hamilton* (1873) 44 Ind. 76; *Pittsburgh, etc., R. Co. v. Martin* (1882) 82 Ind. 476; *Pittsburgh, etc., R. Co. v. Burton* (1894) 139 Ind. 357-377, 37 N. E. 150, 38 N. E. 594; *Cleveland, etc., R. Co. v. Miles* (1904) 162 Ind. 646, 70 N. E. 985. And especially is this true in the case of a backing train. *Lake Shore, etc., R. Co. v. Boyts* (1896) 16 Ind. App. 640, 45 N. E. 812; *Cleveland, etc., R. Co. v. Carey* (1904) 33 Ind. App. 275, 279, 71 N. E. 244. See, also, *Elliott on Railroads*, §§ 1153 to 1158. The complaint directly alleges a failure to give any signals of any character, by whistle, bell, or light on the rear, while the train was backing toward and over the crossing at the rate of 30 miles an hour at dark. This was a gross and culpable violation of appellant's common-law duty, and consequently negligence.

[5] It is finally argued by appellant's counsel that the complaint does not show that appellant's negligence was the proximate cause of appellee's injury, because it does not directly allege that she would have heard a signal, if given, or seen a light, if displayed, on the backing car. Such allegations were not required; the general averments sufficiently show that appellant's negligence as alleged was the proximate cause of the injury to appellee. *Greenawaldt v. Lake Shore, etc., R. Co.* (1905) 165 Ind. 219, 223, 74 N. E. 1081.

The overruling of appellant's motion for a new trial is assigned as error. The motion for a new trial states numerous causes, but all are waived by appellant by a failure to state any proposition, point, or authority in support thereof, except those questioning the sufficiency of the evidence to sustain the verdict, and the action of the trial court in giving and refusing certain instructions.

[6] As to the contention of counsel for appellant that the evidence does not prove the breach of a duty by appellant owed to

appellee, it may be said that the evidence amply sustains every allegation of the complaint as to the failure to signal the approach to the crossing of appellant's backing train at dark, by whistle, bell, or a light on the coal car, which was the nearest part of the train. Indeed, on the trial appellant's counsel expressly conceded that no whistle was blown or light displayed. The evidence fairly sustains the charge that the train moved over the crossing at a speed of about 30 miles an hour, struck the vehicle in which appellees were riding, and carried it forward from 50 to 75 feet, when the car which struck the vehicle was derailed. And it appears that the train was making little noise as it approached. There was testimony for appellant from the conductor and brakeman that the bell was rung, and that the speed was not more than eight miles an hour. But the weight of the evidence sustains the complaint in these particulars. The fact that the testimony of neither the fireman nor engineer was given is not without significance, particularly as to the ringing of the bell.

[7] It is contended by counsel for appellant that, as it appears that appellee did not require her vehicle to be stopped before entering upon the crossing of appellant's tracks, alight therefrom, and go upon the tracks in quest of an approaching train, she, in failing to so do, was guilty of negligence as a matter of law, which was the proximate cause of her injury. To sustain such a contention in this case would be to practically deprive the public of the use of the streets of cities and towns, where they are crossed by the tracks of railroads. The evidence shows that appellee and her husband were traveling on a much used street at dark of a winter evening, going to their home near the city of Marion. The street was crossed by appellant's main track and switch track, over which they were compelled to travel to reach their home. They were familiar with the crossing, having passed over it many times in safety. Their view of the tracks of appellant in the direction from which the train which struck them came was obstructed by coal sheds and other buildings, so that for a distance of about 100 feet from the switch on which the train ran to a point within from 6 to 10 feet of the switch a train approaching thereon could not have readily been seen. They were sitting together on a seat in the front of a florist wagon, which was drawn by a gentle horse. The husband was driving. The seat was open, so that they could see and hear. On approaching the crossing, the horse was pulled down to a very slow walk, about a mile and a half or two miles an hour. The eyesight and hearing of both were unimpaired. Both of them kept looking in both directions for an approaching train, and listened continuously,

and heard or saw none, until the horse had entered upon the switch track, and the coal car of the backing train, running quietly without light or signal of any kind, appeared out of the dusk, and almost at once struck them. If the signals had been given, they could have heard them, and if a light had been displayed they could have seen it. Under these circumstances, it was for the jury to determine whether appellee was guilty of contributory negligence. It cannot be said, as a matter of law, that her failure to stop, or to stop entirely, and go upon the track in advance of the horse was negligence which contributed to her injury. In the absence of signals or light, it is not sure that either would have been effective in avoiding the collision. Pittsburgh, etc., R. Co. v. Martin (1882) 82 Ind. 483; Pittsburgh, etc., R. Co. v. Wright (1881) 80 Ind. 236; Malott v. Hawkins (1902) 159 Ind. 127, 63 N. E. 308; Greenawaldt v. Lake Shore, etc., R. Co. (1905) 165 Ind. 219, 74 N. E. 1081; Chicago, etc., R. Co. v. Turner (1904) 33 Ind. App. 265, 69 N. E. 484; Baltimore, etc., R. Co. v. Rosborough (1907) 40 Ind. App. 15, 80 N. E. 869; Pittsburgh, etc., R. Co. v. Lynch (1908) 43 Ind. App. 177, 87 N. E. 40.

Counsel for appellant complains at some length of a number of instructions given by the court of its own motion and at the request of appellee, and of the refusal of the court to give a number of instructions requested by appellant. While there may be some technical inaccuracies in one or more of the instructions given, an examination of them discloses none that was calculated to mislead the jury to prejudice the substantial rights of appellant. Taking all of the instructions given together, they were quite as favorable to appellant as the case made warranted.

[8] Instruction No. 3, requested by appellant and refused by the court, told the jury that appellee had no right to proceed to cross the tracks "until she *knew* it was safe to do so," and that she could not recover for an injury sustained because of her failure "to ascertain and *know* that no train was coming close to the crossing." The law did not require the high degree of care of appellee, practically insuring her own safety, that this instruction would have held her to.

Instruction No. 4 requested was correctly refused, because the same vice inheres in it. Instructions Nos. 13, 16, and 18, in so far as they state the law correctly, were covered by other instructions given. Moreover, they contained incorrect statements of the law as to appellee's duty. As before stated in this opinion, it cannot be said, as a matter of law, that appellee's failure to stop the horse and to precede it upon the track, and there look and listen, made her guilty of contributory negligence.

The case seems to have been fairly tried and substantial justice reached in the trial court, and its judgment is affirmed.

(48 Ind. App. 442)

FURNESS v. BRUMMITT et al.
(No. 7,607.)

(Appellate Court of Indiana, Division No. 1.
Oct. 10, 1911.)

1. EQUITY (§ 66*)—MAXIMS.

He who seeks equity must do equity.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 188-190; Dec. Dig. § 66.*]

2. ESTOPPEL (§ 68*)—INCONSISTENCY—CONDUCT OF COMPLAINANT.

Where an owner obtains judgment of the superior court that an order by the board of commissioners in a drainage proceeding was void because made and enjoining its execution in vacation, and the adverse party acquiesces therein, and on his application further proceedings in the case are taken before the board, the order of the board made in vacation must be considered void, since the owner on appeal in a subsequent action to enjoin the board cannot consistently contend that its order is regular and valid so as to end the jurisdiction of the board, or that it was only erroneous, after having obtained the injunction on the ground that it was absolutely void.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. §§ 165-169; Dec. Dig. § 68.*]

3. DRAINS (§ 35*)—PROCEEDINGS FOR ASSESSMENT—RECORD OF BOARD OF COMMISSIONERS.

A writing appearing upon the records of the board of commissioners in a proceeding to establish a ditch as to its meeting as per adjournment and hearing a report and confirming assessments, though entered by direction of the board when not legally in session, does not change the status of the proceedings, nor destroy its jurisdiction, already attached, where an order of the superior court does not go further than to enjoin the execution of such order.

[Ed. Note.—For other cases, see Drains, Dec. Dig. § 35.*]

4. JUDGMENT (§ 27*)—CONCLUSIVENESS—VOID JUDGMENT.

A void judgment is in legal effect no judgment and by it no rights are divested and from it no rights can be obtained. Being worthless in itself, all proceedings founded upon it are equally worthless, and it neither binds nor bars any one.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 38; Dec. Dig. § 27.*]

5. COUNTIES (§ 56*)—BOARD OF COMMISSIONERS—RECORD.

Where a board of county commissioners acting where it has jurisdiction of the persons or of the subject-matter and in lawful session makes a final order, it cannot subsequently change it.

[Ed. Note.—For other cases, see Counties, Cent. Dig. § 73; Dec. Dig. § 56.*]

6. DRAINS (§ 40*)—PROCEEDINGS TO ESTABLISH—BOARD OF COMMISSIONERS—JURISDICTION AFTER CASE HELD IN PART VOID.

Where the action of a board of commissioners approving a report and confirming the assessments for establishing a ditch has been held void, because made in vacation, the status of the proceedings before the commissioners is not changed, but remains the same as if such action or attempted action had not been taken, and the board did not lose jurisdiction of the proceedings, and may lawfully begin over at

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

the point where the proceedings had ceased to be legal.

[Ed. Note.—For other cases, see Drains, Dec. Dig. § 40.*]

7. DRAINS (§ 40*)—ERRONEOUS ORDER OF COMMISSIONERS—REMEDY.

From an erroneous or irregular order of the board of commissioners in a drainage proceeding, the remedy is by appeal, and not by an independent suit to enjoin execution thereof.

[Ed. Note.—For other cases, see Drains, Dec. Dig. § 40.*]

8. DRAINS (§ 40*)—ACTION TO ENJOIN CONSTRUCTION—PARTIES.

Where a ditch has been established and a commissioner appointed to construct it, the commissioner, and not the petitioner, is the one to be enjoined if any proceedings to enjoin will lie, since the case by such order passed beyond the control of the petitioner or other parties to the proceeding.

[Ed. Note.—For other cases, see Drains, Dec. Dig. § 40.*]

Appeal from Superior Court, Porter County; Chas. H. Truesdell, Judge.

Action for an injunction by Albert W. Furness against William Brummitt and another. Dismissed as to the other defendant, and judgment for defendant Brummitt, and plaintiff appeals. Affirmed.

N. L. Agnew, for appellant. H. H. Loring, for appellee.

FELT, P. J. The facts pertinent to the question presented for decision by this appeal are that on June 30, 1906, the appellee Brummitt filed in the office of the auditor of Porter county, Ind., his petition for the drainage of certain lands belonging to himself and others, averring that the drain would not exceed two miles in length, and would not cost to exceed \$300, which petition was by the Auditor referred to the county surveyor; that on July 10, 1906, the surveyor filed his report thereon, which report was on file when the board of county commissioners convened on August 6, 1906; that said board "by agreement of the parties" set the same for hearing specially on August 11, 1906, which time was after the expiration of the August term of the commissioners' court, and in vacation; that on said day "the board met as per adjournment" at their regular place of meeting, and proceeded to hear and determine all questions relating to said drainage petition, and after finding that due notice had been given, and considering certain remonstrances, including that of appellant, by agreement of the parties approved said report, confirmed the assessments as modified, established the ditch, and referred the same to Alfred R. Putnam, county surveyor, for construction; that appellant's land was assessed \$10 and he was present when the order of August 11, 1906, was made by the board of commissioners; that thereafter appellant appealed to the Porter superior court, which appeal was dismissed by the court, and

thereupon appellant filed suit in said superior court against appellee and said surveyor to enjoin the construction of said ditch, alleging that the order of the board of commissioners entered on August 11, 1906, was void because the board had no power to adjourn from August 6, to August 11, 1906, to consider and pass upon the petition and remonstrances in said proceeding; that no notice of the convening of the special session of said board had been given, and the board was not legally in session on August the eleventh and the order then made was void; that on June 25, 1907, this suit was tried, and the superior court of Porter county rendered judgment enjoining the construction of said ditch under the order of August 11th; that on July 1, 1907, the appellee appeared before said board of commissioners while in legal session, called up said proceeding, made known the action of the superior court, and thereupon said board set the hearing of the report of the engineer and the remonstrances in said proceeding for the first Monday in August, 1907, and notified all parties affected thereby of the time and place of hearing; that on Monday August 5, 1907, the board took up the hearing of said report, including the remonstrance of appellant filed on July 16, 1906; that the appellant appeared before said board and filed motion praying for a dismissal of appellee's petition and the report thereon, on the ground that the commissioners then had no jurisdiction over said petition and report and no authority to hear and determine the same, which motion was overruled by the board; that thereupon the board proceeded to hear the evidence on said report and remonstrances, in the presence of appellant, and, after hearing the same, made an order confirming the assessments shown in the report, establishing the ditch and appointing Guy F. Stinchfield, county surveyor, construction commissioner. No appeal was taken from this order, but on September 9, 1907, appellant filed suit in the Porter superior court against appellee, Brummitt, and Guy F. Stinchfield, to enjoin them from constructing said ditch as ordered by the board on August 5, 1907. The complaint was dismissed as to Stinchfield. Appellee Brummitt thereupon filed answer in two paragraphs, the first of which was a general denial. The second set up in detail the facts of all the proceedings in both courts. A demurrer for want of facts was filed to the second paragraph of the answer, and was overruled. The court found for appellee Brummitt that appellant should take nothing by his complaint, and rendered judgment accordingly. A motion for a new trial was filed and overruled.

The errors assigned present the question that the finding and judgment of the court

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

is not sustained by sufficient evidence. The gist of appellant's contention is that after the judgment of the superior court was rendered on June 25, 1907, enjoining the construction of the ditch, there was no proceeding pending before the board of commissioners, nothing was before them upon which they could legally act in said proceeding, and that their action in setting the case for hearing in assuming jurisdiction and trying and determining the case was absolutely null and void, and appellee should have been enjoined as prayed.

[1, 2] This is a suit in equity. He who seeks equity must do equity. The appellant obtained in his favor the judgment of June 25, 1907, holding the order of the commissioners made on August 11, 1906, void, and appellee acquiesced therein, and on his application the further proceedings in the case were taken before the board of commissioners, so that for the purposes of this appeal the orders of the board of commissioners made on August 11, 1906, must be considered null and void. Appellant cannot now consistently contend that the order was regular and valid, and ended the jurisdiction of the board, or that it was only erroneous, after having obtained an injunction on the ground that it was absolutely void. In view of this situation, the proceeding before the board of county commissioners was not changed by the action of the members of the board on August 11th, but remained the same as if no such action or attempted action had been taken. Had the board been legally in session—a question we need not and do not determine—(see *Kraus v. Lehman*, 170 Ind. 408, 83 N. E. 714, 84 N. E. 769), and made such order, even though erroneous, the remedy would have been by appeal and not by suit to enjoin. *Gavin v. Board, etc.*, 104 Ind. 201-206, 8 N. E. 846; *Badger v. Merry et al.*, 139 Ind. 631-634, 39 N. E. 309. What the superior court did was to enjoin the carrying out of an order void because made when the board was not legally in session.

[3] The writing appearing upon the records, though placed there in pursuance of the direction of members of the board, when not legally in session as such board of commissioners, did not change the status of the case, the delay in taking further action did not destroy the jurisdiction of the board, which had already attached, nor did the judgment of the superior court go further than to enjoin the execution of the void order. *Hobbs v. Board, etc.*, 103 Ind. 575-580, 8 N. E. 263; *Anderson v. Weber*, 39 Ind. App. 443-447, 79 N. E. 1055. In *Tolin v. Jones*, 33 Ind. App. 423, 431, 71 N. E. 678, 681, this court, in speaking of an order made by a board of commissioners, said: "As this additional order was absolutely void because of want of jurisdiction of the subject-matter concerning which it was made, it was immaterial whether it stood as

such, or should afterwards be stricken out. It could be binding upon no one for any purpose, and was from the beginning as if never made. * * * Nor can it be said that this void provision made void the final order approving the report of the viewers. The order approving the report was complete in itself." The principle involved here is the same as that in the case from which we have quoted.

[4] Freeman on Judgments (4th Ed.) § 117, states: "A void judgment is in legal effect no judgment. By it no rights are divested. From it no rights can be obtained. Being worthless in itself, all proceedings founded upon it are equally worthless. It neither binds nor bars any one." See, also, *Thompson v. McCorkle*, 136 Ind. 484-493, 34 N. E. 813, 36 N. E. 211, 43 Am. St. Rep. 334. The question we are called upon to decide is not at all similar to the question presented where an appeal is taken from an order of the board of commissioners made when legally in session in a case of a proceeding where the board has jurisdiction. Here the judgment of the superior court enjoining the construction of the ditch, because of the want of power to act when the board ordered its construction, did not change the status of the proceeding before the board but left it pending the same as if no steps had been taken after August 5, 1906.

[5] In reaching this conclusion we are not unmindful of the holdings of our Supreme Court to the effect that when a board of county commissioners, acting in a case where it has jurisdiction of the person and of the subject-matter, and when in lawful session, makes a final order, it cannot subsequently change or annul such order. *Town of Hardinsburg v. Cravens*, 148 Ind. 1-8, 47 N. E. 153; *Gavin v. Board, etc.*, 104 Ind. 201-204, 8 N. E. 846; *Badger v. Merry*, 139 Ind. 631, 39 N. E. 309.

[6] Our conclusion is consistent with those decisions, the distinction being that in the case at bar we are dealing with an order, for the purpose of the case at least, absolutely void because when made the board was not legally in session. The board did not lose jurisdiction of the proceeding by its members assuming to act when not in session, and might lawfully begin over at the point where the proceedings had ceased to be legal.

[7] From this it follows that after the board on August 5, 1907, made the second order establishing the ditch, the remedy of appellant for relief from such order, if irregular or erroneous, was by appeal, and not by an independent suit to enjoin.

[8] Furthermore, the ditch having been established and the commissioner appointed to construct it, if any independent action could thereafter be maintained to enjoin its construction, the commissioner was the one to be enjoined, for the case had by such orders passed beyond the control of the petitioners

or other parties to the proceeding. *Crume v. Wilson et al.*, 104 Ind. 583, 4 N. E. 169; *Board, etc., v. Jarnecke et al.*, 164 Ind. 658, 74 N. E. 520.

No available error is shown by the record, and the judgment is affirmed.

(48 Ind. App. 407)

CHICAGO & E. R. CO. v. KIRACOFÉ.
(No. 7,150.)

(Appellate Court of Indiana, Division No. 1.
Oct. 4, 1911.)

1. PLEADING (§ 433*)—INJURIES TO SERVANT—COMPLAINT—OBJECTIONS AFTER VERDICT.

Plaintiff alleged that, pursuant to orders of his engineer, he went on the pilot of his engine to flag another train; that the timbers in the pilot were rotten, and while he was on the pilot they gave way from the weight of his body and caused him to fall, and, in order to avoid being run over, he threw himself from the track, and in so doing, and without fault on his part, his hand was injured; that the injuries were caused wholly by defendant's negligence in failing to properly inspect the engine and pilot, and in failing to provide a pilot sufficient to bear the weight of employees whose duties require them to ride thereon, and in failing to provide the crew with reasonably safe machinery and appliances, particularly the pilot; and that prior to his injury plaintiff had no knowledge of the defective condition of the pilot. *Held*, that the complaint was sufficient after verdict under the rule that, if the complaint states facts sufficient to bar another suit for the same cause of action, the verdict cures all other defects.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1451-1477; Dec. Dig. § 433.*]

2. MASTER AND SERVANT (§ 297*)—INCONSISTENT FINDINGS—VERDICT—SPECIAL INTERROGATORIES.

Plaintiff was thrown from the pilot of an engine on which he was working, and alleged that the pilot fell to pieces under his weight because it was rotten and defective. The jury specially found that plaintiff climbed down on the pilot while the engine was moving, and that the nose of the pilot struck a crossing rail by which it was broken; that it was not constructed of oak firmly bolted and fastened to the engine, but that it did not fall from plaintiff's weight; that plaintiff was on the pilot to flag another train according to orders from his engineer, and that he could not at the time pass through the gangway with safety for that purpose; that he had been given a book of rules explaining his duties and agreed to study the same. *Held*, that such answers were not so in conflict with the general verdict for plaintiff as to overcome the same.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 297.*]

3. MASTER AND SERVANT (§ 289*)—INJURIES TO SERVANT—RAILROAD EMPLOYÉ—ACTS IN EMERGENCY—CONTRIBUTORY NEGLIGENCE.

Where a railroad brakeman, acting in an emergency, under orders of his engineer to flag another train, went on the pilot of the engine, and was there injured by the collapse of the pilot when it struck the crossing rail of another railroad, whether his act in riding on the pilot constituted contributory negligence was for the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1089-1132; Dec. Dig. § 289.*]

4. MASTER AND SERVANT (§ 296*)—INJURIES TO SERVANT—RAILROADS—INSTRUCTIONS—FAILURE TO FOLLOW RULES.

Where a brakeman went on the pilot of his engine in response to orders of his engineer, which he was bound to obey, to flag another train, and was injured while riding there, the court properly refused to charge that, if the railroad company enacted rules and put them in plaintiff's hands, it was his duty to obey them in the discharge of his duties, except as qualified by the statement that, if conditions arose when the rule could not be followed, then it was plaintiff's duty to take such steps as an ordinarily prudent person would take to prevent loss or destruction of property.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1180-1194; Dec. Dig. § 296.*]

5. TRIAL (§ 296*)—OMISSION CURED BY OTHER INSTRUCTIONS.

An instruction as to the duty of defendant railroad company to inspect its engines was not objectionable for failure to include the doctrine of assumed risk, concerning which the jury were fully charged in other instructions.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 705-718; Dec. Dig. § 296.*]

Appeal from Circuit Court, Huntington County; Samuel E. Cook, Judge.

Action by Alvin R. Kiracofé against the Chicago & Erie Railroad Company. Judgment for plaintiff, and defendant appeals. Affirmed.

W. O. Johnson and Kenner, Lucas & Kenner, for appellant. Leah & Lesh, for appellee.

FELT, P. J. The appellee recovered judgment for \$100 against appellant for personal injuries. The errors assigned are (1) the complaint does not state facts sufficient to constitute a cause of action; (2) overruling appellant's motion for judgment on the answers to the interrogatories notwithstanding the general verdict; (3) overruling appellant's motion in arrest of judgment; (4) and overruling the motion for a new trial.

[1] The complaint alleges, in substance, that on and prior to November 8, 1907, appellee was an employé of appellant as a brakeman; that as such brakeman he was subject to the order of the engineer of the train upon which he worked, and it was his duty to obey such orders; that on said day while so employed he was directed by said engineer to go upon the pilot of his engine and flag train No. 9; that, in pursuance of such order, he went upon the pilot to flag said train; that the timbers in said pilot were rotten and defective, and while appellee was upon said pilot for the purposes aforesaid the timbers and braces gave way from the mere weight of appellee's body, and caused him to fall, and, in order to avoid being run over, he threw himself from the track, and in so doing, and without any fault on his part, caught his hand and injured two of his fingers; that said injuries were caused wholly by the negligence of the appellant in failing to properly inspect said

engine and the pilot, and in failing to provide a pilot to said engine sufficient to bear the weight of any of the employes of said company whose duties require them to ride thereon, and in failing to provide the crew upon said train, and appellee, with reasonably safe machinery and appliances, particularly the pilot of the engine, with which to perform the work required of them in the discharge of their duties; that prior to the time he received his said injury appellee had no knowledge of the defective condition of said pilot. Where the sufficiency of a complaint is not questioned until after verdict (assignment of errors 1 and 3), all intendments are in favor of the pleading. If there is not a total failure to state some essential element of the right of recovery, and the complaint states facts sufficient to bar another suit for the same cause of action, the verdict cures all other defects, and is sufficient to sustain the judgment. *Oliver Typewriter Co. v. Vance*, 95 N. E. 327; *Scott v. Collier*, 166 Ind. 644, 647, 78 N. E. 184. Tested by this rule, we think the complaint clearly sufficient, even if insufficient as against a demurrer, which we do not determine.

[2] The jury in answer to interrogatories found that the engineer and conductor had written orders and the same were read by appellee; that appellee went through the cab window, and climbed down upon the pilot, while the engine was moving; that the nose of the pilot struck the west crossing rail of the Lake Erie & Western tracks, and the pilot was broken; that it was not constructed of solid oak, firmly bolted and fastened to the engine; that it did not fail by reason of appellee's weight; that the engineer told appellee to flag No. 9, and he could not at that time pass through the gangway with safety for the purpose of flagging the train; that appellee when he entered appellant's employment was given a book of rules explaining his duties, and he agreed to study the same; that appellee's train arrived at Kingsland at 7:52, and it would require 10 minutes to clear the siding, and No. 9 was to leave Kingsland at 8 o'clock. These answers are not in such conflict with the general verdict as to overcome it and entitle appellant to judgment thereon.

[3] It is true there are many cases holding that to ride upon a pilot, without apparent necessity for so doing, is negligence that will preclude a recovery, but where an employe is acting in an emergency, under orders he is bound to obey, whether his act in so doing constitutes contributory negligence which will defeat a recovery in case of an injury is a question of fact to be determined by the jury from the evidence. *Baltimore, etc., R. Co. v. Slaughter*, 167 Ind. 330, 341, 79 N. E. 186, 7 L. R. A. (N. S.) 597, 119 Am. St. Rep. 503; *Baltimore, etc., R. Co. v. Leathers*, 12 Ind. App. 544, 40 N. E. 1094; *Filer*

v. N. Y. C. R. R. Co., 49 N. Y. 47, 10 Am. Rep. 327; *Kane v. Northern Central Ry. Co.*, 128 U. S. 91, 9 Sup. Ct. 16, 32 L. Ed. 339; *Warden v. L. & N. R. Co.*, 94 Ala. 277, 10 South. 276, 14 L. R. A. 552; 4 Thompson on Negligence, §§ 4731-4752. [4] The appellant requested the court to give the following instruction: "I instruct you that if the railroad company laid down rules, and put them in the hands of the plaintiff, that it was his duty to obey those rules in the discharge of his duties." The court refused the instruction, and gave the following: "I instruct you that if the railroad company laid down rules, and put them into the hands of the plaintiff, it was his duty to obey those rules in the discharge of his duties, but, if conditions should arise when the rule could not be followed, then it is the duty of the employe to take such steps as an ordinarily prudent man would take to prevent loss of life or destruction of property." The instruction given by the court, when fairly construed, is supported by authority. The one refused states the same rule without any qualifications, and, as applied to the facts of this case, the court was warranted in refusing it. *C. C. & St. L. Ry. Co. v. Gossett, Adm'x*, 172 Ind. 525, 543, 87 N. E. 723; *Diamond Block Coal Co. v. Cuthbertson*, 166 Ind. 290, 313, 76 N. E. 1060. The court was also asked to instruct the jury that, if a railroad brakeman rides on a pilot of an engine and is injured, he cannot recover damages, even though he may have been ordered to do so by a superior whose orders he is bound to obey. This instruction was properly refused. While, as a general proposition, riding upon the pilot of an engine shows negligence upon the part of the one so doing, it is not true in every case, and on the facts of this case it was a question for the jury to determine from the evidence, and not a pure question of law, to be declared by the court. *Cleveland, etc., R. Co. v. Gossett*, supra; *Baltimore, etc., R. Co. v. Leathers*, supra; *Gulf, O. & S. F. R. Co. v. Knox et ux*, 25 Tex. Civ. App. 450, 61 S. W. 969.

[5] Objection is also made to instruction No. 3 tendered by appellee and given by the court. In this instruction there is no attempt to enumerate the elements essential to a recovery, but to instruct the jury as to the duty of the railway company to inspect its engines.

The objection urged is that it fails to include the doctrine of assumed risk, but, as the court in other instructions fully instructed the jury as to the assumption of risk by an employe, the objection cannot be sustained, for the error, if any, was harmless.

On the whole, the instructions given stated the law fully and fairly to both parties, and the motion for a new trial was properly overruled.

Judgment affirmed.

(48 Ind. A. 465)

CROUCH et al. v. LEWIS et al. (No. 7,313.)
(Appellate Court of Indiana, Division No. 2
Oct. 11, 1911.)

1. PLEADING (§ 364*)—MOTION TO STRIKE.

There is no error in sustaining a motion to strike out a part of a pleading which is redundant, immaterial, or irrelevant.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1156-1162; Dec. Dig. § 364.*]

2. PLEADING (§ 364*)—MOTION TO STRIKE—SURPLUSAGE.

It was not error to strike an allegation from a counterclaim that plaintiffs had been partners continuously for more than two years, and that defendant had been for many years engaged in the general contracting business, where it was nowhere alleged in the counterclaim that plaintiffs entered into the contract in question as partners; the allegation being mere descriptio personæ.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1156-1162; Dec. Dig. § 364.*]

3. APPEAL AND ERROR (§ 1042*)—HARMLESS ERROR.

The striking of an allegation of a counterclaim that defendant was held responsible for work and actions of a subcontractor was harmless, where the fact alleged sufficiently appeared from the other facts which were not stricken.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4110-4114; Dec. Dig. § 1042.*]

4. PLEADING (§ 364*)—MOTION TO STRIKE—ALLEGATIONS OF PERFORMANCE—COUNTERCLAIM.

Under the rule that in an action for breach of contract it must be alleged, as to conditions precedent, that the party seeking to enforce the same had complied with all such conditions on his part, or alleged facts showing proper excuse for not doing so, it was error to strike from a counterclaim an allegation that defendant had fully performed on his part.

[Ed. Note.—For other cases, see Pleading, Dec. Dig. § 364.*]

5. APPEAL AND ERROR (§ 1042*)—RULING ON PLEADINGS—PREJUDICE.

The striking of an allegation from a counterclaim that defendant had performed the contract in question on his part was harmless, where defendant's answer contained substantially the same averment, and the question of defendant's performance became a part of the issues adjudicated.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4110-4114; Dec. Dig. § 1042.*]

6. APPEAL AND ERROR (§ 1078*)—ASSIGNMENTS OF ERROR—WAIVER.

An assignment of error not discussed is waived.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4256-4261; Dec. Dig. § 1078.*]

7. PLEADING (§ 35*)—SURPLUSAGE—BREACH OF CONTRACT.

An allegation that plaintiffs knew that failure on their part to complete their portion of the work in question within the time stipulated would damage defendant was surplusage, under the rule that one is liable on breach of contract for such damages as are the proximate result of his failure to perform, if such damages could be reasonably foreseen, whether he knew they would ensue or not.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 76-80; Dec. Dig. § 35.*]

Appeal from Circuit Court, Hancock County; R. L. Mason, Judge.

Action by John E. Lewis and others against Larkin W. Crouch and others. Judgment for plaintiffs, and defendants appeal. Affirmed.

Felt & Binford, for appellants. John F. Wiggins and Cook & Cook, for appellees.

IBACH, J. This suit was brought by appellees to enforce an alleged liability for unpaid money on a building contract and bond executed by appellant Larkin W. Crouch, as principal, and appellants Jesse P. Cook and John H. Haskell, as sureties.

Appellant Crouch had entered into a contract with the trustee of Delaware school, Delaware township, Hamilton county, for the erection of a schoolhouse in said township, and had sublet a portion of the work to be done in the erection to appellees. Appellees recovered judgment below.

The errors relied upon in the appeal arise on the ruling of the trial court, upon the motion of appellees, containing 14 separate specifications, to strike out certain parts from the third paragraph of answer or counterclaim of appellant Crouch, in which he seeks to recover a judgment against appellees for nonperformance on their part of the same contract which they sued on. This motion was overruled as to specifications numbered 5, 10, and 12, but sustained as to the remaining 11 specifications.

[1] It is well settled that there is no error in sustaining a motion to strike out, where the part of the pleading objected to by the motion is redundant, immaterial, or irrelevant. Elliott's Appellate Procedure, § 639, and cases there cited.

[2] Specification 1 stricken out was an allegation that the plaintiffs had been partners continuously for more than two years; and that defendant has been for many years engaged in the general contracting business. This allegation was immaterial and mere surplusage, for it was nowhere alleged in the counterclaim that the plaintiffs entered into the contract as partners, and the whole of the words embraced in this specification are mere descriptio personæ.

[3] Specification 2 was an allegation that defendant was held responsible for the work and action of a subcontractor. While this was not an improper allegation, the fact alleged appears sufficiently from the other facts pleaded in the counterclaim, and which were not stricken out, so that the striking out of this allegation was harmless.

[4] The language stricken out, because of specification 3 of the motion, was an allegation that the defendant had fully performed his part of the contract between him and plaintiffs. A counterclaim, to be good, must contain all the essential averments of a com-

plaint. *Wabash Union v. James*, 8 Ind. App. 449, 35 N. E. 919; *Blaney v. Postal*, 10 Ind. App. 131, 34 N. E. 849; *Stoner v. Swift*, 164 Ind. 652, 74 N. E. 248. And in an action on a contract for a breach thereof it must be alleged, as to conditions precedent, that a party seeking to enforce the same has complied with all such conditions of said contract on his part, or allege facts showing a proper excuse for not doing so. *Mondamin Meadows Dairy Co. v. Brudi*, 163 Ind. 642, 72 N. E. 643; *Collins v. Amiss*, 159 Ind. 593, 65 N. E. 906; *Stoner v. Swift*, supra; *Magic Packing Co. v. Stone-Ordean Co.*, 158 Ind. 538, 64 N. E. 11, and cases cited. Such being the well-settled principles of law, it was error for the court to strike from the counterclaim the language of specification 3, as the facts contained therein were not elsewhere alleged in the counterclaim.

[5] But it appears from the record that under his second paragraph of answer appellant had averred full performance on his part of all the obligations by him to be performed under the allegations of the complaint, which averment is even more inclusive than the allegation stricken from the counterclaim. The court below held the counterclaim good on demurrer, after the allegation in question was stricken out. As the answer contains in substance the same averment, the question of defendant's performance became a part of the issues adjudicated at the trial. The evidence not being in the record, this court will presume that evidence on this point was introduced, as under the issues it might have been, and that this error did not harm appellant. *Clause, etc., Co. v. Bank*, 145 Ind. 682, 44 N. E. 256; *Anglemyer v. Blackburn*, 16 Ind. App. 352, 45 N. E. 483.

It can be said of the allegations of the following specifications, namely: (4) concerning the time plaintiffs worked after the time stipulated by their contract for the completion of the work; (7) as to plaintiffs' failure to have sufficient force of workmen on the building to be able to complete the same on time; (11) as to the loss occasioned by defendant hiring an extra carpenter, who was paid for time he did not work, and as to the value of certain services rendered by such carpenter and by defendants' foreman; and (13) alleging that the work done after the time stipulated for completion was made more expensive by cold weather—that all these facts are sufficiently averred elsewhere in the counterclaim, and that the words stricken out add nothing to its force.

The allegation of specification 6, that the defendant sublet to subcontractors the different parts of the construction of the building, except the carpenter work, which he did himself, is superfluous, since such of the facts alleged as are relevant appear else-

where in the pleading. Specification 8, alleging that the plaintiffs were not prevented by fire or circumstances over which they had no control from completing their part of the work on time, in addition to setting up matter which appears elsewhere, negatives a defense, and is superfluous for that reason. *Pine Civil Tp. v. Huber Mfg. Co.*, 83 Ind. 121.

[6] Appellant has waived the error assigned in striking out of the language of specification 9 by failure to discuss it.

[7] Specification 14 alleges that the plaintiffs knew, at the time they entered into the contract, that failure on their part to complete their portion of the work within the time stipulated would damage defendant. This fact essentially appears from other allegations, but such allegation is unnecessary, for one is liable on breach of contract for such damages as are the proximate result of his failure to perform, if such damages could be reasonably foreseen, whether or not he actually knew that such damages would ensue. 8 Am. & Eng. Ency. Law (2d Ed.) p. 565.

All the issues which the counterclaim was intended to present were presented at the trial, after the striking out of the different portions which are assigned as error, and, as we find no error shown by the record which we believe prejudicial to appellant, the judgment is affirmed.

FELT, J., not participating.

(48 Ind. A. 417)

PERPETUAL BUILDING, LOAN & SAVINGS ASS'N v. STILLER et al.
(No. 7,455.)

(Appellate Court of Indiana, Division No. 1.
Oct. 5, 1911.)

1. APPEAL AND ERROR (§ 606*)—TRANSCRIPT—INDEX IN PLEADINGS—EFFECT OF FAILURE.

Appellate Court rule 3 (55 N. E. iv), requiring an index referring to the initial page of each pleading exhibit, which index shall form the first page of the transcript, is imperative, so that the sufficiency of answers against appellant's demurrers need not be considered where the rule is ignored, and cannot be considered if appellee asks a dismissal on that account.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 2664; Dec. Dig. § 606.*]

2. APPEAL AND ERROR (§ 606*)—DISMISSAL—DEFECTIVE TRANSCRIPT.

Where the appellee does not ask for a dismissal of the appeal for appellant's noncompliance with Appellate Court rule 3 (55 N. E. iv), requiring an index referring to the initial page of each pleading, etc., and appellant has by an index attached to its bill of exceptions complied with the rule as to an index of the evidence, and its brief contains a copy of the complaint, together with the answers, motion for a new trial, and the substance of the evidence and the sufficiency of the pleadings, and correctness of the other matters set out in appellant's brief, are admitted, the appeal will not be dismissed for

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

noncompliance with the rule, but the sufficiency of the answers on demurrer will be considered.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2864; Dec. Dig. § 606.*]

Appeal from Circuit Court, Jasper County; C. W. Hanly, Judge.

Action by the Perpetual Building, Loan & Savings Association against Bert Stiller and others. From a judgment for defendants, plaintiff appeals. Affirmed.

Foltz & Spitler and Frank Foltz, for appellant. A. Halleck and Jasper Guy, for appellees.

HOTTEL, J. This is an action by appellant against the appellees on a promissory note for \$400 and to foreclose a mortgage on real estate given to secure the same. There was judgment for appellees for costs.

The complaint is in one paragraph, to which each appellee filed his separate answer, denying the execution of the note and mortgage. Appellees also filed joint answers designated as paragraphs 3, 4, and 5. Demurrers were filed by appellant to each paragraph of answer, which demurrers were each overruled and exceptions saved. The errors assigned call in question the several rulings of the court in overruling the demurrers to each of the paragraphs of answer, and in overruling the motion for a new trial, but appellant has in its brief, so far as the answers are concerned, urged the insufficiency of the third and fifth paragraphs alone.

[1] Appellant has deprived itself of a consideration of the question presented by the demurrers to these paragraphs of answer by failing to comply with that part of rule 3 (55 N. E. iv) of this court which requires an "index referring to the initial page * * * of each pleading exhibit and other paper in the record, such index to form the first page of the transcript." This rule, so far as it applies to the pleadings, has been entirely disregarded, and the only index found in the transcript is an index of the evidence only attached to the bill of exceptions near the middle of the record. The rule is positive, of long standing, and its observance has been by this and the Supreme Court fre-

quently held imperative. State ex rel. Whitaker v. Lankford et al., 158 Ind. 34, 62 N. E. 624; Dixon v. Poe, 158 Ind. 54, 62 N. E. 628; McCormick Harvesting Machine Co. v. Hinchman, 37 Ind. App. 83, 78 N. E. 327; Peterson v. Union Trust Co. et al., 160 Ind. 700, 65 N. E. 1025; Whinrey v. Start et al., 35 Ind. App. 623, 74 N. E. 32. If the appellees had, in their brief, urged a dismissal of the appeal, because of appellant's failure to comply with said rule, and the appellant, after having its attention so called to such an omission, had then failed, as it has, to make any effort to correct or supply such omission before the cause came up for decision, there would be under the authorities, supra, nothing for this court to do but dismiss the appeal, and we may add that said authorities warrant this court in entering such dismissal upon its own motion.

[2] But appellees make no insistence upon dismissal, and the appellant has by said index attached to its bill of exceptions made an effort to comply with said rule in so far as it applies to an index of the evidence, and has also set out in its brief a copy in full of the complaint and its exhibits, together with each of the defendants' answers of non est factum and plea of payment, the motion for a new trial, and the substance of the evidence. The sufficiency of each of these pleadings is, in effect, admitted by each party, respectively, and the correctness of the motion for new trial and the statement of the evidence set out in said brief is not questioned.

We have for the reasons above indicated, instead of dismissing the appeal, examined the several grounds of the motion for new trial, and this examination, together with a careful review of the evidence in the case, convinces us that the motion presents no reversible error, and that the evidence is entirely sufficient to sustain the decision of the court upon the issues tendered by the complaint, said answers of non est factum, and plea of payment and the denial thereof, and that a correct decision upon the merits of the cause has been reached by the court below.

The judgment is therefore affirmed.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes 95 N.E.—71

MEMORANDUM DECISIONS

In re **AHLERS et al.** (Court of Appeals of New York. March 28, 1911.) Appeal from an order of the Appellate Division of the Supreme Court in the Second Judicial Department (141 App. Div. 891, 127 N. Y. Supp. 61), entered December 30, 1910, which reversed an order (69 Misc. Rep. 177, 124 N. Y. Supp. 1009) of Special Term granting an application for a writ of certiorari and directing the issuance of a liquor tax certificate to the relator. Grant C. Fox, George E. Mott, Frederick E. Grant, Ashbel P. Fitch, and Morton C. Fitch, for appellant. Herbert H. Kellogg and William G. Van Loon, for respondents.

PER CURIAM. Order affirmed, with costs, upon opinion of Carr, J., below.

CULLEN, C. J., and VANN, WILLARD BARTLETT, HISCOCK, and CHASE, JJ., concur. HAIGHT and WERNER, JJ., absent.

AINSWORTH, Respondent, v. DUTCHESS HAT WORKS, Appellant. (Court of Appeals of New York. April 25, 1911.) Appeal from a judgment of the Appellate Division of the Supreme Court in the Second Judicial Department (136 App. Div. 893, 120 N. Y. Supp. 1112), entered December 15, 1909, affirming a judgment in favor of plaintiff entered upon a verdict in an action to recover for personal injuries alleged to have been sustained by plaintiff through the negligence of defendant, his employer. William L. O'Brien and Frank V. Johnson, for appellant. Charles Morschauer, for respondent.

PER CURIAM. Judgment affirmed, with costs.

CULLEN, C. J., and GRAY, WERNER, WILLARD BARTLETT, HISCOCK, CHASE, and COLLIN, JJ., concur.

ALLEN v. GRAY. (Court of Appeals of New York. May 2, 1911.)

PER CURIAM. Motion for reargument denied, with \$10 costs. See 201 N. Y. 504, 94 N. E. 652.

ANTHONY, Appellant, v. ABBOTT, Respondent, et al. (Court of Appeals of New York. March 14, 1911.) Appeal from a judgment of the Appellate Division of the Supreme Court in the Fourth Judicial Department (136 App. Div. 913, 120 N. Y. Supp. 1112), entered February 1, 1910, affirming a judgment in favor of defendant entered upon a dismissal of the complaint by the court at a Trial Term in an action to recover upon a check alleged to have been given to the plaintiff by the defendant's testator before her death. O. M. Reilly, J. R. Collins, and F. H. Collins, for appellant. James R. Shea, for respondent.

PER CURIAM. Judgment affirmed, with costs.

CULLEN, C. J., and GRAY, VANN, WERNER, WILLARD BARTLETT, and CHASE, JJ., concur. HAIGHT, J., absent.

In re **BALDWIN'S WILL.** (Court of Appeals of New York. May 9, 1911.) Appeal from an order of the Appellate Division of the Supreme Court in the Second Judicial Department (142 App. Div. 904, 126 N. Y. Supp. 1121), entered December 30, 1910, which affirmed a decree of the Kings County Surro-

gate's Court (67 Misc. Rep. 329, 124 N. Y. Supp. 612), admitting to probate a paper pronounced as the last will and testament of Charles D. Baldwin, deceased. See, also, 128 N. Y. Supp. 1112. William Murray and Floyd Martin Sheffield, for appellants. Edward J. Fanning and Henry M. Dater, for respondent.

PER CURIAM. Order affirmed, with costs. CULLEN, C. J., and HAIGHT, VANN, WERNER, HISCOCK, and COLLIN, JJ., concur. GRAY, J., absent.

BARCALO MFG. CO., Appellant, v. MALDONADO & CO., Respondent. (Court of Appeals of New York. March 28, 1911.) Appeal, by permission, from an order of the Appellate Division of the Supreme Court in the Fourth Judicial Department (140 App. Div. 939, 125 N. Y. Supp. 1112), entered January 27, 1911, which affirmed an order of Special Term directing a compulsory reference of the issues in an action to recover for goods sold and delivered and for money had and received. The following questions were certified: "(1) Do the causes of action set out in plaintiff's amended complaint and the denials and defenses in the answer and reply entitle plaintiff to a jury trial? (2) Did the court have jurisdiction to refer the issues in the first question to a referee, to hear, try, and determine the same without the consent of plaintiff?" 127 N. Y. Supp. 1110. August Becker, for appellant. Alfred L. Becker and Maurice O. Spratt, for respondent.

PER CURIAM. Order affirmed, with costs, on the ground that the answer does not controvert the allegations of the second cause of action stated in the complaint, but sets up an affirmative defense. First question certified answered in the negative; second in the affirmative.

CULLEN, C. J., and VANN, HISCOCK, and CHASE, JJ., concur. WILLARD BARTLETT, J., dissents. HAIGHT and WERNER, JJ., absent.

BARRY, Respondent, v. CITY OF NEW YORK, Appellant. (Court of Appeals of New York. April 7, 1911.) Appeal, by permission, from a judgment of the Appellate Division of the Supreme Court in the First Judicial Department (141 App. Div. 927, 126 N. Y. Supp. 1121), entered December 9, 1910, affirming a judgment in favor of plaintiff entered upon a decision of the court at a Trial Term without a jury in an action to recover a deficiency in salary alleged to be due plaintiff. See, also, 127 N. Y. Supp. 1111. Archibald B. Watson, Corp. Counsel (Clarence L. Barber and Theodore Connolly, of counsel), for appellant. George M. Curtis and Charles E. Hill, for respondent.

PER CURIAM. Judgment affirmed, with costs.

CULLEN, C. J., and GRAY, HAIGHT, VANN, WERNER, HISCOCK, and COLLIN, JJ., concur.

BEACH v. LARGE et al. (Court of Appeals of New York. March 3, 1911.) Appeal from a judgment of the Appellate Division of the Supreme Court in the Third Judicial Department (134 App. Div. 988, 119 N. Y. Supp. 1114), entered November 12, 1909, affirming an interlocutory judgment in favor of plaintiff entered upon a decision of the court at a Trial Term

without a jury in an action of partition. Edgar T. Brackett and A. J. Dillingham, for appellant. William H. Hollister, Jr., and William W. Morrill, for respondents.

PER CURIAM. Appeal dismissed, with costs.

CULLEN, C. J., and GRAY, WERNER, WILLARD BARTLETT, HISCOCK, CHASE, and COLLIN, JJ., concur.

BELFER, Respondent, v. LUDLOW, Appellant. (Court of Appeals of New York. May 2, 1911.) Motion to dismiss an appeal from an order of the Appellate Division of the Supreme Court in the Second Judicial Department (143 App. Div. 147, 127 N. Y. Supp. 623), entered February 17, 1911, which affirmed an order of Special Term granting a motion for leave to issue an execution. The motion was made on the ground that the order appealed from was not appealable to the Court of Appeals. See, also, 129 N. Y. Supp. 626. Francis A. McCloskey, for the motion. Frank L. Holt, opposed.

PER CURIAM. Motion granted and appeal dismissed, with costs and \$10 costs of motion.

In re BESCH. (Court of Appeals of New York. May 9, 1911.) Appeal from an order of the Appellate Division of the Supreme Court in the Third Judicial Department (139 App. Div. 922, 124 N. Y. Supp. 1110), entered July 26, 1910, which affirmed an order of Special Term denying a motion to vacate an order for the examination of the appellant herein as an expected party to an action. Andrew J. Nellis and Walter E. Ward, for appellant. J. S. Frost, for respondent.

PER CURIAM. While we are of the opinion that the order sought to be reviewed was made without authority, we are also of the opinion that it is not a final order in a special proceeding and subject to appeal to this court, but that its validity may be tested by the appellant when any attempt is made to punish him for failing to comply with the order. Matter of Strong v. Randall, 177 N. Y. 400, 69 N. E. 721. The appeal, therefore, is dismissed, but, under the circumstances, without costs.

CULLEN, C. J., and VANN, WERNER, HISCOCK, and COLLIN, JJ., concur. HAIGHT, J., concurs, only in the dismissal of the appeal. GRAY, J., absent.

BLUEMNER, Respondent, v. GARVIN, Appellant. (Court of Appeals of New York. May 2, 1911.) Motion to dismiss an appeal from a judgment of the Appellate Division of the Supreme Court in the First Judicial Department (143 App. Div. 927, 128 N. Y. Supp. 1113), entered March 17, 1911, affirming a judgment in favor of plaintiff entered upon a verdict in an action for services. The motion was made upon the ground that the judgment was not appealable of right to the Court of Appeals, and that permission to appeal had not been obtained. Joseph M. Hartfield, for the motion. Peter J. Everett, opposed.

PER CURIAM. Motion granted and appeal dismissed, with costs and \$10 costs of motion.

BOARD OF WATER COM'RS OF CITY OF CORNING, Appellant, v. CITY OF CORNING, Respondent (two cases). (Court of Appeals of New York. March 14, 1911.) Appeal from two orders of the Appellate Division of the Supreme Court in the Fourth Judicial Department (140 App. Div. 11, 124 N. Y. Supp. 268), entered July 12, 1910, which reversed two orders of Special Term denying motions to vacate a judgment heretofore en-

tered by default in an action to recover for water used for municipal purposes and granted said motions. The following question was certified: "Has the plaintiff, under the provisions of chapter 195 of the Laws of 1906, the right in this action to recover of the defendant for water used for municipal purposes?" See, also, 140 App. Div. 920, 125 N. Y. Supp. 1113. Waldo W. Willard, for appellant. James O. Sebring, for respondent.

PER CURIAM. Order in each case affirmed, without costs, on the ground that the plaintiff's remedy is by mandamus against the municipal officers. Question certified answered in the negative.

CULLEN, C. J., and GRAY, VANN, WERNER, WILLARD BARTLETT, and CHASE, JJ., concur. HAIGHT, J., absent.

BRADY, Appellant, v. NEW YORK CENT. & H. R. R. CO., Respondent. (Court of Appeals of New York. March 3, 1911.) Appeal from a judgment of the Appellate Division of the Supreme Court in the Second Judicial Department (136 App. Div. 896, 120 N. Y. Supp. 1115), entered January 17, 1910, affirming a judgment in favor of defendant entered upon a dismissal of the complaint by the court at a Trial Term and an order denying a motion for a new trial in an action to recover for the death of the plaintiff's intestate alleged to have been occasioned by the negligence of defendant, his employer. M. Spencer Bevins and Abraham Oberstein, for appellant. John F. Brennan, for respondent.

PER CURIAM. Judgment affirmed, with costs.

CULLEN, C. J., and GRAY, VANN, WERNER, HISCOCK, and COLLIN, JJ., concur. HAIGHT, J., absent.

BRANDLY, Respondent, v. AMERICAN BUTTER CO., Appellant. (Court of Appeals of New York. April 7, 1911.) Appeal from a judgment of the Appellate Division of the Supreme Court in the First Judicial Department (134 App. Div. 964, 119 N. Y. Supp. 1115), entered November 22, 1909, affirming a judgment in favor of plaintiff entered upon a verdict in an action for services. See, also, 130 App. Div. 878, 114 N. Y. Supp. 1120; 130 App. Div. 899, 114 N. Y. Supp. 1152. Schuyler C. Carlton and John P. Everett, for appellant. Benjamin N. Cardozo and Nathan Ottinger, for respondent.

PER CURIAM. Judgment affirmed, with costs.

CULLEN, C. J., and GRAY, HAIGHT, VANN, WERNER, HISCOCK, and COLLIN, JJ., concur.

BRINKERHOFF, Respondent, v. GREEN et al., Appellants. (Court of Appeals of New York. March 3, 1911.) Appeal from a judgment of the Appellate Division of the Supreme Court in the First Judicial Department (137 App. Div. 916, 122 N. Y. Supp. 481), entered April 13, 1910, which affirmed a judgment of Special Term construing the will of George J. Seabury, deceased. Mortimer W. Byers, for appellants. Charles D. Ridgway, for respondent.

PER CURIAM. Judgment affirmed, with costs to both parties, payable out of the estate.

CULLEN, C. J., and GRAY, HAIGHT, WILLARD BARTLETT, HISCOCK, and CHASE, JJ., concur. VANN, J., absent.

BROOKLYN DOCK & TERMINAL CO. v. BAHRENBURG et al. (Court of Appeals of New York. April 25, 1911.) Appeal from a judgment of the Appellate Division of the Su-

preme Court in the Second Judicial Department (135 App. Div. 799, 120 N. Y. Supp. 205), entered January 13, 1910, affirming a judgment in favor of plaintiff entered upon a verdict directed by the court in an action for rent. Henry Wetherhorn, for appellants. James O. Sheldon, for respondent.

PER CURIAM. Judgment affirmed, with costs.

CULLEN, C. J., and GRAY, HAIGHT, VANN, WILLARD BARTLETT, CHASE, and COLLIN, JJ., concur.

BROOKLYN TRUST CO. v. PHILLIPS et al. (Court of Appeals of New York. March 3, 1911.) Appeal from an order of the Appellate Division of the Supreme Court in the Second Judicial Department (134 App. Div. 697, 119 N. Y. Supp. 401), entered November 19, 1909, reversing a judgment in favor of defendant appellant entered upon a decision of the court on trial at Special Term and granting a new trial in an action for the judicial settlement of the accounts of the plaintiff trustee. See, also, 137 App. Div. 890, 121 N. Y. Supp. 1126. William M. Benedict, for appellant. Duane P. Cobb and Granville I. Burr, for respondents.

PER CURIAM. Order affirmed and judgment absolute ordered against appellant on the stipulation, with costs in all courts.

GRAY, VANN, WERNER, HISCOCK, and COLLIN, JJ., concur. CULLEN, C. J., not sitting. HAIGHT, J., absent.

BUCHHOLZ-HILL TRANSP. CO., Respondent, v. BAXTER, Appellant. (Court of Appeals of New York. May 2, 1911.) Motion to dismiss an appeal from a judgment of the Appellate Division of the Supreme Court in the Second Judicial Department (142 App. Div. 25, 126 N. Y. Supp. 514), entered January 12, 1911, affirming a judgment in favor of plaintiff entered upon a verdict in an action to recover damages alleged to have been occasioned plaintiff through the neglect of defendant to promptly perform his contract with the said plaintiff to buoy a certain wreck. The motion was made upon the ground that the appeal was taken for purpose of delay, and was frivolous. Pierre M. Brown, for the motion. Norman B. Beecher, opposed.

PER CURIAM. Motion denied, with \$10 costs.

BUCKLEY, Respondent, v. BEINHAEUER, Appellant. (Court of Appeals of New York. March 14, 1911.) Appeal, by permission, from a judgment of the Appellate Division of the Supreme Court in the First Judicial Department (136 App. Div. 540, 121 N. Y. Supp. 180), entered February 5, 1910, affirming a judgment in favor of plaintiff entered upon a verdict in an action to recover for personal injuries alleged to have been sustained through the negligence of defendant, his employer. See, also, 137 App. Div. 923, 122 N. Y. Supp. 1123. Frank V. Johnson and E. Clyde Sherwood, for appellant. William A. McQuaid and G. V. Smith, for respondent.

PER CURIAM. Judgment affirmed, with costs.

CULLEN, C. J., and GRAY, VANN, WERNER, WILLARD BARTLETT, and CHASE, JJ., concur. HAIGHT, J., absent.

BUFFUM, Respondent, v. BUFFALO & L. E. TRACTION CO., Appellant, et al. (Court of Appeals of New York. April 25, 1911.) Appeal from a judgment of the Appellate Division of the Supreme Court in the Fourth

Judicial Department (137 App. Div. 879, 118 N. Y. Supp. 1097), entered October 23, 1909, affirming a judgment in favor of plaintiff entered upon a verdict in an action to recover for personal injuries alleged to have been sustained through the negligence of defendant. Lyman M. Bass, for appellant. W. H. Ticknor, for respondent.

PER CURIAM. Judgment affirmed, with costs.

CULLEN, C. J., and GRAY, HAIGHT, VANN, WILLARD BARTLETT, CHASE, and COLLIN, JJ., concur.

BUILDERS' MORTGAGE CO. v. BERKOWITZ et al. (Court of Appeals of New York. April 4, 1911.) Appeal, by permission, from an order of the Appellate Division of the Supreme Court in the Second Judicial Department (142 App. Div. 57, 126 N. Y. Supp. 464), entered December 30, 1910, which affirmed an order (67 Misc. Rep. 595, 123 N. Y. Supp. 355) of Special Term relieving the respondent herein from her purchase at a foreclosure sale, directing a resale of the premises and that out of the proceeds the said respondent be paid the amount of a deposit made by her on her purchase, her expenses and costs. See, also, 134 App. Div. 136, 118 N. Y. Supp. 804. Henry Escher, Jr., and Lyttleton Fox, for appellant. George E. Miner, for respondent.

PER CURIAM. Order affirmed, with costs.

CULLEN, C. J., and VANN, WERNER, WILLARD BARTLETT, HISCOCK, and CHASE, JJ., concur. HAIGHT, J., absent.

BURNS, Respondent, v. STAUNTON et al., Appellants. (Court of Appeals of New York. March 14, 1911.) Appeal from a judgment of the Appellate Division of the Supreme Court in the Fourth Judicial Department (134 App. Div. 996, 119 N. Y. Supp. 1116), entered November 27, 1909, affirming a judgment in favor of plaintiff entered upon a verdict in an action for libel. A. H. Cowie, for appellants. Thomas Woods, for respondent.

PER CURIAM. Judgment affirmed, with costs.

CULLEN, C. J., and GRAY, VANN, WERNER, WILLARD BARTLETT, and CHASE, JJ., concur. HAIGHT, J., absent.

CANDEE, SMITH & HOWLAND CO. v. CITY OF NEW YORK et al. (Court of Appeals of New York. April 25, 1911.) Appeal from a judgment of the Appellate Division of the Supreme Court in the First Judicial Department (135 App. Div. 915, 119 N. Y. Supp. 1116), entered December 11, 1909, affirming a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term in an action to foreclose a mechanic's lien. Arnold L. Davis, John Burlinson Coleman, and Edward R. Finch, for appellants. Albert R. Hager, for respondent.

PER CURIAM. Judgment affirmed, with costs.

CULLEN, C. J., and GRAY, WERNER, WILLARD BARTLETT, HISCOCK, CHASE, and COLLIN, JJ., concur.

In re CHADSEY. (Court of Appeals of New York. March 14, 1911.) Appeal from an order of the Appellate Division of the Supreme Court in the First Judicial Department (141 App. Div. 458, 126 N. Y. Supp. 456), entered January 18, 1911, which suspended the appellant herein from practicing as an attorney for the term of six months and until reinstatement. Charles A. Boston and Nathan B.

Chadsey, for appellant. Einar Chrystie, for respondent.

PER CURIAM. Order affirmed.

CULLEN, C. J., and GRAY, HAIGHT, VANN, WERNER, WILLARD BARTLETT, and CHASE, JJ., concur.

In re CHADSEY. (Court of Appeals of New York. April 4, 1911.)

PER CURIAM. Motion for reargument denied, with \$10 costs. See 201 N. Y. —, 95 N. E. 1124.

CHARLES LEHMAN-CHARLEY, Respondent, v. BARTLETT et al., Appellants, et al. (Court of Appeals of New York. April 25, 1911.) Appeal from a judgment of the Appellate Division of the Supreme Court in the First Judicial Department (135 App. Div. 674, 120 N. Y. Supp. 501), entered January 25, 1910, modifying and affirming as modified a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term in an action to rescind a subscription for stock and to recover the amount paid therefor. John L. Wilkie and W. G. Peckham, for appellants. Howard Taylor and John G. Jackson, for respondent.

PER CURIAM. Judgment affirmed, with costs.

CULLEN, C. J., and GRAY, HAIGHT, VANN, CHASE, and COLLIN, JJ., concur. WILLARD BARTLETT, J., not sitting.

CHURCH, Respondent, v. NEW YORK CENT. & H. R. R. CO., Appellant. (Court of Appeals of New York. March 21, 1911.) Appeal, by permission, from a judgment of the Appellate Division of the Supreme Court in the First Judicial Department (135 App. Div. 914, 119 N. Y. Supp. 1117), entered December 3, 1909, which affirmed a determination of the Appellate Term (116 N. Y. Supp. 560) affirming a judgment of the Municipal Court of the city of New York in favor of plaintiff in an action to recover the value of certain baggage stolen while in the custody of defendant. See, also, 135 App. Div. 924, 120 N. Y. Supp. 1117. William Mann and Alex. S. Lyman, for appellant. Reuben M. Cohen, for respondent.

PER CURIAM. Judgment affirmed, with costs.

CULLEN, C. J., and GRAY, WERNER, WILLARD BARTLETT, HISCOCK, CHASE, and COLLIN, JJ., concur.

CITY OF GENEVA, Respondent, v. HENSON, Appellant. (Court of Appeals of New York. May 9, 1911.) Appeal from Supreme Court, Appellate Division, Fourth Department. Condemnation proceedings by the City of Geneva against Robert W. Henson. From an order of the Appellate Division, Fourth Department, unanimously affirming a report of appraisers bringing up for review an interlocutory judgment (140 App. Div. 49, 124 N. Y. Supp. 588), entered on the report of a referee determining the extent of the defendant's ownership of the lands sought to be condemned, he appeals. Affirmed. John D. Lynn, for appellant. Arthur J. Hammond and Henry S. Bacon, for respondent. Thomas Carmody, Atty. Gen. (J. A. Kellogg, of counsel), filing a brief on behalf of the state.

PER CURIAM. Upon a former review in this court of the proceedings had in this case, in which it had been held in the courts below that the title of the lands under the water of Seneca Lake in front of the western shore thereof had passed to the state of Massachusetts under the treaty of Hartford in 1786,

and that Henson, by reason of his ownership of the uplands bordering upon the lake, became the owner of the lands under the waters thereof out to the point sought to be condemned in this proceeding, it was held that the order should be reversed upon the ground that in the description under which Henson derived title, his line ran to the lake, and thence along the shore thereof, thus indicating an intention not to convey the title to the lands under water out to the center of the lake, but did include all docks, buildings, and fixtures, rights, and privileges then owned by the grantor, etc. City of Geneva v. Henson, 195 N. Y. 447, 88 N. E. 1104. On the retrial of the issues the referee has now found that under a proper construction of the treaty of Hartford the state of New York did not divest itself of the lands under the water of Seneca Lake, it being navigable and used for commerce; and as to the extent of the title of Henson of the lands under the waters of the lake in front of his premises he followed substantially the opinion of this court on its former review. The report of the referee having been confirmed and the appraisal had, the case comes up for review under a unanimous affirmance of the Appellate Division. We do not deem it necessary to now construe the treaty of Hartford and determine the question as to whether or not the lands under the water of Seneca Lake passed to the state of Massachusetts. The question presented is as to the extent of the title of Henson. That question has to be determined from the description in his deed and that of his predecessors in interest and by his occupancy, and the determination of that question is not affected by the treaty, whatever may be its construction. This question was fully considered in the former review by this court, and therefore the order should be affirmed, with costs, upon that opinion.

CULLEN, C. J., and GRAY, HAIGHT, VANN, WERNER, HISCOCK, and COLLIN, JJ., concur.

Order affirmed.

CITY OF NEW YORK, Respondent, v. ALHAMBRA THEATER CO., Appellant. (Court of Appeals of New York. April 25, 1911.) Appeal from an order of the Appellate Division of the Supreme Court in the First Judicial Department (136 App. Div. 509, 121 N. Y. Supp. 3), entered February 8, 1910, reversing a judgment in favor of defendant entered upon a dismissal of the complaint by the court at a Trial Term and granting a new trial in an action to recover a penalty for an alleged violation of an ordinance of the city of New York prohibiting theatrical performances on Sunday. Louis J. Vorhaus and Charles Goldzier, for appellant. Archibald R. Watson, Corp. Counsel (Theodore Connolly and Terence Farley, of counsel), for respondent.

PER CURIAM. Order affirmed and judgment absolute ordered against appellant on the stipulation, with costs in all courts.

CULLEN, C. J., and GRAY, WERNER, WILLARD BARTLETT, HISCOCK, CHASE, and COLLIN, JJ., concur.

CLARK, Respondent, v. WEST, Appellant. (Court of Appeals of New York. March 14, 1911.) Appeal, by permission, from a judgment of the Appellate Division of the Supreme Court in the Second Judicial Department (137 App. Div. 23, 122 N. Y. Supp. 380), entered April 6, 1910, affirming a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term in an action on contract and for an accounting. See, also, 125 App. Div. 654, 110 N. Y. Supp. 110; 138 App. Div. 922, 123 N. Y. Supp. 1111. William H. Oppenheimer

and H. V. Rutherford, for appellant. William B. Hale, for respondent.

PER CURIAM. Judgment affirmed, with costs, without passing upon the question whether the contract was entire or severable.

CULLEN, C. J., and GRAY, VANN, WERNER, WILLARD BARTLETT, and CHASE, JJ., concur. HAIGHT, J., absent.

CLARK, Respondent, v. WEST, Appellant. (Court of Appeals of New York. April 4, 1911.)

PER CURIAM. Motion for reargument denied, with \$10 costs. See 201 N. Y. —, 95 N. E. 1125. See, also, 125 App. Div. 654, 110 N. Y. Supp. 110; 138 App. Div. 922, 123 N. Y. Supp. 1111.

COLE, Appellant, v. LESTER et al., Respondents, et al. (Court of Appeals of New York. March 14, 1911.) Appeal from a judgment, entered July 11, 1908, upon an order of the Appellate Division of the Supreme Court in the Fourth Judicial Department (125 App. Div. 899, 109 N. Y. Supp. 1127), affirming an interlocutory judgment in favor of defendants entered upon a decision of the court on trial at Special Term in an action of partition. William Townsend and Erwin L. Hockridge, for appellant. Charles D. Thomas, for respondents.

PER CURIAM. Judgment affirmed, with costs.

CULLEN, C. J., and GRAY, VANN, WERNER, WILLARD BARTLETT, and CHASE, JJ., concur. HAIGHT, J., absent.

COLWELL, Respondent, v. E. R. ALLEN FOUNDRY CO., Appellant. (Court of Appeals of New York. April 25, 1911.) Appeal from a judgment of the Appellate Division of the Supreme Court in the Second Judicial Department (139 App. Div. 916, 124 N. Y. Supp. 1113), entered July 1, 1910, affirming a judgment in favor of plaintiff entered upon a verdict in an action to recover broker's commissions. James O. Sebring, for appellant. George W. Wingate, for respondent.

PER CURIAM. Judgment affirmed, with costs.

CULLEN, C. J., and GRAY, WERNER, WILLARD BARTLETT, HISCOCK, CHASE, and COLLIN, JJ., concur.

CONDON, Respondent, v. NEW ROCHELLE WATER CO., Appellant. (Court of Appeals of New York. April 25, 1911.) Appeal from a judgment of the Appellate Division of the Supreme Court in the Second Judicial Department (136 App. Div. 897, 120 N. Y. Supp. 1119), entered January 7, 1910, affirming a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term in an action to restrain the defendant from charging plaintiff in excess of a certain rate for water or from interfering with plaintiff's connections with its mains. John J. Crennan and Edwin T. Rice, for appellant. Henry G. K. Heath, for respondent.

PER CURIAM. Judgment affirmed, with costs.

CULLEN, C. J., and GRAY, WERNER, WILLARD BARTLETT, HISCOCK, CHASE, and COLLIN, JJ., concur.

CORELL v. SYLVESTER et al. (Court of Appeals of New York. May 16, 1911.) Appeal from a judgment of the Appellate Division of the Supreme Court in the Second Judicial Department (137 App. Div. 888, 121 N. Y.

Supp. 1128), entered March 12, 1910, affirming a judgment in favor of plaintiff entered upon a verdict in an action to recover moneys alleged to have been paid by mistake. See, also, 198 N. Y. 627, 92 N. E. 1082. Louis Zinke, for appellants. Emanuel S. Cahn, for respondent.

PER CURIAM. Judgment affirmed, with costs.

CULLEN, C. J., and GRAY, WERNER, WILLARD BARTLETT, HISCOCK, CHASE, and COLLIN, JJ., concur.

COURTNEY, Respondent, v. NIAGARA FALLS HYDRAULIC POWER & MANUFACTURING CO., Appellant. (Court of Appeals of New York. March 21, 1911.) Appeal from a judgment of the Appellate Division of the Supreme Court in the Fourth Judicial Department (138 App. Div. 383, 122 N. Y. Supp. 721), entered May 18, 1910, affirming a judgment in favor of plaintiff entered upon a verdict in an action to recover for the death of plaintiff's intestate alleged to have been occasioned by the negligence of defendant, his employer. Ralph S. Kent, for appellant. Eugene M. Ashley and Augustus Thibaudreau, for respondent.

PER CURIAM. Judgment affirmed, with costs.

CULLEN, C. J., and VANN, WILLARD BARTLETT, HISCOCK, CHASE, and COLLIN, JJ., concur. HAIGHT, J., absent.

In re CRESCENT ST. IN CITY OF NEW YORK. (Court of Appeals of New York. March 28, 1911.) Appeal from an order of the Appellate Division of the Supreme Court in the Second Judicial Department (127 N. Y. Supp. 37), entered December 30, 1910, which affirmed an order of Special Term denying a motion to correct and modify a report of commissioners of estimate and assessment in the above-entitled proceeding. See, also, 127 N. Y. Supp. 1116. Louis Marshall and Samuel F. Jacobs, for appellant. George E. Blackwell, for respondent. Frank E. Hagemeyer. Archibald R. Watson, Corp. Counsel (Joel J. Squier, Norman J. Marsh, and William B. R. Faber, of counsel), for respondent City of New York.

PER CURIAM. Appeal dismissed, with costs.

CULLEN, C. J., and VANN, WERNER, WILLARD BARTLETT, HISCOCK, and CHASE, JJ., concur. HAIGHT, J., absent.

CUBA, Respondent, v. DRUSKIN et al., Appellants. (Court of Appeals of New York. May 16, 1911.) Appeal, by permission, from an order of the Appellate Division of the Supreme Court in the First Judicial Department (135 App. Div. 508, 120 N. Y. Supp. 381), entered December 30, 1909, which reversed a determination of the Appellate Term, affirming a judgment of the Municipal Court of the city of New York in favor of defendants, and directed judgment in favor of plaintiff in an action by a purchaser of real property against the vendors to recover for a breach of a covenant against incumbrances contained in the deed. See, also, 136 App. Div. 933, 120 N. Y. Supp. 1120. Abraham H. Sarasohn, for appellants. Leon Kronfeld, for respondent.

PER CURIAM. Order affirmed, with costs.

CULLEN, C. J., and GRAY, HAIGHT, VANN, WERNER, WILLARD BARTLETT, and CHASE, JJ., concur.

DELHAYE, Respondent, v. HILDEBRAND, Appellant. (Court of Appeals of New York. Feb. 28, 1911.) Motion to dismiss an appeal from a judgment of the Appellate Division of the Supreme Court in the Second Judicial Department (126 N. Y. Supp. 1126), entered De-

ember 30, 1910, affirming a judgment in favor of plaintiff entered upon a verdict and an order denying a motion for a new trial in an action to recover for labor and materials furnished. The motion was made upon the ground that the Court of Appeals had no jurisdiction to hear the appeal; permission to appeal not having been obtained. Max Perlman, for the motion. Wilson W. Thompson, opposed.

PER CURIAM. Motion denied, with \$10 costs.

DEVLIN, Respondent, v. BROOKLYN HEIGHTS R. CO., Appellant. (Court of Appeals of New York. April 25, 1911.) Appeal from a judgment of the Appellate Division of the Supreme Court in the First Judicial Department (135 App. Div. 921, 120 N. Y. Supp. 1121), entered December 31, 1909, affirming a judgment in favor of plaintiff entered upon a verdict in an action to recover for personal injuries alleged to have been sustained through the negligence of defendant. D. A. Marsh and George D. Yeomans, for appellant. John M. Ward, for respondent.

PER CURIAM. Judgment affirmed, with costs.

CULLEN, C. J., and GRAY, WERNER, WILLARD BARTLETT, HISCOCK, CHASE, and COLLIN, JJ., concur.

DEXTER, Respondent, v. JETTER BREWING CO., Appellant. (Court of Appeals of New York. March 21, 1911.) Appeal from a judgment of the Appellate Division of the Supreme Court in the Second Judicial Department (134 App. Div. 920, 118 N. Y. Supp. 1103), entered October 11, 1909, affirming a judgment in favor of plaintiff entered upon a verdict directed by the court in an action to recover for goods sold and delivered. See, also, 196 N. Y. 562, 90 N. E. 1158, 136 App. Div. 888, 119 N. Y. Supp. 1123. Charles Trosk and Otto C. Sommerich, for appellant. William F. Hagarty, for respondent.

PER CURIAM. Judgment affirmed, with costs.

CULLEN, C. J., and GRAY, HAIGHT, VANN, WERNER, WILLARD BARTLETT, and CHASE, JJ., concur.

DIXON, Respondent, v. COZINE, Appellant. (Court of Appeals of New York. May 16, 1911.) Appeal from a judgment of the Appellate Division of the Supreme Court in the Second Judicial Department (134 App. Div. 921, 118 N. Y. Supp. 1103), entered January 4, 1910, affirming a judgment (114 N. Y. Supp. 615) in favor of plaintiff entered upon a decision of the court on trial at Special Term in an action to compel specific performance of a contract for the sale of real property. Charles C. Suffren, for appellant. Malcolm Ross Matheson, for respondent.

PER CURIAM. Judgment affirmed, with costs.

CULLEN, C. J., and GRAY, WERNER, WILLARD BARTLETT, HISCOCK, CHASE, and COLLIN, JJ., concur.

In re DONNELLY. (Court of Appeals of New York. April 4, 1911.) Appeal from an order of the Appellate Division of the Supreme Court in the Second Judicial Department, entered November 18, 1910 (In re Riede, 138 App. Div. 83, 122 N. Y. Supp. 600), which affirmed a decree of the Kings County Surrogate's Court admitting to probate the will of Mary E. Donnelly, deceased. Thomas J. Farrell, for appel-

lant. Samuel C. Worthen and Monte London, for respondent.

PER CURIAM. Order affirmed, with costs.

CULLEN, C. J., and VANN, WERNER, WILLARD BARTLETT, HISCOCK, and CHASE, JJ., concur. HAIGHT, J., absent.

DONNELLY, Appellant, v. KATZ, Respondent. (Court of Appeals of New York. March 14, 1911.) Appeal from a judgment of the Appellate Division of the Supreme Court in the Second Judicial Department (133 App. Div. 905, 117 N. Y. Supp. 644), entered July 13, 1909, affirming a judgment in favor of defendant entered upon a dismissal of the complaint by the court at a Trial Term in an action to recover for personal injuries alleged to have been sustained by the plaintiff through the negligence of the defendant in failing to keep the halls of his tenement house lighted. James F. O'Neill and H. G. McDowell, for appellant. William A. Jones, Jr., for respondent.

PER CURIAM. Judgment affirmed, with costs.

CULLEN, C. J., and GRAY, HAIGHT, VANN, WERNER, and CHASE, JJ., concur. WILLARD BARTLETT, J., not voting.

DUFFY, Appellant, v. MEYER, Respondent. (Court of Appeals of New York. April 25, 1911.) Appeal from a judgment of the Appellate Division of the Supreme Court in the First Judicial Department (135 App. Div. 915, 119 N. Y. Supp. 1123), entered December 8, 1909, affirming a judgment in favor of defendant entered upon a verdict in an action to recover damages alleged to have been occasioned plaintiff by the fraudulent representations of defendant. Edward W. S. Johnston, for appellant. Abraham Benedict, for respondent.

PER CURIAM. Judgment affirmed, with costs.

CULLEN, C. J., and GRAY, HAIGHT, VANN, WILLARD BARTLETT, CHASE, and COLLIN, JJ., concur.

DUFFY, Respondent, v. OTIS ELEVATOR CO., Appellant. (Court of Appeals of New York. April 25, 1911.) Appeal from a judgment of the Appellate Division of the Supreme Court in the Second Judicial Department (134 App. Div. 913, 118 N. Y. Supp. 859), entered October 25, 1909, affirming a judgment in favor of plaintiff entered upon a verdict in an action to recover for personal injuries alleged to have been sustained by plaintiff through the negligence of defendant, his employer. Henry S. Curtis and Frederick B. Campbell, for appellant. John F. Brennan, for respondent.

PER CURIAM. Judgment affirmed, with costs.

CULLEN, C. J., and GRAY, HAIGHT, VANN, WILLARD BARTLETT, CHASE, and COLLIN, JJ., concur.

DUMARY, Respondent, v. UNITED TRACTION CO., Appellant. (Court of Appeals of New York. March 21, 1911.) Appeal from a judgment of the Appellate Division of the Supreme Court in the Third Judicial Department (134 App. Div. 989, 119 N. Y. Supp. 1123), entered November 10, 1909, affirming a judgment in favor of plaintiff entered upon a verdict in an action on contract. P. C. Dugan, for appellant. Murray Downs, for respondent.

PER CURIAM. Judgment affirmed, with costs.

CULLEN, C. J., and GRAY, WERNER, WILLARD BARTLETT, HISCOCK, CHASE, and COLLIN, JJ., concur.

DURYEA et al., Appellants, v. LOHRKE et al., Respondents. (Court of Appeals of New York. May 19, 1911.) Appeal from a judgment of the Appellate Division of the Supreme Court in the First Judicial Department (136 App. Div. 555, 121 N. Y. Supp. 138), entered March 4, 1910, modifying and affirming as modified a judgment in favor of defendants entered upon a verdict in an action on contract. Robert B. Honeyman, for appellants. Herman Aaron, for respondents.

PER CURIAM. Judgment affirmed, with costs.

CULLEN, C. J., and GRAY, HAIGHT, VANN, WERNER, WILLARD BARTLETT, and CHASE, JJ., concur.

EARLE, Appellant, v. WHITE KNOB OOP-PER CO., Limited, et al., Respondents, et al. (Court of Appeals of New York. March 14, 1911.) Appeal from a judgment of the Appellate Division of the Supreme Court in the First Judicial Department (132 App. Div. 929, 117 N. Y. Supp. 1133), entered June 18, 1909, affirming a judgment in favor of defendants entered upon a dismissal of the complaint by the court at a Trial Term in an action to recover from the directors of an insolvent corporation the face value of certain of its debenture bonds. Paris S. Russell and John Ingle, Jr., for appellant. Charles Howland Russell, for respondents.

PER CURIAM. Judgment affirmed, with costs.

CULLEN, C. J., and VANN, WERNER, WILLARD BARTLETT, and CHASE, JJ., concur. GRAY, J., not sitting. HAIGHT, J., absent.

EGAN, Respondent, v. MOSLER SAFE CO., Appellant. (Court of Appeals of New York. May 16, 1911.) Appeal from a judgment of the Appellate Division of the Supreme Court in the Second Judicial Department (134 App. Div. 920, 118 N. Y. Supp. 1008), entered November 4, 1909, affirming a judgment in favor of plaintiff entered upon a verdict in an action to recover for personal injuries alleged to have been sustained by plaintiff through the negligence of defendant, his employer. Allan E. Brosmith, Joseph F. Murray, and Frank V. Johnson, for appellant. Eugene F. McKinley and Charles D. Millard, for respondent.

PER CURIAM. Judgment affirmed, with costs.

CULLEN, C. J., and GRAY, HAIGHT, VANN, WERNER, HISCOCK, and COLLIN, JJ., concur.

ELLIS et al., Respondents, v. TOWN OF PELHAM, Appellant. (Court of Appeals of New York. March 14, 1911.) Appeal from a judgment of the Appellate Division of the Supreme Court in the Second Judicial Department (134 App. Div. 926, 118 N. Y. Supp. 1104), entered October 20, 1909, affirming a judgment in favor of plaintiffs entered upon a decision of the court on trial at Special Term (116 N. Y. Supp. 87) in an action to remove a cloud upon title by reason of defendant's claim of a right of way over the premises in question. Henry G. K. Heath, for appellant. Philip S. Dean, for respondents.

PER CURIAM. Judgment affirmed, with costs.

CULLEN, C. J., and GRAY, HAIGHT, VANN, WERNER, and CHASE, JJ., concur. WILLARD BARTLETT, J., not sitting.

ELTING, Respondent, v. SCHWARTZ, Appellant. (Court of Appeals of New York. March 14, 1911.) Appeal from a judgment of the Appellate Division of the Supreme Court in the Second Judicial Department (134 App. Div. 926, 118 N. Y. Supp. 1105), entered October 13, 1909, affirming a judgment in favor of plaintiff entered upon the report of a referee in an action for a copartnership accounting. Milton A. Fowler and Charles Morschauser, for appellant. F. B. Lown and C. W. H. Arnold, for respondent.

PER CURIAM. Judgment affirmed, with costs.

CULLEN, C. J., and GRAY, VANN, WERNER, WILLARD BARTLETT, and CHASE, JJ., concur. HAIGHT, J., absent.

FISCHEL, Respondent, v. LESE, Appellant, et al. (Court of Appeals of New York. April 25, 1911.) Appeal from a judgment of the Appellate Division of the Supreme Court in the First Judicial Department (135 App. Div. 921, 120 N. Y. Supp. 1123), entered December 28, 1909, affirming a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term in an action to foreclose a mortgage. See, also, 198 N. Y. 597, 92 N. E. 1084. John D. Connolly, Jr., for appellant. J. A. Seidman, for respondent.

PER CURIAM. Judgment affirmed, with costs.

CULLEN, C. J., and GRAY, WERNER, WILLARD BARTLETT, HISCOCK, CHASE, and COLLIN, JJ., concur.

FITZGERALD, Respondent, v. CITY OF NEW YORK, Appellant. (Court of Appeals of New York. April 7, 1911.) Appeal, by permission, from a judgment of the Appellate Division of the Supreme Court in the First Judicial Department (141 App. Div. 927, 126 N. Y. Supp. 1129), entered December 9, 1910, affirming a judgment in favor of plaintiff entered upon a decision of the court at a Trial Term without a jury in an action to recover a deficiency in salary alleged to be due the plaintiff. See, also, 127 N. Y. Supp. 1111. Archibald R. Watson, Corp. Counsel (Clarence L. Barber and Theodore Connolly, of counsel), for appellant. George M. Curtis and Charles E. Hill, for respondent.

PER CURIAM. Judgment affirmed, with costs.

CULLEN, C. J., and GRAY, HAIGHT, VANN, WERNER, HISCOCK, and COLLIN, JJ., concur.

FOLEY, Respondent, v. UTICA SANITARY MILK CO., Appellant. (Court of Appeals of New York. March 14, 1911.) Appeal from a judgment of the Appellate Division of the Supreme Court in the Fourth Judicial Department (134 App. Div. 955, 118 N. Y. Supp. 1106), entered October 8, 1909, affirming a judgment in favor of plaintiff entered upon the report of a referee in an action to recover for services. James H. Merwin, for appellant. P. H. Fitzgerald, for respondent.

PER CURIAM. Judgment affirmed, with costs.

CULLEN, C. J., and GRAY, HAIGHT, WERNER, and CHASE, JJ., concur. VANN and WILLARD BARTLETT, JJ., dissent.

FOX, Respondent, v. COX, Appellant. (Court of Appeals of New York. May 2, 1911.)

PER CURIAM. Motion for reargument denied, with \$10 costs. See 201 N. Y. 189, 94 N. E. 628. See, also, 128 App. Div. 876, 113 N. Y. Supp. 121.

In re FREUND'S ESTATE. (Court of Appeals of New York. May 16, 1911.) Appeal from an order of the Appellate Division of the Supreme Court in the First Judicial Department (143 App. Div. 835, 128 N. Y. Supp. 48), entered March 10, 1911, which affirmed an order of the New York County Surrogate's Court assessing a transfer tax upon the estate of Max Freund, deceased. Benjamin Tuska and Carl S. Stern, for appellant. Thomas E. Rush, for respondent.

PER CURIAM. Order affirmed, with costs, on opinion of McLaughlin, J., below.

CULLEN, C. J., and GRAY, HAIGHT, VANN, WERNER, and COLLIN, JJ., concur. HISCOCK, J., not voting.

FULTON LIGHT, HEAT & POWER CO. et al., Respondents, v. STATE, Appellant. (Court of Appeals of New York. May 2, 1911.)

PER CURIAM. Motion for reargument denied, with \$10 costs. See 200 N. Y. 400, 94 N. E. 199.

GANSEVOORT BANK, Appellant, v. EMPIRE STATE SURETY CO., Respondent. (Court of Appeals of New York. April 25, 1911.) Appeal from a judgment of the Appellate Division of the Supreme Court in the First Judicial Department (136 App. Div. 939, 121 N. Y. Supp. 1131), entered February 21, 1910, affirming a judgment in favor of defendant entered upon a dismissal of the complaint by the court at a Trial Term in an action to recover on a bond given as security for the payment of a promissory note. J. Campbell Thompson, for appellant. Benjamin Reass, for respondent.

PER CURIAM. Judgment affirmed, with costs.

CULLEN, C. J., and GRAY, WERNER, WILLARD BARTLETT, HISCOCK, CHASE, and COLLIN, JJ., concur.

GORE, Appellant, v. NEW YORK CENT. & H. R. R. CO., Respondent. (Court of Appeals of New York. April 25, 1911.) Appeal from a judgment of the Appellate Division of the Supreme Court in the Fourth Judicial Department (136 App. Div. 909, 120 N. Y. Supp. 1126), entered December 17, 1909, affirming a judgment in favor of defendant entered upon a dismissal of the complaint by the court at a Trial Term in an action to recover damages for sickness of plaintiff alleged to have resulted from the failure of defendant to properly heat its cars. Merwin W. Lay, for appellant. Samuel M. Havens, for respondent.

PER CURIAM. Judgment affirmed, with costs.

CULLEN, C. J., and GRAY, WERNER, WILLARD BARTLETT, HISCOCK, CHASE, and COLLIN, JJ., concur.

GOTTLIEB, Appellant, v. ALTSCHULER et al., Respondents. (Court of Appeals of New York. May 2, 1911.) Motion to dismiss an appeal from an order of the Appellate Division of the Supreme Court in the First Judicial Department (143 App. Div. 935, 128 N. Y. Supp. 1125), entered March 31, 1911, which affirmed an order of Special Term directing the plaintiff to execute to the defendant Altschuler a release from liability under a judgment heretofore rendered. The motion was made upon the ground that the order appealed from was not appealable of right to the Court of Appeals. Abraham Rosenstein, for the motion. Herman Gottlieb, opposed.

PER CURIAM. Motion denied, with \$10 costs.

In re GOULD. (Court of Appeals of New York. April 4, 1911.) Appeal from an order of the Appellate Division of the Supreme Court in the Fourth Judicial Department (127 N. Y. Supp. 1122), entered February 4, 1911, which affirmed an order of Special Term granting a motion for a peremptory writ of mandamus to compel the appellant herein to permit the petitioner to examine its books and papers. Daniel J. Kenefick, David T. Davis, and William B. Symmes, Jr., for appellant. Charles B. Sears, for respondent.

PER CURIAM. Order affirmed, with costs, without prejudice to any application to the Supreme Court for limitation of the provisions of the order.

CULLEN, C. J., and VANN, WERNER, WILLARD BARTLETT, HISCOCK, and CHASE, JJ., concur. HAIGHT, J., absent.

In re GRADE CROSSING COM'RS OF CITY OF BUFFALO. (Court of Appeals of New York. May 2, 1911.) Motion to amend remittitur. See 201 N. Y. 32, 94 N. E. 188.

PER CURIAM. Motion granted. Remittitur to be recalled and amended by striking therefrom the provision allowing costs in all courts, and inserting, instead thereof, a provision that the reversal is without costs to either party.

GUARDIAN TRUST CO. OF NEW YORK v. STRAUS. (Court of Appeals of New York. Feb. 28, 1911.) Appeal from a judgment of the Appellate Division of the Supreme Court in the First Judicial Department (139 App. Div. 884, 123 N. Y. Supp. 852), entered June 17, 1910, affirming a judgment in favor of plaintiff entered upon the report of a referee in an action to have life insurance of Louis Straus, deceased, applied to the payment of his debts. Bruce Ellison and Lewis E. Sisson, for appellant. W. S. McGuire, for respondent.

PER CURIAM. Judgment affirmed, with costs.

CULLEN, C. J., and VANN, WILLARD BARTLETT, HISCOCK, CHASE, and COLLIN, JJ., concur. HAIGHT, J., absent.

GUGGENHEIM, Appellant, v. GUGGENHEIM, Respondent. (Court of Appeals of New York. April 7, 1911.) Appeal from a judgment of the Appellate Division of the Supreme Court in the First Judicial Department (135 App. Div. 914, 119 N. Y. Supp. 1127), entered December 8, 1909, affirming a judgment in favor of defendant entered upon the report of a referee in an action for divorce. John J. Lordan, for appellant. Samuel Untermyer and Louis Marshall, for respondent.

PER CURIAM. Judgment affirmed, with costs.

CULLEN, C. J., and GRAY, HAIGHT, VANN, WERNER, HISCOCK, and COLLIN, JJ., concur.

HARBAUGH, Appellant, v. HOILIS PARK COMPANY et al., Respondents. (Court of Appeals of New York. May 16, 1911.) Appeal from a judgment of the Appellate Division of the Supreme Court in the Second Judicial Department (134 App. Div. 935, 118 N. Y. Supp. 1111), entered October 29, 1909, affirming a judgment in favor of defendants entered upon a dismissal of the complaint by the court on trial at Special Term in an action to have declared void the cancellation of a certificate for certain shares of stock. Louis Zinke and Alex-

ander U. Zinke, for appellant. Norman B. Beecher, for respondents.

PER CURIAM. Judgment affirmed, with costs.

CULLEN, C. J., and GRAY, HAIGHT, VANN, WERNER, HISCOCK, and COLLIN, JJ., concur.

HARRISON, Respondent, v. HARTFORD LIFE INS. CO., Appellant. (Court of Appeals of New York. Feb. 28, 1911.) Appeal from a judgment of the Appellate Division of the Supreme Court in the First Judicial Department (137 App. Div. 918, 122 N. Y. Supp. 1130), entered March 15, 1910, affirming a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term (63 Misc. Rep. 93, 118 N. Y. Supp. 401) in an action to recover alleged overpayments made on a certificate of assessment insurance. See, also, 126 App. Div. 952, 111 N. Y. Supp. 1122; 141 App. Div. 933, 126 N. Y. Supp. 1131. John Vernou Bouvier, Jr., James C. Jones, and Harry H. Bottome, for appellant. Evan Shelby, for respondent.

PER CURIAM. Judgment affirmed, with costs.

CULLEN, C. J., and VANN, WILLARD BARTLETT, HISCOCK, CHASE, and COLLIN, JJ., concur. HAIGHT, J., absent.

HEDDEN CONST. CO., Respondent, v. ROSSITER REALTY CO., Appellant. (Court of Appeals of New York. April 25, 1911.) Appeal from a judgment of the Appellate Division of the Supreme Court in the First Judicial Department (136 App. Div. 601, 121 N. Y. Supp. 64), entered February 11, 1910, affirming a judgment in favor of plaintiff entered upon a verdict in an action to recover for extra work alleged to have been performed in connection with a building contract. William H. Harris, for appellant. Frederick Hulse, for respondent.

PER CURIAM. Judgment affirmed, with costs.

CULLEN, C. J., and GRAY, HAIGHT, VANN, WILLARD BARTLETT, CHASE, and COLLIN, JJ., concur.

HEYMANN, Respondent, v. STEICH, Appellant. (Court of Appeals of New York. March 14, 1911.) Appeal from a judgment of the Appellate Division of the Supreme Court in the Second Judicial Department (134 App. Div. 176, 118 N. Y. Supp. 1113), entered October 11, 1909, affirming a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term (134 App. Div. 176, 114 N. Y. Supp. 603), in an action to recover the amount of a deposit and expenses of searching title paid and incurred under a contract for the sale of real property, title to which was rejected as unmarketable. James Troy, for appellant. Jacob Brenner, for respondent.

PER CURIAM. Judgment affirmed, with costs.

CULLEN, C. J., and GRAY, HAIGHT, VANN, WERNER, WILLARD BARTLETT, and CHASE, JJ., concur.

INGRAHAM v. PHILLIPS et al. (Court of Appeals of New York. April 7, 1911.) Appeal from a judgment entered October 4, 1909, upon an order of the Appellate Division of the Supreme Court in the Second Judicial Department (133 App. Div. 901, 117 N. Y. Supp. 165), which affirmed an order of the court at a Trial Term denying a motion for a new trial made after the direction of a verdict in an action of partition. See, also, 134 App. Div. 922, 118 N. Y. Supp. 1115. Percy L. Housel and Rob-

ert W. Duvall, for appellant. Henry W. Unger and James Kearney, for respondent.

PER CURIAM. Judgment affirmed, with costs, upon the ground that section 57n of the federal bankruptcy act (Act July 1, 1898, c. 541, 30 Stat. 561 [U. S. Comp. St. 1901, p. 3444]), being prohibitory, the creditors of the bankrupt Phillips, who elected the appellant Terry as trustee, were disabled by the lapse of more than one year from the adjudication in bankruptcy from proving their claims before the referee. In re Meyer (D. C.) 181 Fed. 904.

CULLEN, C. J., and GRAY, HAIGHT, VANN, WERNER, HISCOCK, and COLLIN, JJ., concur.

JACKSON, Respondent, v. GREENE et al., Appellants. (Court of Appeals of New York. May 2, 1911.)

PER CURIAM. Motion for reargument denied, with \$10 costs. See 201 N. Y. 76, 93 N. E. 1107.

JEANERETTE, Appellant, v. JUNGMAN, Respondent. (Court of Appeals of New York. Feb. 28, 1911.) Appeal from a judgment of the Appellate Division of the Supreme Court in the First Judicial Department (132 App. Div. 925, 116 N. Y. Supp. 1138), entered May 17, 1909, affirming a judgment in favor of defendant entered upon a dismissal of the complaint by the court at a Trial Term and an order denying a motion for a new trial in an action to recover for the death of plaintiff's intestate alleged to have been occasioned by the negligence of defendant, his employer. Thomas J. O'Neill and L. F. Fish, for appellant. John C. Robinson and Frank V. Johnson, for respondent.

PER CURIAM. Judgment reversed and new trial granted, costs to abide event, on the ground that the evidence presented a question of fact for the jury.

CULLEN, C. J., and GRAY, HAIGHT, VANN, HISCOCK, and COLLIN, JJ., concur. WERNER, J., absent.

JOHNSTON, Respondent, v. GARVEY, Appellant. (Court of Appeals of New York. Feb. 28, 1911.) Appeal from a judgment of the Appellate Division of the Supreme Court in the First Judicial Department (139 App. Div. 659, 124 N. Y. Supp. 278), entered July 19, 1910, modifying and affirming as modified a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term in an action to compel specific performance of a contract to purchase real property. See, also, 125 N. Y. Supp. 1151; 199 N. Y. 555, 93 N. E. 1123. Joseph G. Engel, Jacob B. Engel, and Isaac V. Schavrien, for appellant. Edward W. Johnston and Lewis Johnston, for respondent.

PER CURIAM. Judgment affirmed, with costs, on opinion of Muller, J., below.

CULLEN, C. J., and GRAY, HAIGHT, VANN, WERNER, HISCOCK, and COLLIN, JJ., concur.

JONES, Respondent, v. COMMERCIAL TRAVELERS' MUT. ACCIDENT ASS'N OF AMERICA, Appellant. (Court of Appeals of New York. March 14, 1911.) Appeal from a judgment of the Appellate Division of the Supreme Court in the Second Judicial Department (134 App. Div. 936, 118 N. Y. Supp. 1116), entered October 25, 1909, affirming a judgment (114 N. Y. Supp. 559) in favor of plaintiff entered upon a decision of the court on trial at Special Term in an action to set aside for

fraud a settlement under a policy of accident insurance to recover an amount due thereunder, and to enjoin defendant from canceling the same. Eliphalet W. Tyler and Henry B. Singer, for appellant. William A. Wight, for respondent.

PER CURIAM. Judgment modified by striking therefrom the provision awarding the injunction, and, as modified, affirmed, without costs to either party.

CULLEN, C. J., and GRAY, VANN, WERNER, WILLARD BARTLETT, and CHASE, JJ., concur. HAIGHT, J., absent.

JONES, Respondent, v. GOULD et al. Appellants. (Court of Appeals of New York. May 9, 1911.) Appeal, by permission, from an order of the Appellate Division of the Supreme Court in the First Judicial Department (143 App. Div. 244, 128 N. Y. Supp. 280), entered March 16, 1911, which reversed an order of Special Term denying a motion for a retaxation of costs. The following questions were certified: "(1) Does the remittitur of the Court of Appeals, reversing the judgment entered pursuant to an order of the Special Term, as modified and affirmed by the Appellate Division which dismissed the complaint, and awarding costs to the plaintiff appellant in all courts, embrace costs awarded to the parties defendant to abide the event by another and prior and unreversed judgment of the Appellate Division, from which no appeal has been taken to the Court of Appeals? (2) Does such an award of costs authorize the taxing clerk to tax an additional allowance awarded to the plaintiff as the prevailing party by an order of the Trial Term, which allowance was included in and made a part of the judgment of the Trial Term in favor of the plaintiff, which judgment was subsequently reversed by the Appellate Division by a judgment of reversal, from which no appeal has been taken to the Court of Appeals? (3) Does such an award of costs relate exclusively to costs upon the motion at Special Term for judgment dismissing the complaint, and the costs in subsequent proceedings consequent thereon in the Appellate Division and the Court of Appeals?" See, also, 200 N. Y. 554, 94 N. E. 1095; 129 N. Y. Supp. 1038. F. C. Nicodemus, Jr., Lawrence Greer, and Appleton D. Palmer, for appellants. Charles Haldane and David McClure, for respondent.

PER CURIAM. Order of Appellate Division reversed and that of Special Term affirmed, without costs to either party. First two questions certified answered in the negative. Third question answered in the affirmative, on dissenting opinion of Miller, J., below.

CULLEN, C. J., and HAIGHT, WERNER, VANN, HISCOCK, and COLLIN, JJ., concur. GRAY, J., absent.

In re KELLER et al. (Court of Appeals of New York. March 28, 1911.) Appeal from an order of the Appellate Division of the Supreme Court in the First Judicial Department (142 App. Div. 454, 127 N. Y. Supp. 16), entered January 25, 1911, which reversed an order of Special Term denying a petition for the removal of Hugo F. Keller as testamentary trustee under the will of Adolph Keller, deceased, and granted said petition. Albert Stickney, for appellant. W. G. Philippeau and Alfred B. Cruikshank, for respondents.

PER CURIAM. Order affirmed, without costs, on the ground that the order appealed from was within the discretion of the Supreme Court.

CULLEN, C. J., and VANN, WILLARD BARTLETT, HISCOCK, and CHASE, JJ., concur. HAIGHT and WERNER, JJ., absent.

KENNEY, Appellant, v. WELSH, Respondent. (Court of Appeals of New York. April 7, 1911.) Appeal from a judgment of the Appellate Division of the Supreme Court in the First Judicial Department (137 App. Div. 925, 122 N. Y. Supp. 1132), entered April 15, 1910, affirming a judgment in favor of defendant, entered upon a verdict directed by the court in an action to determine the validity of a will. F. P. Whitaker, Charles J. Hardy, and Thomas E. FitzGerald, for appellant. Eugene A. Philbin, for respondent.

PER CURIAM. Judgment reversed and new trial granted, costs to abide event, on the ground that the evidence presented a question of fact for the jury.

CULLEN, C. J., and VANN, WILLARD BARTLETT, HISCOCK, CHASE, and COLLIN, JJ., concur. HAIGHT, J., absent.

KERNS, Respondent, v. DAVENPORT, Appellant. (Court of Appeals of New York. March 14, 1911.) Appeal from a judgment of the Appellate Division of the Supreme Court in the Second Judicial Department (136 App. Div. 898, 120 N. Y. Supp. 1130), entered January 5, 1910, affirming a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term in an action to compel specific performance of a contract to purchase real property. Harry E. Lewis, for appellant. Meier Steinbrink, for respondent.

PER CURIAM. Judgment affirmed, with costs.

CULLEN, C. J., and GRAY, WERNER, WILLARD BARTLETT, HISCOCK, CHASE, and COLLIN, JJ., concur.

KINKAID v. CHAPTER GENERAL, KNIGHTS OF ST. JOHN & MALTA, Appellant (two cases). (Court of Appeals of New York. April 25, 1911.) Appeal, by permission, in each of the above-entitled actions from a judgment of the Appellate Division of the Supreme Court in the First Judicial Department (135 App. Div. 919, 120 N. Y. Supp. 1130), entered upon an order made December 23, 1909, which affirmed a determination of the Appellate Term affirming a judgment of the Municipal Court of the city of New York in favor of plaintiff in an action to recover an installment alleged to be due upon a certificate of endowment insurance. H. F. Lawrence and Louis M. King, for appellant. Howard C. Lake, for respondent.

PER CURIAM. Judgment in each case affirmed, with costs, on the ground that the case contains no exceptions raising the question argued on this appeal.

CULLEN, C. J., and GRAY, WERNER, WILLARD BARTLETT, HISCOCK, COLLIN, and CHASE, JJ., concur.

KOHLI, Appellant, v. FERNANDEZ, Respondent, et al. (Court of Appeals of New York. March 3, 1911.) Appeal from a judgment of the Appellate Division of the Supreme Court in the First Judicial Department (133 App. Div. 723, 118 N. Y. Supp. 163), entered July 21, 1909, affirming a judgment in favor of defendant entered upon a verdict directed by the court and an order denying a motion for a new trial in an action to recover an indebtedness, evidenced and secured by a certain mortgage of lands in the island of Cuba. See, also, 135 App. Div. 910, 119 N. Y. Supp. 1131. William D. Guthrie and Charles K. Carpenter,

for appellant. Austen G. Fox, S. Sidney Smith, and Elliot Smith, for respondent.

PER CURIAM. Judgment affirmed, with costs.

CULLEN, C. J., and GRAY, VANN, WERNER, HISCOCK, and COLLIN, JJ., concur. HAIGHT, J., absent.

KORN et al., Respondents, v. LIPMAN et al., Appellants. (Court of Appeals of New York. May 2, 1911.)

PER CURIAM. Motion for reargument or to amend remittitur denied, with \$10 costs. See 201 N. Y. 404, 94 N. E. 861.

KOZAK, Respondent, v. ERIE R. CO., Appellant. (Court of Appeals of New York. April 25, 1911.) Appeal from a judgment of the Appellate Division of the Supreme Court in the Second Judicial Department (135 App. Div. 726, 119 N. Y. Supp. 876), entered December 16, 1909, which reversed an order of the court at a Trial Term setting aside a verdict in favor of plaintiff and dismissing the complaint and directed the reinstatement of said verdict in an action to recover for personal injuries alleged to have been sustained by plaintiff through the negligence of defendant, his employer. See, also, 198 N. Y. 601, 92 N. E. 1089. Charles A. Collin and Elbert N. Oakes, for appellant. John C. Robinson, for respondent.

PER CURIAM. Judgment affirmed, with costs.

CULLEN, C. J., and GRAY, WERNER, WILLARD BARTLETT, HISCOCK, CHASE and COLLIN, JJ., concur.

LANE, Respondent, v. KOENIG, Appellant. (Court of Appeals of New York. March 14, 1911.) Appeal from a judgment of the Appellate Division of the Supreme Court in the Fourth Judicial Department (137 App. Div. 879, 118 N. Y. Supp. 1119), entered October 25, 1909, affirming a judgment in favor of plaintiff entered upon a decision of the court on trial at an equity term in an action to abate a nuisance and for damages. See, also, 197 N. Y. 558, 91 N. E. 1116. Frank S. Coburn, for appellant. Oscar Tryon, for respondent.

PER CURIAM. Judgment modified by striking therefrom the mandatory provisions thereof, leaving the injunction to stand otherwise and as modified affirmed, without costs to either party.

GRAY, WERNER, HISCOCK, COLLIN, and CHASE, JJ., concur. CULLEN, C. J., and WILLARD BARTLETT, J., dissent solely as to injunction against chimney.

LANNING, Respondent, v. TRUST CO. OF AMERICA, Appellant. (Court of Appeals of New York. March 28, 1911.) Appeal from a judgment of the Appellate Division of the Supreme Court in the First Judicial Department (139 App. Div. 933, 124 N. Y. Supp. 1119), entered July 14, 1910, affirming a judgment in favor of plaintiff entered upon a verdict directed by the court in an action for money had and received. Martin W. Littleton, for appellant. Joseph M. Hartfield and J. Du Pratt White, for respondent.

PER CURIAM. Judgment affirmed, with costs.

CULLEN, C. J., and VANN, WILLARD BARTLETT, HISCOCK, CHASE, and COLLIN, JJ., concur. HAIGHT, J., absent.

LEE, Appellant, v. NEVINS, Respondent. (Court of Appeals of New York. April 25, 1911.) Appeal from a judgment of the Appellate Division of the Supreme Court in the First Judicial Department (136 App. Div. 930, 123 N. Y. Supp. 1151), entered January 27, 1910, affirming a judgment in favor of defendant entered upon a dismissal of the complaint by the court on trial at Special Term in an action to secure plaintiff's reinstatement as a member of the defendant association. Alfred Steckler and Levin L. Brown, for appellant. Max D. Steuer and Gerald B. Rosenheim, for respondent.

PER CURIAM. Judgment affirmed, with costs.

CULLEN, C. J., and GRAY, HAIGHT, VANN, WILLARD BARTLETT, COLLIN, and CHASE, JJ., concur.

LEVY, Respondent, v. BROOKLYN UNION PUB. CO., Appellant. (Court of Appeals of New York. May 16, 1911.) Appeal, by permission, from an order of the Appellate Division of the Supreme Court in the First Judicial Department (137 App. Div. 947, 123 N. Y. Supp. 1126), entered April 29, 1910, which affirmed an interlocutory judgment of Special Term overruling a demurrer to the complaint in an action for libel. The following question was certified: "Does the complaint herein state facts sufficient to constitute a cause of action?" Paul Eugene Jones, for appellant. William F. Clare, for respondent.

PER CURIAM. Order affirmed, with costs, and question certified answered in the affirmative.

CULLEN, C. J., and GRAY, HAIGHT, VANN, WERNER, HISCOCK, and COLLIN, JJ., concur.

LIND, Respondent, v. LONG ISLAND R. CO., Appellant. (Court of Appeals of New York. March 21, 1911.) Appeal from a judgment of the Appellate Division of the Supreme Court in the Second Judicial Department (136 App. Div. 898, 120 N. Y. Supp. 1132), entered January 5, 1910, affirming a judgment in favor of plaintiff entered upon a verdict in an action to recover for personal injuries alleged to have been sustained by plaintiff through the negligence of defendant, his employer. William C. Beecher and Joseph F. Keany, for appellant. Frederick N. Van Zandt, for respondent.

PER CURIAM. Judgment affirmed, with costs.

CULLEN, C. J., and GRAY, WERNER, WILLARD BARTLETT, HISCOCK, COLLIN, and CHASE, JJ., concur.

LINGS et al., Respondents, v. BLODGETT & ORSWELL CO., Appellant. (Court of Appeals of New York. May 2, 1911.) Motion to dismiss an appeal from a judgment of the Appellate Division of the Supreme Court in the First Judicial Department (140 App. Div. 933, 125 N. Y. Supp. 1128), entered November 28, 1910, affirming a judgment in favor of plaintiffs entered upon a verdict in an action on contract for goods sold and delivered. The motion was made on the ground that the appeal was frivolous. George W. Bristol, for the motion. Lanier McKee, opposed.

PER CURIAM. Motion granted and appeal dismissed, with costs and \$10 costs of motion.

LYNCH v. ROBERT P. MURPHY HOTEL CO. et al. (Court of Appeals of New York. April 25, 1911.) Appeal from a judgment of

the Appellate Division of the Supreme Court in the First Judicial Department (136 App. Div. 940, 121 N. Y. Supp. 1139), entered March 2, 1910, affirming a judgment in favor of defendant respondent entered upon a dismissal of the complaint as to it by the court on trial at Special Term in an action for an injunction to restrain interference with plaintiff's alleged right to maintain a cab stand in front of certain premises in the city of New York. James Kearney, for appellant. William F. Goldbeck, for respondent.

PER CURIAM. Judgment affirmed, with costs.

CULLEN, C. J., and GRAY, WERNER, WILLARD BARTLETT, HISCOCK, COLLIN, and CHASE, JJ., concur.

McCLATCHY et al., Respondents, v. J. B. MALCOLM & CO., Appellant. (Court of Appeals of New York. March 14, 1911.) Appeal from a judgment of the Appellate Division of the Supreme Court in the Fourth Judicial Department (137 App. Div. 881, 123 N. Y. Supp. 1127), entered October 25, 1909, affirming a judgment in favor of plaintiffs entered upon a verdict in an action to recover for an alleged breach of contract. E. W. Hamn, for appellant. M. A. Leary, for respondents.

PER CURIAM. Judgment affirmed, with costs.

CULLEN, C. J., and GRAY, WERNER, WILLARD BARTLETT, HISCOCK, COLLIN, and CHASE, JJ., concur.

McCONNELL, Appellant, v. McCULLOUGH et al., Respondents. (Court of Appeals of New York. April 25, 1911.) Appeal from a judgment of the Appellate Division of the Supreme Court in the Second Judicial Department (125 App. Div. 930, 110 N. Y. Supp. 1136), entered May 13, 1908, affirming a judgment in favor of defendants entered upon a dismissal of the complaint by the court at a Trial Term without a jury in an action of ejectment. Andrew F. Van Thun, Jr., and Walter G. Rooney, for appellant. William F. Clare and Frederick A. Gill, for respondents.

PER CURIAM. Judgment affirmed, with costs.

CULLEN, C. J., and GRAY, WERNER, WILLARD BARTLETT, HISCOCK, COLLIN, and CHASE, JJ., concur.

McKANE, Appellant, v. DADY et al., Respondents. (Court of Appeals of New York. March 14, 1911.) Appeal from a judgment of the Appellate Division of the Supreme Court in the Second Judicial Department (128 App. Div. 190, 112 N. Y. Supp. 650), entered October 26, 1908, affirming a judgment in favor of defendants entered upon a dismissal of the complaint by the court at a Trial Term in an action on contract. See, also, 128 App. Div. 893, 112 N. Y. Supp. 1136. Jesse Fuller, Jr., and Frederick W. Sparks, for appellant. Jerry A. Wernberg, for respondents.

PER CURIAM. Judgment affirmed, with costs.

CULLEN, C. J., and GRAY, VANN, WERNER, WILLARD BARTLETT, and CHASE, JJ., concur. HAIGHT, J., absent.

In re MALONE. (Court of Appeals of New York. April 25, 1911.) Appeal from an order of the Appellate Division of the Supreme Court in the Third Judicial Department (130 N. Y. Supp. 1119), entered December 12, 1910, which dismissed an appeal from a decree of the Albany county Surrogate's Court settling the accounts of Owen J. Malone, as administrator of

the estate of Catherine Grimes, deceased. See, also, 130 N. Y. Supp. 1120. James F. Tracey and Eugene D. Flanigan, for appellant. Thomas Carmody, Atty. Gen. (Wilbur W. Chambers, of counsel), for respondent.

PER CURIAM. Order affirmed, without costs.

CULLEN, C. J., and GRAY, HAIGHT, WILLARD BARTLETT, CHASE, and COLLIN, JJ., concur. VANN, J., not voting.

MANLEY v. FISKE et al. (Court of Appeals of New York. Feb. 28, 1911.) Appeal from a judgment of the Appellate Division of the Supreme Court in the First Judicial Department (139 App. Div. 665, 124 N. Y. Supp. 149), entered July 22, 1910, which modified and affirmed as modified a judgment (66 Misc. Rep. 388, 123 N. Y. Supp. 129) of Special Term sustaining the validity of a charitable bequest in the will of Henry H. Paul, deceased. J. Hampden Dougherty, for appellant Manley. Francis Woodbridge and Harry David Kerr, for appellants Overman and others. Charles E. Lydecker, for respondents Fiske and others. E. C. Crowley, for Attorney General.

PER CURIAM. Judgment affirmed, with costs to all parties payable out of the estate.

CULLEN, C. J., and VANN, WILLARD BARTLETT, HISCOCK, CHASE, and COLLIN, JJ., concur. HAIGHT, J., absent.

MANNING, Appellant, v. GRANT, Respondent. (Court of Appeals of New York. May 2, 1911.) Motion to dismiss an appeal from a judgment of the Appellate Division of the Supreme Court in the Third Judicial Department (142 App. Div. 921, 127 N. Y. Supp. 1131), entered January 14, 1911, affirming a judgment in favor of defendant entered upon a verdict in an action to recover personal property alleged to constitute part of the estate of plaintiff's testator. The motion was made upon the ground that the Appellate Division had unanimously decided the verdict was supported by the evidence and that the exceptions were frivolous. Nelson L. Robinson, for the motion. Adelbert N. Boynton, opposed.

PER CURIAM. Motion denied, with \$10 costs.

MARKGRAF, Respondent, v. FELLOWSHIP OF SOLIDARITY, Appellant. (Court of Appeals of New York. March 21, 1911.) Appeal from a judgment of the Appellate Division of the Supreme Court in the Second Judicial Department (134 App. Div. 984, 119 N. Y. Supp. 665), entered November 27, 1909, affirming a judgment in favor of plaintiff entered upon a verdict directed by the court in an action upon a policy of life insurance. Miles M. Dawson, for appellant. Max Solomon, for respondent.

PER CURIAM. Judgment affirmed, with costs.

CULLEN, C. J., and GRAY, WERNER, WILLARD BARTLETT, HISCOCK, COLLIN, and CHASE, JJ., concur.

MARSEN, Appellant, v. NICHOLS COPPER COMPANY, Respondent. (Court of Appeals of New York. Feb. 28, 1911.) Motion for leave to withdraw an appeal from an order of the Appellate Division of the Supreme Court in the Second Judicial Department (134 App. Div. 294, 118 N. Y. Supp. 867), entered October 12, 1909, which reversed a judgment in favor of plaintiff entered upon a verdict and an order denying a motion for a new trial and granted a new trial in an action to recover for personal injuries alleged to have been sustained

through the defendant's negligence. The motion was made upon the ground that the order of the Appellate Division was silent as to whether said reversal was upon the law or the facts. Martin T. Manton, for the motion. Nadal, Carrere & Jones, opposed.

PER CURIAM. Appeal dismissed, with costs and \$10 costs of motion.

MEYER, Respondent, v. B. A. & G. N. WILLIAMS, Appellant. (Court of Appeals of New York. April 25, 1911.) Appeal from a judgment of the Appellate Division of the Supreme Court in the First Judicial Department (134 App. Div. 963, 119 N. Y. Supp. 1135), entered November 9, 1909, affirming a judgment in favor of plaintiff entered upon a verdict in an action to recover for personal injuries alleged to have been sustained by plaintiff through the negligence of the defendant. John Vernou Bouvier, Jr., Dudley Davis, and Frank V. Johnson, for appellant. Charles Steckler, Alfred Steckler, and Levin L. Brown, for respondent.

PER CURIAM. Judgment affirmed, with costs.

CULLEN, C. J., and GRAY, HAIGHT, VANN, WILLARD BARTLETT, COLLIN, and CHASE, JJ., concur.

In re MILLER'S WILL. (Court of Appeals of New York. May 2, 1911.) Appeal from an order of the Appellate Division of the Supreme Court in the First Judicial Department (141 App. Div. 349, 126 N. Y. Supp. 690), entered December 30, 1910, which reversed an order of Special Term granting a motion to dismiss the above proceeding for failure of prosecution and denied said motion. William P. Maloney, for appellants. Joseph Fettretch, John H. Judge, Henry J. Wehle, and William S. Katzenstein, for respondents.

PER CURIAM. Appeal dismissed, with costs.

CULLEN, C. J., and GRAY, HAIGHT, VANN, WERNER, HISCOCK, and COLLIN, JJ., concur.

MILLIKEN BROS., Inc., v. CITY OF NEW YORK et al. (Court of Appeals of New York. March 21, 1911.)

PER CURIAM. Motion for reargument denied, with \$10 costs. See 201 N. Y. 65, 94 N. E. 196.

MOSIER et al., Respondents, v. UNITED STATES FIDELITY & GUARANTY COMPANY, Appellant. (Court of Appeals of New York. April 25, 1911.) Appeal from a judgment of the Appellate Division of the Supreme Court in the Fourth Judicial Department (134 App. Div. 849, 119 N. Y. Supp. 157), entered November 22, 1909, affirming a judgment in favor of plaintiffs entered upon a verdict directed by the court in an action to recover for an alleged breach of contract. George P. Keating and William J. Donovan, for appellant. Lincoln A. Groat, for respondents.

PER CURIAM. Judgment affirmed, with costs.

CULLEN, C. J., and GRAY, HAIGHT, VANN, WILLARD BARTLETT, COLLIN, and CHASE, JJ., concur.

MOTT, Respondent, v. DEGNON REALTY & TERMINAL IMPROVEMENT COMPANY, Appellant. (Court of Appeals of New York. March 14, 1911.) Appeal from a judgment of the Appellate Division of the Supreme

Court in the Second Judicial Department (134 App. Div. 980, 119 N. Y. Supp. 1136), entered November 24, 1909, affirming a judgment in favor of plaintiff entered upon a verdict in an action to recover for personal injuries alleged to have been sustained by plaintiff through the negligence of defendant, his employer. Eugene Lamb Richards, Jr., Rutherford B. Meyer, and Frank Verner Johnson, for appellant. George F. Hickey and M. P. O'Connor, for respondent.

PER CURIAM. Judgment affirmed, with costs.

CULLEN, C. J. and GRAY, WERNER, WILLARD BARTLETT, HISCOCK, CHASE, and COLLIN, JJ., concur.

NEWBURGH LIGHT, HEAT & POWER CO., Respondent, v. TRAVELERS' INS. CO., Appellant. (Court of Appeals of New York. March 14, 1911.) Appeal from a judgment of the Appellate Division of the Supreme Court in the Second Judicial Department (134 App. Div. 913, 118 N. Y. Supp. 865), entered October 18, 1909, affirming a judgment in favor of plaintiff entered upon a verdict directed by the court in an action to recover upon a policy of liability insurance. Frank V. Johnson and William L. O'Brien, for appellant. Arthur F. Gotthold and John L. Wilkie, for respondent.

PER CURIAM. Judgment affirmed, with costs.

CULLEN, C. J., and GRAY, WERNER, WILLARD BARTLETT, HISCOCK, COLLIN, and CHASE, JJ., concur.

NEWTON v. HUNT et al. (Court of Appeals of New York. April 4, 1911.) Cross-appeals from a judgment of the Appellate Division of the Supreme Court in the First Judicial Department (134 App. Div. 325, 119 N. Y. Supp. 3), entered January 6, 1910, which modified and affirmed as modified a judgment in favor of plaintiff entered upon a decision (59 Misc. Rep. 633, 112 N. Y. Supp. 573) of the court on trial at Special Term in an action to enforce a lien against a certain trust fund. Paul Armitage and S. B. Livingston, for plaintiff. Alton B. Parker, Flamen B. Candler, Robert W. Candler, and J. Frederic Kernochan, for defendants Anna B. Hunt and others. Edmund L. Baylies and Devereux Milburn, for defendant Rupert H. Hunt.

PER CURIAM. Judgment affirmed, with costs.

CULLEN, C. J., and GRAY, VANN, WERNER, HISCOCK, and COLLIN, JJ., concur. HAIGHT, J., absent.

NEW YORK AUTOMOBILE CO., Appellant, v. FRANKLIN et al., Respondents. (Court of Appeals of New York. May 16, 1911.) Appeal from a judgment of the Appellate Division of the Supreme Court in the Fourth Judicial Department (134 App. Div. 908, 118 N. Y. Supp. 1127), entered August 21, 1909, affirming a judgment in favor of defendants entered upon a dismissal of the complaint by the court on trial at Special Term in an action for an accounting. Will B. Crowley and Ceylon H. Lewis, for appellant. G. H. Stilwell, for respondents Franklin and others. John W. Suggett and Louis L. Waters, for respondent Brown. Theodore E. Hancock, for respondent Wilkinson.

PER CURIAM. Judgment affirmed, with costs.

CULLEN, C. J., and GRAY, HAIGHT, VANN, WERNER, HISCOCK, and COLLIN, JJ., concur.

NEW YORK STATE NAT. BANK OF ALBANY, Appellant, v. **WHITEHALL WATER POWER CO., Limited**, Respondent. (Court of Appeals of New York. May 2, 1911.) Motion for leave to withdraw an appeal from an order of the Appellate Division of the Supreme Court in the Third Judicial Department (140 App. Div. 739, 125 N. Y. Supp. 861), entered November 17, 1910, reversing a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term in an action to recover on contract. The motion was made upon the grounds that no judgment had been entered upon the order of reversal and that the appeal had been inadvertently taken. **Marcus T. Hun**, for the motion. **Edgar T. Brackett**, opposed.

PER CURIAM. Motion granted on payment of costs and \$10 costs of motion within 20 days. On failure to make such payment the motion is denied, with \$10 costs.

NIAGARA LOAN ASS'N, Appellant, v. **BENTLEY**, Respondent. (Court of Appeals of New York. March 14, 1911.) Appeal from a judgment of the Appellate Division of the Supreme Court in the Fourth Judicial Department (137 App. Div. 879, 118 N. Y. Supp. 1127), entered October 22, 1909, affirming a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term in an action to foreclose a chattel mortgage. **Charles Newton**, for appellant. **D. N. McNaughton** and **W. W. Saperston**, for respondent.

PER CURIAM. Judgment reversed and new trial granted, costs to abide event, on dissenting memorandum of **McLennan, P. J.**, and **Spring, J.**, below.

CULLEN, C. J., and **GRAY, VANN, WERNER, WILLARD BARTLETT, and CHASE, JJ.**, concur. **HAIGHT, J.**, absent.

O'REILLY, Appellant, v. **MEYER**, Respondent. (Court of Appeals of New York. April 25, 1911.) Appeal from a judgment of the Appellate Division of the Supreme Court in the First Judicial Department (135 App. Div. 915, 119 N. Y. Supp. 1138), entered December 8, 1909, modifying and affirming as modified a judgment in favor of defendant entered upon a verdict in an action to recover damages alleged to have been occasioned plaintiff by defendant's fraudulent representations. **Edward W. S. Johnston**, for appellant. **Abraham Benedict**, for respondent.

PER CURIAM. Judgment affirmed, with costs.

CULLEN, C. J., and **GRAY, HAIGHT, VANN, WILLARD BARTLETT, CHASE, and COLLIN, JJ.**, concur.

PACKER et al., Appellants, v. **VAN WAGENEN et al.**, Respondents. (Court of Appeals of New York. March 3, 1911.) Appeal from a judgment of the Appellate Division of the Supreme Court in the Third Judicial Department (136 App. Div. 904, 120 N. Y. Supp. 1138), entered January 21, 1910, affirming a judgment in favor of defendants entered upon a verdict directed by the court in an action to determine the validity of the will of **Peres Packer**, deceased. **I. H. Palmer** and **Thomas E. Courtney**, for appellants. **Howard D. Newton** and **William H. Sullivan**, for respondents.

PER CURIAM. Judgment affirmed, with costs to respondents payable out of the estate.

CULLEN, C. J., and **GRAY, VANN, WERNER, HISCOCK, and COLLIN, JJ.**, concur. **HAIGHT, J.**, absent.

PALIN, Respondent, v. **GARY BRICK CO.**, Appellant. (Court of Appeals of New York. March 21, 1911.) Appeal from a judgment of the Appellate Division of the Supreme Court in the Third Judicial Department (138 App. Div. 831, 123 N. Y. Supp. 1132), entered May 12, 1910, modifying and affirming as modified a judgment in favor of plaintiff entered upon a verdict in an action to recover for the death of plaintiff's intestate alleged to have been occasioned by the negligence of defendant, his employer. See, also, 128 App. Div. 933, 113 N. Y. Supp. 1141. **Andrew J. Nellis**, for appellant. **John Scanlon**, for respondent.

PER CURIAM. Judgment affirmed, with costs.

CULLEN, C. J., and **GRAY, WERNER, WILLARD BARTLETT, HISCOCK, CHASE, and COLLIN, JJ.**, concur.

PARHAM, Appellant, v. **BURNS et al.**, Respondents. (Court of Appeals of New York. March 3, 1911.) Appeal, by permission, from a judgment of the Appellate Division of the Supreme Court in the Second Judicial Department (135 App. Div. 884, 120 N. Y. Supp. 142), entered January 5, 1910, affirming a judgment in favor of plaintiff entered upon a dismissal of the complaint by the court on trial at Special Term in an action to set aside a judgment entered by consent against the plaintiff's assignor and others. See, also, 136 App. Div. 946, 121 N. Y. Supp. 1141. **Joseph F. Perdue** and **John J. Adams**, for appellant. **Benjamin N. Cardozo** and **Edgar J. Nathan**, for respondents.

PER CURIAM. Judgment affirmed, with costs, on opinion of **Miller, J.**, below.

CULLEN, C. J., and **GRAY, HAIGHT, VANN, WERNER, HISCOCK, and COLLIN, JJ.**, concur.

PARR, Appellant, v. **ALEXANDER et al.**, Respondents. (Court of Appeals of New York. Feb. 28, 1911.) Appeal from a judgment of the Appellate Division of the Supreme Court in the Third Judicial Department (134 App. Div. 990, 119 N. Y. Supp. 1138), entered November 29, 1909, affirming a judgment in favor of defendants entered upon a verdict directed by the court in an action to determine the validity of the will of **John G. Crawford**, deceased. **W. J. McClusky** and **S. E. McClusky**, for appellant. **Clarence S. Ferris**, for respondents.

PER CURIAM. Judgment affirmed, with costs.

CULLEN, C. J., and **GRAY, VANN, WERNER, HISCOCK, and COLLIN, JJ.**, concur. **HAIGHT, J.**, absent.

PEOPLE, Appellant, v. **ACKER**, Respondent (three cases). (Court of Appeals of New York. March 3, 1911.) Appeal in each of the above actions from an order of the Appellate Division of the Supreme Court in the Fourth Judicial Department (134 App. Div. 908, 118 N. Y. Supp. 1129), entered July 6, 1909, which affirmed an interlocutory judgment of the Niagara County Court sustaining a demurrer to an indictment charging the defendant with the crime of subornation of perjury. **Fred M. Ackerson**, Dist. Atty., for the People. **Daniel J. Kenefick** and **Alfred W. Gray**, for respondent.

PER CURIAM. Order in each case affirmed on the authority of *In re Loney*, 134 U. S. 372, 10 Sup. Ct. 384, 33 L. Ed. 949.

CULLEN, C. J., and **GRAY, VANN, WERNER, HISCOCK, and COLLIN, JJ.**, concur. **HAIGHT, J.**, absent.

PEOPLE, Respondent, v. BLEECKER ST. & F. F. R. CO., Appellant, et al. (Court of Appeals of New York. March 28, 1911.) Appeal, by permission, from an order of the Appellate Division of the Supreme Court in the First Judicial Department (140 App. Div. 611, 125 N. Y. Supp. 1045), entered November 18, 1910, which affirmed an interlocutory judgment of Special Term (87 Misc. Rep. 577, 124 N. Y. Supp. 782), overruling a demurrer to the complaint in an action brought by the Attorney General to oust the appellant from certain franchises in the city of New York. The following questions were certified: "(1) Does the complaint herein state facts sufficient to constitute a cause of action against the defendant? (2) Has the plaintiff herein legal capacity to sue, without leave of the Supreme Court granted before the action was brought?" 127 N. Y. Supp. 1136. Ernest E. Baldwin, Henry Wollman, Benjamin F. Wollman, Edward S. Seidman, and Robert G. Starr, for appellant. Thomas Carmody, Atty. Gen. (Franklin Kennedy, of counsel), for respondent. Archibald R. Watson, Corp. Counsel (William P. Burr and William J. Clarke, of counsel), for City of New York, intervening.

PER CURIAM. Order affirmed, with costs. Both questions certified answered in the affirmative.

CULLEN, C. J., and VANN, WERNER, WILLARD BARTLETT, HISCOCK, and CHASE, JJ., concur. HAIGHT, J., absent.

PEOPLE v. BROOKLYN BANK IN CITY OF NEW YORK. (Court of Appeals of New York. May 19, 1911.) Appeal from an order of the Appellate Division of the Supreme Court in the Third Judicial Department (140 App. Div. 750, 126 N. Y. Supp. 155), entered December 9, 1910, which reversed two orders of Special Term and reduced certain allowances made to the receivers of the Brooklyn Bank and their counsel. See, also, 64 Misc. Rep. 538, 118 N. Y. Supp. 722; 131 N. Y. Supp. —. Augustus Van Wyck, John J. Linson, and Conrad Saxe Keyes, for appellants Hasbrouck and others. Charles M. Stafford, for appellant Higgins. S. Stanwood Menken, for respondent Brooklyn Bank.

PER CURIAM. Appeal dismissed, without costs.

CULLEN, C. J., and GRAY, HAIGHT, VANN, WERNER, HISCOCK, and COLLIN, JJ., concur.

PEOPLE, Respondent, v. GEBHARDT, Appellant. (Court of Appeals of New York. April 25, 1911.) Appeal from a judgment of the Supreme Court, rendered October 21, 1910, at a Trial Term for the county of Suffolk, upon a verdict convicting the defendant of the crime of murder in the first degree. E. J. Reilly, Nathan O. Petty, and John R. Vunk, for appellant. George H. Furman, Dist. Atty., for the People.

PER CURIAM. Judgment of conviction affirmed. No opinion is written because the guilt is clear and there is no point raised against the judgment below that requires or is worthy of discussion.

CULLEN, C. J., and GRAY, HAIGHT, VANN, WILLARD BARTLETT, CHASE, and COLLIN, JJ., concur.

PEOPLE, Respondent, v. HOYT, Appellant. (Court of Appeals of New York. March 21, 1911.) Appeal from an order of the Appellate Division of the Supreme Court in the First Judicial Department (139 App. Div. 923, 124 N. Y. Supp. 1124), entered July 8, 1910, which affirmed a judgment of the Court of General

Sessions of the Peace in the county of New York rendered upon a verdict convicting the defendant of the crime of grand larceny in the first degree. See, also, 137 App. Div. 948, 123 N. Y. Supp. 1134. Clark L. Jordan, for appellant. Charles S. Whitman, Dist. Atty. (Robert C. Taylor, of counsel), for the People.

PER CURIAM. Judgment of conviction affirmed.

CULLEN, C. J., and GRAY, WERNER, WILLARD BARTLETT, HISCOCK, CHASE, and COLLIN, JJ., concur.

PEOPLE, Respondent, v. MOORE, Appellant. (Court of Appeals of New York. March 14, 1911.) Appeal from an order of the Appellate Division of the Supreme Court in the First Judicial Department (142 App. Div. 402, 127 N. Y. Supp. 98), entered January 20, 1911, which affirmed a judgment of the Court of General Sessions of the Peace in the county of New York, rendered upon a verdict convicting the defendant of a violation of subdivision 4 of section 2460 of the Penal Law (Consol. Laws, c. 40), entitled "Compulsory prostitution of women." See, also, 127 N. Y. Supp. 1136. Alexander Karlin, for appellant. Charles S. Whitman, Dist. Atty. (Robert C. Taylor, of counsel), for the People.

PER CURIAM. Judgment of conviction affirmed.

CULLEN, C. J., and GRAY, VANN, WERNER, WILLARD BARTLETT, and CHASE, JJ., concur. HAIGHT, J., absent.

PEOPLE, Respondent, v. NACCO, Appellant. (Court of Appeals of New York. April 25, 1911.) Appeal from a judgment of the Supreme Court, rendered June 24, 1909, at a Trial Term for the county of Niagara, upon a verdict convicting the defendant of the crime of murder in the first degree. T. F. C. Clary, for appellant. Fred M. Ackerson, Dist. Atty., for the People.

PER CURIAM. Judgment of conviction affirmed.

CULLEN, C. J., and GRAY, HAIGHT, WILLARD BARTLETT, and CHASE, JJ., concur. VANN and COLLIN, JJ., dissenting.

PEOPLE, Respondent, v. PUMP, Appellant. (Court of Appeals of New York. April 25, 1911.) Appeal from an order of the Appellate Division of the Supreme Court in the First Judicial Department (140 App. Div. 933, 125 N. Y. Supp. 1137), entered November 25, 1910, which affirmed a judgment of the Court of Special Sessions of the city of New York convicting the defendant of a violation of the liquor tax law. P. A. McManus and G. H. Mallory, for appellant. Charles S. Whitman, Dist. Atty. (Robert S. Johnstone, of counsel), for the People.

PER CURIAM. Order affirmed.

CULLEN, C. J., and GRAY, WERNER, WILLARD BARTLETT, HISCOCK, CHASE, and COLLIN, JJ., concur.

PEOPLE, Respondent, v. TILMAN, Appellant. (Court of Appeals of New York. April 4, 1911.) Appeal from an order of the Appellate Division of the Supreme Court in the First Judicial Department (139 App. Div. 572, 124 N. Y. Supp. 44), entered July 8, 1910, which reversed a judgment (63 Misc. Rep. 461, 118 N. Y. Supp. 442) of the Court of General Sessions of the Peace in the county of New York sustaining a demurrer to an indictment for perjury and overruling such demurrer. Abraham Levy and Henry W. Unger, for appellant. Charles

S. Whitman, Dist. Atty. (Robert S. Johnstone, of counsel), for the People.

PER CURIAM. Order affirmed, on opinion of Laughlin, J. below.

CULLEN, C. J., and GRAY, VANN, WERNER, HISCOCK, and COLLIN, JJ., concur. HAIGHT, J., absent.

PEOPLE, Respondent, v. WALTMAN, Appellant. (Court of Appeals of New York. April 4, 1911.) Appeal from an order of the Appellate Division of the Supreme Court in the First Judicial Department (135 App. Div. 914, 119 N. Y. Supp. 1139), entered December 3, 1909, which affirmed a judgment of the Court of General Sessions of the Peace in the county of New York rendered upon a verdict convicting the defendant of the crime of extortion. Clark L. Jordan, for appellant. Charles S. Whitman, Dist. Atty. (Robert S. Johnstone, of counsel), for the People.

PER CURIAM. Judgment of conviction affirmed.

CULLEN, C. J., and GRAY, VANN, WERNER, HISCOCK, and COLLIN, JJ., concur. HAIGHT, J., absent.

PEOPLE ex rel. BRADY, Appellant, v. CLEMENT, State Com'r of Excise, et al., Respondents. (Court of Appeals of New York. March 28, 1911.) Appeal from an order of the Appellate Division of the Supreme Court in the Second Judicial Department (127 N. Y. Supp. 68), entered December 30, 1910, which reversed an order of Special Term granting an application for a writ of certiorari and directing the issuance of a liquor tax certificate to the relator. E. B. Barnum, for appellant. Herbert H. Kellogg, for respondents.

PER CURIAM. Order affirmed, with costs, on opinion of Carr, J., in Matter of Ahlers, 141 App. Div. 891, 127 N. Y. Supp. 61.

CULLEN, C. J., and VANN, WILLARD BARTLETT, HISCOCK, and CHASE, JJ., concur. HAIGHT and WERNER, JJ., absent.

PEOPLE ex rel. COHOES RY. CO., Appellant, v. PUBLIC SERVICE COMMISSION OF NEW YORK, SECOND DISTRICT, et al., Respondents. (Court of Appeals of New York. May 9, 1911.) Appeal from an order of the Appellate Division of the Supreme Court in the Third Judicial Department (143 App. Div. 769, 128 N. Y. Supp. 384), entered March 10, 1911, which confirmed a determination of the defendant commission directing the relator to charge a five-cent fare, instead of six cents, on its cars running between the cities of Albany and Rensselaer, in compliance with chapter 353 of the Laws of 1905. See, also, 143 App. Div. 974, 128 N. Y. Supp. 1139. Lewis E. Carr and Patrick C. Dugan, for appellant. Ledyard P. Hale and Thomas F. McDermott, for respondents.

PER CURIAM. Order affirmed, with costs. CULLEN, C. J., and GRAY, HAIGHT, VANN, WERNER, HISCOCK, and COLLIN, JJ., concur.

PEOPLE ex rel. KELLY, Appellant, v. MILLIKEN et al., Respondents. (Court of Appeals of New York. Feb. 28, 1911.) Appeal from an order of the Appellate Division of the Supreme Court in the Third Judicial Department (140 App. Div. 762, 126 N. Y. Supp. 291), entered November 30, 1910, which reversed an order of Special Term (68 Misc. Rep. 101, 124 N. Y. Supp. 924) granting a motion for a peremptory writ of mandamus to compel the defendants to approve the transfer of the relator from the

position of personal clerk to a Supreme Court justice to that of court attendant in the Supreme Court. James O. Cropsey and Rufus O. Catlin, for appellant. Thomas Carmody, Atty. Gen. (Franklin Kennedy, of counsel), for respondents.

PER CURIAM. Order affirmed, with costs.

CULLEN, C. J., and VANN, WILLARD BARTLETT, HISCOCK, CHASE, and COLLIN, JJ., concur. HAIGHT, J., absent.

PEOPLE ex rel. NEW YORK, O. & W. RY. CO., Respondent, v. SHAW et al., Assessors, Appellants. (Court of Appeals of New York. May 16, 1911.) Appeal from an order of the Appellate Division of the Supreme Court in the Third Judicial Department (143 App. Div. 811, 128 N. Y. Supp. 177), entered March 31, 1911, which modified and affirmed as modified an order of Special Term reducing and confirming as reduced an assessment against the relator for purposes of taxation. A. G. Patterson, for appellants. Charles L. Andrus, for respondent.

PER CURIAM. Order affirmed, with costs.

CULLEN, C. J., and GRAY, HAIGHT, VANN, WERNER, HISCOCK, and COLLIN, JJ., concur.

PEOPLE ex rel. TERHUNE, Appellant, v. BINGHAM, Police Com'r, Respondent. (Court of Appeals of New York. May 16, 1911.) Appeal from an order of the Appellate Division of the Supreme Court in the First Judicial Department (132 App. Div. 929, 117 N. Y. Supp. 1144), entered May 28, 1909, which dismissed a writ of certiorari and affirmed the proceedings of the defendant in dismissing the relator from the police force of the city of New York. Jacob Rouss and Louis J. Grant, for appellant. Archibald R. Watson, Corp. Counsel (Terence Farley and Harry Crone, of counsel), for respondent.

PER CURIAM. Order affirmed, with costs.

CULLEN, C. J., and GRAY, HAIGHT, VANN, WERNER, HISCOCK, and COLLIN, JJ., concur.

PEOPLE ex rel. TOPPING, Respondent, v. PURDY et al., Com'rs, Appellants. (Court of Appeals of New York. May 9, 1911.) Appeal from an order of the Appellate Division of the Supreme Court in the First Judicial Department (143 App. Div. 389, 128 N. Y. Supp. 569), entered March 24, 1911, which affirmed an order of Special Term reducing an assessment against certain real property of the relator for purposes of taxation. Archibald R. Watson, Corp. Counsel (Curtis A. Peters, of counsel), for appellants. Merle I. St. John and A. Wheeler Palmer, for respondent.

PER CURIAM. Order affirmed, with costs.

CULLEN, C. J., and HAIGHT, VANN, WERNER, HISCOCK, and COLLIN, JJ., concur. GRAY, J., absent.

PEOPLE ex rel. WALKER, Respondent, v. McANENY, President of Borough of Manhattan, Appellant. (Court of Appeals of New York. May 9, 1911.) Appeal from an order of the Appellate Division of the Supreme Court in the First Judicial Department (139 App. Div. 88, 123 N. Y. Supp. 845), entered June 17, 1910, which modified and affirmed as modified an order of Special Term granting a motion for a peremptory writ of mandamus to compel the reinstatement of the relator in the office of superintendent of public buildings and offices in the borough of Manhattan. See, also, 143 App. Div. 931, 128 N. Y. Supp. 1141. Archibald R. Watson, Corp. Counsel (Clarence Farley and Elliot S. Benedict, of counsel), for

appellant. Herbert C. Smyth, John W. Browne, and Frederic C. Scofield, for respondent.

PER CURIAM. Order affirmed, with costs.

CULLEN, C. J., and HAIGHT, VANN, WERNER, HISCOCK, and COLLIN, JJ., concur. GRAY, J., absent.

PEOPLE'S BANK of CITY of NEW YORK, Respondent, v. FULLER'S EXPRESS CO., Appellant. (Court of Appeals of New York. March 21, 1911.) Appeal from a judgment of the Appellate Division of the Supreme Court in the First Judicial Department (136 App. Div. 937, 121 N. Y. Supp. 1143), entered February 10, 1910, affirming a judgment in favor of plaintiff entered upon a verdict directed by the court in an action to recover upon a promissory note. Paul Eugene Jones, for appellant. Herbert R. Limburg and Harry F. Mela, for respondent.

PER CURIAM. Judgment affirmed, with costs.

CULLEN, C. J., and WERNER, WILLARD BARTLETT, HISCOCK, CHASE, and COLLIN, JJ., concur. GRAY, J., not sitting.

POLITO et al., Respondents, v. PITRIELLO et al., Appellants. (Court of Appeals of New York. March 14, 1911.) Appeal from a judgment of the Appellate Division of the Supreme Court in the Second Judicial Department (132 App. Div. 903, 116 N. Y. Supp. 1145), entered April 27, 1909, affirming a judgment in favor of plaintiffs entered upon a decision of the court on trial at Special Term in an action to foreclose a mechanic's lien. See, also, 198 N. Y. 596, 92 N. E. 1099. H. H. Van Dyck, Bruce R. Duncan, and Peter J. McGoldrick, for appellants. K. C. McDonald and M. V. McDonald, for respondents.

PER CURIAM. Judgment affirmed, with costs.

CULLEN, C. J., and GRAY, WERNER, WILLARD BARTLETT, CHASE, HISCOCK, and COLLIN, JJ., concur.

RENWICK, Appellant, v. RENWICK et al., Respondents. (Court of Appeals of New York. Feb. 28, 1911.) Appeal from a judgment of the Appellate Division of the Supreme Court in the First Judicial Department (136 App. Div. 938, 121 N. Y. Supp. 1145), entered February 9, 1910, affirming a judgment (63 Misc. Rep. 596, 117 N. Y. Supp. 217) in favor of defendants entered upon a dismissal of the complaint by the court on trial at Special Term in an action to recover an interest in certain real property heretofore held in trust and now claimed by the plaintiff to have been equitably converted into personalty. See, also, 128 App. Div. 905, 112 N. Y. Supp. 1144; 128 App. Div. 905, 115 N. Y. Supp. 1142. George Bell, for appellant. George Welwood Murray and John P. Herren, for respondents.

PER CURIAM. Judgment affirmed, with costs.

CULLEN, C. J., and VANN, WILLARD BARTLETT, HISCOCK, CHASE, and COLLIN, JJ., concur. HAIGHT, J., absent.

REXFORD et al., Respondents, v. TANNER, Appellant. (Court of Appeals of New York. March 14, 1911.) Appeal from a judgment of the Appellate Division of the Supreme Court in the Fourth Judicial Department (134 App. Div. 907, 118 N. Y. Supp. 1137), entered July 19, 1909, affirming a judgment in favor of plaintiffs entered upon the report of a referee in an action for waste. See, also, 199 N. Y. 523, 92 N. E. 1100. Adelbert Frank Jenks,

for appellant. Arthur B. Ottaway and Frans C. Lewis, for respondents.

PER CURIAM. Judgment affirmed, with costs.

CULLEN, C. J., and GRAY, WERNER, WILLARD BARTLETT, CHASE, HISCOCK, and COLLIN, JJ., concur.

RICHARD, Respondent, v. MATHEWS, Appellant. (Court of Appeals of New York. March 21, 1911.) Appeal from a judgment of the Appellate Division of the Supreme Court in the Second Judicial Department (132 App. Div. 903, 116 N. Y. Supp. 1146), entered April 26, 1909, affirming a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term in an action to restrain the defendant from interfering with the use by the plaintiff of a certain strip of land. See, also, 133 App. Div. 928, 118 N. Y. Supp. 1137. Mitchell May, for appellant. Frank Comeaky, for respondent.

PER CURIAM. Judgment affirmed, with costs.

CULLEN, C. J., and GRAY, WERNER, WILLARD BARTLETT, CHASE, HISCOCK, and COLLIN, JJ., concur.

RILEY v. ROBINSON. (Court of Appeals of New York. April 25, 1911.) Appeal from a judgment of the Appellate Division of the Supreme Court in the Second Judicial Department (128 App. Div. 178, 112 N. Y. Supp. 753), entered November 5, 1908, affirming a judgment in favor of defendant entered upon a dismissal of the complaint by the court on trial at Special Term in an action to determine title to real property. Andrew F. Van Thun, Jr., Henry P. Burr, and Edward F. Riley, for appellant. Albert C. Aubery, for respondent.

PER CURIAM. Judgment affirmed, with costs.

CULLEN, C. J., and GRAY, WERNER, WILLARD BARTLETT, CHASE, HISCOCK, and COLLIN, JJ., concur.

ROACH, Respondent, v. NEW YORK CENT. & H. R. R. CO., Appellant. (Court of Appeals of New York. April 25, 1911.) Appeal from a judgment of the Appellate Division of the Supreme Court in the Fourth Judicial Department (136 App. Div. 944, 121 N. Y. Supp. 1145), entered February 7, 1910, affirming a judgment in favor of plaintiff entered upon a verdict in an action to recover for personal injuries alleged to have been sustained by plaintiff through the negligence of defendant, his employer. Alfred L. Becker, for appellant. Parton Swift, for respondent.

PER CURIAM. Judgment affirmed, with costs.

GRAY, HAIGHT, VANN, WILLARD BARTLETT, CHASE, and COLLIN, JJ., concur. CULLEN, C. J., dissents.

ROGAN v. METROPOLITAN SAVINGS BANK. (Court of Appeals of New York. March 3, 1911.) Appeal from a judgment of the Appellate Division of the Supreme Court in the First Judicial Department (139 App. Div. 929, 124 N. Y. Supp. 1128), entered July 18, 1910, affirming a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term in an action to recover possession of certain savings bank books alleged to constitute part of the estate of Patrick Hall, deceased. John T. Fenlon and John V. Judge, for appellant. James Kearney, for respondent.

PER CURIAM. Judgment affirmed, with costs.

CULLEN, C. J., and GRAY, VANN, WERNER, HISCOCK, and COLLIN, JJ., concur. HAIGHT, J., absent.

RUTHERFURD, Respondent, v. CARPENTER, Appellant. (Court of Appeals of New York. April 25, 1911.) Appeal from a judgment of the Appellate Division of the Supreme Court in the First Judicial Department (134 App. Div. 881, 119 N. Y. Supp. 790), entered December 9, 1909, affirming a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term in an action to charge the defendant with a trust ex maleficio. John S. Davenport, for appellant. F. R. Minnith and Henry Siegrist, for respondent.

PER CURIAM. Judgment reversed and new trial granted, costs to abide event, on dissenting opinion of Ingraham, J., below.

GRAY, WERNER, WILLARD BARTLETT, and CHASE, JJ., concur. CULLEN, C. J., and HISCOCK and COLLIN, JJ., dissent.

SADLER et al., Respondents, v. BOSTON & BOLIVIA RUBBER CO., Appellant. (Court of Appeals of New York. May 9, 1911.) Appeal, by permission, from an order of the Appellate Division of the Supreme Court in the First Judicial Department (140 App. Div. 367, 125 N. Y. Supp. 405), entered November 4, 1910, which affirmed an order of Special Term denying a motion to set aside and declare null and void the service of a summons. The following question was certified: "Upon the facts appearing upon this application, did the Supreme Court of this state acquire jurisdiction of the Boston & Bolivia Rubber Company?" See, also, 140 App. Div. 936, 126 N. Y. Supp. 1145. John W. Griggs, for appellant. Charles H. Tuttle, for respondents.

PER CURIAM. Order affirmed, with costs. Question certified answered in the affirmative.

CULLEN, C. J., and GRAY, HAIGHT, VANN, WERNER, HISCOCK, and COLLIN, JJ., concur.

SCHAFFHAUSER, Respondent, v. S. LIEBMAN'S SONS BREWING CO., Appellant. (Court of Appeals of New York. March 21, 1911.) Appeal from a judgment of the Appellate Division of the Supreme Court in the Second Judicial Department (136 App. Div. 895, 120 N. Y. Supp. 1145), entered December 18, 1909, affirming a judgment in favor of plaintiff entered upon a verdict in an action to recover for personal injuries alleged to have been sustained by plaintiff through the negligence of defendant, his employer. Martin A. Schenck and Frederick Hulse, for appellant. August P. Wagener, for respondent.

PER CURIAM. Judgment affirmed, with costs.

CULLEN, C. J., and GRAY, WILLARD BARTLETT, and CHASE, JJ., concur. WERNER, HISCOCK, and COLLIN, JJ., dissent.

SECOR, Respondent, v. ARDSLEY ICE CO., Appellant. (Court of Appeals of New York. April 7, 1911.) Appeal from a judgment of the Appellate Division of the Supreme Court in the Second Judicial Department (133 App. Div. 136, 117 N. Y. Supp. 414), entered June 11, 1909, modifying and affirming as modified a judgment in favor of plaintiff entered upon a verdict directed by the court in an action to recover for an alleged breach of contract. Joseph F. Perdue, Samuel R. Taylor, and Joseph L. Glover, for appellant. Wilson Brown, Jr., for respondent.

PER CURIAM. Judgment affirmed, with costs.

CULLEN, C. J., and GRAY, HAIGHT, VANN, WERNER, HISCOCK, and COLLIN, JJ., concur.

SMITHER, Appellant, v. SMITHER, Respondent. (Court of Appeals of New York. April 25, 1911.) Appeal from an order of the Appellate Division of the Supreme Court in the Fourth Judicial Department (137 App. Div. 881, 118 N. Y. Supp. 1143), entered October 20, 1909, which affirmed an order of Special Term modifying a prior judgment of divorce by striking out the provision for alimony. Henry W. Hill, for appellant. Walter W. Chamberlain and Eugene M. Bartlett, for respondent.

PER CURIAM. Order affirmed, without costs.

CULLEN, C. J., and GRAY, VANN, WILLARD BARTLETT, CHASE, and COLLIN, JJ., concur. HAIGHT, J., taking no part.

STEWART, Respondent, v. GARFORD, Appellant. (Court of Appeals of New York. May 16, 1911.) Appeal from a judgment of the Appellate Division of the Supreme Court in the First Judicial Department (135 App. Div. 919, 120 N. Y. Supp. 1147), entered January 3, 1910, affirming a judgment in favor of plaintiff entered upon a verdict directed by the court in an action to recover on a promissory note. John W. Ingram and Frank E. Bradley, for appellant. Gilbert H. Montague, for respondent.

PER CURIAM. Judgment affirmed, with costs.

CULLEN, C. J., and GRAY, HAIGHT, VANN, WERNER, WILLARD BARTLETT, and CHASE, JJ., concur.

SWAN, Respondent, v. GARDNER, Appellant. (Court of Appeals of New York. May 16, 1911.) Appeal from a judgment of the Appellate Division of the Supreme Court in the Fourth Judicial Department (131 App. Div. 923, 115 N. Y. Supp. 1146), entered March 12, 1909, affirming a judgment in favor of plaintiff entered upon a verdict in an action to recover for services alleged to have been rendered by plaintiff's testator, during her lifetime, to the defendant. I. R. Breen, for appellant. Brayton A. Field, for respondent.

PER CURIAM. Judgment affirmed, with costs.

CULLEN, C. J., and GRAY, HAIGHT, VANN, WERNER, WILLARD BARTLETT, and CHASE, JJ., concur.

SWENSON, Respondent, v. NORCROSS BROS. CO., Appellant. (Court of Appeals of New York. April 25, 1911.) Appeal from a judgment of the Appellate Division of the Supreme Court in the First Judicial Department (135 App. Div. 914, 119 N. Y. Supp. 1146), entered December 21, 1909, affirming a judgment in favor of plaintiff entered upon a verdict in an action to recover for personal injuries alleged to have been sustained by plaintiff through the negligence of defendant, his employer. George H. D. Foster, for appellant. Martin T. Manton, for respondent.

PER CURIAM. Judgment affirmed, with costs.

CULLEN, C. J., and GRAY, HAIGHT, VANN, WILLARD BARTLETT, CHASE, and COLLIN, JJ., concur.

TAYLOR et al., Respondents, v. GUINAN, Appellant. (Court of Appeals of New York. May 2, 1911.) Motion to dismiss an appeal from a judgment of the Appellate Division of the Supreme Court in the Second Judicial Department (141 App. Div. 921, 126 N. Y. Supp. 1147), entered November 28, 1910, affirming a judgment in favor of plaintiffs entered upon a

verdict in an action to recover for labor performed and materials furnished. The motion was made upon the grounds that the judgment was not appealable; that the exceptions were frivolous; that no question of law was involved; and that the appeal was taken only for delay. George L. Robinson, for the motion. H. B. Philbrook, opposed.

PER CURIAM. Motion denied, with \$10 costs.

THOMPSON, Respondent, v. STANDARD FASHION CO., Appellant. (Court of Appeals of New York. April 25, 1911.) Appeal, by permission, from a judgment of the Appellate Division of the Supreme Court in the First Judicial Department (128 App. Div. 926, 112 N. Y. Supp. 1148), entered November 30, 1908, modifying and affirming as modified a judgment in favor of plaintiff entered upon a verdict in an action to recover for personal injuries alleged to have been sustained through the defendant's negligence. See, also, 128 App. Div. 931, 113 N. Y. Supp. 1148; 133 App. Div. 945, 118 N. Y. Supp. 1146; 134 App. Div. 953, 118 N. Y. Supp. 1107. Herbert Noble, for appellant. Harold Nathan and Meyer Greenburg, for respondent.

PER CURIAM. Judgment affirmed with costs.

CULLEN, C. J., and GRAY, WERNER, WILLARD BARTLETT, CHASE, HISCOCK, and COLLIN, JJ., concur.

In re TIBBITTS' ESTATE. (Court of Appeals of New York. May 16, 1911.) Appeal from an order of the Appellate Division of the Supreme Court in the Fourth Judicial Department (136 App. Div. 906, 119 N. Y. Supp. 1147), entered December 1, 1909, which affirmed an order of the court at a Trial Term denying a motion to set aside a verdict answering certain questions as to the validity of the will of Henry W. Tibbitts, deceased, and for a new trial. See, also, 143 App. Div. 961, 128 N. Y. Supp. 1147. Homer Weston and Waldo Weston, for appellant. Frank R. Walker, for respondent.

PER CURIAM. Order affirmed, with costs. GRAY, HAIGHT, WERNER, and HISCOCK, JJ., concur. CULLEN, C. J., and VANN, and COLLIN, JJ., dissent.

In re TIFFANY'S ESTATE. (Court of Appeals of New York. May 9, 1911.) Appeal from an order of the Appellate Division of the Supreme Court in the First Judicial Department (143 App. Div. 327, 128 N. Y. Supp. 106), entered March 10, 1911, which affirmed an order of the New York County Surrogate's Court assessing a transfer tax upon the estate of Charles C. Tiffany, deceased. Charles P. Howland and William Roberts, for appellants. Henry A. Miller and John S. Jenkins, for respondent.

PER CURIAM. Order affirmed, with costs, on opinion of McLaughlin, J., below.

CULLEN, C. J., and HAIGHT, VANN, WERNER, HISCOCK, and COLLIN, JJ., concur. GRAY, J., absent.

TONKONOGY et al. v. FUCHS et al. (Court of Appeals of New York. March 14, 1911.) Appeal from a judgment of the Appellate Division of the Supreme Court in the Second Judicial Department (134 App. Div. 930, 118 N. Y. Supp. 1146), entered October 16, 1909, affirming a judgment in favor of plaintiffs entered upon a decision of the court on trial at Special Term in an action to foreclose a mortgage on real property. See, also, 136 App. Div. 890, 119 N. Y. Supp. 1147. James

P. Judge, for appellant. George Tonkonogy, for respondents.

PER CURIAM. Judgment affirmed, with costs.

CULLEN, C. J., and GRAY, WERNER, WILLARD BARTLETT, CHASE, HISCOCK, and COLLIN, JJ., concur.

TUSCARORA LAND & IMPROVEMENT CO. v. MILLAR. (Court of Appeals of New York. May 2, 1911.) Motion to dismiss an appeal from a judgment of the Appellate Division of the Supreme Court in the Fourth Judicial Department (143 App. Div. 955, 128 N. Y. Supp. 1148), entered March 14, 1911, affirming a judgment in favor of plaintiff entered upon a decision of the court on trial at an equity term in an action to enjoin the defendant from impeding and diverting the waters of a certain creek. The motion was made upon the ground that the findings of fact had been unanimously affirmed by the Appellate Division, that the exceptions were frivolous, and that no question was presented that could be reviewed by the Court of Appeals. Martin Clark, for the motion. August Becker, opposed.

PER CURIAM. Motion denied, with \$10 costs.

UNITED MERCHANTS' REALTY & IMPROVEMENT CO., Appellant, v. NEW YORK HIPPODROME, Respondent. (Court of Appeals of New York. April 7, 1911.) Appeal, by permission, from a judgment entered July 30, 1909, upon an order of the Appellate Division of the Supreme Court in the First Judicial Department (133 App. Div. 582, 118 N. Y. Supp. 128), which reversed a determination (61 Misc. Rep. 308, 113 N. Y. Supp. 740) of the Appellate Term reversing a judgment of the City Court of the city of New York in favor of defendant entered upon a dismissal of the complaint in an action to recover rent alleged to be due under a lease. See, also, 130 App. Div. 901, 115 N. Y. Supp. 1147; 134 App. Div. 953, 118 N. Y. Supp. 1147. S. M. Strock, Charles Levy, and E. F. Spitz, for appellant. Benjamin N. Cardozo and William Klein, for respondent.

PER CURIAM. Judgment affirmed, with costs.

CULLEN, C. J., and GRAY, HAIGHT, VANN, WERNER, HISCOCK, and COLLIN, JJ., concur.

UNITED STATES FIDELITY & GUARANTY CO., Appellant, v. BELDEN et al., Respondents. (Court of Appeals of New York. March 14, 1911.) Appeal from a judgment of the Appellate Division of the Supreme Court in the Fourth Judicial Department (129 App. Div. 936, 115 N. Y. Supp. 1147), entered February 20, 1909, affirming a judgment in favor of defendants entered upon a dismissal of the complaint by the court at a Trial Term without a jury in an action to recover amounts which plaintiff was compelled to pay in satisfaction of certain judgments against defendants by reason of its having become surety upon defendants' bond on appeal therefrom. C. G. Baldwin, for appellant. Leonard C. Crouch, for respondents.

PER CURIAM. Judgment affirmed, with costs.

CULLEN, C. J., and GRAY, HAIGHT, WERNER, WILLARD BARTLETT, and CHASE, JJ., concur. VANN, J., not sitting.

VAN ALSTINE, Appellant, v. SYRACUSE RAPID TRANSIT RY. CO., Respondent. (Court of Appeals of New York. May 2, 1911.) Motion to dismiss an appeal from an order of the Appellate Division of the Supreme Court in

the Fourth Judicial Department (142 App. Div. 925, 126 N. Y. Supp. 1149), entered January 11, 1911, reversing a judgment in favor of plaintiff entered upon a verdict and granting a new trial in an action to recover for personal injuries alleged to have been sustained through the negligence of defendant. The motion was made upon the ground that the Court of Appeals had no jurisdiction to review the order appealed from, that the appellant had not stipulated for judgment absolute in the event of affirmance, and that the appeal was frivolous. See, also, 143 App. Div. 958, 128 N. Y. Supp. 1149. Charles E. Spencer, for the motion. Frank T. Miller, opposed.

PER CURIAM. Motion granted and appeal dismissed, with taxable costs accrued to date and \$10 costs of motion.

VIVIAN et al., Appellants, v. STEERS, Respondent. (Court of Appeals of New York. April 25, 1911.) Appeal from a judgment of the Appellate Division of the Supreme Court in the Second Judicial Department (136 App. Div. 926, 120 N. Y. Supp. 1149), entered January 25, 1910 affirming a judgment in favor of defendant entered upon the report of a referee in an action for an accounting. See, also, 200 N. Y. 506, 93 N. E. 1134. Willard N. Baylis and Elliott J. Smith, for appellants. Charles Thaddeus Terry and Timothy M. Griffing, for respondent.

PER CURIAM. Judgment affirmed, with costs.

CULLEN, C. J., and GRAY, HAIGHT, VANN, WILLARD BARTLETT, CHASE, and COLLIN, JJ., concur.

WEBSTER REALTY CO., Appellant, v. GERATY, Respondent. (Court of Appeals of New York. April 25, 1911.) Appeal from a judgment of the Appellate Division of the Supreme Court in the First Judicial Department (135 App. Div. 920, 120 N. Y. Supp. 1150), entered December 30, 1909, affirming a judgment in favor of defendant entered upon a dismissal of the complaint by the court on trial at Special Term in an action to compel the specific performance of a contract to sell real property. M. Edward Kelley and Max Stern, for appellant. Harold Swain, for respondent.

PER CURIAM. Judgment affirmed, with costs, without prejudice to an action at law if plaintiff is so advised.

CULLEN, C. J., and GRAY, WERNER, WILLARD BARTLETT, HISCOCK, CHASE, and COLLIN, JJ., concur.

WEISSBERGER et al., Appellants, v. WAL-LACH et al., Respondents. (Court of Appeals of New York. March 28, 1911.) Appeal from a judgment of the Appellate Division of the Supreme Court in the First Judicial Department (135 App. Div. 918, 120 N. Y. Supp. 1150), entered December 30, 1909, affirming a judgment in favor of defendants entered upon a decision of the court on trial at Special Term in an action to compel the specific performance of a contract to sell real estate. Albert A. Howell, for appellants. Stanislaus N. Tuckman, for respondents.

PER CURIAM. Judgment affirmed, with costs.

CULLEN, C. J., and GRAY, WERNER, WILLARD BARTLETT, HISCOCK, CHASE, and COLLIN, JJ., concur.

WHIPPLE, Respondent, v. LYONS BEET SUGAR REFINING CO., Appellant. (Court of Appeals of New York. April 25, 1911.) Appeal from a judgment of the Appellate Division of the Supreme Court in the Fourth Judi-

cial Department (133 App. Div. 933, 118 N. Y. Supp. 1150), entered October 25, 1909, affirming a judgment in favor of plaintiff entered upon a decision of the court at a Trial Term without a jury in an action on contract. Charles P. Williams, for appellant. Irving L'Hommedieu, for respondent.

PER CURIAM. Judgment affirmed, with costs.

CULLEN, C. J., and GRAY, HAIGHT, VANN, WILLARD BARTLETT, CHASE, and COLLIN, JJ., concur.

WILCOX, Respondent, v. MUTUAL MILK & CREAM CO., Appellant. (Court of Appeals of New York. March 14, 1911.) Appeal from a judgment of the Appellate Division of the Supreme Court in the Fourth Judicial Department (134 App. Div. 908, 118 N. Y. Supp. 1150), entered July 16, 1909, affirming a judgment in favor of plaintiff entered upon a verdict in an action to recover for personal injuries alleged to have been sustained through the negligence of defendant, his employer. S. B. Mead and Irving G. Hubbs, for appellant. Giles S. Piper, for respondent.

PER CURIAM. Judgment affirmed, with costs.

CULLEN, C. J., and GRAY, VANN, WERNER, WILLARD BARTLETT, and CHASE, JJ., concur. HAIGHT, J., absent.

WILCOX et al., Respondents, v. RICHMOND LIGHT & R. CO. et al., Appellants. (Court of Appeals of New York. April 25, 1911.) Appeal from an order of the Appellate Division of the Supreme Court in the Second Judicial Department (142 App. Div. 44, 128 N. Y. Supp. 266), entered December 30, 1910, which affirmed an order of Special Term granting a motion for a peremptory writ of mandamus to compel the defendant railroad companies to exchange transfers at certain intersecting points on their lines. Lewis H. Freedman and Harold Russell Griffith, for appellants. George S. Coleman, Arthur Du Bois, and Edward M. Deegan, for respondents.

PER CURIAM. Order affirmed, with costs.

CULLEN, C. J., and VANN, WERNER, WILLARD BARTLETT, HISCOCK, and CHASE, JJ., concur. HAIGHT, J., absent.

WILLSON, Appellant, v. FAXON, WILLIAMS & FAXON, Respondent. (Court of Appeals of New York. May 2, 1911.) Motion for leave to withdraw an appeal from a judgment of the Appellate Division of the Supreme Court in the Fourth Judicial Department (138 App. Div. 359, 122 N. Y. Supp. 778), entered May 4, 1910, reversing a judgment in favor of plaintiff entered upon a verdict and granting a new trial in an action to recover damages alleged to have been suffered by plaintiff through the defendant negligently selling her cathartic tablets containing calomel, instead of cascara. The motion was made upon the ground that the appeal had been inadvertently taken. See, also, 143 App. Div. 961, 123 N. Y. Supp. 1151. Charles Newton, for the motion. Carlton E. Ladd, opposed.

PER CURIAM. Motion granted on payment of costs and \$10 costs of motion within 20 days. On failure to make such payment, the motion is denied, with \$10 costs.

WILSON et al., Respondents, v. NEVINS, Appellant. (Court of Appeals of New York. May 2, 1911.) Motion to dismiss an appeal from a judgment of the Appellate Division of the Supreme Court in the First Judicial Department (127 N. Y. Supp. 1150), entered Feb-

ruary 7, 1911, modifying and affirming as modified a judgment in favor of plaintiff entered upon a verdict in an action to recover for goods alleged to have been sold and delivered to plaintiff's wife. The motion was made upon the ground that the exceptions were frivolous, and presented no question of law for review. See, also, 63 Misc. Rep. 380, 118 N. Y. Supp. 421. Godfrey Goldmark, for the motion. Louis T. Noonan, opposed.

PER CURIAM. Motion denied, with \$10 costs.

WRIGHT, Respondent, v. KNIGHTS OF MACCABEES OF THE WORLD, Appellant. (Court of Appeals of New York. May 16, 1911.) Appeal from a judgment of the Appellate Division of the Supreme Court in the Fourth Judicial Department (140 App. Div. 918, 125 N. Y. Supp. 1151), entered October 15, 1910, affirming a judgment in favor of plaintiff entered upon the report of a referee in an action to have declared void certain by-laws of the defendant and to compel plaintiff's reinstatement as a member thereof. Alton B. Parker, D. D. Aitken, and George W. Miller, for appellant. John Conboy, for respondent.

PER CURIAM. Judgment affirmed, with costs, on the authority of the decision in this case reported in 196 N. Y. at page 391, 89 N. E. 1078, 31 L. R. A. (N. S.) 423, 134 Am. St. Rep. 838.

CULLEN, C. J., and GRAY, HAIGHT, VANN, WERNER, and CHASE, JJ., concur. WILLARD BARTLETT, J., absent.

ZAUN, Appellant, v. LONG ISLAND R. CO. Respondent. (Court of Appeals of New York. April 4, 1911.) Appeal from a judgment of the Appellate Division of the Supreme Court in the Second Judicial Department (139 App. Div. 719, 124 N. Y. Supp. 511) entered August 19, 1910, affirming a judgment in favor of defendant entered upon a dismissal of the complaint by the court at a Trial Term in an action to recover for the death of plaintiff's intestate alleged to have been occasioned by the defendant's negligence. R. A. Mansfield Hobbs, for appellant. Matthew J. Keany, Edward Kelly, and Joseph F. Keany, for respondent.

PER CURIAM. Judgment affirmed, with costs.

CULLEN, C. J., and GRAY, HAIGHT, VANN, WERNER, HISCOCK, and COLLIN, JJ., concur.

MACBETH-EVANS GLASS CO. v. JONES. (No. 21,875.) (Supreme Court of Indiana. June 23, 1911.) Appeal from Circuit Court, Grant County; H. J. Paulis, Judge. Action by Arthur Jones against the Macbeth-Evans Glass Company. From a judgment for plaintiff, defendant appealed to the Appellate Court, and, under Burns' Ann. St. 1908, § 1405, cause transferred to the Supreme Court. Affirmed. B. H. Campbell, E. R. Call, J. F. Cowern, and Frederick E. Matson, for appellant. G. A. Dentler, H. F. Hardin, and Marshall Williams, for appellee.

COX, J. The questions presented in this appeal are the same as those involved and decided in the case of Macbeth-Evans Glass Co. v. Van Blarican, 95 N. E. 313, No. 21,879, decided by this court June 9, 1911, and, on the authority of that case, the judgment in this is affirmed.

MACBETH-EVANS GLASS CO. v. TITUS. (No. 21,876.) (Supreme Court of Indiana. June 20, 1911.) Appeal from Circuit Court, Grant County; H. J. Paulis, Judge. Action

by George A. Titus against the Macbeth-Evans Glass Company. From a judgment for plaintiff, defendant appealed to the Appellate Court, and, under Burns' Ann. St. 1908, § 1405, cause transferred to the Supreme Court. Affirmed. B. H. Campbell, E. R. Call, Joseph F. Cowern, and F. E. Matson, for appellant. Stephen McSwiggan, for appellee.

COX, J. The questions presented in this appeal are the same as those involved and decided in the case of Macbeth-Evans Glass Co. v. Van Blarican, 95 N. E. 313, No. 21,879, decided by this court June 9, 1911, and, on the authority of that case, the judgment in this is affirmed.

TORREY v. BOSTON ELEVATED RY. CO. (Supreme Judicial Court of Massachusetts. Suffolk. May 18, 1911.) Exceptions from Superior Court, Suffolk County; John F. Brown, Judge. Action by William C. Torrey against the Boston Elevated Railway Company. There was a verdict for defendant, to which plaintiff excepted. Exceptions overruled. L. G. Roberts, for plaintiff. E. P. Saltonstall and C. W. Blood, for defendant.

HAMMOND, J. The evidence did not justify a finding that the starting signal by bell was given by the conductor or by his direction. The charge, though brief, stated the law tersely and correctly, and is not justly open to the criticisms made by the plaintiff that it was contradictory and misleading. Exceptions overruled.

AKRON ENGINEERING CO. et al. v. NEVIN et al. (No. 11,698.) (Supreme Court of Ohio. June 27, 1911.) Error to Circuit Court, Summit County. Allen, Waters, Young & Andrews, for plaintiffs in error. Rial M. Smith, J. A. H. Myers, and Otis, Beery & Otis, for defendants in error.

PER CURIAM. Judgment affirmed.

SPEAR, C. J., and DAVIS, SHAUCK, PRICE, JOHNSON, and DONAHUE, JJ., concur.

ALBERY v. PRITCHARD et al. (No. 11,871.) (Supreme Court of Ohio. May 9, 1911.) Error to Circuit Court, Franklin County. F. F. D. Albery, for plaintiff in error. Walter S. Page, for defendants in error.

PER CURIAM. Judgment affirmed.

DAVIS, PRICE, and DONAHUE, JJ., concur.

ALBERY v. PRITCHARD et al. (No. 11,872.) (Supreme Court of Ohio. May 9, 1911.) Error to Circuit Court, Franklin County. F. F. D. Albery, for plaintiff in error. Walter S. Page, for defendants in error.

PER CURIAM. Judgment affirmed.

DAVIS, PRICE, and DONAHUE, JJ., concur.

ALLEN et al. v. BLASER et al. (No. 11,750.) (Supreme Court of Ohio. April 11, 1911.) Error to Circuit Court, Franklin County. J. W. Coulter, Mitchell & Bruce, R. V. Sears, R. W. Johnston, O. W. Aldrich, and Smith W. Bennett, for plaintiffs in error. M. R. Patterson, for defendants in error.

PER CURIAM. Judgment affirmed.

SPEAR, C. J., and SHAUCK and JOHNSON, JJ., concur.

APPLER v. PORTSMOUTH ST. R. & LIGHT CO. (No. 12,793.) (Supreme Court of

Ohio. June 20, 1911.) Error to Circuit Court, Scioto County. James S. Thomas and Oscar W. Newman, for plaintiff in error. Milner, Miller & Searl, for defendant in error.

PER CURIAM. Judgment of circuit and common pleas court reversed and cause remanded.

SPEAR, C. J., and PRICE, JOHNSON, and DONAHUE, JJ., concur.

BABCOCK v. SHOOK. (No. 12,559.) (Supreme Court of Ohio. May 2, 1911.) Error to Circuit Court, Franklin County. Frederick N. Sinks, for plaintiff in error. Bolin & Bolin, for defendant in error.

PER CURIAM. Judgment affirmed.

SHAUCK, PRICE, JOHNSON, and DONAHUE, JJ., concur.

BAKER v. LAVER et al. (No. 12,568.) (Supreme Court of Ohio. May 9, 1911.) Error to Circuit Court, Henry County. W. P. Duffy and Donovan & Dittmer, for plaintiff in error. W. W. Campbell, for defendants in error.

PER CURIAM. Judgment reversed. Grounds stated in journal entry. This court being of opinion that the new matter set up in the answer and cross-petition of the defendants below, and the reply thereto, presented an issue of an equitable nature, and properly triable before the determination of the issue tendered by the petition, and the cause, therefore, was triable to the court, and not to a jury, and was, therefore, appealable. It is considered and adjudged that the judgment of the circuit court, dismissing said appeal, be, and the same is, hereby reversed, and said cause is remanded to said circuit court, with direction to overrule said motion to dismiss the appeal, and for further proceedings according to law.

SPEAR, C. J., and SHAUCK, PRICE, JOHNSON, and DONAHUE, JJ., concur.

BAKEWELL COAL CO. v. ROBERTS et al. (No. 12,640.) (Supreme Court of Ohio. June 13, 1911.) Error to Circuit Court, Belmont County. Fred Spriggs, Albert W. Kennon, and Newell K. Kennon, for plaintiff in error. Charles J. Lynch, for defendants in error.

PER CURIAM. Judgment affirmed.

SPEAR, C. J., and PRICE, JOHNSON, and DONAHUE, JJ., concur.

BALDWIN v. J. A. FAY & EGAN CO. et al. (No. 11,808.) (Supreme Court of Ohio. April 25, 1911.) Error to Circuit Court, Hamilton County. Charles B. Wilby and Mitchell Wilby, for plaintiff in error. Morison R. Waite and John R. Schindel, for defendants in error.

PER CURIAM. Judgment affirmed.

DAVIS, PRICE, and DONAHUE, JJ., concur.

BALTIMORE & O. R. CO. et al. v. CITY OF NEWARK. (No. 12,003.) (Supreme Court of Ohio. June 30, 1911.) Error to Circuit Court, Licking County. Robt. J. King, F. A. Durban, and Kibler & Montgomery, for plaintiffs in error. Frank A. Bolton, City Sol., for defendant in error.

PER CURIAM. Judgment affirmed.

SPEAR, C. J., and PRICE and DONAHUE, JJ., concur.

BAUGHN et al. v. COIL et al. (No. 11,755.) (Supreme Court of Ohio. March 28, 1911.)

Error to Circuit Court, Fayette County. Frank A. Chaffin, John N. Baughn, and Humphrey Jones, for plaintiffs in error. John Logan, for defendants in error.

PER CURIAM. Judgment affirmed.

DAVIS, PRICE, and DONAHUE, JJ., concur.

BELMONT COAL MINING CO. v. McFARLAND. (No. 12,613.) (Supreme Court of Ohio. May 9, 1911.) Error to Circuit Court, Belmont County. Gordon D. Kinder, Albert W. Kennon, and Newell K. Kennon, for plaintiff in error. Danford & Danford and Fred Spriggs, for defendant in error.

PER CURIAM. Judgment affirmed.

PRICE, JOHNSON, and DONAHUE, JJ., concur.

BLACKWELL v. OHIO CONSOL. OIL CO. (No. 11,784.) (Supreme Court of Ohio. April 11, 1911.) Error to Circuit Court, Harrison County. R. H. Minter, for plaintiff in error. Hollingsworth & Worley, for defendant in error.

PER CURIAM. Judgment affirmed.

DAVIS, PRICE, and DONAHUE, JJ., concur.

BOARD OF COM'RS OF CRAWFORD COUNTY et al. v. DENZER. (No. 12,434.) (Supreme Court of Ohio. March 21, 1911.) Error to Circuit Court, Crawford County. C. H. Henkel and Finley & Gallinger, for plaintiffs in error. J. C. Tobias and R. V. Sears, for defendant in error.

PER CURIAM. Judgment affirmed, there not being enough of the record printed to show the error complained of.

SPEAR, C. J., and DAVIS, SHAUCK, PRICE, JOHNSON, and DONAHUE, JJ., concur.

BOARD OF COM'RS OF SHELBY COUNTY et al. v. PARTINGTON et al. (No. 12,594.) (Supreme Court of Ohio. May 18, 1911.) Error to Circuit Court, Shelby County. Charles C. Marshall and Percy R. Taylor, for plaintiffs in error. Barnes & Mills, for defendants in error.

PER CURIAM. Judgment affirmed.

DAVIS, SHAUCK, and PRICE, JJ., concur.

BOARD OF EDUCATION OF LAKE TOWNSHIP v. BOARD OF EDUCATION OF SPECIAL SCHOOL DIST. OF UNION-TOWN et al. (No. 12,739.) (Supreme Court of Ohio. May 9, 1911.) Error to Circuit Court, Stark County. Craine & Snyder, for plaintiff in error. Braucher & Sweitzer, for defendants in error.

PER CURIAM. Judgment affirmed.

SPEAR, C. J., and DAVIS, SHAUCK, PRICE, and JOHNSON, JJ., concur. DONAHUE, J., not participating.

BOND v. HARDING et al. (No. 11,711.) (Supreme Court of Ohio. March 14, 1911.) Error to Circuit Court, Harrison County. Hollingsworth & Worley, for plaintiff in error. Perry & Rowland, for defendants in error.

PER CURIAM. Judgment affirmed.

DAVIS, SHAUCK, and PRICE, JJ., concur.

BOWERS et al. v. MYERS et al. (No. 12,512.) (Supreme Court of Ohio. June 20, 1911.) Error to Circuit Court, Wayne County.

Ed. S. Wertz, for plaintiffs in error. Critchfield & Hay, for defendants in error.

PER CURIAM. Judgment affirmed.

SPEAR, C. J., and DAVIS and PRICE, JJ., concur. DONAHUE, J., not participating.

BREWER v. P. HAYDEN SADDLERY HARDWARE CO. (No. 12,628.) (Supreme Court of Ohio. May 31, 1911.) Error to Circuit Court, Franklin County. Claude L. Brewer, for plaintiff in error. Lemuel D. Lilly, for defendant in error.

PER CURIAM. Judgment affirmed.

SHAUCK, PRICE, JOHNSON, and DONAHUE, JJ., concur.

BROWNE v. RILEY, Auditor, et al. (No. 12,606.) (Supreme Court of Ohio. June 20, 1911.) Error to Circuit Court, Licking County. J. R. Fitzgibbon, for plaintiff in error. U. G. Denman, Atty. Gen., Phil. B. Smythe, Pros. Atty., Carl Norpell, Justus Wilson, J. A. Alburn, and Clarence D. Laylin, for defendants in error.

PER CURIAM. Judgment affirmed on authority of *Adler v. Whitbeck*, 44 Ohio St. 539, 9 N. E. 672.

SPEAR, C. J., and DAVIS, SHAUCK, PRICE, and JOHNSON, JJ., concur.

BUEHLER v. COOK et al. (No. 12,046.) (Supreme Court of Ohio. June 6, 1911.) Error to Circuit Court, Jefferson County. E. De Witt Erskine and J. C. Bieger, for plaintiff in error. P. P. Lewis and Dio Rogers, for defendants in error.

PER CURIAM. Judgment affirmed.

SPEAR, C. J., and SHAUCK and JOHNSON, JJ., concur.

BURRELL v. HOLTZ et al. (No. 12,578.) (Supreme Court of Ohio. June 20, 1911.) Error to Circuit Court, Licking County. S. L. James, for plaintiff in error. U. G. Denman, Atty. Gen., Phil. B. Smythe, Pros. Atty., Justus Wilson, Carl Norpell, J. A. Alburn, and Clarence D. Laylin, for defendants in error.

PER CURIAM. Judgment affirmed on authority of *Adler v. Whitbeck*, 44 Ohio St. 539, 9 N. E. 672, and of *Conwell v. Sears*, 65 Ohio St. 49, 61 N. E. 155.

SPEAR, C. J., and DAVIS, SHAUCK, PRICE, and JOHNSON, JJ., concur.

BUTLER v. MORRIS et al. (No. 11,718.) (Supreme Court of Ohio. April 11, 1911.) Error to Circuit Court, Cuyahoga County. Solders, Thayer & Mansfield, for plaintiff in error. Westenhaver, Boyd, Rudolph & Brooks, for defendants in error.

PER CURIAM. Judgment affirmed.

DAVIS, SHAUCK, and PRICE, JJ., concur.

CAMPBELL et al. v. EUCHENHOFER et al. (No. 12,021.) (Supreme Court of Ohio. June 13, 1911.) Error to Circuit Court, Montgomery County. Young & Young, for plaintiffs in error. Van Deman, Burkhart & Smith and Gottschall & Turner, for defendants in error.

PER CURIAM. Judgment affirmed.

SPEAR, C. J., and SHAUCK and JOHNSON, JJ., concur.

CAVEY v. ILIFF et al. (No. 11,456.) (Supreme Court of Ohio. April 18, 1911.) Error to Circuit Court, Hamilton County. W.

W. Symmes and Thos. L. Michie, for plaintiff in error. Drausin Wulsin and Fred W. Keam, for defendants in error.

PER CURIAM. Judgment of reversal affirmed. Final judgment reversed and cause remanded. Grounds stated in journal entry. This court finding from the record that the judgment of the circuit court is in effect an adjudication that the judgment of the court of common pleas is against the weight of the evidence, the judgment of reversal is affirmed. But, this court being of opinion that the cause should be submitted to a jury, the final judgment rendered by the circuit court is hereby reversed.

SPEAR, C. J., and DAVIS, SHAUCK, PRICE, JOHNSON, and DONAHUE, JJ., concur.

CENTRAL UNION TELEPHONE CO. v. CAMPBELL. (No. 12,648.) (Supreme Court of Ohio. June 13, 1911.) Error to Circuit Court, Huron County. C. P. & R. D. Wickham, for plaintiff in error. J. R. McKnight and A. V. Andrews, for defendant in error.

PER CURIAM. Judgment affirmed.

PRICE, JOHNSON, and DONAHUE, JJ., concur.

CHAPMAN v. MAHONING VALLEY RY. CO. (No. 11,716.) (Supreme Court of Ohio. April 11, 1911.) Error to Circuit Court, Mahoning County. Frank Jacobs and D. J. Hartwell, for plaintiff in error. Arrel, Wilson & Harrington, for defendant in error.

PER CURIAM. Judgment affirmed.

SPEAR, C. J., and DAVIS, SHAUCK, JOHNSON, and DONAHUE, JJ., concur.

CHILCOTE, Sheriff, v. DICKERSON. (No. 12,647.) (Supreme Court of Ohio. June 13, 1911.) Error to Circuit Court, Morrow County. T. B. Mateer and M. R. Patterson, for plaintiff in error. W. J. Geer, for defendant in error.

PER CURIAM. Judgment affirmed.

DAVIS, SHAUCK, and JOHNSON, JJ., concur.

CHRIS HOLL HARDWARE CO. v. LOGAN BRICK SUPPLY CO. (No. 12,509.) (Supreme Court of Ohio. April 11, 1911.) Error to Circuit Court, Hocking County. Harley M. Whitcraft, for plaintiff in error. O. V. Wright, for defendant in error.

PER CURIAM. Judgment affirmed on authority of *Davis v. Turner*, 69 Ohio St. 101, 68 N. E. 819.

DAVIS, SHAUCK, PRICE, and JOHNSON, JJ., concur.

CINCINNATI, G. & P. R. CO. v. KNABB. (No. 12,631.) (Supreme Court of Ohio. May 31, 1911.) Error to Circuit Court, Clermont County. W. J. Thompson and O. E. Young, for plaintiff in error. W. C. Bishop and Louis Hicks, for defendant in error.

PER CURIAM. Judgment affirmed.

PRICE, JOHNSON, and DONAHUE, JJ., concur.

CINCINNATI TRACTION CO. v. ZEITSCHICK. (No. 12,724.) (Supreme Court of Ohio. May 2, 1911.) Error to Circuit Court, Hamilton County. Kinhead & Rogers, for

plaintiff in error. Max B. May, for defendant in error.

PER CURIAM. Judgment affirmed.

SPEAR, C. J., and DAVIS, SHAUCK, PRICE, JOHNSON, and DONAHUE, JJ., concur.

CITY OF AKRON et al. v. MORGAN. (No. 12,440.) (Supreme Court of Ohio. June 27, 1911.) Error to Circuit Court, Summit County. N. M. Greenberger, City Sol., and Jonathan Taylor, Asst. City Sol., for plaintiffs in error. Otis, Beery & Otis and Grant, Sieber & Mather, for defendant in error.

PER CURIAM. Judgment affirmed.

DAVIS, PRICE, and DONAHUE, JJ., concur.

CITY OF AKRON et al. v. MORGAN. (No. 12,441.) (Supreme Court of Ohio. June 27, 1911.) Error to Circuit Court, Summit County. N. M. Greenberger, City Sol., and Jonathan Taylor, Asst. City Sol., for plaintiffs in error. Otis, Beery & Otis and Grant, Sieber & Mather, for defendant in error.

PER CURIAM. Judgment affirmed.

DAVIS, PRICE, and DONAHUE, JJ., concur.

CITY OF CINCINNATI v. HYNICKA, Treasurer, et al. (No. 12,617.) (Supreme Court of Ohio. March 21, 1911.) Error to Circuit Court, Hamilton County. Edward M. Ballard, City Sol., and Geoffrey Goldsmith, Asst. City Sol., for plaintiff in error. Henry T. Hunt, Pros. Atty., Alfred Bettman and Stanley W. Merrell, Asst. Pros. Attys., and Louis A. Ireton, for defendants in error.

PER CURIAM. Judgment affirmed on authority of City of Cincinnati v. Lewis, Auditor, 66 Ohio St. 49, 63 N. E. 568.

SPEAR, C. J., and DAVIS, SHAUCK, PRICE, JOHNSON, and DONAHUE, JJ., concur.

CITY OF COLUMBUS v. WALCUTT. (No. 11,866.) (Supreme Court of Ohio. June 30, 1911.) Error to Circuit Court, Franklin County. George S. Marshall, City Sol., and Weinland, Hoover & Davies, for plaintiff in error. Huling & Huling, for defendant in error.

PER CURIAM. Judgment affirmed.

SPEAR, C. J., and DAVIS, SHAUCK, PRICE, and JOHNSON, JJ., concur.

CITY OF DAYTON v. GOLDSBERRY. (No. 11,776.) (Supreme Court of Ohio. April 11, 1911.) Error to Circuit Court, Montgomery County. Philo G. Brangam, City Sol., Walter V. Snyder, Charles J. Brennan, and William A. Pohlman, Asst. City Sol., for plaintiff in error. D. B. Van Pelt and Fitzgerald & Spriggs, for defendant in error.

PER CURIAM. Judgment affirmed. Grounds stated in journal entry. This court is of opinion that the evidence offered at the trial with respect to plaintiff forgetting about the condition of the timbers of the bridge was properly excluded, and that the circuit court in holding that ruling to be error was in itself in error as to that matter. But this court being further of opinion that the cause should have been submitted by the court of common pleas to the jury, and that that court therefore erred in sustaining the motion to direct a verdict for all the defendants, the judgment of the circuit court reversing the judgment of the court of common pleas and remanding the cause to that court for further proceedings with

respect to the claim of the plaintiff below against the city of Dayton is affirmed.

SPEAR, C. J., and JOHNSON and DONAHUE, JJ., concur.

CITY OF ELYRIA v. METCALF. (No. 12,667.) (Supreme Court of Ohio. June 27, 1911.) Error to Circuit Court, Lorain County. H. A. Pounds, for plaintiff in error. Webber & Metcalf, for defendant in error.

PER CURIAM. Judgment affirmed.

SPEAR, C. J., and DAVIS, SHAUCK, PRICE, JOHNSON, and DONAHUE, JJ., concur.

CITY OF URBANA v. MAGGERT. (No. 11,705.) (Supreme Court of Ohio. March 14, 1911.) Error to Circuit Court, Champaign County. G. P. Seibert and C. B. Heiserman, for plaintiff in error. G. V. Fromme, A. C. Bolinger, and Waite & Deaton, for defendant in error.

PER CURIAM. Judgment affirmed.

SPEAR, C. J., and DAVIS, SHAUCK, PRICE, JOHNSON, and DONAHUE, JJ., concur.

CITY OF ZANESVILLE v. GRAY. (No. 12,527.) (Supreme Court of Ohio. June 30, 1911.) Error to Circuit Court, Muskingum County. T. F. Thompson, City Sol., for plaintiff in error. E. F. O'Neal, for defendant in error.

PER CURIAM. Judgment affirmed.

PRICE, JOHNSON, and DONAHUE, JJ., concur.

CITY OF ZANESVILLE et al. v. HILLIER et al. (No. 12,528.) (Supreme Court of Ohio. May 9, 1911.) Error to Circuit Court, Muskingum County. T. F. Thompson, for plaintiffs in error. H. B. Buker, for defendants in error.

PER CURIAM. Judgment affirmed.

SPEAR, C. J., and PRICE and JOHNSON, JJ., concur. DONAHUE, J., not participating.

CLEVELAND, A. & C. RY. CO. et al. v. JONES. (No. 11,950.) (Supreme Court of Ohio. May 16, 1911.) Error to Circuit Court, Holmes County. Allen, Waters, Young & Address, for plaintiffs in error. Wellington Stillwell, for defendant in error.

PER CURIAM. Judgment affirmed.

DAVIS, PRICE, and JOHNSON, JJ., concur.

CLEVELAND DREDGE & DOCK CO. v. SMITH et al. (No. 11,931.) (Supreme Court of Ohio. May 23, 1911.) Error to Circuit Court, Cuyahoga County. Kline, Tolles & Morley, for plaintiff in error. H. L. Peeke and H. H. Johnson, for defendants in error.

PER CURIAM. Judgment affirmed.

DAVIS, PRICE, and DONAHUE, JJ., concur.

CLEVELAND SHORT LINE RY. CO. v. DUNCAN et al. (No. 12,833.) (Supreme Court of Ohio. April 25, 1911.) Error to Circuit Court, Cuyahoga County. Kline, Tolles & Morley, for plaintiff in error. H. Melvin Roberts, for defendants in error.

PER CURIAM. Judgment reversed. Grounds stated in journal entry. It is ordered and adjudged by this court that the judgment of the said circuit court be, and the same hereby is,

reversed for error in its conclusions of law and in making the decree on the facts found, it being found by the circuit court (finding 14): "Ever since the spring and summer of 1907 it has been a matter of general public notoriety, and the plaintiffs, and each of them, have had notice, that defendant had acquired its right of way through said allotments for the purpose of constructing and operating a railroad thereon, and also knew where said right of way was located; that defendant was making preparation to let contracts to various contractors for the construction of its tracks, switches, etc., thereon, and that said contracts necessarily involved very large sums of money; that during the years 1908 and 1909 defendant negotiated publicly with the officials of the village of East Cleveland as to the manner of crossing the streets within said village, and the mode of crossing these streets was the principal issue in the municipal campaigns of 1907 and 1909 in that village. The defendant finally agreed with the village of East Cleveland, Ohio, as to the manner of crossing the streets and other public places in said village on December 28, 1909." The circuit court further found as a fact that "soon after acquiring its right of way defendant let the necessary contracts, and between the years 1906 and 1909 completed the construction of the west half of its railroad from Rockport to Newburgh, in Cuyahoga county, Ohio, and in the meantime defendant let contracts involving several million dollars for the completion of its said road from Newburgh to Collinwood in said county, including the portion thereof through said two allotments. Work was forthwith commenced under such contracts, and at the commencement of this action (May 2, 1910) had progressed as far as the south line of said allotments, and work was in progress over practically the whole line, from Newburgh to said allotments, including a bridge over Eddy Road." The court further found that "on April 19, 1910, the contractor entered upon the right of way of said allotments and erected on Block A a large barracks for housing his workmen; also, two or three days before this suit was begun on one of the lots near Eddy Road he erected an office, and on another lot near the office he commenced the erection of a large frame building for storing materials. This building was about two-thirds completed when this action was commenced. This action was commenced on May 2, 1910. At the time of the commencement of this action work on its railroad south and west of said allotments had progressed so far that it was then practically impossible for said defendant to change its line through said allotments." On the above facts so found by the circuit court, the plaintiffs below are chargeable with such laches in deferring their suits for almost three years after knowing the defendant's purpose in acquiring said right of way that they are not entitled to an injunction against defendant company to prevent the further work and expenditures in completing its line of railroad on said right of way. On account of such laches, and the character of the alleged interests which plaintiffs below allege they own in said allotments and the several lots thereof, to wit, a restriction by covenant in the deeds for said lots to their use for residences only, under a general plan of the original grantors, the plaintiffs are not entitled to the injunction prayed for, especially against the defendant below in its attempt to exercise the right of eminent domain, under the facts as above found, although the defendant may have had knowledge of said restricting covenants when it acquired its right of way. The remedy, if any, is at law, and not in equity. It is therefore considered and adjudged by this court that the judgment and decree of the circuit court be and the same is hereby reversed, the injunctions heretofore granted dissolved, and all the petitions embraced in this

record, on which injunction was granted, in whole or in part, are dismissed.

DAVIS, SHAUCK, PRICE, and JOHNSON, JJ., concur.

CLEVELAND & M. V. RY. CO. v. BOARD OF COM'RS OF MAHONING COUNTY et al. (No. 12,020.) (Supreme Court of Ohio. June 13, 1911.) Error to Circuit Court, Mahoning County. Hine, Kennedy & Manchester, for plaintiff in error. M. A. Norris, S. S. Conroy, and W. R. Graham, for defendants in error.

PER CURIAM. Judgment affirmed.

DAVIS, PRICE, and DONAHUE, JJ., concur.

COLUMBUS CITIZENS' TELEPHONE CO. v. HUNTER. (No. 12,680.) (Supreme Court of Ohio. May 23, 1911.) Error to Circuit Court, Franklin County. Daugherty, Todd & Rarey, for plaintiff in error. Wilson & Rector, for defendant in error.

PER CURIAM. Judgment affirmed.

SPEAR, C. J., and SHAUCK, PRICE, JOHNSON, and DONAHUE, JJ., concur.

COLUMBUS RY. & LIGHT CO. v. GROOMS. (No. 12,577.) (Supreme Court of Ohio. May 16, 1911.) Error to Circuit Court, Franklin County. 'Booth,' Keating, Peters & Pomerene, for plaintiff in error. F. S. Monnett, for defendant in error.

PER CURIAM. Judgment affirmed.

PRICE, JOHNSON, and DONAHUE, JJ., concur.

CORNELL et al. v. CORNELL. (No. 11,980.) (Supreme Court of Ohio. June 13, 1911.) Error to Circuit Court, Columbiana County. Metzger & Smith, for plaintiffs in error. Taylor & Harris, for defendant in error.

PER CURIAM. Judgment modified. Grounds stated in journal entry. It is ordered and adjudged by this court that the judgment of the said circuit court be and the same hereby is modified by allowing to the said Sampson P. Cornell a further credit in addition to those allowed him by the circuit court of the sum of \$214.43 for expenses paid by him in repair and betterment of the property sought to be partitioned in this action; and, there being no other or further error appearing on the record of this case to the prejudice of plaintiff in error, it is hereby ordered and adjudged that said judgment as so modified be, and the same hereby is, affirmed.

SPEAR, C. J., and DAVIS, SHAUCK, PRICE, JOHNSON, and DONAHUE, JJ., concur.

DAVIES, Auditor, et al. v. ACKLIN. (No. 11,690.) (Supreme Court of Ohio. March 14, 1911.) Error to Circuit Court, Lucas County. H. C. Webster, Pros. Atty., and James S. Martin, for plaintiffs in error. B. A. Hayes, for defendant in error.

PER CURIAM. Judgment affirmed.

DAVIS, PRICE, and DONAHUE, JJ., concur.

DEAN v. W. J. HAMILTON COAL CO. et al. (No. 12,599.) (Supreme Court of Ohio. May 31, 1911.) Error to Circuit Court, Franklin County. W. G. Brossman and W. H. Jones,

for plaintiff in error. Addison, Sinks & Babcock, for defendants in error.

PER CURIAM. Judgment affirmed.

SHAUCK, PRICE, JOHNSON, and DONAHUE, JJ., concur.

DOWNS v. MILLER et al. (No. 12,395.) (Supreme Court of Ohio. May 2, 1911.) Error to Circuit Court, Ross County. John P. Phillips, for plaintiff in error. Silas F. Garrett, Elijah Cutright, Jr., and Peter J. Blosser, for defendant in error.

PER CURIAM. Judgment affirmed.

SPEAR, C. J., and SHAUCK and PRICE, JJ., concur.

DUDLEY et al. v. BOARD OF EDUCATION OF LEIPSIK VILLAGE SCHOOL DIST. et al. (No. 12,641.) (Supreme Court of Ohio. June 13, 1911.) Error to Circuit Court, Putnam County. Bailey & Leasure, for plaintiffs in error. A. A. Slaybaugh, Watts & Moore, and Risser & Smith, for defendants in error.

PER CURIAM. Judgment affirmed.

SPEAR, C. J., and SHAUCK, PRICE, JOHNSON, and DONAHUE, JJ., concur.

EAST OHIO SEWER PIPE CO. v. ADAMS. (No. 11,790.) (Supreme Court of Ohio. March 14, 1911.) Error to Circuit Court, Jefferson County. A. C. Lewis and J. O. Naylor, for plaintiff in error. P. P. Lewis and J. W. Porter, for defendant in error.

PER CURIAM. Judgment affirmed.

DAVIS, SHAUCK, PRICE, JOHNSON, and DONAHUE, JJ., concur.

EBERHARD MFG. CO. v. CLARKE. (No. 11,802.) (Supreme Court of Ohio. May 16, 1911.) Error to Circuit Court, Cuyahoga County. Ford, Snyder & Tilden, for plaintiff in error. Frank C. Scott and Foran & Powell, for defendant in error.

PER CURIAM. Judgment reversed. Grounds stated in journal entry. It is ordered and adjudged by this court that the judgment of the said circuit court be, and the same hereby is, reversed for error in affirming and in not reversing the judgment of the court of common pleas in the case of Ann Clarke, Adm'x, v. Eberhard Manufacturing Company. And proceeding to render the judgment which the said circuit court should have rendered it is considered and adjudged that the said judgment of the court of common pleas of Cuyahoga county be and the same hereby is reversed for error in giving in charge to the jury plaintiff's request No. 7 on page 446 of said record; also, for refusing to give to the jury defendant's request No. 35, to be found on page 456 of the printed record.

SPEAR, C. J., and DAVIS, SHAUCK, JOHNSON, and DONAHUE, JJ., concur.

ECKERT v. SHAFFER. (No. 12,635.) (Supreme Court of Ohio. June 6, 1911.) Error to Circuit Court, Wood County. A. W. Eckert and F. P. Reigle, for plaintiff in error. N. R. Harrington, for defendant in error.

PER CURIAM. Judgment affirmed.

SPEAR, C. J., and DAVIS, SHAUCK, PRICE, JOHNSON, and DONAHUE, JJ., concur.

EDWARD E. FISHER CO. v. WHEELER et al. (No. 11,924.) (Supreme Court of Ohio. May 16, 1911.) Error to Circuit Court, Franklin County. Fred C. Rector, for plaintiff in error.

Harry A. Clark and George H. Jones, for defendants in error.

PER CURIAM. Judgment affirmed.

DAVIS, SHAUCK, JOHNSON, and DONAHUE, JJ., concur.

ERIE STONE CO. v. PLACE. (No. 12,689.) (Supreme Court of Ohio. May 31, 1911.) Error to Circuit Court, Van Wert County. Blachly & Kerns, for plaintiff in error. H. L. Conn and W. H. Dailey, for defendant in error.

PER CURIAM. Judgment of the circuit court reversed and judgment of the common pleas affirmed.

SPEAR, C. J., and DAVIS, SHAUCK, and PRICE, JJ., concur.

FEDERAL GLASS CO. v. PETRUSCHKE. (No. 12,474.) (Supreme Court of Ohio. March 21, 1911.) Error to Circuit Court, Franklin County. Arnold, Morton & Irvine and C. E. Blanchard, for plaintiff in error. Watson, Stouffer & Davis, for defendant in error.

PER CURIAM. Judgment affirmed.

SHAUCK, PRICE, and JOHNSON, JJ., concur.

FELT v. LOWE. (No. 11,913.) (Supreme Court of Ohio. May 16, 1911.) Error to Circuit Court, Lucas County. Albert P. McKee and Claude R. Banker, for plaintiff in error. Glenn R. C. Failing, for defendant in error.

PER CURIAM. Judgment affirmed.

SPEAR, C. J., and SHAUCK and JOHNSON, JJ., concur.

FOSTER v. CITY OF PORTSMOUTH. (No. 11,878.) (Supreme Court of Ohio. May 9, 1911.) Error to Circuit Court, Scioto County. Evans & Crawford, for plaintiff in error. Horace L. Small, City Sol., for defendant in error.

PER CURIAM. Judgment affirmed.

DAVIS, PRICE, and DONAHUE, JJ., concur.

FRASIER et al. v. VILLAGE OF BRIDGEPORT. (No. 11,930.) (Supreme Court of Ohio. May 16, 1911.) Error to Circuit Court, Belmont County. John B. Driggs, J. C. Heinelein, James C. Tallman, W. V. Campbell, and Hunter S. Armstrong, for plaintiffs in error. C. L. Weems, George C. McKee, and Gordon D. Kinder, for defendant in error.

PER CURIAM. Judgment affirmed.

SPEAR, C. J., and SHAUCK and JOHNSON, JJ., concur.

FREDERICKTOWN OIL & GAS CO. v. SCOTT. (No. 11,933.) (Supreme Court of Ohio. May 23, 1911.) Error to Circuit Court, Knox County. Waight & Moore, for plaintiff in error. Wm. M. Koons & Sons, for defendant in error.

PER CURIAM. Judgment affirmed.

SPEAR, C. J., and SHAUCK and JOHNSON, JJ., concur.

FREY et al. v. HANDWORK et al. (No. 12,629.) (Supreme Court of Ohio. May 31, 1911.) Error to Circuit Court, Wood County. F. P. Reigle and Edward Beverstock, for plaintiffs in error. Emery F. Lynn, Gillmer & Gill-

mer, Dunpace & Solether, and C. W. Watkins, for defendants in error.

PER CURIAM. Judgment affirmed.

SPEAR, C. J., and DAVIS, SHAUCK, PRICE, JOHNSON, and DONAHUE, JJ., concur.

GALLENSTEIN et al. v. CITY OF PORTSMOUTH. (No. 12,397.) (Supreme Court of Ohio. May 16, 1911.) Error to Circuit Court, Scioto County. Evans & Crawford, for plaintiffs in error. Horace L. Small, City Sol., for defendant in error.

PER CURIAM. Judgment affirmed.

DAVIS, SHAUCK, and JOHNSON, JJ., concur.

GASTON v. YOUNGSTOWN & O. R. R. CO. et al. (No. 11,758.) (Supreme Court of Ohio. March 28, 1911.) Error to Circuit Court, Columbiana County. P. M. Smith, for plaintiff in error. Squire, Sanders & Dempsey, Wm. M. Duncan, and Metzger & Smith, for defendants in error.

PER CURIAM. Judgment modified. Grounds stated in journal entry. This court, proceeding to give construction to the decree and judgment of said circuit court of November 2, 1908, finds and adjudges that the order directing the plaintiff in error to execute and deliver to the said railroad company a deed of the premises requires only a deed of a right of way, and does not require the delivery of a deed conveying title in fee simple. This court further finds and adjudges that the true construction of that portion of said judgment and decree whereby the clerk of the court is directed to enter on the record in the office of the recorder of the county, a transfer of title to said premises to the railroad company, ought to be and is that the entry shall show, and the effect of the record so made will be, the transfer of title to a right of way only over said premises. Giving further construction to said judgment and decree, this court finds and adjudges that the same contains nothing preventing plaintiff in error from insisting upon the stopping at the platform of a reasonable number of cars daily and from enforcing such right in all proper and legal ways, which right is hereby expressly reserved to him. And the judgment of the circuit court, as here modified, is affirmed.

SPEAR, C. J., and DAVIS, PRICE, and JOHNSON, JJ., concur.

GENERAL RY. SIGNAL CO. v. VALOIS. (No. 12,709.) (Supreme Court of Ohio. March 28, 1911.) Error to Circuit Court, Lucas County. Smith & Baker, for plaintiff in error. Stephen Brophy, for defendant in error.

PER CURIAM. Judgment affirmed.

SPEAR, C. J., and DAVIS, PRICE, JOHNSON, and DONAHUE, JJ., concur.

GEORGE W. CARMICHAEL & CO. v. RACE. (No. 12,201.) (Supreme Court of Ohio. June 6, 1911.) Error to Circuit Court, Lake County. Seaton & Paine, for plaintiff in error. B. C. Shepherd and H. E. Hammar, for defendant in error.

PER CURIAM. Judgment affirmed.

SHAUCK, PRICE, and DONAHUE, JJ., concur.

GERMOND et al. v. CONNEAUT MUT. LOAN & TRUST CO. et al. (No. 12,473.) (Supreme Court of Ohio. March 21, 1911.) Error to Circuit Court, Ashtabula County.

Allen M. Cox and H. G. Kingdom, for plaintiffs in error. Perry & Hitchcock, for defendants in error.

PER CURIAM. Judgment affirmed.

DAVIS, SHAUCK, PRICE, and JOHNSON, JJ., concur.

GIACIN v. FRENCH BROS. DAIRY CO. (No. 11,983.) (Supreme Court of Ohio. May 23, 1911.) Error to Circuit Court, Hamilton County. Scott Bonham, for plaintiff in error. Albert Bettinger and J. Shroder, for defendant in error.

PER CURIAM. Judgment affirmed.

DAVIS, PRICE, and DONAHUE, JJ., concur.

GILFILLAN v. BOWER et al. (No. 12,396.) (Supreme Court of Ohio. May 2, 1911.) Error to Circuit Court, Ross County. John P. Phillips, for plaintiff in error. Silas F. Garrett, Elijah Cutright, Jr., and Peter J. Blosser, for defendants in error.

PER CURIAM. Judgment affirmed.

SPEAR, C. J., and SHAUCK and PRICE, JJ., concur.

GOLNER et al. v. MEEKER. (No. 12,073.) (Supreme Court of Ohio. June 13, 1911.) Error to Circuit Court, Cuyahoga County. Jas. W. Stewart and White, Johnson & Cannon, for plaintiffs in error. Gage, Wilbur & Williams and David & Heald, for defendant in error.

PER CURIAM. Judgment affirmed.

DAVIS, PRICE, and DONAHUE, JJ., concur.

GREAT LAFAYETTE v. PENNSYLVANIA CO. (No. 12,013.) (Supreme Court of Ohio. June 27, 1911.) Error to Circuit Court, Mahoning County. Myron A. Norris and James V. Murphy, for plaintiff in error. Arrel, Wilson & Harrington, for defendant in error.

PER CURIAM. Judgment affirmed.

SPEAR, C. J., and DAVIS and PRICE, JJ., concur.

HAGUE v. HAGUE et al. (No. 11,979.) (Supreme Court of Ohio. May 31, 1911.) Error to Circuit Court, Muskingum County. Winn & Bassett, for plaintiff in error. John R. Stonesipher and John J. Adams, for defendants in error.

PER CURIAM. Judgment affirmed.

DAVIS, PRICE, and DONAHUE, JJ., concur.

HAMBURGER v. CINCINNATI TRACTION CO. (No. 12,735.) (Supreme Court of Ohio. April 11, 1911.) Error to Circuit Court, Hamilton County. Horstman & Horstman, for plaintiff in error. Miller Outcalt and J. W. Heintzman, for defendant in error.

PER CURIAM. Judgment affirmed.

DAVIS, SHAUCK, PRICE, JOHNSON, and DONAHUE, JJ., concur.

HAMILTON LUMBER CO. v. HAMILTON HOMESTEAD & LOAN CO. et al. (No. 11,909.) (Supreme Court of Ohio. June 20, 1911.) Error to Circuit Court, Butler County. Sam. D. Fitton, Jr., for plaintiff in error.

error. **M. O. Burns, Beekley & Beekley, and Nelson Williams**, for defendants in error.

PER CURIAM. Judgment affirmed.

DAVIS, SHAUCK, PRICE, and JOHNSON, JJ., concur.

HARDESTY et al. v. OSBORN. (No. 12,087.) (Supreme Court of Ohio. May 9, 1911.) Error to Circuit Court, Franklin County. **Warner & Halterman and Pugh & Pugh**, for plaintiffs in error. **Williams, Williams, Taylor & Nash and Charles J. Pretzman**, for defendant in error.

PER CURIAM. Judgment affirmed.

DAVIS, PRICE, and DONAHUE, JJ., concur.

HARDING v. COMMISSIONERS OF ROAD DIST. NO. 1 et al. (No. 13,051.) (Supreme Court of Ohio. June 20, 1911.) Error to Circuit Court, Mahoning County. **De Camp & Jackson**, for plaintiff in error. **W. S. Anderson & Son**, for defendants in error.

PER CURIAM. Judgment affirmed.

SPEAR, C. J., and DAVIS, PRICE, JOHNSON, and DONAHUE, JJ., concur.

HARMON v. BROWN. (No. 12,623.) (Supreme Court of Ohio. March 21, 1911.) Error to Circuit Court, Lucas County. **Julian H. Tyler and Morison R. Waite**, for plaintiff in error. **Marshall & Fraser and George C. Bryce**, for defendant in error.

PER CURIAM. Judgment affirmed.

SPEAR, C. J., and DAVIS, PRICE, JOHNSON, and DONAHUE, JJ., concur.

HARMON v. MORIARITY. (No. 12,708.) (Supreme Court of Ohio. June 27, 1911.) Error to Circuit Court, Lucas County. **Morison R. Waite and Julian H. Tyler**, for plaintiff in error. **Wm. B. Duck and Harry E. King**, for defendant in error.

PER CURIAM. Judgments reversed and judgment for plaintiff in error. Grounds stated in journal entry. It is ordered and adjudged by this court that the judgment of the said circuit court be, and the same hereby is, reversed for error in affirming and in not reversing the judgment of the court of common pleas of Lucas county, Ohio, in the case of **Thomas Moriarity v. Judson Harmon, Receiver**. And, proceeding to render the judgment which the said circuit court should have rendered, it is considered and adjudged by this court that the said judgment of the court of common pleas of Lucas county in said cause of **Thomas Moriarity v. Judson Harmon, Receiver**, be and the same hereby is reversed for error in overruling the motion made by said Harmon, receiver, at the conclusion of all the evidence, for an order arresting said evidence and directing the jury to return a verdict for said Judson Harmon, receiver, and in not granting said motion, and for error in overruling the motion of said Judson Harmon, receiver, for a new trial, this court being of opinion that there is no evidence contained in the record tending to show negligence on the part of the employees of the said receiver in the operation of its train or otherwise, nor that any act of said employees brought about, or contributed to, the injury to said Moriarity.

SPEAR, C. J., and DAVIS, SHAUCK, JOHNSON, and DONAHUE, JJ., concur.

HART v. POOR et al. (No. 12,841.) (Supreme Court of Ohio. May 31, 1911.) Error

to Circuit Court, Hamilton County. **Cohen & Mack and Milton Hurtig**, for plaintiff in error. **Frank F. Dinsmore**, for defendants in error.

PER CURIAM. Judgment affirmed.

DAVIS, SHAUCK, PRICE, JOHNSON, and DONAHUE, JJ., concur.

HEAFIELD v. COLUMBUS CHAIN CO. (No. 11,827.) (Supreme Court of Ohio. May 9, 1911.) Error to Circuit Court, Franklin County. **Addison, Sinks & Babcock**, for plaintiff in error. **Barton Griffith, S. A. Webb, and Cyrus Huling**, for defendant in error.

PER CURIAM. Judgment affirmed. Grounds stated in journal entry. This court finding from the record that the circuit court in passing upon the record of the court of common pleas, and in reviewing the evidence given in that court at the trial of **Heafield** against the **Columbus Chain Company**, found that, by the manifest weight of the evidence, the transaction commenced with the acquisition of the stock certificates by plaintiff in error, **Heafield**, and the consideration for the \$8,000 note was a gambling contract within the meaning of section 4269, Rev. St.; and, this court being of opinion that such an infirmity may be taken advantage of by the said chain company, it is considered and adjudged that the judgment of the circuit court be, and the same is hereby, affirmed.

SPEAR, C. J., and PRICE, JOHNSON, and DONAHUE, JJ., concur.

HOGUE et al. v. ELLIOTT et al. (No. 12,603.) (Supreme Court of Ohio. May 31, 1911.) Error to Circuit Court, Montgomery County. **Gottschall & Turner**, for plaintiffs in error. **Powell & Howell**, for defendants in error.

PER CURIAM. Judgment affirmed.

SHAUCK, PRICE, JOHNSON, and DONAHUE, JJ., concur.

HOLLAND v. MAXWELL et al. (No. 11,746.) (Supreme Court of Ohio. April 11, 1911.) Error to Circuit Court, Greene County. **M. R. Snodgrass**, for plaintiff in error. **Charles L. Spencer and Maxwell & Maxwell**, for defendants in error.

PER CURIAM. Petition in error dismissed on authority of **Collins v. Davis**, 33 Ohio St. 567, and **Andrews v. City of Youngstown**, 25 Ohio St. 218.

DAVIS, SHAUCK, PRICE, JOHNSON, and DONAHUE, JJ., concur.

HOLMES v. MARVIN. (No. 11,845.) (Supreme Court of Ohio. May 9, 1911.) Error to Circuit Court, Hancock County. **Squire, Sanders & Dempsey and E. V. Bope**, for plaintiff in error. **George F. Pendleton and Alfred Graber**, for defendant in error.

PER CURIAM. Judgment affirmed.

DAVIS, PRICE, JOHNSON, and DONAHUE, JJ., concur.

HOMER v. ROSS. (No. 12,504.) (Supreme Court of Ohio. April 11, 1911.) Error to Circuit Court, Holmes County. **W. & Wayne Stillwell**, for plaintiff in error. **W. J. Weirick**, for defendant in error.

PER CURIAM. Judgment affirmed.

DAVIS, PRICE, and JOHNSON, JJ., concur.

HOSHOR v. BOARD OF COM'RS OF FAIRFIELD COUNTY. (No. 12,946.) (Supreme Court of Ohio. June 27, 1911.) Error to Circuit Court, Fairfield County. C. A. Radcliffe and M. A. Daugherty, for plaintiff in error. T. T. Courtright, Pros. Atty., U. S. Brandt, W. H. Land, and J. E. Todd, for defendant in error.

PER CURIAM. Judgment affirmed on the reasoning of the opinion of the circuit court of Fairfield county in this case.

DAVIS, SHAUCK, and PRICE, JJ., concur.
DONAHUE, J., not participating.

HURLBUT v. JONES. (No. 11,701.) (Supreme Court of Ohio. April 18, 1911.) Error to Circuit Court, Sandusky County. J. D. Finch, W. J. Mead, and Lester Wilson, for plaintiff in error. Finefrock, Garver & Bogue, Garver, Garver & Garver, and L. J. Turley, for defendant in error.

PER CURIAM. Judgment affirmed. Ground stated in journal entry. It is ordered and adjudged by this court that the judgment of said circuit court be and the same is hereby affirmed on the ground only that paragraph 6 on page 225 of the printed record, while a fair statement of the law generally, is not correct as applied to the facts and circumstances of this case as disclosed by the evidence with respect to the confidential relation existing between the parties. The question of the right to amend the bill of exceptions is not passed upon.

SPEAR, C. J., and PRICE, JOHNSON, and DONAHUE, JJ., concur.

INCORPORATED VILLAGE OF MENDEN et al. v. SMITH et al. (No. 11,953.) (Supreme Court of Ohio. May 23, 1911.) Error to Circuit Court, Mercer County. Frank V. Short, City Sol., and Robert L. Mattingly, for plaintiffs in error. James D. Johnson, for defendants in error.

PER CURIAM. Judgment affirmed.

DAVIS, PRICE, and DONAHUE, JJ., concur.

INGERSOLL AMUSEMENT CO. v. STILES. (No. 11,642.) (Supreme Court of Ohio. March 14, 1911.) Error to Circuit Court, Mahoning County. Arrel, Wilson & Harrington, for plaintiff in error. George Edwards and D. F. Anderson, for defendant in error.

PER CURIAM. Judgment reversed. Grounds stated in journal entry. It is ordered and adjudged by this court that the judgment of the said circuit court be, and the same hereby is, reversed for error in affirming, and in not reversing the judgment of the court of common pleas of Mahoning county in the case of Marietta Stiles v. Ingersoll Amusement Company. And, proceeding to render the judgment which said circuit court should have rendered. It is considered and adjudged that the judgment of said court of common pleas in the said cause be, and the same is hereby, reversed for error in the admission of evidence and for overruling the motion for new trial, there being a fatal variance between the allegations of negligence in the amended petition and the evidence given at the trial, and for failure of proof to support the averments of negligence in said amended petition.

SPEAR, C. J., and SHAUCK, PRICE, JOHNSON, and DONAHUE, JJ., concur.

INTERURBAN RY. & TERMINAL CO. v. HINES. (No. 12,529.) (Supreme Court of

Ohio. June 13, 1911.) Error to Circuit Court, Clermont County. Frank F. Dinsmore and Charles M. Leslie, for plaintiff in error. Prescott Smith, Hugh L. Nichols, and D. W. Murphy, for defendant in error.

PER CURIAM. Judgment affirmed.

SPEAR, C. J., and SHAUCK, PRICE, JOHNSON, and DONAHUE, JJ., concur.

JONES v. MAHONING VALLEY RY. CO. (No. 11,678.) (Supreme Court of Ohio. March 14, 1911.) Error to Circuit Court, Mahoning County. T. H. Gillmer and W. S. Anderson & Son, for plaintiff in error. Arrel, Wilson & Harrington, for defendant in error.

PER CURIAM. Judgment affirmed because of error in refusing the tenth request to charge.

SPEAR, C. J., and SHAUCK, PRICE, and DONAHUE, JJ., concur.

KELLER v. KELLER et al. (No. 12,653.) (Supreme Court of Ohio. June 27, 1911.) Error to Circuit Court, Licking County. S. L. James, for plaintiff in error. Flory & Flory and Fulton & Fulton, for defendants in error.

PER CURIAM. Judgment affirmed.

DAVIS, SHAUCK, PRICE, and JOHNSON, JJ., concur.

KELLER v. WILSON. (No. 12,573.) (Supreme Court of Ohio. May 9, 1911.) Error to Circuit Court, Lawrence County. Julius L. Anderson, for plaintiff in error. J. C. Riley and O. E. Irish, for defendant in error.

PER CURIAM. Judgment affirmed.

DAVIS, SHAUCK, PRICE, and JOHNSON, JJ., concur.

KELLEY ISLAND LIME & TRANSPORT CO. v. KAHLER. (No. 12,168.) (Supreme Court of Ohio. May 23, 1911.) Error to Circuit Court, Erie County. Roy H. Williams, H. E. McKeehan, Williams & Steinemann, and Hoyt, Dustin, Kelley, McKeehan & Andrews, for plaintiff in error. Bentley & McCrystal, for defendant in error.

PER CURIAM. Judgment affirmed.

PRICE, JOHNSON, and DONAHUE, JJ., concur.

KELLY v. VANNATTA et al. (No. 11,974.) (Supreme Court of Ohio. May 31, 1911.) Error to Circuit Court, Knox County. Owen & Carr, for plaintiff in error. Columbus Ewalt and Park B. Blair, for defendants in error.

PER CURIAM. Judgment affirmed.

SPEAR, C. J., and SHAUCK and JOHNSON, JJ., concur.

KILBOURNE v. STATE. (No. 12,805.) (Supreme Court of Ohio. May 9, 1911.) Error to Circuit Court, Franklin County. Badger & Ulrey and M. B. Earnhart, for plaintiff in error. Webber, McCoy, King & Game, Edward C. Turner, Pros. Atty., and H. S. Ballard, Asst. Pros. Atty., for the State.

PER CURIAM. Judgment reversed. Grounds stated in journal entry. It is ordered and adjudged by this court that the judgment of the said circuit court be, and the same hereby is, reversed and the judgment of the common pleas court is reversed for error of the common pleas court in its charge to the jury with reference to the testimony of an accomplice, and said

cause is remanded to the common pleas court for further proceedings according to law.

DAVIS, PRICE, JOHNSON, and DONAHUE, JJ., concur.

KOELLNER v. EIGHT HOUR TOBACCO CO. (No. 12,465.) (Supreme Court of Ohio. June 20, 1911.) Error to Circuit Court, Hamilton County. Thorne Baker, for plaintiff in error. Robertson & Buchwalter and T. C. Jung, for defendant in error.

PER CURIAM. Judgment reversed and judgment of the common pleas affirmed.

SPEAR, C. J., and DAVIS, SHAUCK, PRICE, JOHNSON, and DONAHUE, JJ., concur.

LAKE ERIE & W. R. CO. v. SCHWARTZ. (No. 12,639.) (Supreme Court of Ohio. June 6, 1911.) Error to Circuit Court, Allen County. John B. Cockrum, Richie & Richie, and W. H. Leete, for plaintiff in error. Fred France and Halfhill, Quail & Kirk, for defendant in error.

PER CURIAM. Judgment affirmed.

SHAUCK, PRICE, JOHNSON, and DONAHUE, JJ., concur.

LAKE SHORE ELECTRIC RY. CO. v. MILLS. (No. 11,725.) (Supreme Court of Ohio. March 14, 1911.) Error to Circuit Court, Cuyahoga County. M. B. & H. H. Johnson and T. H. Hogsett, for plaintiff in error. R. B. & A. G. Newcomb and Skiles, Green & Skiles, for defendant in error.

PER CURIAM. Judgment affirmed, the errors complained of not being prejudicial.

SPEAR, C. J., and DAVIS, SHAUCK, PRICE, and DONAHUE, JJ., concur.

LAVIN et al. v. STASEL. (No. 12,654.) (Supreme Court of Ohio. June 27, 1911.) Error to Circuit Court, Licking County. J. F. Lingafelter and L. C. Russell, for plaintiffs in error. Albert A. Stasel, for defendant in error.

PER CURIAM. Judgment affirmed.

DAVIS, PRICE, and JOHNSON, JJ., concur.

LAWSON v. HEUCKS OPERA HOUSE CO. (No. 12,562.) (Supreme Court of Ohio. May 9, 1911.) Error to Circuit Court, Hamilton County. Maxwell & Ramsey and Joseph S. Graydon, for plaintiff in error. Jones & Jones, for defendant in error.

PER CURIAM. Judgment affirmed.

PRICE, JOHNSON, and DONAHUE, JJ., concur.

LEE v. DONOVAN WIRE & IRON CO. (No. 12,684.) (Supreme Court of Ohio. May 31, 1911.) Error to Circuit Court, Lucas County. Sala & Carabin and Lindley W. Morris, for plaintiff in error. Doyle & Lewis, for defendant in error.

PER CURIAM. Judgment affirmed.

DAVIS, SHAUCK, and DONAHUE, JJ., concur.

LIMA LOCOMOTIVE & MACHINE CO. v. VAN PELT. (No. 12,701.) (Supreme Court of Ohio. June 27, 1911.) Error to Circuit Court, Allen County. Smith & Baker and

Prophet & Eastman, for plaintiff in error. I. R. Longworth, for defendant in error.

PER CURIAM. Judgment affirmed.

SHAUCK, PRICE, JOHNSON, and DONAHUE, JJ., concur.

LITTLE v. AULTMAN, MILLER & CO. et al. (No. 12,652.) (Supreme Court of Ohio. June 27, 1911.) Error to Circuit Court, Summit County. Harry L. Snyder, Hagelbarger & Mottinger, Hoyt, Dustin, Kelley, McKeehan & Andrews, and T. H. Bushnell, for plaintiff in error. Rogers & Rowley, for defendants in error.

PER CURIAM. Judgment affirmed.

DAVIS, PRICE, JOHNSON, and DONAHUE, JJ., concur.

LOTHAMER et al. v. McALLISTER. (No. 12,498.) (Supreme Court of Ohio. March 28, 1911.) Error to Circuit Court, Stark County. E. L. Mills and W. J. Plero, for plaintiffs in error. Shields & Pomerene and W. O. Wertz, for defendant in error.

PER CURIAM. Judgment affirmed.

DAVIS, SHAUCK, PRICE, and JOHNSON, JJ., concur. DONAHUE, J., not participating.

McALLISTER v. HAGAN et al. (No. 12,492.) (Supreme Court of Ohio. March 28, 1911.) Error to Circuit Court, Stark County. W. O. Wertz and Shields & Pomerene, for plaintiff in error. Welty & Albaugh and Webber & Turner, for defendants in error.

PER CURIAM. Judgment affirmed.

DAVIS, SHAUCK, PRICE, and JOHNSON, JJ., concur. DONAHUE, J., not participating.

McMANN, County Treasurer, v. WOOD et al. (No. 12,665.) (Supreme Court of Ohio. June 27, 1911.) Error to Circuit Court, Huron County. Don J. Young, for plaintiff in error. A. V. Andrews, for defendants in error.

PER CURIAM. Judgment affirmed.

SPEAR, C. J., and DAVIS, SHAUCK, and DONAHUE, JJ., concur.

McNAMARA v. O'NEIL et al. (No. 12,041.) (Supreme Court of Ohio. April 18, 1911.) Error to Circuit Court, Summit County. Miller & Wilson, Slabaugh, Seiberling & Huber, and S. A. Decker, for plaintiff in error. Allen, Waters, Young & Andress, for defendants in error.

PER CURIAM. Judgment affirmed.

SPEAR, C. J., and SHAUCK and JOHNSON, JJ., concur.

MAHONING VALLEY RY. CO. v. HILL. (No. 12,566.) (Supreme Court of Ohio. May 23, 1911.) Error to Circuit Court, Mahoning County. Arrel, Wilson & Harrington, for plaintiff in error. D. F. Anderson, for defendant in error.

PER CURIAM. Judgment affirmed.

SPEAR, C. J., and PRICE and DONAHUE, JJ., concur.

MAIN v. CUMMINS WILD WEST EXHIBITION CO. et al. (No. 12,523.) (Supreme Court of Ohio. April 25, 1911.) Error to Circuit Court, Ashtabula County. A. J. Trunkey and Charles Lawyer, for plaintiff in error. H.

E. Starkey and W. W. Woodbury, for defendants in error.

PER CURIAM. Judgment affirmed. Grounds stated in journal entry. It is ordered and adjudged by this court that the judgment of the said circuit court be, and the same hereby is, affirmed, it appearing from the certified transcript of journal entries in the court of common pleas in said cause that the final judgment in the said court of common pleas was entered on the journal of said court December 18, 1909, and that the appeal bond was filed in said court more than 30 days thereafter, to wit, January 22, 1910, no correction of that record having been made or prayed for in said court of common pleas, being the only court possessed of power to make such correction.

DAVIS, JOHNSON, and DONAHUE, JJ., concur.

MAUK v. SHELLABARGER et al. (No. 12,171.) (Supreme Court of Ohio. April 25, 1911.) Error to Circuit Court, Mercer County. H. G. Richie and C. S. Mauk, for plaintiff in error. C. S. Younger, Frank V. Short, and Ford & Raudabaugh, for defendants in error.

PER CURIAM. Judgment reversed and judgment of the common pleas court affirmed on authority of *Sears v. Sears*, 77 Ohio St. 104, 82 N. E. 1067, 17 L. R. A. (N. S.) 353.

SPEAR, C. J., and DAVIS, PRICE, JOHNSON, and DONAHUE, JJ., concur.

MAZELIN et al. v. MAZELIN et al. (No. 11,720.) (Supreme Court of Ohio. March 21, 1911.) Error to Circuit Court, Licking County. Frederic M. Black and Kibler & Montgomery, for plaintiffs in error. Smythe & Smythe, Fulton & Fulton, and T. B. Fulton, for defendants in error.

PER CURIAM. Judgment reversed. Grounds stated in journal entry. It is ordered and adjudged by this court that the judgment of the said circuit court be, and the same hereby is, reversed for error in affirming and in not reversing the judgment of the court of common pleas of Licking county. And, proceeding to render the judgment which said circuit court should have rendered, it is considered and adjudged by this court that the judgment of the court of common pleas of Licking county in said cause be and the same is hereby reversed for error in excluding and in not admitting in evidence the agreement of March 14, 1904, the said agreement being, in the judgment of this court, competent as contradictory evidence or impeaching evidence, that it was material, and that its exclusion was prejudicial error.

SPEAR, C. J., and DAVIS, SHAUCK, PRICE, and JOHNSON, JJ., concur. DONAHUE, J., not participating.

METZGER et al. v. TRUST CO. OF AMERICA et al. (No. 11,769.) (Supreme Court of Ohio. April 18, 1911.) Error to Circuit Court, Lucas County. Goeke & Anderson, Kohn & Northup, and King, Tracy, Chapman & Welles, for plaintiffs in error. Smith & Beckwith, for defendants in error.

PER CURIAM. Judgment affirmed.

SPEAR, C. J., and SHAUCK and JOHNSON, JJ., concur.

METZGER SEED & OIL CO. v. BERG. (No. 12,567.) (Supreme Court of Ohio. May 31, 1911.) Error to Circuit Court, Lucas County. Smith & Baker, for plaintiff in error. Orville S. Brumback, for defendant in error.

PER CURIAM. Judgment reversed and judgment for plaintiff in error. Grounds stat-

ed in journal entry. It is ordered and adjudged by this court that the judgment of the said circuit court be, and the same hereby is, reversed for error in affirming the judgment of the common pleas court, and the court finds that there is error in the record and the proceedings of the court of common pleas in this, that said court erred in overruling the motion of defendant at the close of the evidence in the case to arrest the evidence from the jury and to direct a verdict in favor of the defendant, for which error it is ordered and adjudged that said judgment of the court of common pleas be, and the same is, hereby reversed; and, coming now to render the judgment that the court of common pleas should have rendered, it is ordered and adjudged that the petition of plaintiff, the defendant in error herein, be, and it is hereby, dismissed.

DAVIS, SHAUCK, PRICE, JOHNSON, and DONAHUE, JJ., concur.

MICHIGAN MUT. LIFE INS. CO. v. WHITAKER. (No. 12,586.) (Supreme Court of Ohio. May 9, 1911.) Error to Circuit Court, Hamilton County. A. H. Wilkinson, J. C. Voorheis, and Robert Ramsey, for plaintiff in error. Charles W. Baker and Thorne Baker, for defendant in error.

PER CURIAM. Judgment affirmed.

SPEAR, C. J., and DAVIS, SHAUCK, PRICE, JOHNSON, and DONAHUE, JJ., concur. Affirmed on rehearing, infra.

MICHIGAN MUT. LIFE INS. CO. v. WHITAKER. (No. 12,586.) (Supreme Court of Ohio. June 13, 1911.) Error to Circuit Court, Hamilton County. A. H. Wilkinson, J. C. Voorheis, and Robert Ramsey, for plaintiff in error. Charles W. Baker and Thorne Baker, for defendant in error. On rehearing.

PER CURIAM. Former judgment (supra) adhered to.

SPEAR, C. J., and PRICE, JOHNSON, and DONAHUE, JJ., concur.

MILLER v. HALL et al. (No. 11,880.) (Supreme Court of Ohio. May 9, 1911.) Error to Circuit Court, Henry County. P. C. Prentiss, for plaintiff in error. Donovan & Dittmer, for defendants in error.

PER CURIAM. Judgment affirmed.

SPEAR, C. J., and SHAUCK and JOHNSON, JJ., concur.

MITZ et al. v. FRIEDMAN et al. (No. 11,815.) (Supreme Court of Ohio. April 25, 1911.) Error to Circuit Court, Richland County. A. A. Douglass and Reed & Beach, for plaintiffs in error. Cummings, McBride & Wolfe, for defendants in error.

PER CURIAM. Judgment affirmed.

DAVIS, PRICE, and JOHNSON, JJ., concur.

MT. GILEAD NAT. BANK v. POLLOCK. (No. 12,674.) (Supreme Court of Ohio. June 27, 1911.) Error to Circuit Court, Morrow County. L. K. Powell and Harlan & Wood, for plaintiff in error. T. B. Mateer and M. W. Spear, for defendant in error.

PER CURIAM. Judgment affirmed.

SPEAR, C. J., and DAVIS, SHAUCK, PRICE, and JOHNSON, JJ., concur.

MURPHY v. BROWN et al. (No. 12,571.) (Supreme Court of Ohio. May 9, 1911.) Er-

ror to Circuit Court, Montgomery County. O. C. Snipe, for plaintiff in error. R. Otto Bauman, Van Deman, Burkhart & Smith, and McConaughy & Shea, for defendants in error.

PER CURIAM. Judgment affirmed.

DAVIS, SHAUCK, PRICE, and JOHNSON, JJ., concur.

MYERS v. MASSILLON LOAN & BUILDING CO. (No. 11,943.) (Supreme Court of Ohio. May 16, 1911.) Error to Circuit Court, Stark County. D. F. Reinhoel, for plaintiff in error. W. E. N. Hemperly and Shields & Pomerene, for defendant in error.

PER CURIAM. Judgment affirmed.

DAVIS, PRICE, and JOHNSON, JJ., concur.

NATIONAL MASONIC PROVIDENT ASS'N v. BARNES. (No. 12,459.) (Supreme Court of Ohio. April 25, 1911.) Error to Circuit Court, Licking County. Cummings, McBride & Wolfe and Kibler & Montgomery, for plaintiff in error. A. A. Stasel, for defendant in error.

PER CURIAM. Judgment affirmed.

DAVIS, SHAUCK, and PRICE, JJ., concur.

NEAL v. CLEVELAND, P. & E. RY. CO. (No. 11,798.) (Supreme Court of Ohio. April 25, 1911.) Error to Circuit Court, Cuyahoga County. Neal & Hyde and J. C. Hutchins, for plaintiff in error. Squire, Sanders & Dempsey, for defendant in error.

PER CURIAM. Judgment affirmed.

SPEAR, C. J., and DAVIS, SHAUCK, PRICE, JOHNSON, and DONAHUE, JJ., concur.

NORTHERN OHIO TRACTION & LIGHT CO. v. CARR. (No. 12,630.) (Supreme Court of Ohio. April 18, 1911.) Error to Circuit Court, Cuyahoga County. Ford, Snyder & Tilden, for plaintiff in error. Wm. B. Beebe and A. W. Lamson, for defendant in error.

PER CURIAM. Judgment affirmed.

SPEAR, C. J., and PRICE, JOHNSON, and DONAHUE, JJ., concur.

OHIO CENTRAL TRACTION CO. v. KRUGER. (No. 11,785.) (Supreme Court of Ohio. May 2, 1911.) Error to Circuit Court, Crawford County. Cummings, McBride & Wolfe, for plaintiff in error. H. R. Shuler and J. G. Meuser, for defendant in error.

PER CURIAM. Judgment reversed and cause remanded. Grounds stated in journal entry. It is ordered and adjudged by this court that the judgment of the said circuit court affirming the judgment of the common pleas court be, and the same hereby is, reversed, and the judgment of the common pleas court be, and the same hereby is, reversed for error of said common pleas court in the admission of evidence as to floods subsequent to the time of the injury complained of in the petition, for the admission of opinion evidence as to the cause of the water backing up on plaintiff's lands, and for the refusal of the court to give in charge to the jury the third request of the defendant in that court, and that plaintiff in error recover of the defendant in error his costs expended in this court and the circuit court of Crawford county, and that said defendant in error pay his own costs in both of said courts.

SPEAR, C. J., and DAVIS, SHAUCK, PRICE, and DONAHUE, JJ., concur.

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OHIO OIL CO. v. WELLING. (No. 12,570.) (Supreme Court of Ohio. May 31, 1911.) Error to Circuit Court, Wood County. J. W. Schaufelberger and Frank P. Reigle, for plaintiff in error. Wilson, Hunt & Garn and N. R. Harrington, for defendant in error.

PER CURIAM. Judgment of the circuit court reversed and judgment of the common pleas affirmed.

SPEAR, C. J., and DAVIS, SHAUCK, PRICE, JOHNSON, and DONAHUE, JJ., concur.

OWINGS v. JENNINGS et al. (No. 11,883.) (Supreme Court of Ohio. May 9, 1911.) Error to Circuit Court, Athens County. Belcher & Conner, G. J. Marriott, and Lewis & Sayre, for plaintiff in error. Grosvenor, Jones & Worstell, for defendants in error.

PER CURIAM. Judgment affirmed.

SPEAR, C. J., and DAVIS, SHAUCK, and PRICE, JJ., concur.

PAVEY v. BOARD OF COMRS OF FAYETTE COUNTY et al. (No. 12,059.) (Supreme Court of Ohio. June 27, 1911.) Error to Circuit Court, Fayette County. John Logan, for plaintiff in error. Post & Reid, for defendants in error.

PER CURIAM. Judgment affirmed.

SPEAR, C. J., and SHAUCK and JOHNSON, JJ., concur.

PENNSYLVANIA CO. v. SUNTALA. (No. 12,442.) (Supreme Court of Ohio. May 16, 1911.) Error to Circuit Court, Ashtabula County. Arrel, Wilson & Harrington, for plaintiff in error. D. F. Anderson, for defendant in error.

PER CURIAM. Judgment affirmed.

DAVIS, SHAUCK, and JOHNSON, JJ., concur.

PETERSON et al. v. VAN INGEN et al. (No. 11,891.) (Supreme Court of Ohio. May 9, 1911.) Error to Circuit Court, Hamilton County. Charles W. Baker and Thorne Baker, for plaintiffs in error. Chas. B. Wilby, Mitchell Wilby, and Morse, Tuttle & Harper, for defendants in error.

PER CURIAM. Judgment affirmed.

SPEAR, C. J., and SHAUCK and JOHNSON, JJ., concur.

PITTSBURGH, C. C. & ST. L. RY. CO. v. MOON et al., Tp. Trustees. (No. 11,704.) (Supreme Court of Ohio. March 21, 1911.) Error to Circuit Court, Miami County. C. B. Heiserman, for plaintiff in error. Alva B. Campbell, William H. Gilbert, and Leonard H. Shipman, for defendants in error.

PER CURIAM. Judgment reversed on authority of Railroad Co. v. Village of Roseville, 76 Ohio St. 108, 81 N. E. 178, and judgment for plaintiff in error on the undisputed facts.

SPEAR, C. J., and DAVIS, SHAUCK, and PRICE, JJ., concur.

POWELL v. POWELL. (No. 12,638.) (Supreme Court of Ohio. June 6, 1911.) Error to Circuit Court, Mahoning County. Arrel, Wil-

son & Harrington, for plaintiff in error. Charles Koonce, Jr., for defendant in error.

PER CURIAM. Judgment of the circuit court reversed, and judgment of the common pleas affirmed.

SPEAR, C. J., and DAVIS, SHAUCK, JOHNSON, and DONAHUE, JJ., concur.

PREDIGER v. CITY OF PORTSMOUTH (No. 12,398.) (Supreme Court of Ohio. May 16, 1911.) Error to Circuit Court, Scioto County. Evans & Crawford, for plaintiff in error. Horace L. Small, City Sol., for defendant in error.

PER CURIAM. Judgment affirmed.

DAVIS, SHAUCK, and DONAHUE, JJ., concur.

PREUSSER v. DIKOB et al. (No. 11,729.) (Supreme Court of Ohio. April 11, 1911.) Error to Circuit Court, Cuyahoga County. Herman Preusser and Francis J. Wing, for plaintiff in error. M. P. Mooney, L. I. Litzler, M. B. & H. H. Johnson, and S. A. Grossner, for defendants in error.

PER CURIAM. Judgment affirmed. Rehearing denied (infra).

DAVIS, PRICE, and DONAHUE, JJ., concur.

PREUSSER v. DIKOB et al. (No. 11,729.) (Supreme Court of Ohio. June 6, 1911.) Error to Circuit Court, Cuyahoga County. Herman Preusser and Francis J. Wing, for plaintiff in error. M. P. Mooney, L. I. Litzler, M. B. & H. H. Johnson, and S. A. Grossner, for defendants in error. On rehearing.

PER CURIAM. Former judgment (supra) adhered to.

RACKLE et al. v. CONNORS et al. (No. 12,176.) (Supreme Court of Ohio. May 9, 1911.) Error to Circuit Court, Cuyahoga County. Charles J. Estep and Frank M. Cobb, for plaintiffs in error. L. F. McGrath and Joseph L. Stern, for defendants in error.

PER CURIAM. Judgment reversed. Grounds stated in journal entry. This court being of opinion that in the original action the cause had not, prior to the trial thereof by the court of common pleas, and entry of judgment therein, been specially assigned for trial out of its regular order within the meaning of section 5134, Rev. St. nor assigned for trial to a jury in series, and the trial thereof by said court was before the action regularly stood for trial, and the court being further of opinion that the plaintiff in error's contention in the present action is not res adjudicata because of the overruling of his motion to vacate judgment to be found at page 86 of the printed record, and marked "Defendants' Exhibit 3." It is considered and adjudged that the judgment of the circuit court be, and the same hereby is, reversed for error in affirming and not reversing the judgment of the court of common pleas of Cuyahoga county in this case of Rackle et al. v. Connors et al. And, proceeding to render the judgment which the said circuit court should have rendered, it is considered and adjudged that the said judgment of the court of common pleas be, and the same is hereby, reversed, and said cause is ordered remanded to said court of common pleas of Cuyahoga county for further proceedings according to law.

SPEAR, C. J., and DAVIS, SHAUCK, and PRICE, JJ., concur.

In re RAUH et al. (No. 12,742.) (Supreme Court of Ohio. May 2, 1911.) Error to Cir-

cuit Court, Putnam County. C. S. Malone, B. L. Griffiths, E. R. Eastman, James A. White, and W. B. Wheeler, for plaintiff in error. Straman & Straman, Henry & Robert Newbegin, and Watts & Moore, for defendants in error.

PER CURIAM. Judgment affirmed on authority of Heidlebaugh, Probate Judge, v. Recker, 81 Ohio St. 514, 91 N. E. 1130, and State ex rel. Conrad v. Patterson, 84 Ohio St. 89, 95 N. E. 780.

SPEAR, C. J., and DAVIS, SHAUCK, PRICE, JOHNSON, and DONAHUE, JJ., concur.

RAYMOND et al. v. BUTTS. (No. 11,691.) (Supreme Court of Ohio. June 13, 1911.) Error to Circuit Court, Portage County. I. T. Siddall and S. F. Hanselman, for plaintiffs in error. R. S. Webb and R. J. Webb, for defendant in error. On rehearing.

PER CURIAM. Former judgment (95 N. E. 387) adhered to.

RENNER v. KIRKNER. (No. 12,524.) (Supreme Court of Ohio. May 2, 1911.) Error to Circuit Court, Mahoning County. Emery F. Lynn, W. S. Anderson, and John Schlarf, for plaintiff in error. Horace T. Smith, Theodore A. Johnson, and M. C. McNab, for defendant in error.

PER CURIAM. Judgment affirmed.

DAVIS, PRICE, and JOHNSON, JJ., concur.

RIDER et al. v. STASEL et al. (No. 12,467.) (Supreme Court of Ohio. May 2, 1911.) Error to Circuit Court, Licking County. Fulton & Fulton and Wilson & Rector, for plaintiffs in error. A. A. Stasel and Carl Norpell, for defendants in error.

PER CURIAM. Judgment affirmed on authority of Drake v. Tucker, 83 Ohio St. 97, 93 N. E. 534.

SPEAR, C. J., and SHAUCK and JOHNSON, JJ., concur.

ROCKEFELLER v. MCINTIRE (No. 12,294.) (Supreme Court of Ohio. June 6, 1911.) Error to Circuit Court, Cuyahoga County. Lawrence, Russel & Eichelberger and Goulder, Holding & Masten, for plaintiff in error. James J. Hogan and Benjamin Parmely, for defendant in error.

PER CURIAM. Judgment of the circuit court reversed and that of the common pleas affirmed.

SPEAR, C. J., and DAVIS, SHAUCK, PRICE, and JOHNSON, JJ., concur.

SAYLER v. THRAILKILL. (No. 12,683.) (Supreme Court of Ohio. April 25, 1911.) Error to Circuit Court, Wood County. N. R. Harrington and J. E. Shatzel, for plaintiff in error. Wilson, Hunt & Garn, Frank P. Riegle, and Edward Beverstock, for defendant in error.

PER CURIAM. Judgment of the circuit court reversed and judgment of the common pleas affirmed.

SPEAR, C. J., and SHAUCK, PRICE, and DONAHUE, JJ., concur.

SCOTT v. STATE. (No. 12,831.) (Supreme Court of Ohio. May 2, 1911.) Error to Circuit Court, Miami County. Thomas B. Kyle,

for plaintiff in error. J. Guy O'Donnell and W. E. Lytle, for the State.

PER CURIAM. Judgment affirmed. Execution fixed for June 23, 1911.

SPEAR, C. J., and SHAUCK, PRICE, and JOHNSON, JJ., concur.

SHARP v. LAKE SHORE ELECTRIC RY. CO. (No. 11,791.) (Supreme Court of Ohio. May 2, 1911.) Error to Circuit Court, Lucas County. John Q. Adams and Curtis T. Johnson, for plaintiff in error. M. B. & H. H. Johnson, T. H. Hogsett, King, Tracy, Chapman & Welles, and Lloyd & Rettig, for defendant in error.

PER CURIAM. Judgment affirmed.

DAVIS, SHAUCK, and PRICE, JJ., concur.

SMITH et al. v. JENNEY et al. (No. 12,743.) (Supreme Court of Ohio. June 20, 1911.) Error to Circuit Court, Hamilton County. J. M. Dawson, for plaintiffs in error. William H. Mackoy and Herbert Jenney, for defendants in error.

PER CURIAM. Judgment affirmed.

DAVIS, PRICE, and DONAHUE, JJ., concur.

SNYDER v. MCCOY. (No. 12,499.) (Supreme Court of Ohio. March 28, 1911.) Error to Circuit Court, Wayne County. Celsus Pomerene and W. S. Hanna, for plaintiff in error. L. R. Critchfield, Sr., and L. R. Critchfield, Jr., for defendant in error.

PER CURIAM. Judgment affirmed.

SHAUCK, PRICE, and JOHNSON, JJ., concur. DONAHUE, J., not participating.

SPERRY v. KIRKPATRICK. (No. 11,973.) (Supreme Court of Ohio. June 30, 1911.) Error to Circuit Court, Knox County. Owen & Carr, for plaintiff in error. Waight & Moore, for defendant in error.

PER CURIAM. Judgment reversed.

Grounds stated in journal entry. It is ordered and adjudged by this court that the judgment of the said circuit court be, and the same hereby is, reversed, and this court finds that on the conceded facts the real estate and the gas contract referred to and described in the pleadings were owned by said parties equally, and that an accounting should be made between the parties of the amounts received and paid out in the purchase of the said land and selling any portions thereof and the amounts received and paid out under the said gas contract, each party being credited with the amount paid in by him for either of said causes and charged with the amount received by him therefrom and a balance struck of the amounts due to each of the said parties in the said land and contract and proceeds thereof, and it is ordered that this cause be sent to the circuit court to take said accounting in accordance with this finding according to law and enter its decree and judgment accordingly.

SPEAR, C. J., and DAVIS, SHAUCK, and JOHNSON, JJ., concur. DONAHUE, J., not participating.

STASEL v. PUGH. (No. 12,555.) (Supreme Court of Ohio. April 25, 1911.) Error to Circuit Court, Licking County. Flory & Flory and A. A. Stasel, for plaintiff in error. Kibler & Montgomery, for defendant in error.

PER CURIAM. Judgment affirmed.

DAVIS, PRICE, and JOHNSON, JJ., concur.

STATE v. BADGLEY. (No. 12,637.) (Supreme Court of Ohio. May 9, 1911.) Error to Circuit Court, Columbiana County. Lewis P. Metzger, Pros. Atty., for the State. C. S. Speaker, for defendant in error.

PER CURIAM. Judgment of the circuit court reversed and judgment of the court of common pleas affirmed.

SPEAR, C. J., and DAVIS, SHAUCK, PRICE, JOHNSON, and DONAHUE, JJ., concur.

STATE v. COVINGTON & BRIDGE CO. (No. 11,826.) (Supreme Court of Ohio. June 6, 1911.) Error to Circuit Court, Franklin County. U. G. Denman, Atty. Gen., and Seth L. McMillan, for the State. Paxton, Warrington & Seasongood, for defendant in error.

PER CURIAM. Judgment affirmed.

DAVIS, SHAUCK, PRICE, JOHNSON, and DONAHUE, JJ., concur.

STATE v. JACKSON. (No. 12,847.) (Supreme Court of Ohio. June 20, 1911.) Error to Circuit Court, Sandusky County. U. G. Denman, Atty. Gen., Timothy S. Hogan, Atty. Gen., E. C. Froehlich, Kohn & Northup, and Fell & Schaal, for the State. Geo. A. True and Ruel H. Crawford, for defendant in error.

PER CURIAM. Judgment affirmed.

DAVIS, PRICE, and DONAHUE, JJ., concur.

STATE v. PARMENTER. (No. 11,577.) (Supreme Court of Ohio. May 23, 1911.) Error to Circuit Court, Ashtabula County. C. L. Taylor, Pros. Atty., and H. J. Redmond, for the State. Charles Lawyer and C. W. Appleby, for defendant in error.

PER CURIAM. Judgment of the circuit court reversed, and that of the common pleas affirmed on authority of State of Ohio v. Young, 77 Ohio St. 529, 83 N. E. 893.

SPEAR, C. J., and SHAUCK, PRICE, JOHNSON, and DONAHUE, JJ., concur.

STATE ex rel. CITY OF TOLEDO v. SANZENBACHER, Auditor. (No. 13,118.) (Supreme Court of Ohio. June 30, 1911.) In mandamus. Cornell Schreiber, City Sol., and Alonzo G. Duer, Asst. City Sol., for relator. Timothy S. Hogan, Atty. Gen., J. M. McGilivray, and Clarence D. Laylin, for respondent.

PER CURIAM. Peremptory writ awarded. Grounds stated in journal entry. This cause came on for hearing and trial on the pleadings, and was argued by counsel. On consideration whereof, the court, construing section 5649-2, section 5649-3, and section 5649-3a of the act of June 2, 1911 (102 Ohio Laws, pp. 268-270), limiting tax rates, find that by the provisions of these sections levies may be made as follows: (1) The taxing authorities of any taxing district may levy taxes not exceeding the aggregate of 10 mills on each dollar of the tax valuation of the property of such taxing district for state, county, township, school, and municipal purposes, subject to the further limitation of the paragraphs following. (2) In addition thereto, levies may be made for sinking fund and interest purposes necessary to provide for any indebtedness incurred before the passage of said act, and any indebtedness that may be incurred after the passage of said act by a vote of the people. (3) In case such levy for the year 1911 shall produce an amount greater than the amount of taxes levied in the year 1910, then such levy of 10 mills on the dollar must be reduced to such a rate as will

produce no more money than the taxes levied for the year 1910. (4) A municipal corporation may levy for municipal purposes as provided in preceding paragraphs 1, 2, and 3 an aggregate of five mills on the taxable property within such corporation only in the event that such levy of five mills, when added to the levy of state, county, township, and school purposes, shall not exceed in the aggregate 10 mills on the dollar, of the taxable property within such taxing district exclusive of levies for sinking fund and interest purposes necessary to provide for any indebtedness incurred before the passage of said act and any indebtedness that may be incurred after the passage of said act by a vote of the people, and provided, further, that such levy of 10 mills on the dollar of taxable property shall not produce for the year 1911 an amount greater than the amount of taxes levied in the year 1910, and, whenever such levy exceeds either of said limitations, then it is the duty of the budget commission to revise and reduce said levies in manner and form as directed and authorized by section 5649-3c, General Code, as enacted June 2, 1911, having due regard to the proportions of the total amount that each taxing board or taxing officers are authorized to levy, so that such aggregate of all taxes for all purposes in each taxing district shall not exceed 10 mills on the dollar, exclusive of sinking fund and interest purposes as aforesaid, and shall not produce for the year 1911 a greater amount of taxes than levied in the year 1910, as provided in paragraph 3 of this entry. But, whenever any levy for township, county, school, or municipal purposes exceeds the maximum amount, that may be levied for such purpose as provided by section 5649-3a, Gen. Code, then such excessive levy must first be reduced by the budget commission to the maximum amount provided in such section before said budget commission proceeds to revise and reduce all the levies certified for such taxing district to bring the aggregate of all within the limitations above referred to, to wit, 10 mills on each dollar of taxable property, and to an amount not greater than the taxes levied in the year 1910. (5) The right to levy five mills on the taxable property within such corporation is further limited by the provision that, if said levy of ten mills for the year 1911 will produce more taxes than were levied in the year 1910, then such levy should again be scaled by the budget commission until the same will produce no larger revenue than the taxes levied in the year 1910. (6) The five mills, which, subject to the qualifications hereinbefore defined, may be levied by a municipal corporation for corporation purposes, are exclusive of such levies for interest and sinking fund purposes as are or may be necessary to provide for any municipal indebtedness incurred prior to the passage of the act of June 2, 1911, and any indebtedness thereafter incurred by a vote of the people. This court therefore finds that the relator is entitled to a peremptory writ of mandamus commanding the auditor of Lucas county, defendant herein, to ascertain the rate of taxes necessary to produce the amounts to him certified by the budget commission of Lucas county, provided that the aggregate (exclusive of the levy for the sinking fund and interest purposes, for indebtedness heretofore incurred, and indebtedness that may have been incurred by a vote of the people) shall not exceed the rate of 10 mills, and the total fund raised thereby, including the amount necessary for the sinking fund and interest as aforesaid, shall not exceed the amount raised in the year 1910, then to enter the same upon the tax duplicate of Lucas county. Also, that he ascertain the rate of the levy necessary for sinking fund and interest purposes to provide for indebtedness incurred before the passage of said act and any indebtedness that may have been incurred since the passage of the act

by a vote of the people, if any, and add such levy to the tax duplicate in addition to said 10 mills, but the total of both levies not to exceed the total sum levied in the year 1910. It is therefore ordered, adjudged, and decreed that a peremptory writ of mandamus issue against the defendant, as auditor of Lucas county, commanding him to make levies as provided herein.

SPEAR, C. J., and DAVIS, SHAUCK, PRICE, JOHNSON, and DONAHUE, JJ., concur.

STATE ex rel. ELLIS, Atty. Gen., v. UNION CENTRAL LIFE INS. CO. (No. 12,700.) (Supreme Court of Ohio. April 18, 1911.) Error to Circuit Court, Hamilton County. U. G. Denman, Atty. Gen., T. S. Hogan, Atty. Gen., W. H. Miller, Asst. Atty. Gen., A. I. Vorys, Ellis G. Kinkead, and Challen B. Ellis, for relator. Maxwell & Ramsey and J. B. Foraker, for respondent.

PER CURIAM. Judgment affirmed. Grounds stated in journal entry. It is ordered and adjudged by this court that the judgment of the said circuit court be, and the same is hereby, affirmed for the following reasons, to wit: (1) There is testimony tending to prove each and all of the controverted facts found by the circuit court. (2) That, therefore, this court will not weigh the evidence in this case, and will accept the findings of fact as declared by the circuit court. (3) That, as found by the circuit court, the defendant in error made no separation of its receipts and expenditures, profits, and losses, as they pertained to participating and to nonparticipating policies, from the time it began the life insurance business up to the 1st day of January, 1908, and that in such conduct of its business it accumulated a surplus, which, on December 31, 1907, amounted to \$2,422,184.25, of which a sum largely in excess of \$400,000 was derived from nonparticipating policies, and that the surplus derived from the nonparticipating policies of the defendant for the years 1908 and 1909 was in excess of \$400,000. (4) That the defendant in error had a lawful right, and was not estopped, to make the said issue of \$400,000 of capital stock and was entitled to apply toward the payment of said stock \$400,000 out of the surplus on hand December 31, 1907, theretofore derived from nonparticipating business, as was done. (5) That upon the facts found relator is not entitled to the relief prayed for.

SPEAR, C. J., and DAVIS, SHAUCK, and PRICE, JJ., concur. JOHNSON and DONAHUE, JJ., not participating.

STATE ex rel. HOWELL v. EIRICK et al., Com'rs of Cuyahoga County, et al. (No. 13,049.) (Supreme Court of Ohio. June 27, 1911.) Error to Circuit Court, Cuyahoga County. William Howell and George L. Dake, for plaintiff in error. John A. Cline, Pros. Atty., and Walter D. Meals, Asst. Pros. Atty., for defendants in error.

PER CURIAM. Judgment affirmed. DAVIS, PRICE, and DONAHUE, JJ., concur.

STATE ex rel. MATHEWS v. FITZGERALD et al., Deputy State Supervisors and Inspectors of Elections, et al. (No. 12,476.) (Supreme Court of Ohio. March 28, 1911.) Error to Circuit Court, Cuyahoga County. P. L. A. Lieghley and M. W. Beacom, for plaintiff in error. John H. Price and U. G. Denman, Atty. Gen., for defendants in error.

PER CURIAM. Petition in error dismissed because of the fact that the expenses of the

primary election have been paid, and the question involved is now a mere moot question.

SPEAR, C. J., and DAVIS, SHAUCK, PRICE, JOHNSON, and DONAHUE, JJ., concur.

STATE ex rel. SCOBIE v. CASS et al., County Building Commission, et al. (No. 12,817.) (Supreme Court of Ohio. March 14, 1911.) Error to Circuit Court, Cuyahoga County. Smart, Marvin & Ford, for plaintiff in error. John A. Cline, Walter D. Meals, Hoyt, Dustin, Kelley, McKeehan & Andrews, Ferdinand Jelke, Jr., and James G. Stewart, for defendants in error.

PER CURIAM. Judgment affirmed. Grounds stated in journal entry. The judgment of the circuit court of Cuyahoga county having been affirmed generally by entry of March 14, 1911, the following supplementary entry under date of March 28, 1911, was made: The judgment of affirmance of the judgment of the circuit court of Cuyahoga county, entered at page 591 of this journal, is based upon the proposition that the work of building the courthouse became and was a "proceeding" within the meaning of section 26 of the General Code, as illustrated by the reasoning of the circuit court in its opinion (32 Ohio Cir. Ct. Rep. 208), and was not affected by the provision of section 2338 of the Code. Whether the work of interior decoration was or not competitive work is not passed upon.

SPEAR, C. J.; and DAVIS, SHAUCK, PRICE, and DONAHUE, JJ., concur.

STATE ex rel. SENTINEL CO. v. SOCKMAN et al., Com'rs, et al. (No. 12,771.) (Supreme Court of Ohio. March 21, 1911.) Error to Circuit Court, Wood County. N. R. Harrington and McClelland & Bowman, for plaintiff in error. William Dunipace and Benjamin F. James, for defendants in error.

PER CURIAM. Judgment affirmed. Grounds stated in journal entry. It is ordered and adjudged by this court that the judgment of the said circuit court be, and the same is hereby, affirmed on the ground that the circuit court of Wood county found the facts in issue in the case between the parties against the plaintiff in error and in favor of the defendants in error, and that said finding of facts by the circuit court is controlling in this court with respect to the facts of the case, and, it appearing to the court that there were reasonable grounds for this proceeding in error, it is ordered that no penalty be assessed herein.

DAVIS, SHAUCK, JOHNSON, and DONAHUE, JJ., concur.

STATE ex rel. STAFFORD v. STATE BOARD OF APPRAISERS AND ASSESSORS. (No. 13,021.) (Supreme Court of Ohio. June 30, 1911.) In mandamus. Graham & Stafford, for relator. Timothy S. Hogan, Atty. Gen., and Joseph McGhee, and C. C. Marshall, Asst. Attys. Gen., for respondent.

PER CURIAM. Peremptory writ awarded.

SPEAR, C. J., and DAVIS, SHAUCK, and PRICE, JJ., concur.

STATE ex rel. WEST v. WRIGHT, Auditor. (No. 11,726.) (Supreme Court of Ohio. March 28, 1911.) Error to Circuit Court, Cuyahoga County. William C. Rogers and A. Lawrence, for plaintiff in error. John A. Cline, Pros. Atty., Walter D. Meals and Fielder San-

ders, Asst. Pros. Attys., and John L. Cannon, for defendant in error.

PER CURIAM. Judgment affirmed.

DAVIS, PRICE, and DONAHUE, JJ., concur.

STEARNS v. JOHN H. HIBBEN DRY GOODS CO. (No. 11,822.) (Supreme Court of Ohio. May 9, 1911.) Error to Circuit Court, Hamilton County. H. D. Peck and Peck, Shaffer & Peck, for plaintiff in error. Walter A. De Camp, for defendant in error.

PER CURIAM. Judgment affirmed.

DAVIS, PRICE, and DONAHUE, JJ., concur.

STREUBER v. PANCAKE et al. (No. 12,584.) (Supreme Court of Ohio. May 16, 1911.) Error to Circuit Court, Lawrence County. T. C. Anderson, for plaintiff in error. A. R. Johnson, Dan C. Jones, and Wm. J. Meyer, for defendants in error.

PER CURIAM. Judgment affirmed.

DAVIS, SHAUCK, PRICE, and JOHNSON, JJ., concur.

STURGES et al. v. LUTZ. (No. 12,498.) (Supreme Court of Ohio. March 28, 1911.) Error to Circuit Court, Richland County. W. H. Gifford and H. B. Dirlam, for plaintiffs in error. Lutz & Lutz and W. S. Kerr, for defendant in error.

PER CURIAM. Judgment affirmed.

DAVIS, SHAUCK, PRICE, and JOHNSON, JJ., concur. DONAHUE, J., not participating.

TIMLIN v. MUNNELLY et al. (No. 11,730.) (Supreme Court of Ohio. March 28, 1911.) Error to Circuit Court, Mahoning County. Charles Koonce, Jr., and Thomas McNamara, Jr., for plaintiff in error. Arrel, Wilson & Harrington, for defendants in error.

PER CURIAM. Judgment affirmed.

SPEAR, C. J., and DAVIS, SHAUCK, PRICE, JOHNSON, and DONAHUE, JJ., concur.

TOLEDO RYS. & LIGHT CO. v. VREELAND. (No. 12,413.) (Supreme Court of Ohio. May 31, 1911.) Error to Circuit Court, Lucas County. Smith & Baker, for plaintiff in error. G. B. Keppel, for defendant in error.

PER CURIAM. Judgment affirmed. Grounds stated in journal entry. It is ordered and adjudged by this court that the judgment of the said circuit court be, and the same is, hereby affirmed, without passing upon the question of whether or not the court erred in its charge to the jury in paragraphs numbered 1, 2, and 3, to be found on pages 88 and 89 of the printed record, the court being of opinion that, considering the character and effect of the undisputed evidence in the case, the charge thus given to the jury cannot have been prejudicial.

SPEAR, C. J., and DAVIS, SHAUCK, JOHNSON, and DONAHUE, JJ., concur.

TOLEDO, ST. L. & W. R. CO. v. PEERY. (No. 12,444.) (Supreme Court of Ohio. May 23, 1911.) Error to Circuit Court, Henry County. Clarence Brown, Lloyd T. Williams,

and W. W. Campbell, for plaintiff in error. James P. Ragan, for defendant in error.

PER CURIAM. Judgment affirmed.

SPEAR, C. J., and DAVIS, SHAUCK, PRICE, JOHNSON, and DONAHUE, JJ., concur.

TOUSSAINT SHOOTING CLUB v. SCHWARTZ et al. (No. 11,686.) (Supreme Court of Ohio. March 14, 1911.) Error to Circuit Court, Ottawa County. Lynch & Day and True & Crawford, for plaintiff in error. William Gordon, for defendants in error.

PER CURIAM. Judgment reversed and judgment for plaintiff in error. Grounds stated in journal entry. This cause came on to be heard upon the transcript of the record of the circuit court of Ottawa county, and was argued by counsel. On consideration whereof, it is ordered and adjudged by this court that the judgment of said circuit court be, and the same hereby is, reversed for error of the circuit court in its conclusions of law upon the facts found by that court, and that said plaintiff in error recover from the defendants in error its costs herein expended, and that the defendants pay their own costs; and, it appearing that the circuit court has found in its second finding of fact that the lessors of the defendants in error never owned to exceed one-fourth interest in the premises in dispute, and it further appearing that the lease found in the third finding of fact to have been executed to the defendants in error by the owners of this one-fourth interest was not executed and acknowledged as required by law, was not recorded, and was not a paper entitled to record, and therefore did not convey an estate in said lands or any part thereof for a term of ten years or for a term of five years, but only from year to year at the will of the parties, this court coming now to render the judgment upon such findings of fact that should have been rendered by the circuit court, it is further ordered and adjudged that the defendants in error be, and they hereby are, perpetually enjoined and restrained from trespassing upon the property described in plaintiff's petition and from interfering, in any manner, with the exclusive rights of the plaintiff in error in its possession of said land for the purposes set forth in the petition of plaintiff. It is further ordered and adjudged that the plaintiff in error recover from the defendants all its costs expended in this action and that defendants pay their own costs, for which execution is awarded.

DAVIS, PRICE, JOHNSON, and DONAHUE, JJ., concur.

TRAUGER v. HOLBEN et al. (No. 11,867.) (Supreme Court of Ohio. May 9, 1911.) Error to Circuit Court, Stark County. D. F. Reinhoehl, for plaintiff in error. R. W. McCaughey and Webber & Turner, for defendants in error.

PER CURIAM. Judgment affirmed.

SPEAR, C. J., and DAVIS, SHAUCK, and PRICE, JJ., concur. DONAHUE, J., not participating.

VALENTINE v. CITY OF CIRCLEVILLE. (No. 12,518.) (Supreme Court of Ohio. May 2, 1911.) Error to Circuit Court, Pickaway County. George W. Lindsay, for plaintiff in error. Meeker Terwilliger, City Sol., for defendant in error.

PER CURIAM. Judgment affirmed.

DAVIS, SHAUCK, and PRICE, JJ., concur.

VAN BUSKIRK v. NEW YORK, C. & ST. L. R. CO. (No. 12,503.) (Supreme Court

of Ohio. March 28, 1911.) Error to Circuit Court, Putnam County. A. A. Slaybaugh and Bailey & Leasure, for plaintiff in error. John H. Clarke and Watts & Moore, for defendant in error.

PER CURIAM. Judgment affirmed.

DAVIS, SHAUCK, PRICE, JOHNSON, and DONAHUE, JJ., concur.

VAN OSTRAN et al. v. DENNISON FOUNDRY & ENGINEERING CO. et al. (No. 11,813.) (Supreme Court of Ohio. April 18, 1911.) Error to Circuit Court, Tuscarawas County. J. G. Patrick, W. B. Stevens, and P. S. Olmstead, for plaintiffs in error. T. H. Loller, Voorhees & Voorhees, Carpenter & Voorhees, and Pomerene & Pomerene, for defendants in error.

PER CURIAM. Judgment affirmed.

SPEAR, C. J., and SHAUCK and JOHNSON, JJ., concur.

WELSH v. RILEY, Auditor, et al. (No. 12,478.) (Supreme Court of Ohio. June 20, 1911.) Error to Circuit Court, Licking County. Jones & Jones, for plaintiff in error. U. G. Denman, Atty. Gen., Phil B. Smythe, Pros. Atty., Carl Norpell, John A. Alburn, and Clarence D. Laylin, for defendants in error.

PER CURIAM. Judgment affirmed on authority of *Adler v. Whitbeck*, 44 Ohio St. 539, 9 N. E. 672.

SPEAR, C. J., and DAVIS, SHAUCK, PRICE, and JOHNSON, JJ., concur.

WELSH v. SLEEPY EYE MILLING CO. (No. 11,984.) (Supreme Court of Ohio. June 20, 1911.) Error to Circuit Court, Cuyahoga County. Hidy Klein & Harris, for plaintiff in error. R. H. Lee and F. H. Crew, for defendant in error.

PER CURIAM. Judgment affirmed.

DAVIS, PRICE, and DONAHUE, JJ., concur.

WHEELING & L. E. R. CO. v. CALCOTT et al. (No. 11,712.) (Supreme Court of Ohio. March 14, 1911.) Error to Circuit Court, Harrison County. Hollingsworth & Worley and Squire, Sanders & Dempsey, for plaintiff in error. R. H. Minter, for defendants in error.

PER CURIAM. Judgment affirmed.

DAVIS, SHAUCK, PRICE, JOHNSON, and DONAHUE, JJ., concur.

WHITE et al. v. BAILEY et al. (No. 12,941.) (Supreme Court of Ohio. June 13, 1911.) Error to Circuit Court, Gallia County. Roscoe J. Mauck, Hollis C. Johnston, and Evan D. Davis, for plaintiffs in error. John H. Summers, C. H. D. Summers, and R. M. Switzer, for defendants in error.

PER CURIAM. Judgment affirmed.

SPEAR, C. J., and SHAUCK, PRICE, JOHNSON, and DONAHUE, JJ., concur.

WILKOFF v. HARTENSTEIN. (No. 12,610.) (Supreme Court of Ohio. May 31, 1911.) Error to Circuit Court, Mahoning County. Frank Jacobs and D. J. Hartwell, for plaintiff in error. D. F. Anderson, for defendant in error.

PER CURIAM. Judgment affirmed.

SHAUCK, PRICE, JOHNSON, and DONAHUE, JJ., concur.

WM. HEFFRON CONST. CO. et al. v. COLEMAN. (No. 12,460.) (Supreme Court of Ohio. March 28, 1911.) Error to Circuit Court, Hamilton County. Littleford, Frost & Foster, for plaintiffs in error. Thomas L. Michie, for defendant in error.

PER CURIAM. Judgment affirmed.

PRICE, JOHNSON, and DONAHUE, JJ., concur.

WILLS CREEK COAL CO. v. BROWN. (No. 12,331.) (Supreme Court of Ohio. April 18, 1911.) Error to Circuit Court, Guernsey County. Charles S. Turnbaugh and Robt. T. Scott, for plaintiff in error. J. H. Mackey, for defendant in error.

PER CURIAM. Judgment affirmed.

SHAUCK, PRICE, JOHNSON, and DONAHUE, JJ., concur.

WOLFE et al. v. JUNCTION CITY SEWER PIPE CO. (No. 11,768.) (Supreme Court of Ohio. April 11, 1911.) Error to Circuit Court, Perry County. Abernethy & Folsom, for plaintiffs in error. Donahue & Spencer, for defendant in error.

PER CURIAM. Judgment affirmed.

SPEAR, C. J., and DAVIS, SHAUCK, PRICE, and JOHNSON, JJ., concur.

WOLF RUN COAL CO. v. BAYSINGER. (No. 12,552.) (Supreme Court of Ohio. May 2, 1911.) Error to Circuit Court, Jefferson County. P. P. Lewis, for plaintiff in error. Erskine & Smith, for defendant in error.

PER CURIAM. Judgment affirmed.

DAVIS, PRICE, JOHNSON, and DONAHUE, JJ., concur.

YORK v. CHAMPION IRON CO. (No. 11,766.) (Supreme Court of Ohio. March 28, 1911.) Error to Circuit Court, Scioto County. T. C. Anderson, for plaintiff in error. George E. Crane and Henry Bannon, for defendant in error.

PER CURIAM. Judgment affirmed.

SPEAR, C. J., and DAVIS, SHAUCK, PRICE, JOHNSON, and DONAHUE, JJ., concur.

BENDER, Appellant, v. PAULUS et al., Respondents. (Court of Appeals of New York. April 26, 1910.)

PER CURIAM. Motion for reargument or to amend remittitur denied, without costs. See 197 N. Y. 369, 90 N. E. 994.

END OF CASES IN VOL. 95

